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| Chang v Board of Mgrs. of 325 Fifth Ave. Condominium |
| 2008 NY Slip Op 31856(U) |
| June 25, 2008 |
| Supreme Court, New York County |
| Docket Number: 0111967/2007 |
| Judge: Judith J. Gische |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: J.S.C.

PART _____

Index Number : 111967/2007
CHANG, JULIA
 vs.
BOARD OF MANAGERS
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

JUN - 2 2008

NEW YORK
COURT CLERK'S OFFICE

Dated: 6/25/08

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

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

Julia Chang

Plaintiff,

Decision/Order

-against-

Index# 111967/07

Mot. Seq. # 001

The Board of Managers of 325 Fifth
Avenue Condominium, Cooper Square Realty, Inc.
And Young Taik Oh,

Defendants.

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

PAPERS

NUMBERED

| | |
|---|---|
| Notice of Motion, LHG affirm., YTO affd., exhibits..... | 1 |
| LCS affirm in Opp..... | 2 |
| EAK affirm. In Opp..... | 3 |
| LHG Reply affirm..... | 4 |

Hon. Gische, J.:

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

Defendant Young Taik Oh ("Oh") moves for an order dismissing the complaint pursuant to CPLR 3211(a)(7) or alternatively for summary judgment dismissing the complaint pursuant to CPLR 3212. Issue has been joined and no note of issue has been filed. CPLR 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004). The motion is opposed by plaintiff and also co-defendants The Board of Managers of 325 Fifth Avenue Condominium ("Condominium") and Cooper Square Realty, Inc. ("Managing Agent").

The complaint alleges that plaintiff was a tenant of apartment unit 26B ("apartment") at a building located at 325 Fifth Avenue in Manhattan ("building"). The

building is a condominium residence. Oh is the individual unit owner of the apartment. Oh leased the apartment to plaintiff. The co-defendants are respectively the board of managers of the condominium and the managing agent. On April 23, 2007 plaintiff was the victim of burglary at the apartment. She claims that defendants were negligent in failing to provide her with proper security. Although there are certain fact specific allegations against the Condominium and Managing Agent, the allegations against Oh are general in nature.

The legal standards applied on a motion to dismiss the complaint and for summary judgment dismissing the complaint are different.

To the extent defendant seeks relief under CPLR § 3211, the facts as alleged by plaintiff in the complaint will be accepted as true, and afforded the benefit of every possible favorable inference (EBCI, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]).

Oh argues that there are no specific claims of negligence directed to him personally. He, therefore, seeks dismissal of the complaint for failure to state a cause of action. The court, however, considers whether the complaint states a recognizable cause of action, not whether the claim will ultimately succeed. Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976); Palo v. Cronin & Byczek, LLP, 43 AD3d 1127 (2nd dept. 2007).

The complaint makes generally allegations of negligence against all defendants, including Oh. It is alleged and Oh does not even deny that he and plaintiff stand in a relationship of landlord tenant. A landlord has a duty maintain minimal security

precautions to protect users against injury caused by the reasonably foreseeable criminal acts of third parties. Williams v. Citibank, N.A., 247 AD2d 49 (1st dept. 1998) lv. Den. 92 NY2d 815. Therefore a complaint which states that a landlord was negligent for failing to provide security against a burglary states a viable cause of action that survives a motion to dismiss.

Oh separately moves for summary judgment. Oh claims that it was not reasonably foreseeable that he, as an out of possession landlord, would anticipate a rash of burglaries at the building. He claims that the Condominium and the Managing agent were responsible for security at the building, and not him. The co-defendants and plaintiff argue that it is premature to grant summary judgment before there has been any discovery in this action.

In connection with summary judgment On a motion for summary judgment, the moving party has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).. Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

Even where a movant makes out a *prima facie* case for summary judgment, the motion can still be denied as premature where further discovery is needed. Betz v. NYC Premier Properties, Inc., 38 AD2d 153 (2nd dept. 2007). This is especially true where the non-moving party has not been given a reasonable time or opportunity to

conduct disclosure relative to pertinent evidence within the exclusive knowledge of the movant or co-defendants. Metichecchia v. Palmeri, 23 AD3d 894 (3rd dept. 2005).

At bar there has not been any discovery. The parties are entitled to ascertain information from Oh on such issues of whether he had actual or constructive knowledge or prior criminal activity at the building and other issues relative to foreseeability before the court considers summary judgment. See: Nallan v. Helmsley-Spear, Inc., 50 NY2d 507 (1980). Summary judgment is, therefore, premature.

Conclusion

In accordance herewith it is hereby:

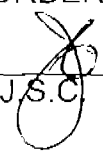
ORDERED that defendant Young Taik Oh's motion to dismiss the complaint as to him is denied in its entirety, and it is further

ORDERED that this matter is set for a status conference before the court on August 7, 2008 at 9:30 am, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this shall constitute the decision and order of the Court., and it is further

Dated: New York, New York
June 25, 2008

SO ORDERED:



J.G. J.S.C.

FILED

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