

Pollack v David Frankel Realty Corp.

2007 NY Slip Op 33085(U)

September 12, 2007

Supreme Court, New York County

Docket Number: 0116520/2005

Judge: Rolando T. Acosta

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

HON. ROLANDO T. ACOSTA

PRESE Index Number : 116520/2005

PART 61

____ POLLACK, IRENE

vs
DAVID FRANKEL REALTY

Sequence Number : 001

SUMMARY JUDGMENT

O. _____

DATE _____

J SEQ. NO. _____

N CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

See attached

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: 9/12/07

SO ORDERED

J.S.C.

ROLANDO T. ACOSTA

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 61

Irene Pollack and Stanley Pollack,

Plaintiff,

— against —

David Frankel Realty Corp. and 444 E. 75th Street
 Corp.,

Defendants.

DECISION/JUDGMENT

FILED

SEP 25 2007

NEW YORK
 COUNTY CLERK'S OFFICE

Index. No. 116520/05

Seq. No. 1

Present:

Rolando T. Acosta
 Supreme Court Justice

The following documents were considered in reviewing defendant 444 E. 75th Street Corp's motion to dismiss the complaint and any cross-claims against it:

Papers	Numbered
Notice of Motion, Affirmation & Affidavit	1 (Exhibits A-K)
Affidavit and Affirmation in Opposition	2 (Exhibit A)
Reply Affirmation	3

Plaintiffs Irene and Stanley Pollack live at 444 East 75th Street, Apt. 9J, in New York County. In 1984, the building was converted into a coop and ownership was conveyed from the sponsor, 444 East 75th Street Venture, to defendant coop corporation 444 East 75th Street Corp. Plaintiffs did not purchase their apartment when it was converted, and thus the shares to their apartment are still owned by the sponsor, but leased to plaintiffs pursuant to a rent stabilized lease. See Defendant's Exhibit G.

The sponsor owns approximately 30 apartments, which are managed by co-defendant David Frankel Realty. The coop, however, is managed by the Charles H. Greenthal Management Corp. According to Lori Fields, who worked for Charles H. Greenthal Management Corp and managed the "premises located at 444 East 75th Street," "[t]here is no management agreement between [the coop] and any management agent regarding the plaintiffs' apartment." See Defendant's Exhibit E, Fields Affidavit at ¶ 11. Indeed, this was confirmed by Ricardo Domenech who was employed by David Frankel Realty and managed the sponsor's units. According to Domenech, he did not know what was the division of responsibility between David Frankel Realty and the coop with respect to the apartment. See

* 3]
Exhibit K, Domenech Deposition at 25.

Loren Green, the superintendent of the building (“super”), testified at his deposition that he too did not know of any agreement that delineated his responsibilities vis-a-vis David Frankel Realty’s with regards to plaintiffs’ apartment. Exhibit G, Green Deposition at p. 12. He noted, however, that he had as little contact as possible with “the sponsor, the man who owes the shares,” because the coop and the sponsor do not get along well. Green Deposition at p. 13.

In May 2006, Green put a ceramic tile floor in plaintiffs’ kitchen, and a porter painted the apartment. Green Deposition at p. 8. He also testified that the building handles damages as a result of plumbing problems that are inside the walls, and “if [the central air conditioning] leaks we’d repair the floor.”

Plaintiffs’ apartment had loose parquet tiles in the hallway, and plaintiffs reported the condition to Green. According to Irene Pollack, the loose tile had nothing to do with plumbing, but rather with dried out glue. Exhibit H, Irene Pollack Deposition at 21. Green acknowledged that he knew about the loose tiles since 1996, and that whenever Irene Pollack complained to him, he would “direct her to complain to her landlord, David Frankel Realty.” Significantly, in response to the question “if there would have been a repair made to the tile floor in the hall way in Apartment 9-J, would that have been made by David Frankel or would it have been made by [the coop]?” Domenech responded, “It would have been made by David Frankel.” See Exhibit K, Domenech Affidavit at 8.

On February 12, 2004, Irene Pollack tripped and fell on one of the loose parquet tiles.¹ Plaintiffs commenced the instant action against David Frankel Realty and 444 East 75th Street Corp, the coop corporation, but did not name the sponsor in the action, nor the coop’s managing agent, the Charles H. Greenthal Management Corp.

444 East 75th Street Corp now moves for summary judgment dismissing the complaint on the basis that since it does not own, manage, operate, control, occupy or maintain the apartment, it cannot be held liable for plaintiff’s injuries. Rather, according 444 East 75th Street Corp, plaintiffs’ have a claim against the sponsor who still owns the shares to the apartment.

The problem with 444 East 75th Street Corp’s argument is that it seems to be under the impression that the building’s super is obligated to maintain only apartments that have been

1. Indeed, David Frankel Realty had a small portion of the floor fixed by a contractor, but it is not clear to the Court whether this occurred after plaintiff’s accident because only small sections of the deposition testimonies have been provided.

converted. That is not the case. Presumably, the coop pays Green with monies it collects from the share owners, including the sponsor. Absent an agreement to the contrary, as the super, whatever Green's duties are and whatever obligations he has to unit holders, applies equally to all the units regardless of who owns them. At this juncture, the Court simply does not know the extent of Green's duties. He clearly does some flooring, since he put a new kitchen tile floor in plaintiffs' apartment in 2006, and it is unclear to the Court whether Green undertook those repairs because the kitchen floor had been damaged by plumbing problems. If part of his duties is to maintain floors and he breached his duty to maintain plaintiffs' floor, the coop may be held liable for its employees's failure to act.

The fact that the coop does not get along with the sponsor does not alter the coop's obligation. Moreover, the fact that Domenech stated that David Frankel Realty would fix problems with the parquet floor (and in fact made some repairs) does not relieve the coop of its responsibility, if any. It merely makes them potentially jointly responsible.

Contrary to 444 East 75th Street Corp's assertions, Dugue v. 1818Newkirk Management Corp., 301 A.D.2d 561 (2nd Dept. 2003), does not dictate a different result. In Dugue, plaintiff was burned by a steam riser in the bathroom. The coop was granted summary judgment because the injury occurred in an apartment owned by the sponsor. In affirming the lower court's decision granting summary judgment, the Appellate Division, Second Department, noted that the coop "did not own the plaintiff's apartment, a rent-stabilized unit, which remained under the ownership of the sponsor after the conversion of the building." It further noted that "the facts do not support the plaintiff's contention that the respondents assumed control or responsibility for insulating the steam riser in the plaintiff's apartment." Here, unlike Dugue, there are questions of fact as to whether the coop assumed the responsibility of fixing floors such as repairing loose parquet tiles, and would therefore be liable for its failure to fix plaintiffs' floor. Accordingly, it is

ORDERED that 444 East 75th Street Corp's motion is denied

This constitutes the Decision and Order of the Court.

Dated: September 12, 2007

ENTER

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED



Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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