Koldys v Fifth Ave. Bldg. Assoc., LLC

2007 NY Slip Op 30632(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0117964/2004

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 4/10/2007

[* 1]

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

PRESENT: Hon. Doris Ling Cohan
Justice

PART 36

Index Number : 117964/2004

KOLDYS, JOSEF

VS.

FIFTH AVENUE BUILDING

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Fifth Ave Building Assoc., LLC is granted in accordance with the attached memorandum decision.

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

FILED
APR 10 2007
NEW YORK COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 4/4/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ Reference

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 36

---x

JOZEF KOLDYS,
Plaintiff,

v.

FIFTH AVENUE BUILDING ASSOCIATES, LLC
and SCHINDLER ELEVATOR CORPORATION,
Defendants.

---x

DECISION AND ORDER

Index. No. 117964/04

Motion Seq. # 003

LING-COHAN, DORIS, J.S.C.

In this personal injury action, defendant, Fifth Avenue Building Associates, LLC ("Fifth Avenue") moves for summary judgment dismissing the complaint and all cross claims against it.[1]

The complaint alleges that plaintiff, Jozef Koldys, ("Mr. Koldys" or "plaintiff") was injured in the course of his duties as a porter when he tripped while exiting a mis-leveled elevator in a building located at 200 Fifth Avenue in Manhattan. Mr. Koldys was employed by Cushman & Wakefield, the manager of 200 Fifth Avenue. At the time of the accident, Fifth Avenue was the fee owner of the 200 Fifth Avenue building (the "subject building"). Mr. Koldys complains that Fifth Avenue and Schindler Elevator Corporation ("Schindler"), the company that was contractually liable to service the elevators at 200 Fifth Avenue, were negligent in their duty to properly maintain and repair the subject elevator.

Fifth Avenue now moves for summary judgment on the ground that it was an out-of-possession owner that had no control over the premises and that it was not contractually obligated to maintain or repair the premises. Fifth Avenue submits a ground lease dated

[1] That branch of the motion seeking dismissal of the cross claims is moot as Schindler Elevator's answer does not contain cross claims. The court notes that a prior motion for summary judgment by this defendant was granted on default (9/20/06 decision, Richter, J.) but, that decision was vacated to permit the parties to submit opposition.

003

December 1, 1950 and a modification to such lease dated April 19, 1994 (Weiss Aff, Ex. F) between Fifth Avenue and 200 Fifth Avenue Associates (200 Fifth) whereby 200 Fifth, as tenant in possession, agreed, "at its sole cost and expense, . . . [to] keep in good repair and shall renew, rebuild and replace, as necessary, . . .all equipment, fixtures and appurtenances used in the buildings." Fifth Avenue also claims that it did not have notice of an alleged problem with the elevator and that it did not have a statutory duty to repair the elevator that would give rise to liability. In further support of the motion, Fifth Avenue submits the affidavit of Jack Feirman, a partner in the company that supervises Fifth Avenue. Mr. Feirman avers that Fifth Avenue never operated, maintained or controlled the subject building and that it did not have employees or offices in the subject building.

In opposition, plaintiff contends that Fifth Avenue is liable for his injury because it reserved right to enter the premises to inspect and make repairs and because it had a non-delegable duty to keep the premises in a reasonably safe condition. In addition, plaintiff argues that Fifth Avenue is liable under the doctrine of res ipsa loquitur.

SUMMARY JUDGMENT

On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 [1980]) The motion must be supported by an "affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." (CPLR 3212[b]). To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212[b]). Thus, where the proponent of the

motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York,* supra at 560) Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v. Steward M. Muller Constr. Co.,* 46 N.Y.2d 276 [1978]; *Fried v. Bower & Gardner,* 46 N.Y.2d 765 [1978])

DISCUSSION

"It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition". (*Putnam v. Stout,* 38 N.Y.2d 607 [1976][citations omitted]; *see also Jackson v United States Tennis Assoc.*, 294 A.D.2d 470 [2nd Dept 2002]; *Dixon v. Nur-Hom Realty Corp.*, 254 A.D.2d 66 [1st Dept 1998]). Here, Fifth Avenue has established its prima facie entitlement to judgment dismissing the complaint by proffering the lease between it and 200 Fifth that demonstrates that Fifth Avenue did not retain control of the premises (Weiss Aff, Ex. F, p.5, paragraph second). Pursuant to that lease, 200 Fifth was contractually liable to keep the subject building in good repair. In addition, Jack Fierman, a partner in the firm that acts as supervisor for Fifth Avenue, submitted an affidavit stating that 200 Fifth maintains and operates the subject building and that Fifth Avenue never operated, controlled or maintained the building.

In opposition, plaintiff has failed to submit any evidence to overcome Fifth Avenue's *prima facie* showing that it did not retain control of the subject building. Moreover, Koldy's has not presented any evidence to show that Fifth Avenue is contractually obligated to repair the

elevators in the building.

Plaintiff's reliance on Fifth Avenue's right of reentry is unavailing. Reservation of a right of reentry for inspection and repair may constitute sufficient retention and control to impose liability for injuries caused by a dangerous condition, but only where liability is based on a significant structural or design defect that violates a specific statutory condition. (*See, Guzman v. Haven Plaza Housing Dev. Fund Co. Inc,* 69 N.Y.2d 559 [1987]; *Plung v. Cohen,* 250 A.D.2d 430 [1998]). Administrative Code of the City of New York sections 27-127 and 27-128, which generally require that an owner of a building maintain and be responsible for its safe condition, do not impose liability in the absence of a breach of some specific safety provision of the Administrative Code. (*Id.*) In *Wagner v. Grinnell Housing Dev. Fund Corp.*, 260 A.D.2d 265, (1st Dept 1999), relied upon by Koldys, the plaintiff was injured because the elevator in the building was not in compliance with a specific safety section of the NYC Administrative Code. In *Wagner*, plaintiff presented evidence that the building had been cited for violation of that specific section of the Administrative Code before plaintiff's accident. Moreover, the *Wagner* court found that the out-of-possession landlord was liable for plaintiff's injuries because, "[t]he building owner...had notice of the defect, which was structural, as evidenced by the fact of the Administrative Code violation, and the dangers resulting therefrom." (internal citations omitted)[2]

Here, plaintiff has failed to come forward with any evidence that Fifth Avenue had notice of the mis-leveling of the elevator, or that it was caused by a structural defect or design defect that violated a specific statutory provision.

---

[2] Plaintiff also relies on *Bonafacio v. 910-930 Southern Blvd., LLC*, 295 A.D.2d 86 (1st Dept 2002). *Bonafacio* is inapposite as the court in that case found that there was a question of fact as to whether defendant owner completely parted with possession and control of the building in view of the unexplained connections among the former owner, the current owner and the agent/lessee; no such questions are presented here.

In addition, the doctrine of res ipsa loquitur is inapplicable here. In order to charge a defendant with liability under the doctrine of res ipsa loquitur, plaintiff must establish that: (1) the accident is of a type that does not occur in the absence of negligence; (2) it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it was not caused by any voluntary action or contribution on the part of the plaintiff. *See, Ebanks v. New York City Transit Authority,* 70 N.Y.2d 621 (1987). Exclusive control is lacking where the proof does not eliminate the activities of a third party. (*see, De Witt Props. v. City of New York,* 44 N.Y.2d 417 (1978). Here, the documentary evidence establishes that the elevator was not in Fifth Avenue's control. Thus, res ipsa loquitur does not apply to this action. (*See, Marszalkiewicz v. Waterside Plaza, LLC,* 35 A.D.3d 176 [1st Dept 2006])

Accordingly, it

ORDERED that Fifth Avenue's motion for summary judgment dismissing the complaint against it is granted, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that within 30 days of entry of this order, Fifth Avenue, serves a copy upon all parties with notice of entry.

DATE 4/4/07

FILED
APR 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Doris Ling-Cohan, J.S.C.