

O'Connor v MH Residential 1, LLC

2007 NY Slip Op 33494(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 9370 Total Characters

Judge: Judith J. Gische

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.

SCANNED ON 10/26/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT:
Index Number : 116352/2005
O'CONNOR, GEORGE

PART 10

vs
MH RESIDENTIAL 1 LLC.
Sequence Number : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

(enforce discovery)

Upon the foregoing papers, it is ordered that this motion

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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

OCT 26 2007

NEW YORK
COUNTY CLERK'S OFFICE

OCT 24 2007

Dated: _____

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

-----X
Christopher O'Connor, as Executor of
the last will and testament of
GEORGE O'CONNOR, deceased,
and DOROTHY O'CONNOR,
Plaintiffs,

Decision/Order

Index No.: 16352/05
Seq. No. : 004

-against-

Present:
Hon. Judith J. Gische
J.S.C.

MH RESIDENTIAL 1, LLC, MH RESIDENTIAL
2, LLC, MH COMMERCIAL, LLC, MANHATTAN
HOUSE PARTNERS, LLC, MANCHESTER
REAL ESTATE AND CONSTRUCTION, LLC,
ROSE ASSOCIATES, INC., DOUGLAS
ELLIMAN PROPERTY MANAGEMENT,
DOUGLAS ELLIMAN REALTY, LLC, NEW
YORK LIFE INSURANCE CO., NEW YORK
LIFE INSURANCE & ANNUITY CORPORATION,
LEYLAND PRATT and ANNE PRATT,

FILED
OCT 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
MH and DE defs' amended n/m [§3211] w/ WSK affirm, exhs	1
Pltff x/m [§§3124 & 3126] w/KM affirm, exhs	2
Pratt defs' opp w/MND affirm w/exhs	3
MH and DE defs' opp to x/m and reply w/WSK affirm, exhs	4
Supp affirm to Pltff's x/m, further support MH & DE motion w/WSK affirm, exhs	5
Pltff Reply w/KLM affirm, exhs	6

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is a wrongful death in which it is alleged that plaintiff George O'Connor was struck by a luggage cart on October 12, 2005 ("date of accident") in the lobby of the

[* 5]

building located at 200 East 66th Street ("the premises") and thereafter died¹ as a result of his injuries. The cart was allegedly operated by Leyland Pratt and/or Anne Pratt (the "Pratt" defendants).

The court has before it a pre-answer motion to dismiss this action against defendants MH Residential 1, LLC, MH Residential 2, LLC, MH Commercial, LLC, Manhattan House Partners, LLC, Manchester Real Estate and Construction, LLC, Douglas Elliman Property Management and Douglas Elliman Realty, LLC who contend they did not own the premises on the date of the accident (collectively hereinafter, "the MH defendants" or "the new owners").

By order dated January 4, 2007, the court denied a prior motion by the MH defendants to dismiss the claims against them. The denial was without prejudice, however, and the court allowed for limited discovery to take place before MH had to answer the amended complaint². Order, Gische J. 1/4/07.

Although defendants New York Life Insurance, Co., New York Life Insurance & Annuity Corporation, and (collectively "the prior owners") have answered and appeared in this action, they have taken no legal position (or opposed) the motion by their co-defendants to dismiss all claims against them.

Plaintiffs have cross moved to enforce discovery, including the preliminary

¹Christopher O'Connor, executor of George O'Connor's estate, was substituted as representative plaintiff as per the court's January 4, 2007, and the court also permitted an amended complaint to be served, asserting the wrongful death claim.

²Although the court placed a 45 day time limitation on discovery it was to facilitate renewal of the motion. Neither plaintiff nor the Pratt defendants raise any claim that this motion is untimely or of prejudice.

[* 4]

conference order of June 22, 2006, their notice for discovery and inspection dated May 25, 2006, and other discovery demands.

The Pratt defendants, who have asserted cross claims for contribution and indemnification against all their fellow co-defendants, oppose the motion to dismiss and join in the arguments offered by plaintiffs in opposition. They also join in arguments provided by plaintiffs in support of their cross motion to enforce discovery. The Pratt defendants separately contend that the MH defendants' motion is really for summary judgment before issue is joined, and should be denied for that reason alone.

At the outset, the court rejects this latter argument by the Pratt defendants, that the motion to dismiss is really a summary judgment motion in disguise. The new owner's motion is not only timely, it is consistent with the court's order of January 4, 2007, that it was subject to renewal. Thus, in deciding the new owner's motion, the court applies the higher standards applicable to motions to dismiss, which is whether, accepting all of the plaintiff's facts, they support the causes of action asserted against the MH defendants. Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976).

Since the new owner's motion to dismiss is premised upon the existence of documentary evidence that they contend is a complete defense to the claims asserted against them, such evidence (in this case, a bargain and sale deed dated October 20, 2005, and other documents) must definitively and unequivocally dispose of the claims against them. CPLR § 3211 (a)(1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

Factual Allegations and Arguments Presented

George O'Connor was struck by a luggage cart in the lobby of the premises on October 12, 2005. He later died from his injuries, after this action was commenced. His legal representative was substituted and the complaint amended to add a wrongful death claim.

Plaintiffs argue that because the building was sold a mere eight (8) days later, on October 20, 2005, the new owners should remain in this lawsuit until discovery has been completed and they are satisfied that new owners have no liability in this action. Thus, plaintiffs (and the Pratt defendants) oppose the motion to dismiss on the merits, and on the basis that it is premature.

In support of their motion to dismiss, and in response to discovery demands, the MH defendants have provided the following: 1) the bargain and sale deed dated October 20, 2005, 2) the Earnest Money Contract and Agreement between the prior owners and two purchasers of the building dated August 3, 2005 ("purchase agreement", 3) the assignment of that purchase agreement as per the October 21, 2005 Assignment and Assumption Agreement among the two purchasers, as assignees, and MH Residential 1, LLC, MH Residential 2, LLC, and MH Commercial, LLC, as assignors, 4) the sworn affidavit of Jin Lee, secretary and treasurer of the (non-Douglas Elliman) MH defendants, and 5) the management contract dated October 21, 2005 between Douglas Elliman and some of the MH defendants.

The new owners also provide a copy of the prior owners' answer with cross claims. The cross claims for contribution and indemnification (common law) are only against the Pratt defendants. The prior owners take no position on whether the current

owners should remain in the case as fellow defendants.

Based upon all of the foregoing, the court holds that the MH defendants have proved that on the date of the accident, they did not own, operate or control the premises, and they should be dismissed as named defendants in this action.

The arguments presented by the Pratt defendants and the plaintiff, that "maybe" there is a way to hold the new owners and the management company they have a contract with legally responsible for the plaintiff's accident is offered without any meaningful legal arguments or facts that would tend to support such a claim. Rhetorical comments ("if New York Life and Rose did not operate and control the subject premises on October 12, 2005, who did?") do not rescue any of the claims against the MH defendants from being dismissed.

Consequently, the MH defendants' motion to dismiss is granted. All claims in the complaint against defendants MH Residential 1, LLC, MH Residential 2, LLC, MH Commercial, LLC, Manhattan House Partners, LLC, Manchester Real Estate and Construction, LLC, Douglas Elliman Property Management and Douglas Elliman Realty, LLC are hereby severed and dismissed.

The cross claims by the Pratt defendants against the MH defendants are hereby severed and dismissed for the same reason.

Having dismissed these claims, plaintiff's motion to compel MH's compliance with their discovery demands is now academic. Nonetheless, the court considered plaintiff's motion on the merits, to see whether the MH defendants had complied with discovery. It appears that they did so, turning over all the documents that plaintiff (and

[* 7]

the Pratt defendants) would have needed to meaningfully oppose the motion to dismiss. Therefore, the cross motion to compel discovery by the now dismissed defendants is denied.

Conclusion

The motion to dismiss by defendants MH Residential 1, LLC, MH Residential 2, LLC, MH Commercial, LLC, Manhattan House Partners, LLC, Manchester Real Estate and Construction, LLC, Douglas Elliman Property Management and Douglas Elliman Realty, LLC is dismissed based upon documentary evidence proving that these defendants did not own, operate, control or maintain the subject premises on the date of the accident.

Plaintiff's motion to compel discovery is denied because the moving defendants substantially complied with discovery, and in any event, now that the MH defendants have been dismissed from the case, the motion is academic.

In accordance with the foregoing,

It is hereby

ORDERED that all claims and cross against defendants MH Residential 1, LLC, MH Residential 2, LLC, MH Commercial, LLC, Manhattan House Partners, LLC, Manchester Real Estate and Construction, LLC, Douglas Elliman Property Management and Douglas Elliman Realty, LLC are hereby severed and dismissed; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants MH Residential 1, LLC, MH Residential 2, LLC, MH Commercial, LLC, Manhattan House

Partners, LLC, Manchester Real Estate and Construction, LLC, Douglas Elliman Property Management and Douglas Elliman Realty, LLC, against plaintiff Christopher O'Connor, as Executor of the last will and testament of GEORGE O'CONNOR, deceased, and DOROTHY O'CONNOR; and it further

ORDERED that the Clerk shall enter judgment in favor of defendants MH Residential 1, LLC, MH Residential 2, LLC, MH Commercial, LLC, Manhattan House Partners, LLC, Manchester Real Estate and Construction, LLC, Douglas Elliman Property Management and Douglas Elliman Realty, LLC, against defendants Leyland Pratt and Anne Pratt; and it is further

ORDERED that any relief request that has not been expressly addressed is hereby denied; and it is further

ORDERED that this shall constitute the decision, judgment and order of the court.

Dated: New York, New York
October 24, 2007

So Ordered:



Hon. Judith J. Gische, JSC

FILED
OCT 26 2007
NEW YORK
COUNTY CLERK'S OFFICE