

Berk v Chung Ki Ng

2008 NY Slip Op 31920(U)

June 30, 2008

Supreme Court, New York County

Docket Number: 0102521/2007

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 102521/2007

BERK, PEGGY

VS.

NG, CHUNG KI

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. 102521/07

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

in this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-B

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2, 3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED

JUL 07 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: June 30, 2008

MARTIN SHULMAN 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: IAS PART 1

-----X
PEGGY BERK,

Plaintiff,

-against-

CHUNG KI NG, CHING KI NG, HA YEE TSE NG,
HOI KEN LEUNG, SIMON CHEUNG LEUNG,
SUK WUN FUNG and CHANG LING OUYANG,

Defendants.
-----X

Index No. 102521/07

FILED

JUL 07 2008

NEW YORK
COUNTY CLERK'S OFFICE

Martin Shulman, J.:

In this personal injury action, defendants Hoi Ken Leung, Simon Cheung Leung, Wun Fung and Chang Ling Ouyang bring this pre-answer motion to dismiss the Complaint based upon documentary evidence (CPLR 3211[a][1]) and for failure to state a cause of action against them (CPLR 3211[a][7]). For the reasons stated below, the motion is granted and the Complaint is dismissed as against the moving defendants.

Plaintiff Peggy Berk alleges that on June 25, 2005, she was injured in her apartment at 320 Second Avenue in New York City. She states that she tripped over a door saddle while walking from the living room into the kitchen. She alleges that the door saddle between the two rooms was "excessively high from the level of the floor, thereby creating an excessive change in levels and a tripping hazard." (Plaintiff's Verified Bill of Particulars at ¶ 3).

The moving defendants seek an order dismissing the Complaint on the grounds that they sold the premises to co-defendants Chung Ki Ng and Ha Yee Tse Ng on August 13,

2003, almost two years before the accident occurred. As such, defendants argue that at the time of the accident, they had no duties with respect to maintenance, inspection or repair of the premises.

Plaintiff and the co-defendants oppose the motion to dismiss. They do not dispute that the premises was sold on August 13, 2003. Instead, they argue that the moving defendants negligently designed and installed the door saddle while they owned the premises. As such, they contend that issues exist as to whether the moving defendants' liability for the condition continued after the apartment was sold because those defendants had notice of the alleged defective condition and failed to remedy it.

"The owner of land ceases to be liable in negligence for its dangerous condition when the ownership of the premises or possession and control pass to another before the injury is sustained." New York Telephone Co. v Mobil Oil Corp., 99 AD2d 185, 188 [1st Dept 1984]; see, Camillery v Getty Refining & Marketing Co., 170 AD2d 567 [2d Dept 1991]. "Even where a continuing trespass or nuisance exists, liability of the owner terminates after the conveyance at such time as the new owner has had a reasonable opportunity to discover the condition by making prompt inspection and necessary repairs (citations omitted)." Id. at 188-89.

Generally, it is a triable question of fact whether sufficient time has passed so as to provide a new owner with a reasonable opportunity to discover the existence of a defective condition in order to remedy it. See, Brazell v Wells Fargo Home Mortgage, Inc., 42 AD3d 409, 410 [1st Dept 2007]; Sarfowaa v Claflin Apts, LLC, 284 AD2d 228 [1st Dept 2001]. However, in certain cases, the court may determine the issue as a matter of law. For

instance, in Brazell v Wells Fargo Home Mortgage, Inc., supra, the court found that the defendant had ample opportunity during the six weeks between the time it acquired the premises and the date of the accident to repair a defective condition which was open and obvious.

Here, it is undisputed that the alleged defective condition was open and obvious, in a well-trafficked part of plaintiff's apartment. Under such circumstances, the court finds that the approximately two year period between the sale of the property and the accident was a sufficient amount of time for the new owners to discover the allegedly defective condition. Neither plaintiff nor the non-moving defendants has put forth any facts to demonstrate that the condition could not have been discovered during that period of time. Therefore, the Complaint fails to allege a cause of action for negligence against the moving defendants. Accordingly, it is

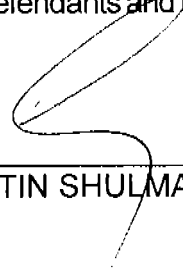
ORDERED that the motion to dismiss the Complaint is granted and the Complaint is severed and dismissed as against defendants Hoi Ken Leung, Simon Cheung Leung, Suk Wun Fung and Chang Ling Ouyang, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the remaining defendants.

Counsel for plaintiff and the remaining defendants are directed to appear for a compliance conference on July 22, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiff, the moving defendants and the co-defendants.

DATED: New York, New York
June 30, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED
JUL 07 2008
NEW YORK
COUNTY CLERKS OFFICE