Alban v SL Green Realty Corp.

2010 NY Slip Op 30669(U)

March 17, 2010

Supreme Court, New York County

Docket Number: 108367/07

Judge: Eileen A. Rakower

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SCANNED ON 3/19/2010

[* 1]

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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 108367/2007

ALBAN, MARY CATHERINE

VS.

SL GREEN REALTY

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. 108367/07

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 19 2010

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 3/17/10

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 15

----------X

MARY CATHERINE ALBAN,

Plaintiffs,

Index No.
108367/07

- against -

Decision and
Order

SL GREEN REALTY CORP. and TRANSEL ELEVATOR & ELECTRIC INC.,

Defendants.

Mot. Seq. No. 003

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FILED
MAR 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained while she was "boarding an elevator at the elevator bank for the 23-30th floors [and] she was caused to trip and fall on a miss-leveled elevator" (elevator #26), at the premises located at 420 Lexington Avenue in the County and State of New York on August 7, 2006. Specifically, plaintiff reports that the elevator was miss-leveled by "an inch and a half to two inches." Defendant Transel Elevator & Electric Inc. ("Transel") is alleged to have installed, repaired, serviced and maintained the subject elevator. Defendant SL Green Realty Corp. ("Green") is the alleged owner of the subject building. Transel now moves for summary judgment pursuant to CPLR 3212 and Green cross-moves for the same relief. Plaintiff opposes both the motion and the cross-motion.

Transel, in support of its motion submits: the pleadings; plaintiff's bill of particulars; the note of issue; the deposition transcript of plaintiff; the deposition transcript of Paul Palagian, Property Manager for Green; the deposition transcript of Tony Lipari, elevator mechanic with Transel; and the deposition transcript of Kevin Richter, service mechanic for Transel. Transel argues that the action should be dismissed against it because it had no actual or constructive notice of the alleged defective condition. Transel claims that plaintiff cannot establish how long the alleged defect existed before the accident, or that she ever informed Transel directly

of the condition, nor can she show that Transel was alerted to the problem by any other source. The only "evidence" plaintiff offers to show that Transel had notice are hearsay statements that someone else had previously tripped on a miss-leveled floor at the same elevator. Green adopts Transel's arguments in support of its cross-motion.

Plaintiff, in opposition, submits: the affidavit of Patrick A. Carrajat, Elevator Consultant; three responses to notices to produce; a Transel work/inspection ticket, dated August 7, 2010 for work performed between 8:30 a.m. and 10:00 a.m.; a copy of a document titled "Elevator Maintenance Contract Specifications;" and a copy of an evaluation report by Boca Group International, Inc. Vertical Transportation Consulting ("Boca").

Plaintiff first asserts that, pursuant to Transel's contract with Green, Transel was supposed to keep written maintenance records for the elevator. Plaintiff points out that she requested such records but that Mr. Lipari claimed he did not have any written records.[1] Plaintiff points to the independent evaluation report of Boca and claims that Transel has failed to remedy about a third of the items that Boca had identified as needing to be remedied. Finally, plaintiff claims that the doctrine of *res ipsa loquitur* applies here because elevators do not miss-level by two inches in the absence of some negligence. As to Green, plaintiff asserts that it had constructive notice of the defect because it violated New York City Building Codes §§27-127, 27-128 and §27-1006.

By way of reply, Green asserts that *res ipsa loquitur* does not apply to it because, as plaintiff concedes in her motion, Green did not have exclusive control of the elevator.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel

[1]Plaintiff does not assert that the motion is premature because discovery is incomplete. Indeed, plaintiff has already filed her note of issue.

alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

It is well settled that in order for a defendant to be found negligent for a defective condition, the defendant must have caused or created the defect, or had actual or constructive notice of the existence of such defect. (see *Beck v. J.J.A. Holding Corp.*, 12 A.D.3d 238 [1st Dept. 2004]). The burden is upon plaintiff to make such a showing. (*Strowman v. Great Atlantic and Pacific Tea, Co., Inc.*, 252 AD2d 384[1st Dept. 1998]). In order to prove that defendant had constructive notice of a defect, plaintiff must show that the defect existed for a sufficient length of time before plaintiff's accident. (*Id.* at 240).

Plaintiff fails to offer any evidence that defendants had either actual or constructive notice of the elevator's miss-leveling. According to Mr. Lipari, who inspected the elevators almost daily, he did not find any miss-leveling problems. Nor did Boca's pre or post evaluation of the elevator reveal any leveling problems. In opposition plaintiff fails to submit evidence in admissible form that would raise an issue of fact with regard to notice. In her deposition, plaintiff refers several times to an incident that occurred "a few months" before her accident, where a man allegedly tripped getting into the elevator because it miss-leveled. However, plaintiff only saw the "top of him tripping, losing his balance," and did not see whether the elevator was level or not. It was only afterwards that plaintiff claimed she learned that the man tripped because of miss-leveling because she heard the other people on the elevator saying that the elevator wasn't level. Plaintiff claims that she and several other people orally reported the incident to the "[t]he people at the desk" in the lobby, yet plaintiff could not identify who she spoke to.

Plaintiff claims that, even if the Court finds that there was no notice, the doctrine of *res ipsa loquitur* applies. Plaintiff must establish that: (1) the accident would not ordinarily occur in the absence of negligence; (2) when the elevator caused the injury it was within the exclusive control of the defendant and; (3) nothing plaintiff did in any way contributed to the happening of the event. (*Hodges v. Royal Realty Corp.*, 42 AD3d 350, 352[1st Dept. 2007]). In order to satisfy the first

requirement, plaintiff submits the affidavit of Mr. Carrajat, an Elevator Consultant, who opines that:

> while the specific cause of the miss-leveling may never be known, the indisputable fact remains that there is a specific cause, something that could have been prevented by proper service and maintenance. Moreover it is my opinion within a reasonable degree of mechanical certainty that there is no way Elevator #26 could have miss-leveled except due to some failure or defect that should have been prevented . . . It is my opinion . . . that an elevator of this type will only miss-level if overloaded or if it has not been properly repaired or maintained.[2]

It is undisputed that the elevator was empty when plaintiff tripped. Plaintiff testifies that no one got off the elevator before she got on. [3] Mr. Richter testifies that in order for an elevator to miss-level by two inches, "something would have to fail because two inches off the floor on a unit that has this type of tape head, the doors would remain closed or they would close."

As to the second requirement, the evidence supports the fact that Transel had exclusive control of the subject elevator. Transel and Green entered into a contract on May 2, 2005, which continued for 5 years unless cancelled with 30 days written notice. The contract required Transel to perform, among other things, the following:

> the service, inspection, examination, cleaning, lubricating, repairing, renewing and replacement of parts and equipment to maintain the Elevators . . . in a safe and first-class operating condition conforming to the standards acceptable throughout the industry. The work shall be performed by the Contractor, and unless otherwise specified, applies to all parts of the equipment listed above, complete and in its entirety . . . [t]he maintenance under this Contract shall provide a constant high quality service to properly protect all elevator equipment from

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[2]Mr. Carrajat consistently refers to the miss-leveling height as "2 inches," which is the high end of plaintiff's visual measurement.

[3]Mr. Richter testifies that miss-leveling can also occur as a result of "cable stretch," meaning that, if the elevator is overloaded and then everyone gets off, the elevator may "pop up." Mr. Richter specifies that an elevator would only pop up about ½ inch under these circumstances.

> deterioration and provide constant peak performance of all elevators . .
> .

Transel was required to have an elevator mechanic present during the "On-site coverage hours."[4] Mr. Lipari testifies that as the "resident mechanic" he was responsible for all 32 elevators in the building during his 7:00 a.m. to 4:00 p.m. shift. He performed daily maintenance and inspection of the elevators, including maintenance of the "digitizing recorder," the mechanism which controls the leveling of the elevator. In addition, the contract calls for Transel to provide:

> At all times, 24 hours per day, 7 days per week . . .two mechanics located within New York City that are designated as the SL Green Emergency Situation Standby Mechanics, whether they are working at SL Green locations or not. In the event of an emergency that affects some or all of the buildings in the SL Green portfolio . . . these two mechanics shall immediately report, without needing to be telephoned or dispatched , to a location to be designated in advance by SL Green . . .

Although exclusivity in elevator accident cases does not have to be "absolute," it must be that the "negligence of which the thing speaks is probably that of defendant and not of another."(*Duke v. Duane Broad Co.*, 181 AD2d 589,591[1st Dept. 1992]). Given the fact that "by contract, all responsibility for the daily operation of the building's elevators was ceded to [Transel], [Green] had no role in inspecting, maintaining or repairing the elevators ; these duties and their faithful execution were the total and complete responsibility of [Transel] by virtue of its contract with [Green]." (*Hodges* at 352). Finally, there is no evidence that plaintiff contributed in any way to the miss-leveling.

With respect to Green, it may not be imputed with constructive notice of the alleged elevator defect based on the alleged violations of the general safety provisions contained in Administrative Code §§27-127 and 27-128. The alleged violation of those codes is "insufficient to forestall summary judgment since . . . no specific statutory violation was identified." *Boateng v. Four Plus Corporation*, 22 AD3d 323,324[1st Dept. 2005).

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[4]The contract refers to "Schedule E," for an identification of on-site coverage hours. However, plaintiff fails to annex Schedule E to his papers.

Plaintiff asserts that a question of fact is raised by Green failing to report her accident pursuant to Administrative Code §27-1006 (requiring the elevator owner to report an accident to the Commissioner and afford the Commissioner access to the elevator in order to investigate the accident). The alleged violation of Administrative Code §27-1006 would have occurred post accident. Thus, it could not have served as constructive notice to Green.

There is no evidence presented to show Green was negligent , that it had notice of any defect, or that it had control over the elevator independent of Transel. Indeed, Transel had an exclusive contract to maintain the elevator, as distinguished from *Singh v. United Cerebral Palsy of New York City*, Inc., 2010 WL 653260[1st Dept. 2010](where court found that exclusive control requirement of *res ipsa loquitur* had not been met because maintenance company did not have an exclusive contract with owner, and only performed work on an "as needed" basis).

Wherefore it is hereby

ORDERED that Transel Elevator and Electric, Inc.'s motion is denied; and it is further

ORDERED that defendant SL Green Realty Corp.'s cross-motion is granted and the complaint is hereby severed and dismissed as against defendant SL Green Realty Corp., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 17, 2010

E[illegible]NA. [illegible]KOWER, J.S.C.

FILED

MAR 19 2010

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