

Wilhelm v Calvert Apts.

2011 NY Slip Op 31613(U)

June 16, 2011

Sup Ct, Queens County

Docket Number: 10699/04

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

AARON WILHELM as the Administrator of
the Estate of CECELIA WILHELM

Plaintiff,

-against-

CALVERT APARTMENTS and RACHEL
ROZMARYN,

Defendants.

Index No: 10699/04

Motion Date: 4/13/11

Motion Cal. No.: 27, 28

Motion Seq. No.: 7, 8

CALVERT APARTMENTS and RACHEL
ROZMARYN,

Third-party Plaintiff

-against-

SUBURBAN ELEVATOR CORP.

Third-party Defendant

Motions sequence numbers 9 & 10 are combined for disposition.

The following papers numbered 1 to 24 read on this motion by Third-party defendant, Suburban Elevator Corp. (Suburban), for summary judgment dismissing the third-party complaint; and motion by defendants/third-party plaintiffs, Calvert Apartments and Rachel Rozmaryn (hereinafter the defendants), for summary judgment dismissing the complaint and summary judgment dismissing Suburban's counterclaim and for summary judgment on their claim for common law indemnification against Suburban.

PAPERS
NUMBERED

Seq.#9	Suburban Elevator Corp.'s	
	Notice of Motion-Affidavits-Exhibits	1 - 4
	Answering Affidavits-Exhibits.....	5 - 7
	Replying Affidavits.....	8 - 10
Seq.#10	Calvert Apartments and Rachel Rozmaryn's,	
	Notice of Motion-Affidavits-Exhibits	11 - 15
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Upon the foregoing papers it is ordered that these motions are denied.

Cecelia Wilhelm, 81 years old, was injured on Sunday, May 20, 2001 at about 9:00 a.m. when she tripped and fell while entering a misleveled elevator that also had liquid on its floor, at the Calvert Apartments, located at 3 Calvert St., Harrison, N.Y.

Plaintiff commenced this action against Calvert Apartments and Rachel Rozmaryn. Rozmaryn is a partner of the partnership that owns the building (hereinafter the defendants). The defendants in turn commenced a third-party action for indemnification and contribution against Suburban Elevator Corp. (hereinafter Suburban) who contracted with R.Z. Realty Co., the managing agent for the building, to service and maintain the subject elevator.

Suburban moves for summary judgment dismissing the third-party complaint and the defendants separately move for summary judgment dismissing the complaint and for summary judgment on its third-party complaint for common law indemnification.

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see

Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; Baker v. D.J. Stapleton, Inc., 43 AD3d 839 [2007]; Scott v. Long Is. Power Auth., 294 AD2d 348 [2002]).

A property owner has a nondelegable duty to maintain its elevator in a reasonably safe condition (see Rogers v. Dorchester Assoc., 32 NY2d 553, 559 [1973]; Ortiz v. Fifth Ave. Bldg. Assoc., 251 AD2d 200 [1998]; O'Neill v. Mildac Props., 162 AD2d 441) and can be held liable if it had actual or constructive notice of a defect in the subject elevator (see Talapin v One Madison Ave. Condominium, 63 AD3d 909 [2009]). A defendant moving for summary judgment dismissing the complaint based on lack of notice is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (see Arzola v. Boston Properties Limited Partnership, 63 AD3d 655 [2009]; Scopettone v. ADJ Holding Corp., 41 AD3d 693 [2007]).

The defendants' motion for summary judgment dismissing the complaint for lack of notice is denied.

In support of the motion defendants submitted, iter alia, the deposition testimony of its superintendent, Alvora which is insufficient to demonstrate, prima facie, lack of notice of the presence of liquid on the elevator floor. Alvora testified that it is his job to clean the hallways, pick up the garbage and do small repairs, that he was the only person employed to work at the premises, and that he works 5 days a week from 8a.m. to 4p.m. and is on call at other times. He also testified that before going off duty at 4p.m. he checks the lobby and elevator for cleanliness. He also stated that he lives in the building and he will clean and mop the lobby and the elevator whenever he sees anything and when someone complains, but there were no complaints of any liquid in the elevator.

However, the plaintiff's accident occurred on Sunday morning, a day and half after he last inspected the premises at about 4p.m. on Friday. Alvora did not state that he was at the building over the week-end or on the day of the accident or when, if at all, he inspected or looked in the elevator during the week-end. Accordingly, defendants have failed to demonstrate the lack of constructive notice as a matter of law.

The defendant's contention that the presence of liquid on the elevator floor is a feigned issue since it was raised for the first time at Cecelia Wilhelm's second deposition and that, in any event, it is irrelevant, since Cecelia Wilhelm testified that this condition did not cause her fall does not warrant summary judgment. Such testimony merely creates issues of fact as to the

cause of Cecelia Wilhelm's fall which must be decided by the jury at trial.

Defendants have also failed to establish lack of notice of the misleveled elevator as a matter of law. In this regard defendants submitted Suburban's maintenance records consisting of "Daily Time Sheet" for 2001 and a 2 page log of service calls to 3 Calvert and Alvora's deposition testimony. Alvora testified that he did not notice any misleveling in the year preceding the accident and he received no complaints of misleveling. He also testified that he does not keep records of any complaints and that he did not test or inspect the elevator for any problems including misleveling, as this is Suburban's responsibility.

In contrast, Cecelia Wilhelm testified at her deposition that she visited the premises daily for 3-4 years and had seen the elevator misleveled several times before. She also testified that the mailman at the building told her that the elevator never stopped level. To substantiate her testimony, the Plaintiff submitted the notarized statement of Nelson Matos, the mailman who services the building, stating he has seen the elevator misleveled. Such conflicting testimony raises issues of credibility which cannot be resolved on a motion for summary judgment.

In opposition, the plaintiff submitted sufficient evidence to raise issues of fact as to whether the misleveling is a recurrent condition and whether defendants had actual notice prior to the accident. A defendant who had actual notice of a recurring dangerous condition can be charged with constructive notice of each specific re-occurrence of that condition (see Edwards v. Great Atlantic & Pacific Tea Co., Inc., 71 AD3d 721 [2010]; David v. New York City Hous. Auth., 284 AD2d 169, 171 [2001]; Osorio v. Wendell Terrace Owners Corp., 276 AD2d 540 [2000]). In addition to Cecelia Wilhelm's deposition testimony and the affidavit from the mailman, plaintiff submitted a letter, dated March 13, 2000, which Suburban sent to R.Z. Realty Co. recommending that the elevator at the premises be updated because it is a single speed elevator, which "by design" cannot be maintained so as to level at each floor. The defendants reliance upon Suburban's maintenance records, which in large part merely state that Suburban performed "regular maintenance", is insufficient to demonstrate that regular maintenance did not include adjustments, maintenance or corrections for misleveling especially in view of Suburban's letter. The maintenance records do not describe what maintenance was needed or performed, yet the letter states, with regard to misleveling, that "We have continually adjusted them in the attempt to minimize the problem, but the condition continues to occur." Defendants' attorney's

affirmation, not based upon personal knowledge, asserting that Suburban's letter was sent at the insurance company's request to all of Suburban's clients who had A.C. elevators whether or not there were misleveling problems is without probative or evidentiary value (see JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373, 384-385 [2005]; Warrington v. Ryder Truck Rental, Inc., 35 AD3d 455 [2006]).

Defense counsels' objections to consideration of various items of evidence that was submitted are unpersuasive. Although the mailman's affidavit was not in admissible form (see Furtow v. Jenstro Enterprises, Inc., 75 AD3d 494 [2010]) the court may consider inadmissible evidence in opposition to a motion for summary judgment (see Franklin v. 2 Guys From Long Pond, Inc., 50 AD3d 846 [2008]; Hernandez v. City of New York, 35 AD3d 812 [2006]) where as here discovery has not been completed (Suburban has not appeared for a deposition) and it is not the only evidence submitted (see Moffett v. Gerardi, 75 AD3d 496 [2010]). Similarly without merit is plaintiff's objection to defendants' use of Alvora's deposition testimony in support of defendants' motion (see Ashif v. Won Ok Lee, 57 AD3d 700 [2008]).

Defendants have also failed to demonstrate entitlement to summary judgment on their claim for common law indemnification against Suburban. A defendant whose liability is purely statutory and vicarious may seek common-law indemnity from one primarily liable for the injury (see D'Ambrosio v. City of New York, 55 NY2d 454 [1982]; Bellefleur v. Newark Beth Israel Med. Cntr., 66 AD3d 807, 808 [2009]). To establish a claim for common-law indemnification, the moving party must demonstrate not only that it was not negligent, but also that the proposed indemnitor was negligent and that its negligence contributed to the accident (see Lodato v. Greyhawk North America, LLC, 71 AD3d 839 [2010]; Bellefleur v. Newark Beth Israel Med. Cntr., 66 AD3d 807, 808 [2009]; Nasuro v. PI Associates, LLC, 49 AD3d 829, 875-876 [2008]). However, summary judgment, even conditional summary judgment, on a claim for common-law indemnification is premature where there is insufficient evidence to establish, as a matter of law, the moving party's freedom from negligence and/or the proposed indemnitor was negligent (see Posa v. Copiague Public School Dist., ___ AD3d ___ [2011], 922 NYS2d 499, 502-503; Bellefleur v. Newark Beth Israel Med. Cntr., 66 AD3d 807, 808 [2009]; Nasuro v. PI Associates, LLC, 49 AD3d 829 [2008]).

In this case, the defendants have failed to demonstrate as a matter of law their own freedom from negligence or the negligence of Suburban. As stated above, the submissions raise numerous issues of fact as to whether there was a recurring misleveling

problem with the elevator, whether Suburban exercised reasonable care in performing its maintenance obligations, whether the defendants were negligent, for failing to update or replace the elevator and whether the negligence, if any, of the defendants and/or Suburban contributed to the accident which issues preclude granting summary judgment on defendants' claim for common law indemnification.

Suburban's motion for summary judgment dismissing the third-party complaint is also denied (see Posa v. Copiaque Public School Dist., supra). Suburban argues that pursuant the limitations of liability provision in its maintenance contract it cannot be held liable to the defendants for, inter alia, misleveling that may occur when it is not at the premises and which occur for reasons that cannot be revealed by the ordinary maintenance offered in the contract. The only evidence Suburban submitted in support of its claim was the affidavit of its president, a copy of the maintenance contract, copies of maintenance records consisting of the "Daily Time Sheet" for 2001 and a copy of the March 13, 2000 letter it sent to R.Z. Realty Co.

Evidence regarding the mechanical condition of the elevator, the reason for its misleveling and what maintenance and adjustments Suburban performed "to minimize" the problem is peculiarly within the knowledge of Suburban's repair and maintenance crew. However, Suburban did not submit any evidence to demonstrate that Suburban exercised reasonable care in performing its maintenance obligations and that the reason for the misleveling could not "be revealed by the ordinary maintenance offered under the contract".

Dated: June 16, 2011
D# 44

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J.S.C.