

Lam v 39 Cam, LLC

2011 NY Slip Op 33407(U)

December 20, 2011

Supreme Court, New York County

Docket Number: 104386/06

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Justice

Index Number : 104386/2006

LAM, ELAINE MAN

VS.

39 CAM LLC

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. 104386/06

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

this motion is for Summary Judgment

| PAGES QUERIED | |
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| 1, 2 | _____ |
| 3, 4 | _____ |
| 5, 6 | _____ |
| 7, 8 | _____ |

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Sur-reply Affs.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

DEC 22 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: Dec. 20, 2011

MARTIN SHULMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
ELAINE MAN LAM,

Plaintiff,

-against-

Index No. 104386/06

39 CAM, LLC, CAMMEBY'S REALTY CORP.,
CAMMEBY'S MANAGEMENT COMPANY, LLC,

Defendants.

-----X
39 CAM, LLC, CAMMEBY'S REALTY CORP.,
CAMMEBY'S MANAGEMENT COMPANY, LLC,

Third Party Index No.
590833/07

Third-Party Plaintiffs,

-against-

FILED

MAINCO ELEVATOR & ELECTRICAL CORP.,

DEC 22 2011

Third-Party Defendant.

-----X
MARTIN SHULMAN, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence nos. 005 and 006 are consolidated for disposition. In motion sequence no. 005, defendants/third-party plaintiffs 39 CAM, LLC ("39 Cam"), Cammeby's Realty Corp. and Cammeby's Management Company, LLC (collectively "Defendants") move for an order: (1) pursuant to CPLR 3212 for summary judgment dismissing the complaint and granting Defendants common-law indemnification against third-party defendant Mainco Elevator & Electrical Corp. ("Mainco"); (2) pursuant to CPLR 3215 (c) dismissing Mainco's counterclaims for indemnification and contribution or, in the alternative, granting Defendants leave to serve and file their answer to those counterclaims; and (3) pursuant to CPLR 3212 dismissing Mainco's counterclaims for indemnification, contribution and breach of contract. In motion seq. no. 006, Mainco moves pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and granting Mainco summary judgment on its counterclaims against third-party plaintiffs for contractual indemnification, breach of contract and common-law indemnification, and

compelling 39 CAM, LLC to reimburse Mainco for all expenses, costs and attorney's fees Mainco incurred in this action, as well as in another action plaintiff commenced.

The complaint alleges that at approximately 1:40 p.m. on April 1, 2003, as plaintiff began to step into elevator no. 4 at 39 Broadway (the "Building") in Manhattan, the elevator doors rapidly closed on her right arm, causing injury to her right elbow, arm and wrist. At her deposition, plaintiff explained that the elevator doors close from left to right, that a door struck the left side of her body and that her right side was jammed against the entrance to the doorway. On the basis of these factual allegations, the complaint alleges causes of action for negligence and nuisance. 39 Cam owns the Building; Cammeby's Management Company, LLC manages it. At the time of plaintiff's accident, Mainco was the elevator contractor.

Defendants' Motion (Seq. No. 5)

A little more than half an hour after plaintiff's accident, James Waters, an inspector, subsequently Chief Inspector, for the New York City Department of Buildings, arrived at the Building in response to a report of the accident from one of Defendants' security officers. Mr. Waters inspected the subject elevator and found that the door's reopening device¹ was functioning normally, as were the hoistway doors and the hoistway door closers.² Mr. Waters concluded that plaintiff's arm had not extended far enough into the elevator to activate the door-reopening device, that plaintiff's arm had become stuck between the hoistway door and the hoistway frame, and that plaintiff injured her arm as she extricated it.

¹ The door's reopening device consists of a safety edge that, when it is working properly and it meets resistance as the door is closing, causes the door to reopen.

² The hoistway door is the door at each floor that opens when the elevator comes to that floor and the elevator door opens, and then closes as the elevator door closes.

Mr. Waters' conclusion is consistent with plaintiff's deposition testimony, taken approximately three years later. Plaintiff testified as follows:

Okay, I step in, my right foot between the elevator, I'm not even get in yet, between, you know, so usually, usually when you get in the elevator, right, you will step all the way in, right?
But that time, that day I did not, you know, put my whole entire foot into the elevator, I only standing between, you know, like the elevator here and this is the twelfth floor and my feet was like this (indicating).

...

I just want to clarify, the question that you're asking me is the door closed on me, it's very fast, it's not even, you know, like normally, you know, like everybody gets in, the door will close, or you touch the door, the sensor will open.

Uh-uh, it's not me. I'm not even standing in the elevator, the door already closed on me

Solomon Aff., Exh. C, at 69, 73. A little later, plaintiff testified that she had touched the safety edge of the elevator door, and that:

usually when we open, when we get to the elevator door, we always hold on the door, like people are going to come in, and I'm always touching the metal, the thing. They were open, but that door was not.

Id. at 80-81. It is not clear whether plaintiff was testifying here that the elevator cab door did reopen on that occasion, or that both the elevator door and the hoistway door usually reopened when the safety edge is touched, but in any event, she consistently testified that only one door had struck her.

Defendants' expert, Patrick A. Carrajat, a member and past director of the National Association of Elevator Contractors, who, in the course of the last 50 years, has served as an expert for plaintiffs and defendants in more than 2,000 elevator accident cases, states in his affidavit that elevator door safety edges cannot repair themselves once they have failed. He concludes that, inasmuch as Mr. Waters found the elevator door safety edge to be working properly shortly after plaintiff's accident, it could not have failed to work properly at the time of that accident.

5]

There is no evidence that Defendants caused any defect in either the elevator door's safety edge or the hoistway door, and it is undisputed that, while Mainco made various repairs to the subject elevator in the year preceding plaintiff's accident, none of those repairs involved the door's safety edge mechanism or the 12th floor hoistway door. Mainco's expert, Patrick McPartland, a principal of PM Engineering, PLLC, Vertical Transportation Consultants, states in his affidavit that he reviewed Mainco's time tickets for the year preceding plaintiff's accident and that they show no calls having been made to Mainco concerning the subject elevator's door reopening device. It is undisputed that Defendants had no actual notice of any defect pertaining to either the safety edge or the hoistway door, and plaintiff has submitted no evidence that Defendants had constructive notice of any such defect. Accordingly, plaintiff's negligence claim fails. See *Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635 (1st Dept 2010); *Levine v City of New York*, 67 AD3d 510 (1st Dept 2009). Plaintiff does not oppose dismissal of her nuisance claim and, indeed, the complaint identifies no nuisance. Nor does plaintiff address Defendants' argument that *res ipsa loquitur* is inapplicable.

Plaintiff argues that, inasmuch as a note of issue has not been filed, Defendants' motion is premature and plaintiff should have an opportunity to retain an expert. Plaintiff's accident took place approximately nine years ago. This action was commenced six years ago. The return date of Defendants' motion was thrice adjourned, for a total of approximately two months. Plaintiff has not explained what an expert, hitherto unretained and as yet unidentified, would opine. Indeed, plaintiff has not submitted an affidavit. Instead, plaintiff's counsel speculates that an expert "may very well" disagree with Mr. Carrajat's conclusions. *Lavelle Aff. in Opp.*, at 2. That speculation warrants neither a denial of Defendants' motion, nor yet another adjournment of this motion. Accordingly, Defendants' motion for summary judgment dismissing the complaint is granted.

Defendants' claim against Mainco for common-law indemnity is moot in view of the complaint's dismissal. In any event, common-law indemnity is available only to a party held vicariously liable for the fault of another. *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909 (1st Dept 2011). Defendants have not been held vicariously liable, and there is no evidence of negligence on Mainco's part. Additionally, that branch of Defendants' motion which seeks leave to serve answers to Mainco's counterclaims is also moot, inasmuch as Defendants have accepted the counterclaims and have served answers thereto.

CPLR 3215 (c) provides that:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court ... shall dismiss the complaint as abandoned

Although this subsection is applicable to counterclaims (*Mint Factors v Goldman*, 74 AD2d 599 [2d Dept 1980]), where third-party claims are contingent upon a finding of liability against the defendant in the main action, the one-year period does not begin until the entry of judgment against the third-party plaintiff. *IMP Plumbing & Heating Corp. v 317 E. 34th St., LLC*, 89 AD3d 593 (1st Dept 2011); *Filippone v All Is. Lease A Car, Inc.*, 201 AD2d 433 (1st Dept 1994). Accordingly, CPLR 3215 (c) does not dictate the dismissal of Mainco's counterclaims for contribution and breach of contract. The latter pertains to a contractual provision of indemnification.

Nonetheless, Mainco's counterclaim for contribution must be dismissed because, as discussed above, there is no evidence of negligence on Defendants' part. Mainco's counterclaim for breach of contract is discussed below.

Mainco's Motion (Seq. No. 6)

Mainco's counterclaim for breach of contract alleges that Mainco tendered the defense and indemnification of this matter to 39 Cam and its insurance carrier and that the

carrier rejected the tender. The Preventive Maintenance Agreement that was in force at the time of plaintiff's accident provides, in relevant part, as follows:

The Owner agrees to indemnify and hold [Mainco] harmless against any liability, claim, damage, loss and expense, including reasonable attorney's fees and expenses, that [Mainco] may incur by reason of its obligations under or the services it provides pursuant to or in connection with this agreement, or in defending any suit ..., (i) where [Mainco]'s responsibility is established exclusively by inference pursuant to the doctrine of *res ipsa loquitur* and without proof of any specific negligent act or omission on [Mainco]'s part or (ii) arising out of Owner's negligence or intentional misconduct.

Solomon Aff. in Opp., Exh. P, at 3. As Mainco's own attorney summarizes this provision, it "requires 39 Cam to indemnify Mainco if: (i) Mainco is held liable based on a theory of *res ipsa loquitur* with no negligence on the part of Mainco or (ii) if Mainco is liable due to the building owner's negligence or intentional misconduct." Solomon Reply Aff., at 17. Mainco has not been held liable on any grounds, including *res ipsa loquitur* or any fault on the part of Defendants. Accordingly, Mainco has no viable claim for contractual indemnification and its claim for breach of contract must be dismissed.

The third-party complaint alleges causes of action for contribution, common-law indemnification and contractual indemnification. None of these claims is viable. As discussed above, common-law indemnification may be had only against a party that was actively at fault in bringing about the plaintiff's injury. See *McCarthy v Turner Constr., Inc.*, 17 NY3d 369 (2011). Here, the evidence is that Mainco neither caused, nor had actual or constructive notice of, any defect related to the subject elevator's door-closing device.

Contribution is a means of apportioning liability among joint tortfeasors. *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21 (1985). Here, there is no evidence that Mainco was a tortfeasor.

Finally, Defendants' cause of action for contractual indemnification verges on frivolous. The sole contract between Defendants and Mainco provides for indemnification running from 39 Cam to Mainco, not the reverse.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 005, that branch of defendants/third party plaintiffs' motion seeking summary judgment dismissing the complaint is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion seeking summary judgment granting common-law indemnification against third-party defendant is denied; and it is further

ORDERED that the branch of the motion seeking relief pursuant to CPLR 3215 (c) is denied; and it is further

ORDERED that the branch of the motion seeking summary judgment dismissing the third-party defendant's counterclaims is granted and the counterclaims are dismissed; and it is further

ORDERED that, in motion sequence no. 006, that branch of the motion seeking summary judgment on third-party defendant's counterclaims is denied; and it is further

ORDERED that the branch of the motion seeking summary judgment dismissing the third-party complaint is granted and the third-party complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
December 20, 2011



HON. MARTIN SHULMAN, J.S.C.

FILED

DEC 22 2011

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