

Kelly v Newmark & Co. Real Estate, Inc.

2007 NY Slip Op 31728(U)

June 20, 2007

Supreme Court, Ulster County

Docket Number: 0043127/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

ELIZABETH KELLY and GALEN KELLY,

Plaintiffs,

-against-

Index No.: 04-3127
RJI No.: 55-05-01784

NEWMARK & COMPANY REAL ESTATE, INC.
and ULSTER ACQUISITION 1 LLC,

Defendants.

NEWMARK & COMPANY REAL ESTATE, INC.
and ULSTER ACQUISITION 1 LLC,

Third-Party Plaintiffs

-against-

THYSSENKRUPP ELEVATOR CORPORATION
(a/k./a THYSSEN ELEVATOR COMPANY and/or
THYSSEN DOVER ELEVATOR COMPANY).

Third-Party Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for injuries allegedly sustained on December 10, 2001 when an elevator misleveled, causing her to trip and fall as she was entering the elevator. Defendants and third-party plaintiffs Newmark & Company Real Estate and Ulster Acquisition 1 LLC (hereinafter Newmark) have moved for summary judgment dismissing plaintiffs' complaint on the ground that they did not have any notice, either actual or constructive, of the alleged defect in the elevator. In the alternative, they seek summary judgment on the issue of contractual indemnification from third-party defendant. The third-party defendant (hereinafter Thyssen) has moved for an order requiring Newmark to indemnify it for all costs and expenses incurred with respect to this action on the ground that Newmark breached the contract between them by failing to obtain liability insurance and for summary judgment dismissing the third-party complaint and all other claims on the grounds that Thyssen did not have notice of the defect and/or that Newmark was actively negligent and therefor may not seek contractual indemnification.

Summary judgment is a drastic remedy which should only be granted when it is

clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). It is not a means merely to challenge the opposition to prove its case. Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

“As the proponent of the motion for summary judgment, it was incumbent upon defendant to establish entitlement to judgment as a matter of law, which would require

the owner of the building to show that the elevator in question was in good repair and that neither defendant nor anyone acting as its agent had any notice, actual or constructive, of any defects or complaints.” (Bonifacio v 910-930 S. Blvd., 295 AD2d 86, 91 [1st Dept 2002]). In support of its motion, Newmark has submitted transcripts of depositions of plaintiff Elizabeth Kelly (hereinafter plaintiff), Newmark’s property manager, the former building engineer for the subject building, and the elevator repairman together with discovery responses. Plaintiff testified that the elevator stopped approximately 6 inches above the floor, causing her to trip when she entered the elevator. Newmark contends that it did not have actual or constructive notice of the specific alleged defect as necessary in order to impose liability.

Newmark and Ulster Acquisition, as the property manager and owner, respectively, of the subject premises had a nondelegable duty to maintain the elevator in safe operating condition (see Rogers v Dorchester Assoc., 32 NY2d 553, 562 [1973]; Oxenfeldt v 22 N. Forest Ave. Corp., 30 AD3d 391, 392 [2d Dept 2006]). It has consistently been held that proof of previous similar elevator malfunctions gives rise to an inference of negligent inspection and repair (see Rogers v Dorchester Assoc., 32 NY2d at 562; Oettinger v Montgomery Kone, Inc., 34 AD3d 969 [3d Dept 2006]; Fanelli v Otis El. Co., 278 AD2d 362 [2d Dept 2000]; Liebman v Otis El. Co., 127 AD2d 745 [2d Dept 1987]). Moreover notice of a recurring dangerous condition may constitute constructive notice of a particular condition (see Suarez v D & C Mgt. Assoc., 284 AD2d 706, 707 [3d

Dept 2001]; Lowe v Spada, 282 AD2d 815, 817 [3d Dept 2001]). As such, it has been held that evidence that an elevator frequently misleveled prior to an accident was sufficient to defeat a motion for summary judgment by the owner as well as the elevator maintenance company (see Oxenfeldt v 22 N. Forest Ave. Corp., 30 AD3d at 392).

The record before the Court includes substantial proof of numerous instances of misleveling in the year before plaintiff's accident. The plaintiff testified that she had seen the elevator mislevel approximately 10 to 12 times. Moreover, Newmark's former building engineer testified that they had had numerous complaints and regular problems with the elevator misleveling, that he had taken it out of service on two or three occasions because it misleveled by more than one inch, that he had placed a warning sign on it on one other occasion and that he did not do anything when it misleveled by less than one inch. He also testified that Thyssen's repairman told him that the elevator was very old and would probably need to be replaced. Plaintiff has also submitted an affidavit from one of her co-employees who averred that she had seen the elevator stop short by as much as six inches, that she received numerous complaints about the elevator stopping short or overshooting the floor, and that she contacted Newmark's building manager every time she received a complaint. She further stated that the building manager informed her that the elevator was old, outdated and in need of repair. It further appears that Thyssen's repair records show several instances of misleveling in the year before plaintiff's accident.

Thyssen has submitted an affidavit from an elevator expert alleging the existence of an industry standard requiring that elevators level within one half inch of the building's floor. He further opined that the doors can not open if the elevator is more than one half inch out of level. The expert has not set forth any foundation or basis for his opinion. He has not provided any source or supporting documentation for the purported industry standard (see Suarez v D & C Mgt. Assoc., 284 AD2d at 707). He has not described the leveling mechanism or provided any explanation as to why the doors could not open if more than one half inch from the proper height. Moreover, he has entirely ignored, dismissed and failed to explain the consistent testimony of the plaintiff and the building engineer to the effect that the elevator often misleveled by as much as two inches (see Hubert v Tripaldi, 307 AD2d 692 [3d Dept 2003]). Since such affidavit fails to set forth the factual basis for the stated opinion it is without probative value (see Romano v Stanley, 90 NY2d 444, 451 [1997]; M & E Mfg. Co. v Frank H. Reis Inc., 258 AD2d 9, 13 [3d Dept 1999]).

The submissions clearly show the existence of questions of fact with respect to whether the owner, the property manager and the elevator maintenance company had actual or constructive notice of the defective condition. Accordingly, Newmark's motion and Thyssen's cross-motion for summary judgment dismissing the complaint shall be denied.

In the alternative, Newmark seeks summary judgment on the issue of contractual

indemnification against Thyssen. Newmark has submitted an elevator service agreement between it and Thyssen dated September 26, 2001, which was in effect on the date of the accident, in which the elevator company agreed to defend and indemnify both the owner and the building manager with respect to any claims arising out of the maintenance of the elevator. The submissions also indicate that Newmark did not have actual notice of the specific manifestation of the problems experienced by the elevator on the date of plaintiff's accident. Under such circumstances, Newmark's liability is vicarious and based upon ownership and control of the property, not any active negligence (see Rogers v Dorchester Assoc., 32 NY2d at 562). "[T]he effect of constructive notice to the owner of the defective condition and the nature of its 'nondelegable' duty [do] not bar it from indemnification." (id. at 562). Therefore, the Court finds that Newmark has made a prima facie showing of a right to summary judgment of contractual indemnification.

Thyssen, in opposition to the motion and in support of its cross motion, contends that Newmark was negligent in failing to provide it with notice that the elevator was misleveling by between one half inch and one inch. Such claim is based upon the conclusory assertions of an industry standard rejected above. There is also no evidence that Thyssen ever informed Newmark of this standard, required any specific notice or expected Newmark to have an employee with expertise in elevators to conduct continued surveillance of the elevator. Moreover, there is no proof of the cause of minor misleveling or that it was directly related to the cause of the significant misleveling which

allegedly caused plaintiff's injuries. In addition, Thyssen's expert has essentially opined that the elevator could not mislevel by between one half and one inch. As such, according to the expert, there could not have been any minor defects to report to Thyssen. Thyssen has therefore failed to raise any issue of fact with respect to Newmark's failure to notify Thyssen of known safety defects.

Thyssen also contends that Newmark was actively negligent in refusing to replace the aged and worn elevator, relying in part upon the maintenance and service agreements which require Newmark to pay for any such significant repairs or upgrades. Thyssen's expert has opined that the leveling problems were due in part to the age of the elevator and the need to have upgraded various parts. However, Thyssen agreed to maintain and service the elevator after specific repairs were made. It is thus clear that Thyssen made an informed determination based upon its expertise that the elevator was serviceable and could be maintained in a safe condition. There is no indication that Thyssen ever informed Newmark that the elevator required replacement or significant upgrade to continue in use. The alleged statement of the repairman that the elevator probably would need to be replaced does not suffice. As such, there is no basis for a finding of active negligence on the part of Newmark for failure to replace the elevator.

Thyssen also contends that discrepancies in the testimony of Newmark's employees coupled with poor documentation of complaints and requests for repair of the elevator establish a failure to provide notice to Thyssen of the defect. However, there is

no proof that Newmark's lack of proper procedures actually resulted in a failure to notify Thyssen of a known defect. As such, Thyssen has failed to raise an issue of fact with respect to such issues.

Even though Thyssen's answer does not contain a request for such relief, Thyssen has cross-moved for an order directing Newmark to defend and indemnify it with respect to this action, relying on the elevator maintenance agreement dated July 11, 2000. Such agreement purported to require Newmark to defend and indemnify Thyssen for Thyssen's own negligence. General Obligations Law § 5-323 provides that any such agreement contained in a building service or maintenance contract is void (see Rogers v Dorchester Assoc., 32 NY2d at 564). Thyssen also relies upon a provision of the contract requiring Newmark to obtain insurance covering Thyssen. Such an insurance procurement agreement does not violate the provisions of the General Obligations Law (see Cavanaugh v 4518 Assoc., 9 AD3d 14, 21 [1st Dept 2004]). However, Thyssen has not offered any proof with respect to the failure to obtain insurance. Thyssen has shown only that Newmark objected to a notice to admit. There has been no determination with respect to such objection, nor has Thyssen obtained a preclusion order on such issue. It has thus failed to meet its burden on the motion.

In any event, the elevator service agreement dated September 26, 2001 specifically provides that it supercedes all prior agreements, which would include the elevator maintenance agreement dated July 11, 2000 upon which Thyssen relies. The later service

agreement requires the elevator company to defend and indemnify the owner and property manager and to provide insurance covering them. It further provides that the elevator company releases and waives all right of recovery for loss of the type required to be covered by such insurance. It therefore appears that Thyssen is not entitled to a defense or indemnification from Newmark. As such, the cross-motion shall be denied.

Moreover, based upon the foregoing, Thyssen has failed to raise any issue of fact with respect to its duty to provide contractual indemnification to Newmark. Newmark's alternative request for summary judgment on such issue shall therefore be granted.

Accordingly it is

ORDERED that defendants and third-party plaintiffs' motion for summary judgment dismissing the complaint is hereby denied, and it is further

ORDERED that defendants and third-party plaintiffs' motion for summary judgment on the issue of contractual indemnification is hereby granted, and it is further

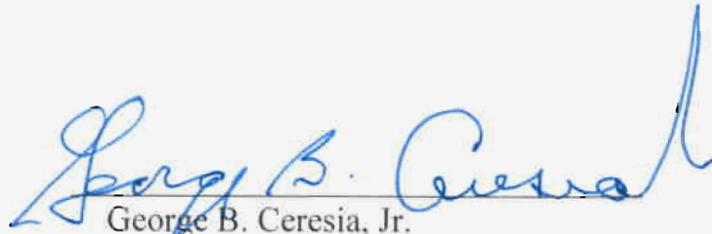
ORDERED that third-party defendant's motion for an order requiring defendants and third-party plaintiffs to defend and indemnify it in this action is hereby denied, and it is further

ORDERED that third-party defendant's motion for summary judgment dismissing the third-party complaint and plaintiff's claims is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendants and third-party plaintiffs, who are directed to enter this

Decision/Order without notice and to serve all other parties' counsel with a copy of this
Decision/Order with notice of entry.

Dated: Troy, New York
June 20, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated April 4, 2007; Affidavit of Melissa Romano-Schulman, Esq.
sworn to April 4, 2007 with Exhibits A-T annexed;
Memorandum of Law dated April 4, 2007;

Notice of Cross-Motion dated May 8, 2007; Affirmation of Dan Quart, Esq. dated May 8,
2007 with Exhibits B-P annexed; Affidavit of George Murray sworn to May 7, 2007;

Affidavit of Cappy Weiner, Esq. sworn to May 14, 2007 with Exhibits B-D annexed;
Affidavit of Debra Shultis sworn to May 10, 2007;

Reply Affirmation of Dan Quart, Esq. dated May 21, 2007 with Exhibit A annexed;

Affidavit of Jenika Conboy, Esq. sworn to May 23, 2007 with Exhibit A annexed;
Reply Memorandum of Law dated May 23, 2007.