

Roldan v New York Univ.

2009 NY Slip Op 32399(U)

September 29, 2009

Supreme Court, Queens County

Docket Number: 3822/2007

Judge: Patricia P. Satterfield

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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

<p>GLADYS ROLDAN, etc., Plaintiff, - against - NEW YORK UNIVERSITY, et al., Defendants.</p>	<p>x</p>	<p>Index Number <u>3822</u> 2007 Motion Date <u>June 3,</u> 2009 Motion Cal. Numbers <u>11, 12 & 13</u> Motion Seq. No. <u>1, 2 & 3</u></p>
<p>NEW YORK UNIVERSITY, et al., Third-Party Plaintiffs, - against - AMERICAN BUILDING MAINTENANCE, Third-Party Defendants.</p>	<p>X</p>	

The following papers numbered 1 to 46 read on the motion by third-party defendant American Building Maintenance (ABM), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and the third-party complaint against ABM; on the motion by defendant Mainco Elevator & Electrical Corp. (Mainco), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims; on the cross motion by defendant Mainco, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims; and on the motion by defendants/third-party plaintiffs New York University and New York University Real Estate Corporation (collectively NYU), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims, pursuant to CPLR 3212 for summary judgment on their claim for contractual indemnification against Mainco, and pursuant to CPLR 3212 for summary judgment against

third-party defendant ABM on the breach of contract claim for failure to procure insurance naming NYU as an additional insured, and for the contractual indemnification claim against ABM.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-12
Notice of Cross Motion - Affidavits - Exhibits.....	13-16
Answering Affidavits - Exhibits.....	17-31
Reply Affidavits.....	32-46

Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

This is an action to recover money damages for personal injuries allegedly suffered by decedent Jose Roldan, during the course of his employment with third-party defendant ABM, as a result of an elevator accident that occurred on February 25, 2004, at premises owned and operated by the NYU defendants located at 269 Mercer Street, New York, New York. Defendant Mainco, an elevator maintenance company, allegedly maintained the elevator at the premises. The accident, which was not witnessed by anyone besides the decedent, allegedly occurred when the decedent was using a freight elevator as part of his duties as a janitor at the premises to remove garbage from the basement to the street. The decedent passed away as a result of an unrelated incident prior to providing deposition testimony or any sworn statement regarding the accident. However, plaintiff Gladys Roldan, the wife of the decedent, claims that decedent was injured as the result of his foot and leg being caught in the door of the freight elevator.

Plaintiff testified at an examination before trial that the decedent died on August 12, 2006, as a result of a gunshot wound following an argument with his son. She testified that the decedent was employed as a janitor by ABM and worked at New York University. She further testified that she learned of the accident when she received a call that decedent was injured as a result of an accident that happened at his job. She stated that she went to the hospital and saw her husband, but he did not tell her what happened. She asserted that a couple of days after the accident, decedent told her that he was injured when the elevator door trapped his foot while he was pushing a garbage cart and attempting to enter the elevator, but when he tried to open the door he was unsuccessful. Plaintiff further testified that she learned of her husband's injuries after her son questioned decedent, and the son then conveyed this information to her. She testified that decedent was alone when the accident occurred.

Michael Callaghan, the building manager employed by NYU since 1995, appeared at an examination before trial on behalf of the NYU defendants, and testified that he had no personal knowledge regarding the decedent's accident, but that he learned of the accident when he received a call from ABM and was told that there was an accident in the elevator. When he arrived at the premises he met with an ABM employee and ABM supervisor, but the decedent had already been moved from the premises by ambulance. He testified that he was informed that neither the supervisor nor the other employee witnessed the accident, but that the decedent's co-employee noticed the decedent was injured when the elevator came up from the basement. Mr. Callaghan testified that he then called Mainco, the elevator maintenance company, to have the elevator checked out. He stated that a Mainco mechanic arrived at the premises, checked out the elevator and informed Mr. Callaghan that the elevator was functioning properly and it was safe to place the elevator back into service. Mr. Callaghan testified that the elevator was a street car freight elevator and he had no specific recollection of any problems with the subject elevator during the year prior to the accident and was not aware of any prior incidents in which someone was injured in the subject elevator.

Patrick Kenny appeared at an examination before trial on behalf of defendant Mainco and testified that on February 25, 2004, he was employed as a journeyman elevator mechanic by Mainco with duties that include maintaining the elevators at the premises. He stated that there were approximately four other Mainco mechanics who were also responsible for maintaining the elevators at the premises and other NYU buildings pursuant to a contract between NYU and Mainco. The Mainco mechanics would perform repairs and do preventive maintenance to the elevators. Mr. Kenny testified that he had no personal knowledge regarding the accident. He further testified that the subject elevator contained gate doors which contain a switch that prevents the elevator from moving if the gate door is open. He stated that the elevator is designed to move freight rather than people between the floors and was set up to be operated from the outside.

Danilo Cabus, the day supervisor for ABM at New York University, testified on behalf of ABM. He testified that ABM provided cleaning services to NYU at the premises pursuant to a contract and the procedure for the removal of trash was that each employee would remove trash from the assigned floor and leave it by the freight elevator. Another employee was assigned to bring the trash to the basement and the trash would later be removed from the basement to the street level for the garbage truck to pick it up. He testified that decedent was employed as a day staff porter by ABM, and decedent had been working as a porter prior to the time ABM began providing janitorial services to NYU and had been trained prior to when he began working for ABM. He stated that if any porter discovered a problem with the freight elevator the procedure would be to report the problem to the NYU building manager. Mr. Cabus testified that prior to the accident he had never received any

complaints regarding the freight elevator at the premises. He also testified that he did not witness the accident and never saw a report regarding the accident.

Non-party Samuel Vera, an employee of ABM at the time of the accident, testified at an examination before trial that he was working at the premises on the date of the accident but did not personally witness the accident. He testified that on the day of the accident, decedent took the elevator down to the sub-basement of the premises. Mr. Vera asserted that after decedent loaded the elevator, decedent radioed to him to bring the elevator back up to street level. Mr. Vera testified that he was on the street level and used a key on the street level control panel to bring the elevator back up. He stated that when the elevator arrived at the street level, he did not notice that decedent was on the elevator and when he eventually saw decedent, he did not notice at first that decedent was injured. He further stated that decedent then told him that decedent had injured his foot, but never told him how the accident occurred.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In this case, decedent never provided any deposition testimony or any other sworn testimony regarding the accident and he is now deceased. Additionally, there were no other witnesses to the accident. Therefore there is no admissible evidence which would establish how the accident occurred. Mainco, the moving defendants, and ABM, the third-party defendants, thus, met their prima facie burden by establishing that any determination as to how the accident occurred would be based entirely on speculation (*see Stock v Otis Elevator*, 52 AD3d 816 [2008]).

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, the plaintiff failed to raise an issue of fact that would warrant the denial of the summary judgment motion. Plaintiff provided no evidence regarding the accident that was not inadmissible hearsay, and plaintiff's argument that the doctrine of *res ipsa loquitur* applies to this case is without merit. *Res ipsa loquitur* is inapplicable to actions involving injuries which could have occurred in the absence of negligence on the part of the defendants (*see Alsaiedi v Garbis*, 287 AD2d 420 [2001]; *Vaynshteyn v Cohen*, 266 AD2d 280 [1999]; *Bass v Otis El. Co.*, 255 AD2d 284 [1996]). Inasmuch as the decedent's injuries in this case could have been caused by the manner in which he used the freight elevator, the doctrine of *res ipsa loquitur* is inapplicable.

The branch of the motion by the NYU defendants for summary judgment on their claim for breach of contract for failure to procure insurance against ABM is denied. ABM

has established that it did in fact procure insurance naming the NYU defendants as additional insured. In light of the determination granting Mainco and ABM's summary judgment motions and the dismissal of plaintiff's complaint, the branches of the NYU defendants cross motion on their cross claim and third-party claim for indemnification is denied as academic.

Accordingly, the motion by the third-party defendant American Building Maintenance, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint is granted and the complaint and the third-party complaint hereby are dismissed. The motion and the cross motion by defendant Mainco Elevator & Electrical Corp., for summary judgment dismissing the complaint and cross claims are granted and the plaintiff's complaint is dismissed. The branch of the motion by defendants/third-party plaintiffs New York University and New York University Real Estate Corporation, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims is granted and the complaint is dismissed. The branches of the motion by defendants/third-party plaintiffs New York University and New York University Real Estate Corporation for summary judgment granting contractual indemnification against defendant Mainco Elevator & Electrical Corp. and for summary judgment against third-party defendant American Building Maintenance on its breach of contract claim for failure to procure insurance naming NYU as an additional insured and on its claim for contractual indemnification against American Building Maintenance are denied.

Dated: September 24, 2009

J.S.C.