

Moriarty v Lenox Terrace Dev. Assoc.

2015 NY Slip Op 30415(U)

March 23, 2015

Supreme Court, New York County

Docket Number: 153681/2012

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JULIE MORIARTY,

Plaintiff,

- against-

INDEX NO. 153681/12

MOTION SEQ. NO. 002

LENOX TERRACE DEVELOPMENT ASSOCIATES,
FOURTH LENOX TERRACE ASSOCIATES, PS
MARCATO ELEVATOR CO., INC., HAMPTON
MANAGEMENT and THE OLNICK ORGANIZATION,

Defendants.

The following papers were read on this motion by the defendants for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Plaintiff Julie Moriarty (Moriarty) brings this personal injury action to recover for injuries allegedly sustained on April 22, 2012, when she tripped and fell upon exiting a misleveled elevator in the building where she resides. Now before the Court is a motion brought by Lenox Terrace Development Associates (Lenox Terrace), Fourth Lenox Terrace Associates (Fourth Lenox), PS Marcato Elevator Co., Inc. (Marcato), Hampton Management (Hampton), and the Olnick Organization (Olnick) (collectively, defendants), pursuant to CPLR 3212, for summary judgment dismissing the complaint and any and all cross-claims asserted herein. Plaintiff is in opposition to the motion. Discovery in this matter is complete, and the Note of Issue has been filed.

BACKGROUND

The subject elevator was one of three passenger elevators in the building, which is

located at 40 West 135th Street in the County, City and State of New York (the building) (see Notice of Motion, Pankow Affirmation, ¶ 7). Co-defendants Lenox Terrace and Fourth Lenox are apparently the building's co-owners, and are themselves evidently owned and/or operated in some capacity by Olnick, while co-defendant Hampton is the building's management company (*id.*; exhibits C, D, G). The remaining co-defendant, Marcato, is an elevator repair company that contracted with Lenox Terrace to service and maintain the building's elevators. (*id.*; exhibit B).

Moriarty testified that on the day of her accident she had left her apartment on the eighth floor and took the middle elevator to the lobby with the intention of walking to the gym (see Zaloudek affirmation in opposition, exhibit A, Moriarty EBT at 6, 14, 22). Moriarty noted that, on two or three occasions during the year before her accident, the elevators had opened between floors leaving the passengers facing a wall, and that she had informed the building's doorman, James Cave (Cave), about those incidents (*id.* at 23-24, 25-28, 31). Moriarty next stated that the elevator ride from the building's eighth floor to the lobby was smooth and uneventful, and that the elevator did not stop on any of the floors in between (*id.* at 41-42). Moriarty then stated that she was standing about a foot from the elevator door when it reached the lobby, that the door opened fully, that she took a step forward with her right foot, and that her left foot tripped when it caught the floor because the elevator had not come down flush, but was an inch or two below the level of the floor (*id.* at 44-48). Moriarty finally stated that, as a result of the trip, she fell forward and her right knee hit the floor and her right arm and head hit the wall of the corridor opposite the elevator door, she lost consciousness briefly and awoke with pain in her right extremities (*id.* at 53-58).

Cave, who testified on behalf of Lenox Terrace and Fourth Lenox, stated that he never received any complaints about the elevators misleveling, and denied having observed any special repair work being done on the elevators, but stated that Marcato sent workers each

month to perform maintenance on the elevators (see Zaloudek Affirmation in Opposition, exhibit B at 16-18). However, Cave later stated that Marcato sent its workers “whenever anybody got stuck in the elevators or anything happened to the elevators” (*id.* at 20). Cave also stated that he heard Moriarty call out when she fell, and that he went to her assistance and called 911, but stated that he did not actually observe her fall and did not notice that the elevator was misleveled (*id.* at 23-26).

Hampton was deposed on May 6, 2013 by its general manager, Kolbi Brown (Brown), who stated that he had located an incident report regarding Moriarty’s accident, and also acknowledged the maintenance contract between Hampton and Marcato (the Marcato contract) (see notice of motion, exhibit H at 20-22, 33). Brown also stated that Marcato generally inspected and performed maintenance work on the building’s elevators approximately once per week (*id.* at 47-48). Brown further stated that there were no violations of record against the building with respect to the elevators, and no work tickets indicating that any work had been performed on them in response to a complaint (*id.* at 57-59). However, Brown acknowledged a January 23, 2012 “elevator inspection test report” that was prepared by a non-party safety consulting company called Van Deusen and Associates (Van Deusen), which periodically inspects Marcato’s maintenance work, that stated that the results were “unsatisfactory” because the middle elevator’s “Z brackets” and “car safety operating device” were missing, and a counterweight was broken (the Van Deusen report) (*id.* at 65-72).

Marcato was deposed on June 6, 2013 by its executive vice president, Lawrence Betz (Betz), who acknowledged the contract between Hampton and Marcato, and stated that, pursuant to that contract, Marcato was responsible for “all of the equipment in the building pertaining to the elevators; ... emergency call backs and any violations which are written would be cured by [Marcato]” (see Zaloudek Affirmation in Opposition, exhibit C at 15). The Court here notes that none of the parties has attached a copy of the Marcato contract to their papers.

Betz also stated that Marcato sent employees to the building to perform maintenance on the elevators twice per month (*id.* at 20). Betz acknowledged the Van Deusen report, but stated that neither a missing Z bracket, a missing car safety operating device or a broken counterweight could cause an elevator to mislevel (*id.* at 35-41). Betz next stated that there are other components of a passenger elevator that could cause the elevator to mislevel if they were broken or lost power, but averred that he had no knowledge of any of those components being broken in the subject elevator (*id.* at 51-55). Finally, Betz initially stated that Marcato had not received any complaints about the subject elevator misleveling, but later acknowledged several emergency service calls that were made with respect to the subject elevator in May and October 2011 (*id.* at 57-58, 62-72).

In her opposition papers, Moriarty presents an expert's affidavit from elevator consultant Patrick Carrajat (Carrajat), who inspected the building's middle elevator, and opines that Moriarty's accident could not have occurred in the absence of negligent maintenance of that elevator (*see* Zaloudek Affirmation in Opposition, exhibit E).

Moriarty commenced this action on June 13, 2012 by filing a summons and complaint that sets forth one cause of action for negligence and one cause of action for negligent supervision (*see* Notice of Motion, exhibit A). Marcato and Lenox Terrace each filed separate answers on June 28, 2012, that include cross-claims against the other co-defendants for comparative negligence (*id.*, exhibits B, C). The remaining co-defendants filed a joint answer on August 29, 2012 that includes cross-claims against Marcato for: 1) contributory negligence; 2) comparative negligence; and 3) breach of contract for failure to obtain insurance (*id.*, exhibit D). On February 28, 2014, all of the defendants jointly filed the instant motion, which seeks summary judgment dismissing the complaint and all of the cross-claims herein.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of

fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; see also *Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR 3212[b]). “Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court’s function on a motion for summary judgment is “issue-finding, rather than issue-determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46

NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212(b)].

DISCUSSION

In their motion, defendants first argue that Moriarty's complaint should be dismissed on the basis that there is no evidence that they had actual or constructive notice of the condition in the elevator that caused her injury (see Notice of Motion, Pankow Affirmation, ¶¶ 16-22).

Moriarty first replies that her claim is based on the doctrine of *res ipsa loquitur* rather than principles of common-law negligence, but also asserts that her claim is also viable under principles of common-law negligence (see Zaloudek Affirmation in Opposition, ¶¶ 9-22). For ease of discussion, the Court will address the arguments in the order that Moriarty raises them.

The Court of Appeals holds that, in order to invoke the doctrine of *res ipsa loquitur* to support a negligence claim, a plaintiff must establish that:

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006], quoting *Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430 [1967], quoting Prosser, Torts § 39 at 218 [3d ed.]; see *Crawford v City of New York*, 53 AD3d 462, 464 [1st Dept 2008]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225 [1st Dept 2002]).

Moriarty asserts that she has established each of the three foregoing elements.

With respect to the first of these elements, Moriarty cites Carrajat's expert report as evidence that the alleged misleveling of the elevator herein is an “event ... of a kind which ordinarily does not occur in the absence of someone's negligence” (see Zaloudek Affirmation in Opposition, ¶ 10). Defendants reply that Carrajat's affidavit “demonstrates a complete and total misunderstanding of how this elevator works” (see Pankow Reply Affirmation, ¶ 6). Defendants also cite a quantity of case law from the Appellate Division, First Department, in which, they

assert, Carrajat has been “repeatedly chastised and his opinions rejected ... [as] unsubstantiated allegations and assumptions without any evidence to back up his conclusions” (*id.*, ¶ 8). The Court notes that Carrajat is actually only identified by name in one of the cases that defendants cite, *Haynes v Estate of Goldman* (62 AD3d 519 [1st Dept 2009]), and that, in that decision, the First Department found that the trial court had properly discounted Carrajat’s expert report because: 1) he inspected the elevator in question 16 months after the subject accident; 2) he failed to refute or even address the factual findings set forth in the defendants’ experts’ report; 3) he failed to identify a component part of the subject elevator to support his assertion that the entire unit was “in an advanced state of disrepair;” and 4) he included several gratuitous and unfounded legal conclusions (*id.* at 521). Here, similarly, Carrajat avers that he inspected the subject elevator 19 months after Moriarty’s accident and also includes several improper legal conclusions in his report, such as that “Marcato failed to properly maintain the subject elevator,” and that Moriarty “did not contribute to her own fall and resulting injuries” (see Zaloudek Affirmation in Opposition, exhibit E, ¶¶ 12, 14). However, the Court also notes that Carrajat reviewed the elevator’s maintenance log and found that it had been taken out of service 12 times in the year prior to Moriarty’s accident, and asserted that two of those occasions involved incidents that, he claimed, were indicative of leveling problems with the elevator (*id.*, ¶ 6). The first of these occurred on October 10, 2011, when the elevator was “removed from its final limits,” and the second on October 14, 2011 when a mechanic “cleaned the magnets mounted on the shaftway tape ... [which] are read by a tape reader on the car top and control the stopping and leveling of the elevator” (*id.*). Counsel for defendants argues in his reply affirmation that “when an elevator stops on the final limits it is indicative of another problem, like overloading the cab or improper electrical supply ... not a leveling issue;” and that “cleaning of [elevator] magnets is part of normal elevator maintenance ... not fixing a leveling problem” (see Pankow reply affirmation, ¶¶ 6-7). To support these assertions, counsel refers to

Betz's deposition testimony (*id.*). However, after reviewing that testimony, the Court cannot accept counsel's argument that it conclusively refutes Carrajat's assertions. When he was asked whether an elevator that reaches its final limits could mislevel, Betz responded that the elevator "obviously overtravelled" (see Zaloudek Affirmation in Opposition, exhibit E at 66-67). When he was asked about the magnet cleaning, Betz first noted that the maintenance report indicated that there was also "debris in the track," and then stated that a magnet that was not cleaned could cause a "malfunction," including a misleveling (*id.* at 70). Thus, as a result of these equivocal statements, defendants are left only with counsel's assertion that neither of the incidents cited in Carrajat's expert's report could have resulted in an elevator misleveling. However, it is well settled that "[a]n attorney's affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof" (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 [1st Dept 1997]). Here, because the documentary evidence does not support counsel's contention, the Court discounts defendants' reply argument. As a result, the Court is left with competing expert testimony on the issue of whether the alleged misleveling of the elevator herein was an "event ... of a kind which ordinarily does not occur in the absence of someone's negligence." It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment (see *e.g.* *Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]). Therefore, at this juncture, the Court rejects defendants' argument that Moriarty has failed to establish the first element required to invoke the doctrine of *res ipsa loquitur* in support of her negligence claim.

With respect to the second element, Moriarty argues that "there is absolutely no issue that the subject elevator was ... owned by the building and solely maintained by [Marcato] under a full service contract between [Marcato] and the building" (see Zaloudek Affirmation in Opposition, ¶ 11). The Court notes that defendants do not contest this point in their reply papers. Therefore, the Court deems it conceded.

With respect to the third element, Moriarty argues that “the accident was not caused in any way by any action of” hers (see Zaloudek affirmation in opposition, ¶ 12). Defendants reply that “pursuant to Betz’s affidavit, [Moriarty] could have tripped on the gap between the cab and the floor” (see Pankow reply affirmation, ¶ 12). However, apart from Moriarty herself, none of the witnesses deposed herein claims to have seen the accident. Thus, this claim is, again, attorney’s speculation which cannot support a motion for summary judgment (*Adam v Cutner & Rathkopf*, 238 AD2d at 239). Therefore, the Court discounts defendants’ reply argument, and notes, again, that Moriarty’s credibility regarding the circumstances of her accident is a matter for the trier of fact, and is inappropriate for resolution on a motion for summary judgment (*Santos v Temco Service Industries, Inc.*, 295 AD2d at 218-219). Therefore, the Court finds that Moriarty has established the third element required to invoke the doctrine of *res ipsa loquitur* in support of her negligence claim. The Court also notes that there is appellate authority that supports the argument that an accident that occurs as a result of a misleveled elevator can constitute actionable negligence under a theory of *res ipsa loquitur* (see *e.g. McLaughlin v Thyssen Dover El. Co.*, 117 AD3d 511 [1st Dept 2014]; *Gutierrez v Broad Fin. Ctr. LLC*, 84 AD3d 648 [1st Dept 2011]; *Fiermonti v Otis El. Co.*, 94 AD3d 691 [2d Dept 2012]; *Ardolaj v Two Broadway Land Co.*, 276 AD2d 264 [1st Dept 2000]; *Bigio v Otis El. Co.*, 175 AD2d 823 [2d Dept 1991]). As a result of the foregoing, the court finds that Moriarty has established triable issues of fact as to the existence of each of the elements of a *res ipsa loquitur* argument, and rejects defendants’ argument that she has failed to do so. Therefore, the Court finds that defendants are not entitled to summary judgment dismissing Moriarty’s negligence claim at this juncture, as a matter of law, and that the viability of Moriarty’s *res ipsa loquitur* theory is a matter to be resolved at trial.

As was previously noted, Moriarty’s second opposition argument is that her claim is also viable under principles of common-law negligence, since there is evidence that defendants had

either actual or constructive notice of the condition in the elevator that caused her injury (see Zaloudek Affirmation in Opposition, ¶¶ 15-22). Regarding those principles, the Appellate Division, First Department, holds that:

“A defendant seeking summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence. A defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff’s case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident” (*Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011] [internal citations omitted]).

Here, defendants had initially argued that “there is no evidence in the record that any defective or dangerous condition existed or that defendants either created the alleged defective condition or had actual notification of the defective condition” (see Notice of Motion, Pankow Affirmation, ¶ 19). They referred to Betz’s deposition testimony that Marcato had not received any complaints about the subject elevator misleveling prior to Moriarty’s accident (*id.*, ¶ 19, 21-22). In opposition, Moriarty cited *Dykes v Starrett City, Inc.* (74 AD3d 1015 [2d Dept 2010]), in which the Appellate Division, Second Department, held that:

“An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found.’ However, the property owner continues to owe a nondelegable duty to elevator passengers to maintain its buildings’ elevators in a reasonably safe manner. Moreover, negligence in the maintenance of an elevator may be inferred from evidence of prior malfunctions” (*id.* at 1016 [internal citations omitted]).

Moriarty then argued that Carrajat’s inspection of the elevator records indicated that it had been taken out of service 12 times in the year before her accident, and that his expert opinion was that two of those occasions involved incidents that indicated a misleveling problem (see Zaloudek Affirmation in Opposition, ¶¶ 17-19). Moriarty also noted that, although Betz initially

denied that Marcato had any reason to believe that there was a misleveling problem with the subject elevator, he later acknowledged both the existence of the 12 service calls for the elevator, and the possibility that two of the incidents could have resulted in the elevator "overtravelling," or experiencing a misleveling "malfunction" (*id.*, ¶ 20, n 3; exhibit C at 66-67, 70). Defendants' reply papers merely restate their original argument, and deny that there is any evidence that the elevator ever misleveled (see Pankow reply affirmation, ¶¶ 6-9). The Court disagrees. It has already determined that Betz's deposition testimony was, at best, equivocal regarding both the state of the elevator and the nature and number of the prior complaints about it, and that it is for the trier of fact to determine his credibility vis a vis Carrajat's. Consequently, the Court must now find that it is also for the trier of fact to determine whether there was indeed sufficient evidence present in the tenant complaints and in Marcato's maintenance inspection to impute constructive notice of a misleveling problem to both Marcato and the building. Therefore, the Court concludes that it would be improper to discount Moriarty's notice argument at this juncture, and finds that defendants are not entitled to summary judgment dismissing that argument at this juncture, either. Accordingly, the Court finds that defendants' motion should be denied in full.

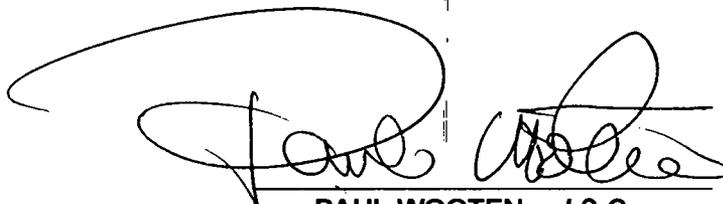
CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Lenox Terrace Development Associates, Fourth Lenox Terrace Associates, PS Marcato Elevator Co., Inc., Hampton Management and the Olnick Organization is, in all respects, denied.

Dated:

3/23/15



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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