

Casey v New York El. & Elec. Corp.

2010 NY Slip Op 30502(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 116522/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 116522/2008

CASEY, BARBARA

vs

NY ELEVATOR & ELECTRICAL CORP.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is deemed to be decided for answer

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Dated: 3/8/10

EJG

EMILY JANE GOODMAN ^{SC}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

BARBARA CASEY, as Administratrix of the
Goods, chattels and credits which were
of KIERAN CASEY, deceased,

Plaintiff,

Index No. 116522/08

-against-

NEW YORK ELEVATOR & ELECTRICAL
CORPORATION and WINOKER REALTY CO.,
INC.,

Defendants.

-----X

Emily Jane Goodman, J.S.C.:

This action involves the untimely death of Kieran Casey (Casey), who fell to his death down a freight elevator shaft. Plaintiff claims that defendant New York Elevator & Electrical Corporation (NYE) is liable for its alleged failure to inspect and repair the freight elevator. NYE moves, prior to any discovery, for summary judgment, pursuant to CPLR 3212, for an order dismissing the complaint, and all cross claims against it, claiming that it had no duty to inspect or maintain the elevator in question, hence absolving it from any liability to Casey.

I. Background

Winoker Realty Co., Inc. (Winoker) is the owner of 29 West 36th Street, New York, N.Y. (premises). The premises contains three elevators, two passenger elevators and one freight elevator, where the accident occurred. According to NYE, the

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freight elevator is located in an area separate from the passenger elevators.

Casey was employed by Broadway 36th Realty, LLC, Winoker's managing agent. On September 12, 2008, he attempted to enter the freight elevator on the fifth floor, from which he had recently disembarked, and fell to his death down the empty shaft, while the elevator was up several floors above him.

The Department of Buildings (DOB) conducted a "walk through" of the premises in the days after the accident, accompanied by NYE's field supervisor, John Diorio (Diorio). The investigation concluded with a report (Report), finding that the accident was caused by three separate problems with the freight elevator: (1) a broken spring in the manual control; (2) a broken gate, wherein a gate safety feature had been "bypassed," allowing the elevator to run despite the fact that the gate was broken; and (3) a broken lock on the fifth floor, which had also been bypassed to allow the elevator to run when the doors were unlocked. Report, Notice of Motion, Ex. B.

NYE had a contract with Winoker, in which NYE agreed to inspect and service the two passenger elevators in the building (Contract). *Id.*, Ex. C. The Contract does not include or mention the freight elevator.

NYE presents a "Call Record" for 2008, which includes a record of all calls for repairs made to it from February 2008 up

to the date of the accident. *Id.*, Ex. F. It also shows several "Customer Service Tickets" (CST) for the same period, showing actual calls to the premises. *Id.*, Ex. G. The Call Record shows that NYE was called about problems with the freight elevator on three occasions, the last one, on May 15, 2008, for a problem with the rear gate handle on the freight elevator.¹ NYE claims that, because there was no contract to service the freight elevator, it did not respond to the first two calls, but responded to the last one, on May 12, 2008. It there found a "damaged freight rear gate," and wrote on the CST that a "proposal [was] needed for an upgrade." *Id.*, Ex. G.

Following that inspection, NYE submitted a proposal (repair proposal) to Winoker dated May 29, 2008, to repair the gate. *Id.*, Ex. H. The repair proposal suggested that NYE would "furnish and install new Bostwick type freight elevator car gate, top track, ball bearing rollers, top and bottom gate guides, safety plate and handle." It is unclear whether all of these things only relate to the repair of the rear gate handle, or that NYE was offering to correct problems beyond the repair of the rear gate handle, which might have necessitated the list of repairs NYE proposed to make. NYE claims that Winoker did not accept NYE's request for a proposal to repair the elevator,

¹The first two calls also referred to the broken rear gate handle, and the "rear gate handle 'bk,'" the meaning of which has not been explained. Notice of Motion, Ex. F.

looking instead for other proposals. Winoker, who appears in opposition to this motion, does not deny that it rejected the proposal.²

Prior to the 2008 accident, in both 2006 and 2007, NYE conducted inspections of the freight elevator for Winoker, pursuant to Administrative Code of the City of New York § 27-998 (a) (1) (Local Law 10). This law requires landlords, such as Winoker, to have all elevators on their premises inspected yearly. On each of the two inspection reports generated from these visits, NYE indicated that all of the elevators were "satisfactory." Plaintiff's Aff. in Opp., Ex. C.

NYE claims that, in a writing dated July 21, 2008, it proposed to inspect all of the elevators, again for the purpose of Local Law 10, for that calendar year (inspection proposal). Notice of Motion, Ex. D. NYE claims that Winoker, while accepting the proposal to inspect the passenger elevators, specifically declined the offer to have the freight elevator inspected. The inspection proposal contains hand-written indications, in two places, that the freight elevator was not to be inspected in the Local Law 10 inspection, and that the inspection would be limited to the two passenger elevators. *Id.*

²In NYE's attorney's affirmation, NYE complains that its attorneys requested documentation of the proposal requests from Winoker's "consultant," Al Gallo (Gallo), but that Gallo refused to provide any documents, purportedly because Winoker "forbade him to do so." Sklar Aff, at 12, n 4.

Winoker made no complaints about the condition of the freight elevator at this time, its last complaint having been prior to the May 12, 2008 visit by NYE, which had resulted in the rejected repair proposal.

NYE maintains that it next heard from Winoker about the condition of the freight elevator immediately after the accident, on September 12, 2008. Notice of Motion, Ex. F, last entry. At that time, and in the days following, Diorio, for NYE, assisted in the DOB's "walk through" of the premises.

II. Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978).

NYE declares that it has met its burden to show that it had no duty (nor opportunity), to repair the freight elevator and, after July 21, 2008, in response to the rejected inspection proposal, had specifically been told by Winoker not to inspect the elevator, negating any liability it might have had to Casey to protect him from harm.

Plaintiff argues that the motion is premature, having been made prior to any discovery. Plaintiff wishes to obtain such things as NYE's repair records for five years prior to the accident. Plaintiff also maintains that NYE fails to meet its burden to demonstrate by conclusive documentary evidence that it is not liable because NYE fails to submit Call Records for the freight elevator in 2006 and 2007 or work records for the freight elevator for 2006 to early 2008. Plaintiff further argues that NYE owed Plaintiff a duty to perform the Local Law 10 inspections with due care, and that an issue of due care is raised by the affidavit of Robert Koch, the superintendent of the building for eighteen years, who left the building's employ only five days before the accident.

NYE concedes that "[a]n 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." *Rogers v*

Dorchester Associates, 32 NY2d 553, 559 (1973); see also *Daniels v Kromo Lenox Associates*, 16 AD3d 111 (1st Dept 2005) (regarding defective boiler). Although NYE maintains that it has no service contract for the freight elevator, it has not submitted evidence disputing the affidavit of Robert Koch, which states that "[w]hen repairs were need on the freight elevator we would contact New York elevator. They would send a mechanic to perform the necessary repairs, which were paid when services were provided." Accordingly, although no written contract exists regarding maintenance of the freight elevator, based upon the Koch affidavit, piece-meal oral contracts to maintain the freight elevator may exist and discovery is needed to determine whether this is the case.³

Moreover, even where an elevator company does not agree to maintain an elevator in safe operating condition, an elevator company may be liable, if it conducts a city-mandated safety inspection in a negligent manner. See *Sanzone v National Elevator Inspection Service, Inc.*, 273 AD2d 94 (1st Dept 2000)

³In response to Winoker's oral request that NYE inspect and repair a problem with the freight elevator's rear gate handle in May of 2008, NYE did inspect the elevator, which resulted in the repair proposal. As this court has noted, it is unclear whether or not NYE inspected the freight elevator for defects beyond the problematic rear gate, as the repair proposal seems to suggest that NYE might have made a more thorough investigation of the freight elevator's problems, and suggested repairs beyond those to the rear gate, there is a question of fact as to whether NYE assumed a duty to fully inspect the elevator, and find the other defects.

("by conducting a New York City-mandated safety inspection of the elevator [the elevator service company] assumed a duty in tort to exercise reasonable care as to said inspection so as to prevent foreseeable harm to users of the elevator, such as plaintiff); *Abato v Millar Elevator Serv. Co.*, 261 AD2d 873 (4th Dept 1999) (elevator service company had a legal duty to perform safety inspection mandated by the City of Buffalo and could be liable to an injured freight elevator operator for failure to use reasonable care). Thus, an exception exists to the general law imposing a duty on a elevator service company based on a routine or systematic maintenance contract, where the elevator service company negligently performs a city mandated inspection.⁴

As NYE conducted the 2006 and 2007 City mandated Local Law 10 inspections, NYE has not met its burden, on this motion, to establish that it performed the 2006 and 2007 inspections with reasonable care, or that as a matter of law, it did not proximately cause the accident. The fact that NYE maintains that its inspections found the freight elevator to be in "satisfactory" condition, is not conclusive documentary evidence

⁴*Remekie v 740 Corporation* (52 AD3d 393, 394 [1st Dept 2008]) does not dictate the contrary result, and is actually consistent with this exception. Although *Remekie* notes that generally "[i]n the absence of a contract for routine or systematic maintenance, an independent repair contractor has no duty to inspect or warn of any purported defects" it also implies that an issue of fact might be raised where an inspection is conducted in response to a verbal request with is not too vague and which is specific as to the time frame. *Id.*

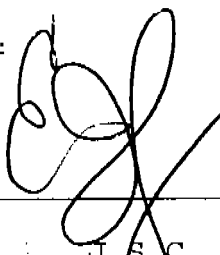
that would entitle it to dismissal of the complaint, before discovery has even commenced.

It is hereby

ORDERED that NYE's motion for an order dismissing the complaint and all cross claims against it is denied.

Dated: March 8, 2010

ENTER:



J.S.C.

EMILY JANE GOODINAN

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