

Mizrachi v Kew Hills, LLC
2017 NY Slip Op 32067(U)
August 10, 2017
Supreme Court, Queens County
Docket Number: 2706/15
Judge: Robert J. McDonald
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OS

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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AIDEN MIZRACHI, an Infant, by his
Father, ELI MIZRACHI,

Index No.: 2706/15

Motion Date: 8/4/17

Plaintiff(s),

Motion No.: 58

- against -

Motion Seq.: 1

KEW HILLS, LLC and REGENT'S PARK
PROPERTIES, INC.,

Defendant(s).

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FILED
AUG 22 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1-4 on this motion:

Papers
Numbered

Notice of Motion-Affirmation-
Affidavit(s)-Service-Exhibit(s)

1-4

Defendant, Kew Hills, LLC, by notice of motion, seeks an order of the Court, pursuant to CPLR § 3212, granting judgment in favor of defendant and dismissing the complaint.

No opposition has been filed.

The underlying action is for personal injuries allegedly sustained by infant plaintiff, Eli Mizrachi, on March 10, 2013 at the condominium building located at 6989 Park Drive East, Kew Gardens, N.Y. On that date, it is alleged the plaintiff was injured when he was running along side the building when he struck his knee on a water spigot located on the side wall of that building.

In support of the motion, defendant submits inter alia, the affirmation of John F. Kelly, Esq.; a copy of the pleadings; the examination before trial of Aiden Mazrachi conducted on October 14, 2016; the examination before trial of Eli Mazrachi conducted

on October 14, 2016; and, the examination before trial of Kew Hills, Inc. by Jeffrey Bookman conducted on December 22, 2016; a photograph of the water spigot; and, Declaration for Regent's Park Properties, Inc. and Kew Hills, Inc.

Infant plaintiff's examination before trial was conducted on October 14, 2016. Aiden Mizrachi testified that on the date of the accident he was playing tag with a friend of his, by the name of Darius who lived upstairs from plaintiff in the condominium complex. Plaintiff states that he recalls running and striking something or to be defined subsequently as a water spigot and falling. Plaintiff maintains that he was bleeding from a cut on his knee requiring eight stitches and scraped his hand. Plaintiff further maintains that he never noticed the spigot protruding from the wall of the condominium complex.

Eli Mizrachi testified at an examination before trial conducted on October 14, 2016. Mr. Mizrachi testified that after the accident, he observed his son on the ground on his left side holding his right knee with his right hand. Thereafter, Mr. Mizrachi took his son to the hospital. Aiden Mizrachi was given a brace to wear for 10 days and missed two days of school.

Jeffrey Bookman testified on behalf of Kew Hills, LLC at an examination before trial on December 22, 2016. Mr. Bookman stated that he is one of the owners of Kew Hills, LLC which owns and rents and sells condominium units at 69-89 Park Drive East. He stated that he did not own the building itself just units within the building. Mr. Bookman testified that he himself owned 30 units in 2013 scattered throughout 12 or 13 acres that comprised the condominium complex. He explained that there are 150 buildings in the complex which is owned by Regent's Park Gardens. Each building is comprised of two units designated as Unit A for the downstairs unit and Unit B for the upstairs unit. Mr. Bookman stated that at the time of the accident, he owned Unit B, and not Unit A where the plaintiffs resided. Mr. Bookman further stated that Kew Hills, is only responsible for the inside of the units. The condominium association shown here as Regent's Park Gardens Condominium maintains the outside of the buildings. Mr. Bookman had no knowledge of the spigot or its location in the complex.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her

position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (O'Toole v. Vollmer, 130 AD3d 597 [2d Dept. 2015]; Suero-Sosa v. Cardona, 112 AD3d 706 [2d Dept. 2013]; Sanchez v. 1710 Broadway, Inc., 79 AD3d 845 [2d Dept. 2010]).

Upon the filing of a declaration (see Real Property Law § 339-n), a condominium is subject to the jurisdiction of the Condominium Act (see Real Property Law § 339-f). In addition, the administration of the condominium's affairs is governed principally by its bylaws, "which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements" (Schoninger v. Yardarm Beach Homeowners' Assn., 134 AD2d at 6; see Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 NY2d 530, 536 [1990]; Murphy v. State of New York, 14 AD3d at 133; Four Bros. Homes at Heartland Condominium II v. Gerbino, 262 AD2d 279, 280 [2d Dept. 1999]; Quinones v. Board of Mgrs. of Regalwalk Condominium I, 242 AD2d 52, 54, [2d Dept. 1998]).

A unit owner's ownership interest in the condominium's common elements does not give rise to liability, whether for common-law negligence because the condominium declaration transfer complete and exclusive control of the common elements to the board of managers. Jerdonek v. 41 West 72 LLC, 143 AD3d 43 [1st Dept. 2016). "[C]ondominium commons elements are solely under the control of the board of managers (Pekelnaya v. Allyn, 25 AD3d 111 [1st Dept. 2005]).

A claim arising from the condition or operation of the common elements does not lie against the owners of individual units. The proper defendant of such a claim is the board of managers. Obligations or liabilities imposed upon the owner of real property does not give rise to a claim against the owners of individual condominium units where the claim arises from a claim against the owner of individual units. (Terranova v. The 10 & 40 Shore Boulevard, Condominium, et al., 2017 NY Misc Lexis 963 (Sup. Ct., Kings County 2017)).

Here the defendant, Kew Hills, Inc. has established their prima facie entitlement to judgment as a matter of law by demonstrating that as an individual unit owners of the condominium, they had no duty to maintain the exterior grounds of

the building were plaintiff tripped and fell on the water spigot.

Accordingly, Kew Hills, LLC motion for summary judgment against plaintiff is granted without opposition and the complaint is dismissed as to them.

The Clerk is directed to enter judgment accordingly

Dated: Long Island City, N.Y.
August 10, 2017



ROBERT J. McDONALD
J.S.C.

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QUEENS COUNTY