Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **LAWRENCE V. CULLEN** IA Part 6
Justice

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| MEE NA YOO, etc., et al., | Index Number 8002 2004 |
| Plaintiffs, | Motion Date January 9, 2007 |
| - against - | |
| DUBOFF PROPERTIES, INC., et al., | Motion Cal. Number 34 |
| Defendants. | Motion Seq. No. 5 |

The following papers numbered 1 to 11 read on this motion by defendants for summary judgment dismissing plaintiffs' claims against them; and on the cross motion of Kyung Ae Chung (Chung) seeking to sever her property damage claims from the main motion.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits ..... | 1-4 |
| Notice of Cross Motion ..... | 5-7 |
| Affidavits in Opposition ..... | 8-10 |
| Reply Affidavits ..... | 11 |

Upon the foregoing papers it is ordered that motion and cross motion are denied.

This action arises out of personal injuries, including a fatality, caused by a fire on the premises owned by defendants DuBoff Properties, Inc. and DuBoff Properties Corp. (DuBoff Properties), which were managed by defendant Madeline Lauber (Lauber), who is also president of DuBoff Properties. The fire occurred on February 29, 2004 in the lower apartment of the premises located at 18-22 215th Street, Bayside, New York. The premises were occupied, pursuant to a lease originally entered into in August 2002, by plaintiffs Ms. Hee Ja Choi (Choi), her two daughters, infant plaintiffs Mee Na Yoo and Hana Yoo, Ms. Chung, and her daughter Winnie. Defendants state that, approximately two days before the fire, Ms. Chung received a call

from a friend asking her if a person named Ok Ki Gang (Gang)could stay in the apartment for a short period of time. Gang called Chung on February 28, 2004 stating that she was on her way to the apartment. Thereafter, both Chung and Choi left to work at a restaurant where they were both employed from 10:00 P.M. to 3 A.M. The children remained in the home and neither Choi nor Chung were present when Gang arrived. The fire was started at approximately 3:00 A.M. by Gang, who had consumed crack cocaine. At the time the Fire Department arrived, the infant plaintiff Hana Yoo was deceased upon being found in the bedroom she shared with her sister, infant plaintiff Mee Na Yoo. Plaintiff Mee Na Yoo, who was found in a closet, survived the fire but has suffered extensive and debilitating brain injuries. Gang subsequently pleaded guilty to manslaughter in the second degree, and was sentenced to 5 to 15 years in jail. Chung's daughter, Winnie, was unharmed.

Plaintffs' claim that defendants were in violation of the Multiple Dwelling Law and the Administrative Code of the City of New York (Administrative Code), as well as the Multiple Dwelling Law of the State of New York. Defendants concede that there were no smoke detectors in the apartment.

Insofar as plaintiffs make no opposition to that branch of the motion seeking dismissal of all claims against Sylvia DuBoff, a former owner of the property, those claims are dismissed. In addition, the court finds that defendants are correct in their arguments that the plaintiffs' claims should properly be dismissed against Madeline Lauber. Plaintiffs make no showing of any fraud or wrong doing on her part so as to warrant imposing liability by piercing the corporate veil. (Fielder v R & K Realty, 295 AD2d 560 [2002].)

DuBoff Properties maintains that, insofar as the apartment was a two-family home, plaintiffs' claims of defendants' violation of the City of New York Multiple Dwelling Law must be dismissed. Defendants assert that, despite plaintiffs' claims that the apartment building was a de facto triplex, defendants conclusively demonstrate that the premises were a two-family dwelling. Plaintiffs provide no certificate of occupancy and no evidence that defendants had collected rent from the alleged third tenant or that defendants had made any structural alterations so as to provide for a third tenant. (Casalino v Laredo, 9 Misc 3d 1105 [2005].) Insofar as plaintiffs' cannot establish the premises as a Multiple Dwelling, it follows that plaintiffs' claims pursuant to the Multiple Dwelling Law are without merit and are dismissed.

With regard to plaintiffs' claims of violation of the New York State Multiple Dwelling Law, the court finds that plaintiffs

cannot sustain their claims of violations of Multiple Dwelling Law § 68 insofar as Multiple Dwelling Law § 4 specifically states that the Code pertains to structures of three or more units only. Accordingly, plaintiffs' claims pursuant thereto must also be denied.

Plaintiffs also assert violations of Administrative Code § 27- 979, which requires that two-family dwellings be equipped with smoke detectors. Defendants concede that the foregoing provision is applicable, but assert that the violation of § 27-979 is only evidence of negligence and not negligence per se. (Elliot v City of N.Y., 95 NY2d 730 [2001].) Moreover, to the extent that defendants argue that the absence of reported case law implies that it was the legislative intent that the provision was not to be enforceable in a suit against a landlord, such an argument is deemed as mere speculation unworthy of further consideration. The defendants provide no evidence of the legislative history of this provision.

With regard to plaintiffs' claims of negligence per se, defendants assert that a plaintiff must still establish the requisite elements of negligence including proximate cause. ( Acevedo v Audobon Mgt. Co., 280 AD2d 91 [2001].) Plaintiffs submit the expert report of Frank A. Valente, a certified fire inspector, who reviewed, among other things, the Fire Department records of the fire and conducted a personal investigation of the premises. This expert stated that, insofar as the children were found out of their beds, specifically where the infant plaintiff Mee Na Yoo was found in a closet and the body of infant plaintiff Hana Yoo was found on the floor near the window, the sounding of a smoke alarm may well have alerted the girls of the danger before the smoke became overwhelming, whereupon they may have reached the window sooner in order to jump to the ground 10 feet below. (Baker v Riverhouse Realty, 300 AD2d 214 [2002]; Salmon v Wendell Terrace Owners Corp., 5 AD3d 372 [2004].)

Defendants do not counter the above with their own expert report, but assert that there can be no finding of negligence insofar as the actions of Gang in setting the fire were unforseeable. However, defendants provide no law or evidence to support their claim that a plaintiff must provide evidence of prior fires on the premises to establish notice or forseeability. Moreover, not even an unforseeable criminal act such as arson will vitiate questions of fact as to whether the lack of smoke detectors could have been the proximate cause of injury. (Salmon v Wendell Terrace Owners Corp., supra.) Rather, plaintiffs' expert further opines that the purpose of smoke detectors is that they are designed to alert people to a sudden threat of fire. ( See, Jamison v 157-61 W. 105 St. Hous. Dev. Fund. Corp., 15 Misc 2d 1106 [2007].)

However, where plaintiffs have provided expert evidence to support the element of proximate cause, in combination with inference of negligence on the part of defendants due to their admitted violation of statutory duty to so equip the premises with smoke detectors, plaintiffs have made a sufficient showing of issues of fact so as to defeat the motion for summary judgment.

Insofar as the questions of liability and negligence remain unresolved, the cross motion of defendant Chung for severance, so as to provide for an expedited determination of her property damage claims, is denied as premature.

Dated: June 12, 2007

LAWRENCE V. CULLEN, J.S.C.