

**Eichelbaum v Douglas Elliman, LLC**

2007 NY Slip Op 31624(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 0117428/2005

Judge: Debra A. James

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

Priscilla Eichelbaum,

Index No.: 117428/05

Plaintiff,

Motion Date: 2/6/07  
Transcript of motion oral  
argument received 4/27/07

- v -

Douglas Elliman, LLC, Daniel Gale Agency,  
Inc., Michael Craig-Scheckman and Sara  
Craig-Scheckman,

Motion Seq. No.: 3, 4, and 5

Motion Cal. No.: \_\_\_\_\_

Defendant

**FILED**  
JUN 11 2007  
NEW YORK  
COUNTY CLERK

The following papers, numbered 1 to 8 were read on these motions for summary judgment  
dismissing Complaint \_\_\_\_\_

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED
1, 2, 3
4
5, 6, 7, 8

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion:  Yes  No

Upon the foregoing papers, the defendants' motions for  
summary judgment to dismiss plaintiff's Complaint must be  
GRANTED.

The pertinent facts are not contested.

This action involves plaintiff, who was 78 years  
old on October 23, 2005, the date of the accident. On that day,  
she was accompanying her daughter to look at a house for sale  
located in Sand Point, New York. Her daughter, acting on behalf

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

of her cousins from California who were in the market for the house, hired defendant Daniel Gale Agency, Inc., ("Daniel Gale") as her "showing broker". Co-defendant Douglas Elliman, LLC ("Douglas Elliman") was hired by defendant owners as the listing real estate agency for the sale of their home where the accident happened. Plaintiff's daughter made arrangements for a visit to the house with one of Daniel Gale's agents, a gentleman named Robert Trent. Another agent from Daniel Gale contacted Douglas Elliman to arrange for the appointment.

On the date of the accident, plaintiff, her daughter, Mr. Trent, and a real estate agent from Douglas Elliman met outside, where Douglas Elliman's agent told everyone to remove their shoes before entering the house. He gave that directive in accordance with instructions made to Douglas Elliman by the co-defendant Sara Craig-Scheckman, co-owner of the house with her husband co-defendant Michael Craig-Scheckman. Ms. Scheckman's reasons for the "no shoes" instruction was so people viewing the house would not scratch or dirty the soft cherry Brazilian wood floors that defendant owners had installed throughout the house. It is not disputed that all of the floors in the house were highly polished and shiny.

All four persons complied with the instruction and entered the house in stocking (or socked) feet. Mr. Trent had visited the house before and removed his shoes at the time. At

the time of the accident, he was carrying a few pairs of surgical stockings or slippers in the trunk of the car. On prior occasions, he offered the surgical stockings or slippers to clients to avoid scratching the floor of houses that he showed, but he did not offer such substitute footwear on this occasion.

After viewing the entire upstairs and downstairs of the home for about twenty minutes, the group proceeded to view the outside of the house. It was at that time that plaintiff fell on the second of three stairs leading down into the dining room.

The sole evidence with respect to the maintenance of the floors is from the deposition of defendant wife. She testified that the floor maintenance is carried out by her housekeeper only. She testified that she specifically instructed the housekeeper how to clean them. She trained the housekeeper to use just a mop and a little bit of water and to never use wax or polish on the wood floors.

Defendants Gale Agency and Douglas Elliman, LLC, move for summary judgment on the grounds, inter alia, that the defendants owe plaintiff no duty of care with respect to the condition of the house. Defendants are correct that it is well settled law that real estate agencies that do not own, control, occupy or make special use of the premises are not liable for personal injury suffered by an invitee to the premises. Where their only connection to the property is to show it to

prospective buyers, real estate agencies owe such persons no duty of care with respect to the condition of the property. Schwalb v Kulaski, 29 AD3d 563 (2<sup>nd</sup> Dept. 2006); Meyer v. Tyner, 273 AD2d 364 (2d Dept. 2000). Here, defendants Gale Agency and Douglas Elliman cannot be held liable in damages suffered by the plaintiff, since their only connection to the house was to show it to prospective buyers.

Nor did either defendant real estate agency owe a duty to plaintiff to refrain from conveying the owners' "no shoe" instructions, or in light of those instructions, to provide her with alternative footwear.

"Whereas one is always has a duty not, by his act, to threaten unreasonable harm to another's person or tangible property, there must be some special relationship between the parties, to create such a duty in respect to misinformation negligently given." Travelers Insurance Companies v Robinson, 79 AD2d 1022 (2<sup>nd</sup> Dept 1981).

The courts have defined a special relationship as a fiduciary one, which involves one of trust that would entitle the plaintiff to rely on such person's representation. Plaintiff asserts no facts that tend to prove that she had such a relationship with either real estate agencies.

In sum, neither real estate agent caused the shiny and polished condition of the floors. Nor did their "no shoes" instructions to plaintiff in any way affect the condition of the premises. Finally, there was no fiduciary relationship between

defendant agents and plaintiff that would entitle her to rely on their statements about her shoes.

Defendants Craig-Scheckmans, the owners of the house, also move for summary judgment dismissing the Complaint.

"It is well established that owners... have a duty to maintain their property in a reasonably safe condition under the existing circumstances (Basso v Miller, 40 NY2d 233, 2412 [1976]) In order to recover damages for a breach of this duty, a plaintiff must establish that the defendant created, or had actual or constructive notice of the dangerous condition that precipitated the injury (citations omitted)." Walters v Northern Trust Company of New York, 29 AD3d 325, 326 (1<sup>st</sup> Dept. 2006).

Defendants Craig-Scheckman argue that as a matter of law, plaintiff is unable to establish that her injury resulted from a dangerous condition in the premises. They rely on the line of cases that establishes "the well-settled principle that absent proof of the reason for plaintiff's fall other than the "inherently slippery" condition of the floor, no cause of action for negligence can properly be maintained (citations omitted)." Walters, supra, Sarmiento v C&E Associates, \_\_ NYS2d \_\_, 2007 WL 1531837 (1<sup>st</sup> Dept. 2007). On that basis, defendant owners have established their prima facie defense to this action.

Plaintiff's rather creative argument is that defendant owners created the dangerous condition by a combination of actions on their part, specifically in giving an affirmative direction to an older woman to remove her shoes when walking on their shiny floors. Such argument fails under the applicable

law.

Unlike cases involving the New York State Labor Law in which contractors have a duty to supervise workers (see Gonzalez v United Parcel Service, 249 AD2d 210 [1<sup>st</sup> Dept 1998]), or involving school liability where school districts have a duty to supervise students (Passafaro v Board of Education, 43 A.D.2d 918 [1<sup>st</sup> Dept. 1974]), property owners have no duty to supervise persons entering upon their land. This distinction is important since unlike the worker in Gonzalez and the student in Passafaro, plaintiff's compliance with the no shoe policy was entirely voluntary, i.e., she had the option to insist on wearing her shoes or to keep wearing her shoes and decline to enter the house. Defendant owners may not be cast in damages as the result of plaintiff's uncoerced decision to comply with their policy. Nor has plaintiff put forth any evidence that the absence of shoes either created or exacerbated the condition of the floor. See Chamberlain v City of New York, 286 AD2d 232, 233 (1<sup>st</sup> Dept. 2001). In this regard, Demshick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), which is cited by plaintiff, is distinguishable on its facts from the case at bar. In Demshick, plaintiff apartment resident suffered injury in a fall during a snowstorm in responding to defendant maintenance person's directive that she move her car so that the parking lot could be plowed. In reversing the motion court's grant of

summary judgment dismissing the complaint against defendant apartment complex, the Demshick appellate court reasoned that the maintenance person's alleged actions placed the plaintiff in a more vulnerable position than if he had done nothing, and that therefore the defendant assumed an additional duty of ensuring that the sidewalks were passable at the time. Here, unlike the snow covered parking lot sidewalks in Demshick, the inherently slippery floors at issue here, are not, as a matter of law, a dangerous condition.

Furthermore, even assuming for the sake of argument that defendant owners had an affirmative duty to refrain from requiring that shoes be removed or to increase the friction between plaintiff's stocking feet and the shiny floors by providing slippers to plaintiff or laying down runners, plaintiff has offered no evidence that defendant owners had actual or constructive notice of a dangerous condition resulting from the combination of factors, in the form of the "no shoes" policy, shiny floors, and elderly visitors. Waiters, p. 327. Finally, defendant owners owed no greater duty to plaintiff because of her status as a senior citizen than to any younger adult entering upon their property. See Lugo v St. Nicholas Associates, 18 AD3d 341 (1<sup>st</sup> Dept. 2005).

In conclusion, having failed to come forward with any evidence, expert or otherwise, that the floors were negligently

maintained (such as by polish, wax or finish negligently applied), or that the floors were wet and/or the owners had notice of an unsafe condition arising from the presence of water (see Madden v New York Hospital, 235 AD2d 245 [1<sup>st</sup> Dept. 1997]; Cook v Rezende, 32 NY2d 596, 599 [1973] and Nevoso v Putter-Fine Building, 18 AD2d 317 [1st Dept. 1964]), plaintiff has failed to rebut defendant owners' entitlement as a matter of law to dismissal of the Complaint.

Accordingly, it is therefore,

ORDERED that defendant Daniel Gale Agency's motion for summary judgment is GRANTED; and it is further

ORDERED that defendant Douglas Elliman, LLC's cross-motion for summary judgment is GRANTED; and it is further

ORDERED that defendants Michael Craig-Scheckman's and Sara Craig-Scheckman's cross motion for summary judgment is GRANTED; and it is further

ORDERED that the Clerk shall enter judgment dismissing the Complaint against all the defendants.

This is the decision and order of the court.

Dated: June 4, 2007

ENTER:

**FILED**  
 JUN 11 2007  
 NEW YORK  
 COUNTY CLERK'S OFFICE

*Debra A. James* J.S.C.  
**DEBRA A. JAMES**  
 J.S.C.