

Klupchak v First E. Village Assoc.

2014 NY Slip Op 32218(U)

June 13, 2014

Sup Ct, New York County

Docket Number: 110617/2009

Judge: Geoffrey D. Wright

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____
Justice

PART 47

Index Number : 110617/2009
KLUPCHAK, ANASTASIA
vs.
FIRST EAST VILLAGE
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. 110617/09
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). _____
Repeating Affidavits _____ | No(s). 3

Cross Motion
Upon the foregoing papers, it is ordered that this motion ~~is denied~~ & cross-motion
is decided in accordance with the annexed hereto decision

FILED

JUN 18 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/13/14

G
GEOFFREY D. WRIGHT, J.S.C.
AISC

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X

ANASTASIA KLUPCHAK,

Plaintiff,

Index # 110617/09

-Against-

DECISION

FIRST EAST VILLAGE ASSOCIATES,
BERNARD MCELONE, SUSAN SCHECK,
TRI-STAR EQUITIES, INC., and ROD FELDMAN,

Defendants.

Present:

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION, AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed.....	FILED
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	JUN 13 2014
Replying Affidavits.....	NEW YORK 3
Exhibits.....	COUNTY CLERKS OFFICE
Other.....cross-motion.....	2

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants Rod Feldman, First East Village Associates, Bernard Mcelhone, Susan Schenk and Tri-Star Equities, Inc., (Defendant) move to dismiss Plaintiff Anastasia Klupchak's (Plaintiff) cause of action alleging violation of the New York City Building Code §27 (Building Code §27), New York City Housing Maintenance Codes §15 (Housing Code §15), and Multiple Dwelling Law §53 (MDL §53). Plaintiff cross-moves for partial summary judgment pursuant to CPLR §3212, claiming that MDL §53 and the Housing Code §15 are applicable as a matter of law. For the reasons discussed below, Defendant's motion to dismiss is denied. Plaintiff's cross-motion for partial summary judgment is also denied.

This case arises from an incident that occurred on November 15, 2008 at 82 2nd Avenue, New York City. Plaintiff was visiting a friend at her apartment located on the fourth floor of the building. At some point during the gathering, Plaintiff accompanied another one of the guests out onto the fire escape to smoke. The fire escape was accessible through the kitchen window of the apartment. As plaintiff tried to reenter the apartment, she fell through the fire escape,

* 3]
plummeting twelve to fifteen feet to a landing below. She sustained injuries, including being rendered a paraplegic.

On a motion for summary judgment, the proponent must make a prima facie showing that they are entitled to judgment as a matter of law, due to the absence of genuine issues of fact. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). Once the movant has made such a showing, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of any genuine issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Where the moving party fails to make a prima facie showing, the motion must be denied. *Winegrad v. City of New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985).

The essential element in a fire escape liability claim under MDL §53 is the date of the fire escape's erection. *People v. Little*, 53 Misc. 2d 645, 279 N.Y.S.2d 576 (1st Dept. 1967). Whether or not the building is designated as a tenement, multi-family dwelling, or otherwise, the statute clearly states that the date of the fire escape's erection is dispositive of whether or not any of the statutes governing fire escape standards are applicable.

Although the original nature and use of the building is murky, it is undisputed that the building and fire escape at 82 2nd Avenue were built sometime before 1918. Well before the Multiple Dwellings Law was enacted in 1929.

MDL §53 is unambiguous. The opening sentence reads explicitly:

"Every fire-escape erected **after April eighteenth nineteen hundred twenty-nine**, shall be located, arranged, constructed and maintained in accordance with the following provisions..."

Plaintiff argues that other provisions of MDL §53 require that the fire escape at 82 2nd Avenue comply with the requirements set forth in MDL §53. Such a reading however, ignores the qualifying nature of the opening sentence. One cannot read the subsequent provisions, which may or may not be more favorable to plaintiff, without first incorporating the opening sentence of MDL §53 into their rationale.

Plaintiff also argues that the subsequent change in the buildings usage, from a two family dwelling to a class A multiple family dwelling (sometime before the 2008 accident), brings it under the purview of MDL §53. While the buildings occupancy change is also undisputed, it is not relevant to MDL §53. In order for an alteration to bring a grandfathered fire escape into the reach of MDL §53, MDL §53 states that the fire escape must have specifically been modified. While the work done on the building included replacing partitions, plumbing and HVAC repair, and the installation of a fire suppression system, none of that work was done on the fire escapes themselves.

Housing Code §15 is also inapplicable to the case at bar. § 15-10(a)(1) of the Housing Code states:

"These rules have been approved by the Department to supplement the provisions of §53 of the Multiple Dwellings Law in relation to Fire Escape."

As such, Housing Code §15 is only applicable when MDL §53 itself is applicable, or, when the fire escape in question was built after 1929.


Defendant's motion for dismissal is denied on two grounds: the application of Building Code §27, and defendant's liability under common law negligence. Building Code §27 is as

unambiguous as MDL §53. Its provision expressly state that they only apply to buildings and fire escapes built or altered after the passage of the code in 1968. Under this reading defendant accurately argues that the 1968 code is inapplicable to a fire escape built pre-1929. However, plaintiff points out that the 82 2nd Avenue was cited for several violations of the building code, between 1984 and 2009. Clearly, if the Building Code §27 was not applicable, there would be no basis for said violations. Furthermore, while plaintiff also argues that the building code of 1939 applies to 82 2nd Avenue, defendant's brief makes no argument to that point. Whether or not the 1938 or the 1968 building codes are applicable is a genuine issue of fact, which should be determined by the finder of fact.

In *Kellman v. 45 Tiemann Assoc.*, the New York Court of Appeals ruled that regardless of a landlord's compliance with applicable statutes and regulations, such is not dispositive as to whether he or she satisfied their duty under the common law. *Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871 (1995). This raises genuine issues of fact as to whether defendant was given actual or constructive notice as to the alleged hazardous nature of the fire escape, and as to whether it was foreseeable that a tenant's use of the fire escape as a patio or terrace as unsafe.

For the aforementioned reasons, this court dismisses plaintiff's cross motion for partial summary judgment, on the applicability of MDL §53 and Housing Code §15 as a matter of law, and denies defendant's motion for dismissal outright.

Dated: 6/13/14


GEOFFREY D. WRIGHT
AJC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

FILED
JUN 18 2014
NEW YORK
COUNTY CLERK'S OFFICE