

<b>Frees v Frank &amp; Walter Eberhart L.P. No. 1</b>
2009 NY Slip Op 30234(U)
February 2, 2009
Supreme Court, New York County
Docket Number: 113981/06
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: MARTIN SHULMAN

Index Number : 113981/2006

FREES, CYNTHIA

vs

FRANK & WALTER EBERHART L.P.

Sequence Number : 001

SUMMARY JUDGMENT

FILE NO. 113981/2006

MOOTION DATE: 2/2/09

MOOTION SEQUENCE NO. 001

MOOTION CLASSIFICATION

FILE NO. 113981/2006

CLASSIFICATION

Number of Motion: 1

Answering Affidavit: 1

Having Affidavit: 1

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion

is granted

and order

FILED  
FEB 04 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: February 2, 2009

MARTIN SHULMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 1

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CYNTHIA FREES,

Plaintiff,

Index No.113981/06

-against-

FRANK & WALTER EBERHART L.P. NO.1  
and EBERHART BROS., INC.,

Defendants.

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MARTIN SHULMAN, J.:

**FILED**  
FEB 04 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action to recover damages for personal injuries, defendants, Frank & Walter Eberhart L.P. No. 1 and Eberhart Bros., Inc. ("Eberhart Bros."), owners of the building located at 321 East 75th Street, New York, New York (the "building"), move for summary judgment dismissing the complaint pursuant to CPLR 3212.

This action arises out of an incident that occurred on April 14, 2005, whereby plaintiff Cynthia Frees, a tenant in apartment 1FW in the building, was allegedly struck on the nose, neck and arms by two kitchen cabinets that fell off the wall in her kitchen. Plaintiff commenced this action against defendants in September 2006, alleging that defendants were negligent in the ownership and management of the building, and also alleging that the doctrine of *res ipsa loquitur* is applicable to this claim.

Plaintiff testified at her deposition that the accident occurred in her apartment which she had resided in since March 2002 (Ex. D to motion, at pp. 44-45). It happened at 8:45 am, after having breakfast, while putting away some dishes and plaintiff injured her nose, neck and arms (*id.* at 78). Plaintiff testified that she had not noticed any problem with the wall of kitchen cabinets during her three years as a tenant

in the apartment, prior to the occurrence of the accident (*id.* at 26), and did not make any complaints regarding those cabinets (*id.* at 44), which were mounted on her kitchen wall above her kitchen counter (*id.* at 23-24), except for the need to replace a hinge on her small kitchen cabinet located above the microwave (*id.* at 43). However, she did complain about the need for a new hinge for a smaller kitchen cabinet door (*id.* at 43) which was replaced to plaintiff's satisfaction by the building superintendent and was operating properly afterwards (*id.* at 44).

According to defendants' vice president, Peter Dinkel, the kitchen cabinets that fell were installed 10 years earlier, in March 1985, as part of an apartment renovation filed with the City of New York (the "City") (Ex. E to motion, at p. 31), and the kitchen installation was inspected and approved by the City (*id.* at 33). The building's maintenance department also inspected and painted the kitchen before it was rented to plaintiff in 2002 (*id.* at 17-18). Prior to the date of the accident, plaintiff used the kitchen cabinets each day, storing her dishes, glassware and canned foods (Ex. D to motion, at p. 36). The defendants never received any complaints that plaintiff's kitchen cabinets were loose or coming apart from the wall (*id.* at 37-38). Upon learning of the accident, Mr. Dinkel sent Jason Enters, defendants' director of construction and design, to inspect the accident site and to determine what happened (*id.* at 25) and it was determined that the cabinets became dislodged from the wood studs in the wall because they were overloaded with dishes (*id.* at 27).

To hold a property owner liable for an accident caused by a dangerous or defective condition on the property, a plaintiff must establish that the owner created the

condition or had actual or constructive notice of it (see *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Briggs v 2244 Morris LP*, 30 AD3d 216 [1<sup>st</sup> Dept 2006]); *Dulgov v City of New York*, 33 AD3d 584 [2<sup>nd</sup> Dept 2006]). Here, the defendants established prima facie entitlement to judgment as a matter of law by submitting, *inter alia*, plaintiff's deposition testimony and the deposition testimony of defendants' vice president, which established that the defendants neither created nor had actual or constructive notice of the alleged dangerous condition (*id.*).

In opposition, the plaintiff submits the affidavit of a building inspector who opines that the cabinets were not installed in accordance with good and reasonable standards in an attempt to raise a triable issue of fact as to negligence (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Dulgov v City of New York, supra*, 33 AD3d at 585). However, his affidavit lacks evidentiary value as his conclusions are not based on an inspection but on his review of photographs which are not in the record (*see Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328 [1986]; *Banks v Freeport Union Free School Dist.*, 302 AD2d 341 [2d Dept 2003]). Also, this affidavit is vague and conclusory, as he fails to cite any specific applicable standards (*see Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 [1991]).

Furthermore, contrary to plaintiff's contention, the doctrine of *res ipsa loquitur* is not applicable to this case. The submission of a case on the theory of *res ipsa loquitur* is warranted only when the plaintiff can establish the following elements: (1) the event must be a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the


\* 5 ]

defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (see *Dermatossian v New York City Transit Auth.*, 67 NY2d 219, 228 [1986] [citation omitted]). It is applicable only to a situation in which "the possibility that the event was caused by the negligence of someone other than defendant 'is so remote that it is fair to permit an inference that the defendant is the negligent party'" (citation omitted)(*Fernandez v Ramos*, 300 AD2d 348, 349 [2d Dept 2002]). Here, the kitchen cabinets were located in plaintiff's apartment in which plaintiff had daily access, and she failed to demonstrate that defendants had control "of sufficient exclusivity to fairly rule out the chance that the [alleged] defect ... was caused by some agency other than defendant's negligence" (*Dermatossian v New York City Transit Auth.*, *supra*, 67 NY2d at 226). For the foregoing reasons, it is

ORDERED that defendants' motion for summary judgment is granted in its entirety and the complaint is hereby dismissed and the Clerk of the Court is directed to enter judgment accordingly.

The foregoing constitutes the Decision and Order of this court. Courtesy copies of this Decision and Order have been provided to counsel for plaintiff and defendants.

Dated: February 2, 2009

  
Hon. Martin Shulman, J.S.C.

**FILED**  
FEB 04 2009  
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NEW YORK