

**Hudson v Bank of New York**

2011 NY Slip Op 31021(U)

April 19, 2011

Supreme Court, New York County

Docket Number: 115614/2008

Judge: Jeffrey K. Oing

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

JEFFREY K. OING  
J.S.C.

PRESENT:

PART 40

Index Number : 115614/2008

HUDSON, KEVIN

vs

BANK OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

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


Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision & order of the Court.*

FILED

APR 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/19/11

  
JEFFREY K. OING 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):

[\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

-----x  
KEVIN HUDSON,

Plaintiff,

-against-

THE BANK OF NEW YORK a/k/a THE BANK OF  
NEW YORK, MELLON CORPORATION and REAL  
ESTATE UNITED, INC.

Defendants.  
-----x

**Index No.:** 115614/08

**Mtn Seq. Nos.** 001 & 002

**DECISION AND ORDER**

**JEFFREY K. OING, J.:**

Defendant Real Estate United, Inc. ("REU") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and defendant's, Bank of New York ("BNY"), cross-claims for tort and contract.

Defendant BNY separately moves, pursuant to CPLR 3212, to dismiss the complaint and all cross-claims against it.

Plaintiff, Kevin Hudson ("Hudson"), cross-moves, pursuant to CPLR 3212, for summary judgment.

#### **Facts**

This action relates to a property located at 363 Highland Avenue, Middletown, NY (the "property"). By way of background, Countrywide Home Loans ("Countrywide"), a non-party, issued the mortgage on the property, acted as the loan servicer, and provided loan servicing operations. When the mortgage went into default, the property was foreclosed and after foreclosure

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Countrywide managed the property. As of July 12, 2007, defendant BNY owned the property. Countrywide contracted with defendant REU to list the property through its agent, Keith Sumner. On April 27, 2008, Hudson, a real estate agent, fell when the third step and stringer broke on the wooden deck steps at the rear of the property.

#### **Discussion**

REU, as the listing agent, asserts that it does not owe to plaintiff a duty of care. In that regard, REU maintains that the agreement with Countrywide was limited to marketing and sale of the property, and that, as such, there was no contractual responsibility to inspect, maintain or repair the property. REU further argues that any maintenance responsibilities referenced in its contract with Countrywide were not applicable to REU and actually lie with Countrywide. REU's arguments are persuasive.

To begin, plaintiff's reliance on the fact that repairs made by Keith Sumner, REU's agent, after the alleged accident demonstrates REU's duty and ownership or control is misplaced. While Sumner in fact boarded up the damaged deck stairs, critically absent from plaintiff's argument is the fact that Sumner first contacted Countrywide about the accident to obtain authorization to block off the steps. Sumner's conduct under these circumstances cannot be deemed to have established that REU

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exercised ownership or control over the property for the purposes of establishing a duty of care.

On the other hand, although a contractual relationship exists herein, a contractual obligation, standing alone, will not give rise to liability unless a party undertakes a service pursuant to a contract and negligently creates or exacerbates a dangerous condition (Grant v Caprice Mgt. Co., 43 AD3d 708 [1st Dept 2007]).

Here, a review of the EBT testimony of Jacqueline Tobolski, a Bank of America Employee<sup>1</sup>, Jeffrey Farnell, a REU principal, and Keith Sumner, within the context of the January 3, 2008 List Letter, the April 6, 2008 List Letter, and the Master List Letter, demonstrates that factual issues exist as to REU's contractual responsibility to inspect, maintain or repair the property.

Nonetheless, while factual issues exist as to REU's contractual duty of care owed to plaintiff, the same cannot be said for the issue of notice. The principle is well settled that there can be no liability absent a showing of notice of the defective condition (Hoffman v United Methodist Church, 76 AD3d 541, 542 [2d Dept 2010]).

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<sup>1</sup>Countrywide merged with Bank of America.

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Plaintiff fails to raise a factual issue that REU and BNY had either actual or constructive notice of the alleged defective condition of the deck stairs. In that regard, plaintiff's reliance on the Broker Survey completed by Sumner that noted the house exterior was deteriorated and needed attention, and the carpentry work including the rear deck, is misplaced. Sumner, at his EBT, testified that the exterior carpentry was noted for financing of the property because the property was to be sold "as is." Further, and more importantly, of the several repairs noted on the Broker's Survey, none of them related to the rear deck steps. Indeed, plaintiff himself testified that he noticed the boards were old, but not cracked or broken, and that there was nothing unusual when he stepped on to the first two steps.

As for constructive notice, that theory requires the condition to be visible, apparent, and in existence for a sufficient period of time to be discovered and remedied (Lee v Bethel First Pentecostal Church of America, Inc., 304 AD2d 798 [2d Dept 2003]). Plaintiff fails to demonstrate that a factual issue exists as to whether REU and BNY had constructive notice of the alleged defective condition. There is no dispute that Sumner inspected the property on a number of occasions. Although contesting the reasonableness of the inspections, plaintiff cannot cite to any part of the record that would indicate a factual issue exists as to whether the deck and steps were in a

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state of disrepair. In that regard, reliance on pre-accident photographs that merely show the deck and steps covered in snow fail to show the condition of the deck or steps. Indeed, the record, instead, shows that Sumner and a number of people viewed the property prior to plaintiff's accident without incident, which precludes a finding of constructive notice.

Further, plaintiff's reliance on the doctrine of res ipsa loquitur to support his cross-motion for summary judgment, and/or to raise a factual issue in opposition to defendants' motions, is unavailing. Contrary to plaintiff's contention, while a lock box combination was needed to enter the property, the rear deck and steps were part of the exterior of the property that were accessible to the public. Further, the property was listed on the Multiple Listing Services and accessed by numerous agents and potential buyers who had unfettered access to the entire property. As such, the property was not in the exclusive control of either BNY or REU (Hardesty v. Harlem, II, LLC, 79 AD3d 472 [1st Dept 2010]; Zimbler v. Resnick 72<sup>nd</sup> St. Associates, 79 AD3d 620 [1st Dept 2010]).

ORDERED that defendant REU's motion for summary judgment dismissing the complaint is granted; and it is further


ORDERED that defendant BNY's cross-motion for summary judgment dismissing the complaint is granted; and it is further

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ORDERED that plaintiff's cross-motion for summary judgment is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/19/11

  
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HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING  
J.S.C.

**FILED**  
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