

Sotomayor v 80-90 Maiden Lane Del, LLC
2011 NY Slip Op 33753(U)
February 1, 2011
Sup Ct, Queens County
Docket Number: 18528/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

CARMEN SOTOMAYOR,

Plaintiff,

-against-

80-90 MAIDEN LANE DEL, LLC., et al.,
Defendants.

Index No. 18528/08

Motion
Date January 11, 2011

Motion
Cal. No. 26

Motion
Sequence No. 3

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Upon the foregoing papers it is ordered that this motion this motion by defendant, Kone, Inc. ("Kone") for an order dismissing the Complaint of the plaintiff on the ground that there are no genuine issues of fact as to whether Kone created, or had constructive or actual notice of the alleged dangerous condition or defect alleged to have caused plaintiff's injury is hereby denied.

This is an action for personal injuries allegedly sustained by the plaintiff, Carmen Sotomayor, on August 11, 2005, as a result of an alleged trip and fall in an elevator in the lobby of the premises of her place of employment located at 80-90 Maiden Lane, New York, New York. Plaintiff alleges that on the date of the accident, 80-90 Maiden Lane Del, LLC owned the building located at the premises numbered 80 Maiden Lane, New York, New York and defendant, A.M. Property Holding Corp. was the managing agent for that same building, and on the date of plaintiff's elevator accident, defendant, Kone, Inc. was the elevator maintenance company responsible for maintaining all of the elevators located at 80 Maiden Lane, New York, New York.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue

(*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see *id.*).

Moving defendant established a prima facie case that there are no triable issues of fact. In support of the motion, moving defendant presents, inter alia, plaintiff's own examination before trial transcript testimony, wherein plaintiff testifies inter alia, that she had worked at 80-90 Maiden Lane for the prior twenty-five (25) years, and had used the elevator in question several times a day, prior to the alleged occurrence, she never witnessed, heard, or saw anything constituting misleveling with respect to the subject elevator from January 1985 through August 11, 2005, that she denies anything that she is claiming happened on the day of the occurrence, ever happened before that time, there were no witnesses to the alleged

occurrence and her only knowledge as to the alleged misleveling was her foot getting stuck and a slight recollection of misleveling upon exiting the elevator, that on the date of the alleged incident, she was looking straight ahead upon entering the elevator and not down at the floor of the elevator, in her many years of working at the building, she had never observed or experienced a misleveling of the elevators; the examination before trial transcript testimony of Jack Constantine on behalf of defendant A. M. Property Holding Corp. and 80-90 Maiden Lane, building manager for 80-90 Maiden Lane, he was not aware of any problems with elevator number five (5) when he became the property manager of the subject building in February 2001, he was not aware of any leveling problems or any type of other problems concerning elevator number five (5) prior to August 11, 2005, that if there was a problem with one of the elevators at 80 Maiden Lane on or before August 11, 2005, either one of the security guards would call the Kone dispatcher directly or they would call his office to contact Kone, accordingly, that a review of the security guard logs provided by co-defendant for a period of one (1) year prior to the date fo the alleged incident, does not reflect a prior misleveling problem with elevator number five (5), that he was not aware of any violations having been issued as a result of any inspections that were done on elevator number five prior to August 11, 2005, that he was not aware of any violations having been issued by the NYC Department of Buildings on either August 11, 2005 or August 12, 2005, as a result of the alleged accident; the examination before trial transcript testimony of Tom Cotu, a Service Superintendent for Kone, Inc., who testified that he had been employed by Kone for 9 years, Kone was responsible for maintaining the elevators at 80-90 Maiden Lane, that the Konect Callout Report produced by co-defendant, which is a report generated by Kone regarding all calls received from the building, reflect callouts for March 4, 2005, March 17, 2005, and July 25, 2005, he did not consider three callouts between January and July in a given year to be unreasonable, none of the callouts reflect a leveling problem, after reviewing the Konnect Callout Report and the Time Ticket Detail Reports for a period of one year prior to the date of the accident, he did not see anything that reflected a leveling problem, or incident of misleveling with elevator number five (5), and he reviewed the three time tickets for August 12, 2005 and that the time ticket of James Reardon of Kone references the fact that he assisted Israel Lucerna in checking out car number five and that "no problem was found with the elevator."

In opposition, plaintiff raises a triable issue of fact. In opposition to the motion, plaintiff submits, inter alia, Time Ticket Detail Reports for the elevators at the subject building

prior to and on the date of accident maintained by Kone, Inc., which reports indicate that the defendants experienced an operating problem with elevator number 5 "not leveling" on April 30, 2004. Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether moving defendant had either actual or constructive notice of a defective condition, whether moving defendant created a defective condition causing plaintiff's accident, and whether moving defendant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, moving defendant's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: February 1, 2011

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Howard G. Lane, J.S.C.