

Meza v 509 Owners LLC
2010 NY Slip Op 31026(U)
April 27, 2010
Supreme Court, New York County
Docket Number: 111212/07
Judge: Marcy S. Friedman
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.

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 111212/2007

MEZA, DORIS

VS.

509 OWNERS LLC

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. 111212/07

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion is for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-11

2-3

4-5

Cross-Motion: Yes No

Memo of Law My

Upon the foregoing papers, it is ordered that this motion is

FILED

APR 28 2010

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

Dated: 4-27-10

Marcy Friedman

MARCY S. FRIEDMAN^{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 57

PRESENT: Hon. Marcy S. Friedman, JSC

FILED
 APR 28 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

_____ x
 DORIS MEZA,

Plaintiff(s),

- against -

Index No.: 111212/07

509 OWNERS LLC, et al.,

Defendant(s).

DECISION/ORDER

_____ x

In this personal injury action, plaintiff Doris Meza sues for damages sustained when she fell as she was exiting an elevator on June 28, 2005. Defendant Nouveau Elevator Industries, Inc. (“Nouveau”), the elevator repair contractor, moves for summary judgment dismissing the complaint and all cross-claims against it. Defendants 509 Owners LLC (“509”) and Emmes Realty Services LLC (“Emmes”), the owner and managing agent of the premises where the accident occurred, cross-move for summary judgment dismissing the complaint against them.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff cannot identify the cause of her fall and, in the alternative, that they had no actual or

constructive notice of the elevator misleveling or any other defective condition. In support of their motions, defendants submit repair records showing that the only complaint that Nouveau received of a misleveled elevator at the subject premises was a complaint made on June 9, 2005, almost three weeks before plaintiff's accident. (See Nouveau's Motion, Ex. J.) Defendants also submit the deposition of Frank Monello, its foreman elevator mechanic, who maintained the elevator on a regular basis and also responded to calls for service. (See e.g. Monello Dep. at 102.) Mr. Monello testified that the cause of the June 9, 2005 problem was mica build-up (*id.* at 85-86), whereas a problem with brake dragging was observed at the service call after plaintiff's accident. (*Id.* at 93.) This evidence is sufficient to make a prima facie showing that defendants did not have actual or constructive notice of an on-going misleveling condition, or notice that the defective condition that caused the June 9 problem was the same condition that caused the alleged misleveling on June 28. (See generally Cortes v Central Elev., 45 AD3d 323 [1st Dept 2007]; Ianotta v Tishman Speyer Props., 46 AD3d 297 [1st Dept 2007]; Santoni v Bertelsmann Prop., Inc., 21 AD3d 712 [1st Dept 2005].)

In opposition to defendants' motions, plaintiff contends that defendants had constructive notice, and that defendants' negligent maintenance of the elevator caused misleveling. In particular, plaintiff submits her deposition testimony that two to three weeks before her accident, she noticed that the subject elevator was misleveled, and notified security at the premises. (See P.'s Dep. at 31-32.) It is undisputed that on June 9, 2005, Nouveau received a call indicating that the subject elevator was stuck between the 6th and 7th floors, that Nouveau repaired the elevator, and that no complaints or accidents occurred between then and plaintiff's accident. However, this sole complaint or occurrence is insufficient to raise a triable issue of fact as to whether defendants had constructive notice of a defective condition as of the date of plaintiff's accident.

The parties also do not dispute that there are multiple possible causes of misleveling of an elevator. Plaintiff fails to submit evidence to show that the alleged misleveling on the date of her accident arose from the same malfunction as the prior occurrence on June 9. (See Ianotta, 46 AD3d at 298; Gjonaj v Otis Elev. Co., 38 AD3d 384 [1st Dept 2007].)

In so holding, the court finds that the affidavit of plaintiff's expert, Ronald Schloss, is insufficient to raise a triable issue of fact as to defendants' notice of a defective condition. Mr. Schloss does not claim to have inspected the elevator. (See Hamdan v Mosholu-Montefiore Community Ctr., 48 AD3d 243 [1st Dept 2008].) His conclusory assertion that the misleveling on the date of the accident was caused by negligent maintenance and by Nouveau's failure to properly maintain the elevator braking system is based on speculation and not on facts in the record. (See Cortes, 45 AD3d at 324; Santoni, 21 AD3d at 715.) Mr. Schloss does not offer any evidence to contradict Nouveau's mechanic's testimony that the June 9 problem was caused by mica, not the brakes. The record is also wholly devoid of any support for plaintiff's expert's claim that Nouveau's mechanic failed to make proper adjustments to the brakes during maintenance visits in June 2005, prior to the accident. (See Schloss Aff., ¶ 21.)

Plaintiff emphasizes that Nouveau's mechanic acknowledged that the subject elevator was an old drum-type, and that the brakes required "a lot of tender care." (Monello Aff. at 92.) That testimony, however, falls far short of raising a triable issue of fact as to whether Nouveau failed to adequately maintain the brakes.

Finally, to the extent that plaintiff argues that she may rely upon the doctrine of *res ipsa loquitur*, plaintiff fails to submit competent evidence to show that the alleged elevator misleveling on the date of the accident would not have occurred in the absence of negligence. The *res ipsa loquitur* doctrine has been applied where the evidence showed that the misleveling

[* 5]

was of sufficient magnitude to be “substantially beyond the acceptable tolerance.” (Burgess v Otis Elev. Co., 114 AD2d 784, 786 [1st Dept 1985], affd for reasons stated below 69 NY2d 623 [1986]; Garrido v International Bus. Mach. Corp., 38 AD3d 594 [1st Dept 2007]; Dickman v Stewart Tenants Corp., 221 AD2d 158 [1st Dept 1995].) The doctrine has been held inapplicable where “plaintiff’s fall could have occurred in the absence of negligence and could have been caused by a misstep on his part.” (Cortes, 45 AD3d at 324.) Here, assuming arguendo that the elevator misleveled, plaintiff acknowledges that she did not see the misleveling before or after the accident (P.’s Dep. at 180), and does not offer any evidence as to the number of inches by which the elevator misleveled. Plaintiff thus does not meet her burden of showing that her fall could only have been caused by negligence and not by a misstep over a differential, within acceptable bounds, between the floor of the elevator and the landing.

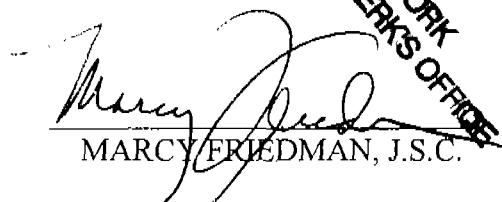
The court has considered plaintiff’s remaining claims and finds them without merit.

It is accordingly hereby ORDERED that the motion of defendant Nouveau Elevator Industries, Inc. is granted to the extent that the complaint and all cross-claims are dismissed as against it, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion of defendants 509 Owners LLC and Emmes Realty Services LLC is granted to the extent that the complaint and all cross-claims are dismissed as against them; and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
April 27, 2010


MARCY FRIEDMAN, J.S.C.

FILED
APR 28 2010
NEW YORK
COUNTY CLERK'S OFFICE