Derouen v Savoy Park Owner, L.L.C.

2012 NY Slip Op 30118(U)

January 9, 2012

Sup Ct, NY County

Docket Number: 110244/2008

Judge: Paul Wooten

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SCANNED ON 1/18/2012

[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

VERYLN DEROUEN, as Administratix of the Estate of MARY DEROUEN, deceased,
Plaintiff,

-against-

SAVOY PARK OWNER, L.L.C and COLUMN FINANCIAL INC.,
Defendants.

Index Number: 110244/2008

Motion Seq.: 002

FILED
JAN 18 2012
COUNTY CLERK'S OFFICE
NEW YORK

SAVOY PARK OWNER, L.L.C and COLUMN FINANCIAL INC.,
Third-Party Plaintiffs,

-against-

GUARDSMAN ELEVATOR CO., INC.,
Third-Party Defendant.

The following papers were read on the summary judgment motions by third-party defendant and defendant/third-party plaintiff.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

In motion sequence number 002, third-party defendant Guardsman Elevator Co., Inc. (Guardsman) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all claims interposed against it.

In motion sequence number 003, defendant/third-party plaintiff Savoy Park Owner, L.L.C. (Savoy) moves, pursuant to CPLR 3212, for summary judgment on the issue of liability dismissing the plaintiff's complaint and granting them indemnification against Guardsman.

The note of issue was filed in this matter on March 18, 2011, and motion sequence number 003 was filed on July 21, 2011. CPLR 3212 (a) sets the outside time limit in which to file summary judgment motions as 120 days after filing the note of issue. As a consequence, motion sequence number 003 is denied as untimely, having been filed more than 120 days after the note of issue was filed. Accordingly, the Court need only address motion sequence number 002.

BACKGROUND

Savoy is the owner of the premises where an accident involving Mary Derouen (Derouen) occurred on April 4, 2008, and Column is the net lessee thereof (Motion, exhibit A). Guardsman was retained by Savoy to furnish professional elevator maintenance and service at the subject premises (Motion, exhibit L).

In the third-party action, third-party plaintiffs allege four causes of action as against Guardsman: (1) common-law indemnification; (2) contractual indemnification; (3) contribution; and (4) breach of contract for failing to acquire insurance (Motion, exhibit D). According to the bill of particulars, third-party plaintiffs allege that Guardsman failed to examine, adjust, repair or maintain the elevator located at 45 West 139th Street, New York, New York (Motion, exhibit F).

In her examination before trial (EBT), Derouen[1] testified that the elevator that is the subject of this litigation was shaking after she entered it on the seventh floor (Derouen EBT, at 51-53). At the time that she entered the elevator, Derouen was rolling a luggage cart, which was to her side (*id.* at 41). When the elevator reached the lobby, Derouen said that the elevator door failed to open, and that she continued to press the elevator button for the door to open (*id.* at 54). According to Derouen, the elevator door eventually did open, but the elevator continued to shake (*id.*). Derouen stated that, because of the shaking of the elevator, she fell

[1]Subsequent to her deposition, Derouen died and her estate was substituted as plaintiff (Motion, exhibit H).

out of the elevator, thereby sustaining injuries (*id.* at 59). Derouen averred that, as she tried to step out of the elevator, she was thrown onto her face on the lobby floor, due to the shaking of the elevator (*id.* at 64). Derouen also said that she visited the building one or two times each month, every month, for 13 years and that she never advised anyone of the elevator shaking prior to the incident in question (*id.* at 23, 32).

Jorge Lovera (Lovera), Savoy's director of maintenance, was deposed in this matter and testified that Advantage Management is the managing agent for the building (Lovera EBT, at 10). Lovera said that, after an accident, an accident report would be prepared by both the building management and by a security company retained by the building (*id.* at 28-31). In addition, Lovera stated that the building had video surveillance cameras (*id.* at 36-37).

According to the incident report prepared by Savoy, "upon exiting the 'C' elevator in 45 West 139th Street, Mrs. Druen [*sic*] tripped and fell" (Motion, exhibit N). According to the incident report prepared by V-Star Security Services, the security company retained by the building, Derouen "stated elevator door didn't open–fell coming out of elevator–cut bottom lip–EMS notified–EMS Bus # 203 Attendant # 3839" (Motion, exhibit O).

Robert Cummins (Cummins), president of Guardsman, was also deposed in this matter and testified that, pursuant to its service contract with Savoy, Guardsman would respond to all requests for service and, in the regular course of business, would prepare dispatch records for all service so provided (Cummins EBT, at 28, 32). Cummins stated that he was informed that an accident had occurred at the subject premises on April 4, 2008, and that he arrived at the building shortly after the accident (*id.* at 43, 52). Cummins said that he observed the surveillance video at approximately 4:30 P.M. on the day of the incident, approximately one hour after the incident, and that, in viewing the video, he observed that the elevator car was flush with the lobby floor (*id.* at 53, 58). Thereafter, Cummins checked the elevators in the building and found nothing wrong with them (*id.* at 60-61). Cummins also opined that it is very

rare for any of these elevators to mis-level (*id.* at 63).

According to Cummins, during the summer of 2007, there were low voltage issues in the area in which the subject building is located because of work being performed by Consolidated Edison, and, as a consequence, elevators in the building would shake (*id.* at 118-119). Cummins averred that, when he viewed the video tape, he did not observe the elevator in question shaking (*id.* at 146).

It is Guardsman's position that the third-party claims asserted against it must be dismissed because: (1) the contract between Guardsman and Savoy does not have any indemnification language; (2) the contract between Guardsman and Savoy does not have a provision requiring that Guardsman acquire insurance; and (3) there is no act of negligence shown on the part of Guardsman.

The maintenance contract between Guardsman and Savoy states, in pertinent part:

> "It is mutually agreed and understood that the repairs or renewals necessitated by ordinary wear and tear only shall apply to this contract. The Company [Guardsman] shall not be required to make repairs or renewals due to *fire, water, storm, negligence, accident, malicious damage,* misuse of the elevator(s), or due to any other reason beyond the company's control. The Company will respond to calls for conditions which warrant adjustment or repairs, but it is mutually understood and agreed that the Company's responsibility will be limited to its negligence when working on or about said equipment. The company does not assume possession nor management of any part of the equipment, and does not assume responsibility for the leveling of cars at floor landings, erratic operation of car doors, shaft doors, or locking mechanisms, or for any other situation which cannot be revealed at the time of our regular service under the terms of this contract.
> The Owner [Savoy] agrees to immediately notify the company of any accident or notice of accident, and the Company is also to be notified of any change in ownership and or management. The Owner will maintain surveillance of the elevator equipment, and when in the opinion of the Owner/Management said equipment operates erratically or in a manner which might cause injury to

> a user thereof, the Owner shall discontinue use until proper service may be rendered by the Company. All notifications of such occurrence shall be in writing. The Owner further agrees to indemnify the Company and save them harmless in the event of their failure to do so.
> The Company shall have no responsibility for following items of the elevator equipment: car enclosure, hoistway entrances, hoistway doors, hoistway door frames and sills, hoistway gates, relamping either incandescent or florescent, light fixtures, fans, main line switches and feeders, hoist cables, sheaves and safety edges. It is understood that this paragraph does not enlarge the scope of the items for which we are responsible (Motion, exhibit L)."

The Court notes that the contract does not contain any requirement that Guardsman obtain insurance coverage.

In partial opposition to the instant motion, Savoy states that the surveillance video clearly supports its contention that Derouen tripped and fell over the luggage that she was pulling behind her, which caused her to fall. Savoy only opposes Guardsman's motion if the Court rules that there is a question of fact as to the maintenance, repair and functioning of the elevator as it pertains to Derouen's accident.

Savoy contends that the contract that it has with Guardsman indicates that Guardsman would indemnify it or, in the alternative, that Guardsman would owe it common-law indemnification since Guardsman possessed the exclusive elevator contract at the subject premises. The Court notes that Savoy has provided no legal authority for this contention, nor has it opposed that portion of Guardsman's motion seeking to dismiss the causes of action seeking contribution and breach of contract for failing to acquire insurance.

In reply, Guardsman states that the contract between it and Savoy does not provide for any contractual indemnification and, in order to be liable for common-law indemnification, there must be a showing of negligence on its part, which Savoy has failed to do. None of the records or documents exchanged between the parties show any prior repair or maintenance due to a

shaking elevator (Motion sequence number 003, exhibit G). Further, when the elevator was examined immediately after the accident, there was no evidence of any defective condition. Guardsman also points to the surveillance video which, it maintains, clearly shows Derouen tripping over her own luggage.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184,185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

That portion of Guardsman's motion seeking to dismiss the causes of action asserted as against it for contribution and breach of contract for failing to acquire insurance is granted without opposition. In addition, the Court notes that the contract did not require Guardsman to acquire insurance.

That portion of Guardsman's motion seeking to dismiss the cause of action asserted as against it for contractual indemnification is granted, since the contract does not provide for such indemnification.

That portion of Guardsman's motion seeking to dismiss the cause of action for common-law indemnification is similarly granted. Common-law indemnification "imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for its failure to correct conditions of which it has knowledge or for its "failure to use reasonable care to discover and correct a condition which it ought to have found" (*Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2d Dept 2006] [internal citations omitted]; *Gleeson-Casey v Otis El. Co.*, 268 AD2d 406, 406-407 [2d Dept 2000]). In the instant matter, no evidence has been provided that Guardsman failed to correct a condition of which it had notice or that it failed to use reasonable care to correct a condition that it should have discovered. Therefore, there is no evidence that Guardsman was negligent so as to engender liability to third-party plaintiffs for common-law indemnification.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that third-party defendant Guardsman Elevator Co., Inc.'s motion for summary judgment dismissing the third-party complaint asserted against it (motion sequence number 002) is granted and the third-party complaint is dismissed, with costs and

disbursements to third-party defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant/third-party plaintiff Savoy Park Owner L.L.C's motion for summary judgment (motion sequence number 003) is denied as untimely.

This constitutes the Decision and Order of the Court.

Dated: JANUARY 9, 2012

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**

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