

**30 E. 33rd St. Realty LLC v PPF Off 2 Park Ave.  
Owner, LLC**

2012 NY Slip Op 33182(U)

March 28, 2012

Sup Ct, NY County

Docket Number: 652633/11

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: \_\_\_\_\_
Justice

PART 61

Index Number : 652633/2011
30 E. 33RD ST. REALTY LLC
vs
PPF OFF TWO PARK AVENUE
Sequence Number : 001
DISMISS ACTION

INDEX NO. \_\_\_\_\_
MOTION DATE \_\_\_\_\_
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed order.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 3/28/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 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: PART 61

-----X  
30 E. 33<sup>RD</sup> ST. REALTY LLC,

Plaintiff,

-against-

PPF OFF 2 PARK AVENUE OWNER, LLC,

Defendant.  
-----X

DECISION AND  
ORDER

Index No.  
652633/11

HON. ANIL C. SINGH, J.:

Defendant moves to dismiss plaintiff’s complaint pursuant to CPLR 3211(a)(7), contending that defendant has no legal obligation to maintain, repair, or replace a deteriorating chimney that was constructed on plaintiff’s building in 1927 by defendant’s predecessor-in-interest. Plaintiff opposes the motion.

Plaintiff is the owner of the twelve story building located at 30 East 33<sup>rd</sup> Street in Manhattan. The building was constructed in 1916 by plaintiff’s predecessor-in-interest.

In 1927, defendant’s predecessor-in-interest built a twenty-five story building with three penthouses at 2 Park Avenue. Defendant’s building is adjacent to plaintiff’s building.

It is undisputed that when defendant’s building was constructed in 1927,

defendant's predecessor-in-interest constructed the existing chimney on plaintiff's building, as required of defendant's predecessor pursuant to the then-existing section 392(9) of the 1916 New York City Building Code.

Plaintiff commenced the instant action by filing a summons and verified complaint on September 21, 2011, asserting five causes of action. The complaint alleges that defendant has permitted the chimney to fall into disrepair and has failed to maintain and repair the chimney; that the chimney is required to be in good order and repair at the sole cost and expense of defendant; and that the chimney is defective and must be replaced immediately. According to the complaint, defendant's legal obligation to repair, maintain, and/or replace the chimney is based upon section 27-860 of the New York City Administrative Code.

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Martin v. Liberty Mut. Ins. Co., 92 A.D.3d 729, 730 [2d Dept., 2012] (internal quotation marks and citations omitted)). “In determining such a motion, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint,

factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail” (Id.).

Plaintiff contends that defendant is legally obligated to repair or replace the chimney under Administrative Code of the City of New York City section 27-860(a)(4), which states in pertinent part:

Adjoining chimneys. (a) Responsibility of owner of taller building. Whenever a building is erected, enlarged, or increased in height so that any portion of such building, except chimneys or vents, extends higher than the top of any previously constructed chimneys within one hundred feet, the owner of such new or altered building shall have the responsibility of altering such chimneys to make them conform with the requirements of section 27-859 of this article. A chimney that is no longer connected with a fireplace or combustion or other equipment for which a chimney was required, shall be exempt from this requirement....

\* \* \*

(f) Procedure. It shall be the obligation of the owner of the new or altered building to:

\* \* \*

(4) Provide for the maintenance, repair, and/or replacement of such extensions and added equipment.

(5) Make such alterations of the same material as the original chimney so as to maintain the same quality and appearance, except where the owner of the chimney affected shall give his or her consent to do otherwise. All work shall be done in such fashion as to maintain the architectural esthetics of the existing building.

There is no language in the statute, which was enacted in 2004, indicating

that the provision was to be applied retroactively. Accordingly, the Court finds that the complaint fails to state a cause of action since the chimney in issue was allegedly constructed or extended by defendant's predecessor in 1927, long before the present statute came into existence (Lichter v. 349 Amsterdam Ave. Corp., 8 A.D.3d 212 [1<sup>st</sup> Dept., 2004]).

In addition, the Court notes that a cause of action based on the requirements set forth in code section 27-860 is subject to a three-year statute of limitations (Mindel v. Phoenix Owners Corp., 17 A.D.3d 227 [1<sup>st</sup> Dept., 2005]). The Court finds that, under the facts alleged, plaintiff's claim is time-barred.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the court.

Date: 3/28/12  
New York, New York

  
Anil C. Singh