

Steinberg v Khamin Assoc., LLC

2010 NY Slip Op 32714(U)

September 27, 2010

Supreme Court, New York County

Docket Number: 103454/08

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 103454/2008

STEINBERG, LEANNE

VS.

KHAMIN ASSOCIATES

SEQUENCE NUMBER : 001

CONSOLIDATION/JOINT TRIAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

2

3

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 is determined in accordance with the accompanying decision/order.

FILED
SEP 30 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/27/10

Saliann Scarpulla
SALIANN SCARRULLA ^{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 19

-----X

LEANNE STEINBERG and ROBERT SHAFTTEL,

Index No.: 103454/08
Submission Date: 6/16/10

Plaintiffs,

DECISION AND ORDER

-against-

KHAMIN ASSOCIATES, LLC,

Defendant.

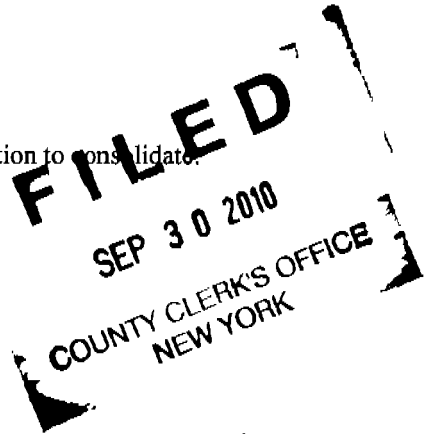
-----X

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Lynbrook, NY 11563

For Defendant:
Khamin Associates, LLC
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Papers considered in review of this motion for summary judgment and motion to consolidate.

Notice of Motion	1
Notice of Motion	2
Affs in Opp	3, 4
Replies	5, 6



HON. SALIANN SCARPULLA, J.:

In this action to recover for property damage, defendant Khamin Associates, LLC (“Khamin”) moves, in motion sequence 001, pursuant to CPLR 602(a) for an Order consolidating the instant action with a related subrogation action, entitled *New Hampshire Insurance Company a/s/o Khamin Associates, LLC v Steinberg, et al.*, New York County Index No. 105713/09. Khamin also moves, in motion sequence 002, for summary judgment dismissing plaintiffs Leanne Steinberg (“Steinberg”) and Robert Shaftel’s (“Shaftel”) complaint.

Background

This action arises from a fire which occurred on October 25, 2007 in apartment 5RE in a building located at 352 East 76th Street, New York, New York (“the building”). The building, which consists of 22 rental units, was constructed in 1910. The first recorded certificate of occupancy for the building was issued by the New York City Department of Buildings in 1927. The last recorded certificate of occupancy was issued in July 1982. Khamin purchased the building and improvements in 2003. Since that time, there have been no substantial renovations to the building’s common spaces, rental units or electrical systems. Prior to purchasing the building, Khamin did not investigate the building’s electrical systems.

On the date of the fire, Steinberg and Shaftel were the residents of Apartment 5RE (“the apartment”). The apartment was a studio with one hallway closet. At that time, as Steinberg and Shaftel intended to move out of the apartment, the apartment was being shown to prospective tenants. The apartment showings were conducted by real estate agent Carol McKusick (“McKusick”), who was granted an exclusive right to show apartments in the building by Khamin. McKusick arranged scheduled showings and apartment access with the various tenants directly. To that effect, Khamin’s involvement in the apartment showings was limited to notifying McKusick of the impending vacancies and providing the tenant contact information.

At an examination before trial, Steinberg testified that, on the day of the fire, she and Shaftel left for work in the morning. At approximately 1:00 p.m., McKusick left a message for her that she was going to be showing the apartment later that afternoon. At approximately 4:00 p.m., McKusick called Steinberg to notify her that the showing was finished, and that she had locked up and left the apartment.

Upon their return from dinner at approximately 9:00 p.m., Steinberg and Shaftel discovered that a fire had been extinguished in their apartment. Steinberg stated that she told the police and fire personnel that the last person in the apartment before the time of the fire was McKusick, and that as far as she knew, no one else had entered the apartment that day.

Steinberg also testified that the police and the fire marshal speculated that the fire had occurred in the hallway closet, and they asked her if the closet's light bulb had a cover on it when she had moved in. The hallway closet, which was approximately eight-foot-high and six-foot-wide, contained a shelf which was located about two to three inches above a clothes rack. The closet's light fixture, an uncovered incandescent light bulb operated by a pull-chain, was located inside the closet above the door.

Steinberg stated that she and Shaftel primarily kept clothing in the closet. Steinberg also kept a clothing storage container on the closet shelf, though she maintained that she never stored anything above the container in proximity to the light fixture. Steinberg also maintained that she never turned on the closet light, as she was too short to

reach the light's pull-chain. However, during apartment showings, McCusick sometimes turned on the closet light.

Non-party Mammone & Company, Inc. ("Mammone"), fire and arson consultants, investigated the fire on behalf of New Hampshire Insurance Company, Khamin's insurer. Ed Cuyar ("Cuyar"), Mammone's fire investigator. He submitted a report, dated November 12, 2007, in which he concluded that the fire originated in the hallway closet of the apartment and was caused as a result of personal property having come into contact with the closet's light bulb.

Khamin retained Jack J. Murphy & Associates, LLC ("Murphy"), an expert in building and fire code compliance, to conduct a review of the pleadings, discovery and investigations related to the fire. In an affidavit, Murphy stated that the light fixture was maintained in compliance with the Building Code, and that even if there was a violation of the Building Code, it is not possible to state with certainty that the fire was proximately caused thereby.

Steinberg and Shaftel commenced this action alleging that their property damage was caused by Khamin's "installing or otherwise permitting to exist in the plaintiffs' apartment an inherently dangerous and defective condition, i.e., an open, pull-chain, surface-mounted, incandescent fixture, too close in proximity to 'storage space'." They asserted two causes of action, one based in common-law negligence and an alleged

statutory violation of Article 410 of the National Electric Code (“NEC”), and the other one premised on breach of the warranty of habitability.

Khamin now moves for summary judgment dismissing the complaint and separately moves for an Order consolidating the instant action with a related subrogation action, entitled *New Hampshire Insurance Company a/s/o Khamin Associates, LLC v Steinberg, et al.*, New York County Index No. 105713/09.

Discussion

Motion for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

“In order for an owner to be liable for a defective condition not of its own making, an injured party must ‘establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected’.” *Golden v. Manhasset Condominium*, 2 A.D.3d 345, 347 (1st Dept. 2003), quoting *Juarez v. Wavecrest Management Team*, 88 N.Y.2d 628, 646 (1996); *Polipo v Sanders*, 227 A.D.2d 256, 257 (1st Dept. 1996).

Insufficient evidence has been presented here to demonstrate that Khamin installed the light fixture at issue, or otherwise created the unsafe condition that caused the property damage. As to actual notice, Khamin has met its prima facie burden on its motion for summary judgment by presenting testimonial evidence demonstrating that it was not aware of any problems with the light fixture that allegedly caused the fire. *See Concetto v. Pedalino*, 308 A.D.2d 470, 470 (2nd Dept. 2003) (defendants met their prima facie burden by presenting evidence in the form of affidavits and deposition testimony which demonstrated that they were not aware of any problems with the ballast in the fluorescent light fixture in the bedroom that allegedly caused the fire).

Bashir Kapdi (“Kapdi”), the property manager for the building, testified at an examination before trial that he was unaware of any renovation work having been conducted prior to Khamin’s purchase of the building, nor did he know whether the closet’s light fixture was present in the apartment before said purchase. Kapdi also maintained that he never received any complaints about any alleged defective or dangerous light fixtures in any of the buildings, nor had he ever been made aware of any instances wherein the premises were cited for same. In addition, as stated previously, there has been no showing of any substantial renovations to the building’s electrical systems, nor did Khamin ever investigate the building’s electrical systems prior to its purchase of the building. Further, Steinberg and Shaftel both testified that they had never complained of any defects in either the light fixture or in its installation or maintenance.

Steinberg and Shaftel also argue that Khamin may still be held responsible for failing to remedy the alleged defect in the light fixture on a constructive notice theory. “When an owner out of possession reserves a right under the terms of a lease to enter upon the premises for purpose of inspecting the same and making certain repairs thereon, the reservation may be deemed to constitute sufficient retention of control so as to permit a finding that he or she had constructive notice of the defective condition so as to subject the owner to liability.” *Wiesen v. Moppa*, 199 A.D.2d 312, 313 (2nd Dept. 1993).

Here, the lease between the parties granted a right of reentry to Khamin.

Specifically, the lease states, in pertinent part:

Entry by Landlord. Landlord may enter the Apartment at reasonable hours to: repair, inspect, exterminate, install or work on master antennas or other systems or equipment and perform other work that Landlord decides is necessary or desirable

Although there is no evidence that Khamin had actual notice of the claimed unsafe condition, its right to reenter the premises is sufficient to charge it with constructive notice. *See Guzman v. Haven Plaza Housing Development Fund Company*, 69 N.Y.2d 559, 566-567 (1987); *Deebs v. Rich-Mar Realty Associates*, 248 A.D.2d 185, 185 (1st Dept. 1998). “An out-of possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs.” *Nikolaidis v. La Terna Restaurant*, 40 A.D.3d 827, 827 (2nd Dept. 2007); *Ram v. 64th Street-Third Avenue Associates, LLC*, 61 A.D.3d 596, 597 (1st Dept 2009)(defendant and out-of-possession landlord was not liable

for dangers posed by a ceiling-mounted box fan because the lease with plaintiff's employer required said employer to keep all fixtures in working order and to make all nonstructural repairs).

However, "[r]eservation of a right to enter the premises for purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect." *Nikolaidis v. La Terna Restaurant*, 40 A.D.3d 827, 827 (2nd Dept. 2007)(defendant made a prima facie showing of its entitlement to judgment as a matter of law by establishing the absence of any statutory violation and the absence of any significant structural or design defect); *McDonald v. Riverbay Corporation*, 308 A.D.2d 345, 346 (1st Dept. 2003)(plaintiffs failed to raise a triable issue of fact that the decoration fell because of a significant structural or design defect); *Javier v. Ludin*, 293 A.D.2d 448, 448 (2nd Dept. 2002).

Here, Khamin has shown the absence of any statutory violation with respect to the placement and maintenance of the light fixture. *Altschuler v. Gramatan Management, Inc.*, 27 A.D.3d 304, 304 (1st Dept. 2006). Steinberg and Shaftel assert that Khamin violated Section 410.16 of the NEC, which governs the types of fixtures which are permitted in clothes closets, as well as the clearance space required between fixtures and storage spaces inside the closets. Section 410.16 prohibits "[i]ncandescent luminaires with open or partially enclosed lamps and pendant luminaires or lampholders" in closets.

In addition, Section 410.16 (c) (1) provides that these bulbs must be installed a minimum of 12 inches from the closet storage space.

However, the NEC was not adopted as part of the New York City Building Code until the year 2001. As the building at issue in this case was constructed in 1910, it qualifies as a building that existed on the effective date of the 1968 Code, and thus, it was grandfathered under the 1968 Code. *See Altschuler v. Gramatan Management, Inc.*, 27 A.D.3d at 304 (as the building at issue was constructed in 1905, it was grandfathered under the Code as it existed at that time).

To that effect, Section 27-111 of the 1968 Code is a grandfathering statute which states that “[t]he lawful occupancy and use of any building ... existing on the effective date of this code or thereafter constructed or installed in accordance with prior code requirements ... may be continued unless a retroactive change is specifically required by the provisions of this code.”

In their opposition papers, Steinberg and Shaftel do not dispute that the building was grandfathered for purposes of the 1968 Building Code and that none of the exceptions to the grandfathering provision apply. *See Carlos v. 395 East 151st Street, LLC*, 41 A.D.3d 193, 195 (1st Dept. 2007); *Isaacs v. West 34th Apartments Corp.*, 36 A.D.3d 414, 416 (1st Dept. 2007)(hazardous condition did not violate the Building Code where building was constructed nearly 40 years before the alleged condition violated provision’s effective date, and the exceptions to the grandfathering provision were

inapplicable); *Id.* (no violation of any specific statutory provision was found where plaintiff offered no evidence demonstrating that a renovation of the type that might have avoided the grandfathering provision was conducted).

Steinberg and Shaftel argue that the fire was caused by Khamin's actual negligence in that McKusick, as a real estate broker retained and employed by Khamin, was negligent in not properly turning off the closet light. However, in their opposition papers, Steinberg and Shaftel do not dispute that McKusick worked as a broker for an independent real estate agency. "The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts." *Parsons v. City of New York*, 195 A.D.2d 282, 284 (1st Dept. 1993), quoting *Rosenberg v. Equitable Life Assurance Society of United States*, 79 N.Y.2d 663, 668 (1992).

"The recognized exceptions to this rule involve situations where the employer (1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep the premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer." *Id.* Here, none of these exceptions apply, and Steinberg and Shaftel have failed to show that Khamin exercised sufficient control over the method or manner in which McKusick performed her duties as a real estate broker to raise a triable issue of fact as to whether Khamin should be held accountable for her acts. See *Melbourne v. New*

York Life Insurance Company, 271 A.D.2d 296, 298 (1st Dept. 2000). Khamin's only involvement in McKusick's work was to call and notify her of impending vacancies and to provide tenant contact information, so that she could arrange for the apartment showings. In addition, although McKusick was granted an exclusive right to show apartments in Khamin's building, she was not empowered to sign the lease on behalf of Khamin.

Further, although an exception to the general rule against vicarious liability exists where a landlord breaches its nondelegable duty under Multiple Dwelling Law § 78 to maintain premises in good repair, this exception is not applicable in this case, as the damage was not the result of the premises being in disrepair and in need of maintenance and repair. *Stagno v. 143-50 Hoover Owners Corporation*, 48 A.D.3d 548, 549 (2nd Dept. 2008); *Parsons v. City of New York*, 195 A.D.2d at 284-285. Notably, McKusick was not on the premises to repair any defect or inspect the apartment.

Steinberg and Shaftel assert that Khamin also breached its statutory non-delegable duty under Multiple Dwelling Law § 78 (1). "Section 78 (1) of the Multiple Dwelling Law requires the owners of multiple dwellings to keep their premises in 'good repair'." *Carlos v. 395 East 151st Street, LLC*, 41 A.D.3d at 195; *Isaacs v. West 34th Apartments Corp.*, 36 A.D.3d at 415. As such, this section "relate[s] to maintenance and repair as opposed to installation and construction." *Parsons v. City of New York*, 195 A.D.2d at 285.

Here, although the subject building is subject to New York's Multiple Dwelling Law ("MDL"), as it consists of 22 rental units, as discussed previously, the damage in this case was not the result of the premises being in disrepair. *See Isaacs v. West 34th Apartments Corp.*, 36 A.D.3d 414 (1st Dept. 2007)(failure to supply radiator covers was not a breach of any duty to keep leased premises in good repair, either under Multiple Dwelling Law or under common law by virtue of the lease).

In sum, as Khamin has made a prima facie showing of its entitlement to judgment as a matter of law by establishing the absence of any applicable statutory violation, and as Steinberg and Shaftel have failed to raise a triable issue of fact, Khamin is entitled to summary judgment dismissing Steinberg and Shaftel's claim for negligence. *See Nikolaidis v. La Terna Restaurant*, 40 A.D.3d at 828.

In addition, "real property law § 235-b does not permit a tenant to recover damage to personal property resulting from a breach of the warranty of habitability" *Couri v. Westchester Country Club, Inc.*, 186 A.D.2d 712, 715 (2nd Dept. 1992); *Elkman v. Southgate Owners Corporation*, 233 A.D.2d 104, 105 (1st Dept. 1996). Thus, as Steinberg and Shaftel seek to recover under this cause of action for the property damage they suffered as a result of the fire, Khamin is entitled to summary judgment dismissing Steinberg and Shaftel's cause of action for breach of the warranty of habitability.

Finally, because the Court is granting Khamin's motion for summary judgment dismissing this action, Khamin's motion seeking consolidation of this action with the related subrogation action is denied as moot.

In accordance with the foregoing, it is hereby

ORDERED that defendant Khamin Associates, LLC's motion (motion sequence 001) for summary judgment is granted, the complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Khamin Associates, LLC's motion (motion sequence 002), pursuant to CPLR 602 (a), for an Order consolidating the instant action with a related subrogation action entitled *New Hampshire Insurance Company a/s/o/ Khamin Associates, LLC v Steinberg, et al.*, New York County Index No. 105713/09 is denied as moot.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 27, 2010

ENTER:

FILED

SEP 30 2010

COUNTY CLERK'S OFFICE
NEW YORK

Saliann Scarpulla

J.S.C.

SALIANN SCARPULLA