

Smolin v 175 Water St. Condominium

2007 NY Slip Op 32490(U)

August 3, 2007

Supreme Court, New York County

Docket Number: 0104916/2005

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 12

Index Number : 104916/2005
SMOLIN, EILEEN
vs
175 WATER STREET CONDOMINIUM
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 104916/05
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

FILED

AUG 13 2007

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*and cross-motion are decided
in accordance with the accompanying
memorandum decision.*

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

Dated: 8/2/07



BARBARA R. KAPNICK J.S.C.

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
EILEEN SMOLIN,

Plaintiff,

-against-

175 WATER STREET CONDOMINIUM and
SAMSON MANAGEMENT, LLC,

Defendants.

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

-----X
EILEEN SMOLIN,

Plaintiff,

-against-

160 FRONT STREET ASSOCIATES, LLC.,

Defendant

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 104916/05
Motion Seq. No. 002
ACTION NO. 1

Index No. 3496/07
ACTION NO. 2

FILED

AUG 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Eileen Smolin seeks in these actions to recover damages for personal injuries she sustained on July 1, 2004 at approximately 2:30 p.m. when she tripped and fell on an allegedly cracked/uneven sidewalk in front of the building located at 175 Water Street in Manhattan, which is managed by defendant Samson Management, LLC.

The Complaint in Action No. 1 originally alleged that the building was owned by defendant 175 Water Street Condominium. An Answer was never served on behalf of that party, but plaintiff

learned during the course of discovery that the actual owner of the building is 160 Front Street Associates, LLC.¹

Consequently, plaintiff recently commenced an action against 160 Front Street Associates, LLC in the Supreme Court, Queens County, under Index No. 3496/07 (Action No. 2).

Defendant Samson Management, LLC now moves for summary judgment dismissing plaintiff's Complaint against it in Action No. 1 on the grounds that: (i) it is not owner of the premises and thus owed no duty of care to plaintiff; (ii) Samson Management did not cause the condition, nor did it have actual or constructive notice of said condition; and (iii) the alleged defect is trivial and non-actionable as a matter of law.

Plaintiff opposes the motion on the grounds, inter alia, that the application is premature because discovery, and specifically the deposition of 160 Front Street Associates, the defendant in Action No. 2, has not yet been completed, and cross-moves for an order consolidating the two actions for all purposes on the grounds that they involve common questions of law and fact.

"[O]rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to

¹ Plaintiff represented on her Note of Issue that she has discontinued her claims against defendant 175 Water Street Condominium.

noncontracting third parties upon the promisor' (citations omitted)." Roveccio v. RY Management Co., Inc., 29 A.D.3d 562 (2nd Dep't 2006). Thus, an agent is generally "liable to third persons only for affirmative acts of negligence". Lennon v. Oakhurst Gardens Corp., 229 A.D.2d 897, 898 (3rd Dep't 1996).

It is true, as plaintiff argues, that "a managing agent of a building may nevertheless be subject to liability for nonfeasance where it has complete and exclusive control of the management and operation of a building." Lennon v. Oakhurst Gardens Corp., *supra* at 898. See also, James v. Greenpoint Financial Corp., 34 A.D.3d 644, 645 (2nd Dep't 2006); Ramirez v. City of New York, 13 A.D.3d 248 (1st Dep't 2004); Ingordo v. Square Plus Operating Corp., 276 A.D.2d 528 (2nd Dep't 2000).

However, "[t]o show the existence of a duty on the part of the defendant, the management contract between the defendant and the owner had to constitute a comprehensive and exclusive set of obligations which the parties could have reasonably expected to displace the owner's duty to maintain the premises safely (citation omitted)." Hagen v. Gilman Management Corp., 4 A.D.3d 330 (2nd Dep't 2004).

In Lennon v. Oakhurst Gardens Corp., *supra*, the Court found that the managing agent could not be subject to liability for its nonfeasance because the written agreement between the parties

revealed that the managing agent did not have control of the property to the exclusion of the owner and that the owner reserved to itself a certain amount of control in the agreement.

The court noted that: (a) "although the agreement stated that [the managing agent] was responsible to 'cause the common elements of the Property to be maintained', it was required to do so '[s]ubject to the direction' of [the owner's] board of directors"; (b) "while [the managing agent] was responsible for hiring employees to maintain the property, the contract provided that '[a]ll such personnel shall be employees of [the owner] and not of [the managing agent]"; and (c) the contract prohibited the managing agent "from making any unbudgeted expenditures exceeding \$5,000 without [the owner's] prior consent, except under emergency conditions." Lennon v. Oakhurst Gardens Corp., supra at 898.

In the instant case, the Management Agreement between Sampson Management ("Agent") and 160 Front Street Associates ("Owner"), provides, in relevant part, as follows:

1.1 APPOINTMENT AND ACCEPTANCE

Owner hereby appoints Agent as sole and exclusive Agent of Owner to lease and manage the property...

* * *

9.1 AGENT'S AUTHORITY TO HIRE

Agent is authorized to hire, supervise, discharge, and pay all servants, employees, contractors, or other personnel necessary to be employed in the management, maintenance, and operation of the Premises. All employees shall be deemed employees of the Owner/Agent, and Agent shall not be liable to

Owner or others for any act or omission on the part of such employees (emphasis supplied).

* * *

Section 10 MAINTENANCE AND REPAIR

Agent is authorized to make or cause to be made, through contracted services or otherwise, all ordinary repairs and replacements reasonably necessary to preserve the Premises in its present condition and for the operating efficiency of the Premises, and all alterations required to comply with lease requirements, governmental regulations, or insurance requirements. Agent is also authorized to decorate the Premises and to purchase or rent, on Owner's behalf, all equipment, tools, appliances, materials, supplies, uniforms, and other items necessary for the management, maintenance, or operation of the Premises...

10.1 APPROVAL FOR EXCEPTIONAL MAINTENANCE EXPENSE

The expense to be incurred for any one item of maintenance, alteration, refurbishing, or repair shall not exceed the sum of \$5,000.00 (emphasis supplied), unless such expense is specifically authorized by Owner, or is incurred under such circumstances as Agent shall reasonably deem to be an emergency...

Based on the papers submitted and the oral argument held on the record on May 16, 2007, this Court finds that the provisions of defendant's management agreement, which are substantially similar to the contractual provisions referenced by the Court in Lennon v. Oakhurst Gardens Corp., supra, establish that defendant in its capacity as managing agent did not have exclusive control of the management and operation of the building.²

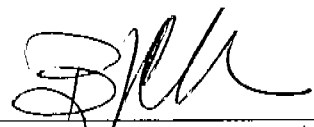
² 160 Front Street Associates, "'having reserved some control, the ultimate obligation for inspecting and repairing remained with it, and in that respect it alone would be responsible for negligence' (citation omitted)." Lennon v. Oakhurst Gardens Corp., supra at 899. Indeed, defendant and the owner appeared to have contemplated such a result since 160 Front Street Associates agreed under Section 13 of the Management

Accordingly, defendant's motion for summary judgment is granted, and the Clerk may enter judgment dismissing plaintiff's Complaint against defendant Samson Management, LLC with prejudice and without costs or disbursements.³

Plaintiff's cross-motion to consolidate this action with Action No. 2 which is pending in Queens County is, therefore, denied as moot.

This constitutes the decision and order of this Court.

Dated: August 3, 2007


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
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COUNTY CLERK'S OFFICE

Agreement to "indemnify, defend, and save Agent harmless from all loss, damage, cost, expense (including attorneys' fees), liability, or claims for personal injury or property damage incurred or occurring in, on, or about the Premises."

³ This decision shall in no way be construed to have made any findings on the other grounds for dismissal raised by defendant Samson Management LLC in its motion for summary judgment, as it was not necessary for this Court to reach any of those issues.