Casey v New York El. & Elec. Corp.
2012 NY Slip Op 31952(U)
July 19, 2012
Supreme Court, New York County
Docket Number: 116522/08
Judge: Saliann Scarpulla
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SCANNED ON 7/23/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla, Justice

PART 19

Index Number : 116522/2008
CASEY, BARBARA
vs.
NY ELEVATOR & ELECTRICAL
SEQUENCE NUMBER : 006
SUMMARY JUDGEMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

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

decided per the memorandum decision dated 7/19/12
which disposes of motion sequence(s) no. 004, 005, 006

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

FILED

JUL 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/19/12

Saliann Scarpulla, J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

---X

BARBARA CASEY, as Administratrix of the Goods, Chattels and Credits which were of KIERNAN CASEY, deceased,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 116522/08

NEW YORK ELEVATOR & ELECTRICAL CORPORATION and WINOKER REALTY CO., INC.,
Defendants.

FILED

JUL 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

---X

NEW YORK ELEVATOR & ELECTRICAL CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party Index No.: 590311/10

BROADWAY 36TH REALTY, LLC,

Third-Party Defendant.

---X

For Plaintiff:
Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz
80 Pine Street, 34th Floor
New York, NY 10005

For Defendant New York Elevator:
Babchik & Young, LLP
200 East Post Road, Suite 200
White Plains, NY 10601

For Third-Party Defendant:
Dillon Horowitz & Goldstein LLP
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For Defendant Winoker Realty Co., Inc.:
Law Office of Patrick J. Crowe
445 Broad Hollow Road - Suite 25
Melville, NY 11747

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for wrongful death, defendant New York Elevator & Electrical Corporation ("NY Elevator") moves (motion sequence 004), pursuant to CPLR 3212, for: (i) summary judgment dismissing plaintiff Barbara Casey's

("Casey") amended complaint, and all cross claims and counterclaims asserted against NY Elevator; and (ii) summary judgment on NY Elevator's claims for common-law indemnity and contribution against defendant Winoker Realty Co., Inc. ("Winoker)" and third-party defendant Broadway 36th Realty, LLC ("Broadway").

Winoker moves (motion sequence 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint, or, in the alternative, to stay this action pending the determination of the matter by the New York State Workers' Compensation Board.

Broadway moves (motion sequence 006), pursuant to CPLR 3212, for an order dismissing Casey's complaint, the third-party complaint, and/or all cross-claims asserted against Broadway.

Broadway is the owner of a commercial building located at 29 West 36th Street in New York City. Broadway purchased the building in May 2008, at which time Winoker became the managing agent. The Building has two passenger elevators and a freight elevator. The freight elevator is located separately from the passenger elevators.

In 1976, NY Elevator's predecessor entered into a contract with the prior owner of the building to service only the two passenger elevators. In July 2006, NY Elevator conducted the city-mandated annual inspection[1] of all three elevators, including the freight elevator. The result of the inspection was "satisfactory." NY Elevator conducted the same inspection in August 2007, with the same "satisfactory" inspection result. In

[1] Administrative Code of the City of New York § 27-998 (a) (1) (Local Law 10) requires landlords to have all elevators on their premises inspected.

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July 2008, NY Elevator was retained by Broadway to inspect only the two passenger elevators.

In February 2008, the New York City Department of Buildings ("DOB") issued a notice of violation to the prior building owner with respect to the freight elevator. The notice stated that the elevator's pit was dirty and that there was an expired two year tag.

In 2008, Broadway and NY Elevator prepared a maintenance agreement ("2008 Agreement"), pursuant to which NY Elevator purportedly agreed to maintain the two passenger elevators. With respect to the freight elevator, the 2008 Agreement provides in handwriting, "monthly lubricate only."

For approximately eighteen years, plaintiff decedent Kiernan Casey ("Mr. Casey") worked in the building as a maintenance worker and the freight elevator operator. As of September 8, 2008, Casey became the building's superintendent, replacing nonparty Robert Koch ("Koch"), who had worked in the building for approximately the same number of years before leaving to work in another commercial building.

On September 12, 2008, Mr. Casey used the freight elevator. He exited on the fifth floor, and, subsequently, when he attempted to re-enter the freight elevator, he fell down the empty shaft because the cab of the elevator had moved up the shaft in his absence. Mr. Casey passed away the same day as a result of the injuries that he sustained.

Mr. Casey's estate has filed for, and now receives, monthly workers' compensation benefits.

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Casey commenced this action, alleging negligence resulting in Mr. Casey's death and negligence resulting in Mr. Casey's physical pain and mental anguish.

Winoker asserted cross claims against NY Elevator for indemnification and contribution. NY Elevator asserted cross claims against Winoker for indemnification and contribution.

In the third-party complaint, NY Elevator asserted claims against Broadway for contribution and indemnification. Broadway, in its turn, counterclaimed against NY Elevator and Winoker for indemnification and contribution. In the amended answer, Winoker asserted a cross claim against NY Elevator and Broadway for contribution and common-law indemnification, and a cross claim against Broadway for contractual indemnification.

Previously, in motion sequence number 001, prior to discovery, NY Elevator moved, pursuant to CPLR 3211, for an order dismissing the complaint, on the ground that NY Elevator had no duty to inspect or maintain the freight elevator in the building. By order dated March 8, 2010 and entered March 12, 2010, the court (Goodman, J. [Ret.]) denied NY Elevator's motion. On appeal, the Appellate Division, First Department affirmed the 03/12/10 Order, stating that "[a]n elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge, or failure to use reasonable care to discover and correct a condition which it ought to have found." *Casey v. New York El. & Elec.*

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Corp., 82 A.D.3d 639, 640-641 (1st Dept. 2011), quoting *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 559 (1973). The court further held, "that duty, is limited, however, to cases where, pursuant to contract, the elevator company has assumed 'exclusive control' of the elevator at the time of the accident and no duty can be imparted by a 'piecemeal oral contract.' There is no evidence in this record that New York Elevator was under contract such to impart a duty upon it to third persons." *Casey*, 82 A.D.3d at 640.

The First Department also held that "even in the absence of a contract, an elevator company can be liable in tort, where it negligently services and/or inspects an elevator." *Casey*, 82 A.D.3d at 640. In support of this proposition, the First Department cited *Alejandro v. Marks Woodworking Mach. Co.*, 40 A.D.2d 770 (1st Dept. 1972) *affd* 33 N.Y.2d 856 (1973) and *Alsaydi v. GSL Enters.*, 238 A.D.2d 533 (2nd Dept. 1997).

Now, after the close of discovery, NY Elevator, Winoker and Broadway each move for summary judgment dismissing the complaint.

Discussion

NY Elevator's Summary Judgment Motion

In support of its motion for summary judgment, NY Elevator submits a copy of the 2008 Agreement, which was not part of the record on the NY Elevator's motion to dismiss. NY Elevator argues that in January 2008, it submitted the 2008 Agreement as a proposal for approval apparently by the building's prior owner or managing agent. Broadway did not sign the 2008 Agreement until August 14, 2008.

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NY Elevator contends, without opposition, that: (i) it was Broadway that added a handwritten insertion under "units to be maintained," "One (1) Freight - monthly lubricate only;" (ii) NY Elevator did not agree to this insertion; (iii) the contract price was not adjusted to reflect this insertion; and (iv) NY Elevator received a copy of the agreement signed by Broadway only after the accident. In fact, the section of the agreement that reads "Approved By: New York Elevator" is blank. NY Elevator provides a copy of an e-mail that it sent to Winoker in October 2008, stating that service of the freight elevator is not included in the 2008 Agreement and that the proposed monthly fee of $650 does not cover the lubrication of the freight elevator.

One of Broadway's principal's testimony, that he "assume[d]" or "suspect[ed]" that NY Elevator would "take care of" or "inspect the [freight] elevator on a monthly basis," is insufficient to create an issue of fact as to whether there was a meeting of the minds regarding material elements of the 2008 Agreement. *See e.g. Computer Assoc. Intl., Inc. v. U.S. Balloon Mfg. Co., Inc.*, 10 A.D.3d 699, 700 (2d Dept. 2004)("A contract is unenforceable where there is no meeting of the minds between the parties regarding a material element thereof"). Even assuming arguendo that NY Elevator and Broadway did reach an agreement, the obligation of NY Elevator with respect to the freight elevator was limited to lubricating it on a monthly basis, but not to fully maintain it. Therefore, NY Elevator has shown that, on the date of the accident, NY Elevator did not have a contractual obligation to maintain the freight elevator.

That, however, is not the end of the inquiry. As the First Department previously observed in this action, even in the absence of a contractual duty, an elevator company may be held liable if it negligently inspected or repaired an elevator. Further, in connection with NY Elevator's pre-discovery motion to dismiss, the First Department held that the documentary evidence submitted by NY Elevator at that time did not "as a matter of law, prove that it did not negligently inspect, service or maintain the freight elevator prior to the accident" and "[q]uestions of fact also exist[ed] as to whether New York Elevator was negligent when it performed prior Department of Buildings inspections." *Casey*, 82 A.D.3d at 640.[2] The First Department cited *Sanzone v. National Elevator Inspection Serv.*, 273 A.D.2d 94 (1st Dept. 2000), which provides that "conducting the City-mandated inspection could give rise to a duty in tort[] to users of the elevator."

On this post-discovery motion NY Elevator also offers an affidavit of professional engineer Patrick McPartland ("McPartland"), dated September 26, 2011. McPartland was present at the DOB post-accident investigation on September 15, 2008. He describes the subject freight elevator as follows:

> the cab of the elevator was comprised of two walls as well as east facing and south facing collapsible manual slide car gates (scissors gates).[3] The gates had gate switches to ensure the

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[3] It appears that the south-facing gate opened only at the street level, whereas the east-facing gate opened on all the other floors.

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> gates which were manually operated were fully closed before movement of the elevator. The hoistway doors at each landing also had electro-mechanical interlocks known as K-locks, to ensure electrical circuit completion before operation. The elevator was to be operated by a ... freight operator via a manual car station consisting of a handle that is spring loaded to a neutral position and which is activated by the operator's movement of the lever in an arc to control direction and speed.

The accident report prepared by Chief Alphonso Marshall and Chief Douglas Smith of the DOB, report # 96/08 and dated October 1, 2008 ("DOB Report"), provides that:

> "[t]he three critical items that contributed to the accident were [i] a broken spring in the cab's manual control station [which] allowed the control handle to fall to the up position, [ii] the fifth floor hoistway door interlock was electrically by-passed and [iii] the cab gate switch (east facing) was in the made position (by-passed electrically) with clear tape[, all of which] allowed the car to move in the up direction, without an operator in the cab, and with the open fifth floor hoistway door and open car gate"

The DOB Report also noted that the east facing gate in the freight elevator cab was damaged "and not free moving in it[]s track, contact roller for gate switch mis-aligned."

McPartland states that the freight elevator had a manual lever type of control, called a run-handle. In order for the elevator to go up or down, the lever had to be moved to the right or to the left, respectively. When the lever was in the upright neutral position, pointing straight up, the elevator remained at rest. There was a spring inside the lever to

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ensure that the lever stayed in the upright/neutral position, unless the lever was manually moved to the right or to the left.

The DOB Report provides that the spring inside the lever was broken, which allowed the lever to move by itself to the "up" position. McPartland also states that "[d]ue to the lack of spring tension, at the time of the accident, the manual control lever slid over to the right, activating the freight elevator with no one in it and the freight elevator rose to the top of the building.

As part of the DOB inspection, which McPartland witnessed, the spring was removed and examined. It was concluded that there was a fresh break in the spring.

Koch, who, until September 6, 2008, was the building's superintendent and Mr. Casey's supervisor, testified that on September 8, 2008, he visited Mr. Casey to give him last-minute instructions before Koch started his new job. That day, the two of them rode the freight elevator together, and Koch noticed, for the first time, that the manual control lever had no tension. He told Mr. Casey that the spring inside the lever was broken and had to be replaced, and that Mr. Casey should ask Winoker to have NY Elevator replace the spring. Koch testified that he rode the freight elevator one week prior and that he did not notice that there was any problem with the spring. Koch testified that NY Elevator was not notified of the spring issue before September 8, 2008. Koch further testified that on the day of the accident, September 12, 2008, he spoke to Mr. Casey and asked him if

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he notified Winoker about the broken spring. Mr. Casey purportedly told him that he did not.

It is undisputed that the last annual inspection of the freight elevator that NY Elevator conducted was in August 2007. In 2008, before the accident, NY Elevator was not hired to inspect the freight elevator. NY Elevator's call tickets between August 2007 and the date of the accident reveal that their elevator inspection and repair pertained to the east-facing gate, but not to the manual control lever.

Accordingly, NY Elevator has made a prima facie showing that as a matter of law it owed no duty of care to Mr. Casey with respect to the broken spring, because: (1) the broken spring in the manual lever did not exist in 2007 when NY Elevator conducted the last mandatory annual inspection; (2) the spring broke shortly before the accident; and (3) NY Elevator had no notice of the broken spring.

In opposition, Casey has not raised an issue of fact. Accordingly, Casey's negligence claim against NY Elevator, to the extent that it is based on the broken spring inside the manual control lever, is dismissed.

As to the hoistway doors, McPartland states that they "led from the fifth floor hallway into the freight elevator itself."

> "The doors consist of two 'swing doors' which are hinged on the left and right side, respectively.... The doors are outfitted with a safety lock known as a 'K lock' [the lock] which, in addition to acting as a mechanical lock, was also designed with an electrical circuit that had to be completed, i.e., 'made' to allow the freight elevator to move. If a hoistway door was

> open, the circuit would not be completed (or 'made'), and the elevator could not move."

The lock provided a safety feature that would prevent the freight elevator from moving if the lock was disengaged while the swing doors were open. In order for the freight elevator to leave the fifth floor, the swing doors had to be closed, the lock had to be manually engaged from inside the freight elevator, which would close an electrical circuit.

McPartland further states that although the lock was broken, "[t]his safety feature was by-passed with wire such that the circuit was always 'closed' .... whether or not the door was open and whether or not the [] lock was engaged." As a result, the freight elevator could run, regardless of the fifth floor hoistway door interlock's or the swing doors' position, and regardless of whether or not there was a passenger inside the freight elevator cab.

In February 2008, the DOB issued a notice of violation with respect to the freight elevator. The notice does not list the fifth floor hoistway door interlock among the issues that the DOB uncovered. However, it is unclear from the notice or the rest of the record whether the notice was generated as a result of the DOB conducting a comprehensive inspection of the freight elevator or as a result of the DOB responding to a complaint about a particular issue.

NY Elevator provides its maintenance log/call record, which shows that, between February 2008 and the date of the accident, NY Elevator did not receive any complaints

about the fifth floor hoistway door interlock. NY Elevator contends that the first time it learned about this defect was after the accident, following the DOB inspection and Report.

Koch testified that, in 2008, after Winoker took became the managing agent, he notified Winoker about various problems with the freight elevator, which did not include the issue of the fifth floor hoistway door interlock being electrically by-passed. Koch stated that, during his tenure at the Building, when he reached the fifth floor and opened the swing doors, the freight elevator would not move, and that he had to physically close the swing doors in order for the elevator to move again. Koch rode the elevator almost on a daily basis.

Koch further testified that "[n]obody ever worked on the door locks when I was there," and he never saw a NY Elevator mechanic do any rewiring of the interlock mechanisms. Mr. Casey never complained to Koch about the fifth floor interlock, and Koch found out for the first time that the fifth floor interlock was by-passed only after the accident.

Based upon the foregoing, NY Elevator has failed to make a *prima facie* showing, as a matter of law, that it did not owe a duty of care to Mr. Casey with respect to the fifth floor hoistway door interlock. Although it appears that NY Elevator did not receive actual notice of this issue, NY Elevator has failed to establish that it did not negligently

perform prior annual inspections, which would have revealed the fifth floor hoistway door interlock issue.

With regard to the cab gate switch, McPartland states that

> "[t]he East[-facing] gate [inside the elevator cab] had a switch ... which must be physically closed by being 'pushed up' when a roller on top of the gate called a 'contact roller' rolls beneath the gate switch when the gate is closed. This is referred to as the gate switch being in the 'made position' [a]s it has the effect of completing the electric circuit. The freight elevator can only move when the gate switch is pushed 'up' into the 'made position.' This is a safety feature meant to prevent the freight elevator from moving while the gate is open."

The DOB Report found that: the east-facing gate was damaged, would not move freely in its track; and, even when closed, the gate roller was misaligned preventing the gate switch from being "pushed up" to the "made position." As a result, the elevator would not move. The DOB Report states that the gate switch had been taped up so that it was always in the "made position," allowing the freight elevator to move even if the gate was open.

Koch testified that, in May 2008, Mr. Casey informed him that the east-facing gate and the gate switch got damaged by a forklift which was carrying a heavy load. Koch informed NY Elevator about this damage. NY Elevator provides a customer service ticket that states that, on May 12, 2008, one of its mechanics inspected the gate and found that it was damaged.

Koch testified that he was told by Winoker to put the broken gate handle back on, even though he informed Winoker that the gate had to be replaced. In order for the elevator to run, Koch came up with an idea of holding the gate switch in place with a stick. He was purportedly told by Winoker to keep the elevator running even though it was dangerous.

It is undisputed that, based on Winoker's request, NY Elevator inspected the freight elevator and proposed that the east-facing gate be replaced. NY Elevator submitted a proposal, dated May 29, 2008, to Winoker "to furnish and install one new Bostwick type freight elevator car gate, top track, ball bearing rollers, top and bottom gate guides, safety plate and handle" for $6,373. Winoker obtained two other proposals from PS Marcato Elevator Company for $3,900 and from Nouveau Elevator Repair for $4,900.

Winoker submitted all three proposals to an elevator consultant, Sierra Consulting Group, Inc., for advice as to whether the gate could be repaired and, if so, which of the three proposals should be accepted. The consultant advised that the gate had to be replaced, that PS Marcato's proposal was the most competitive, that NY Elevator should be given an opportunity to match PS Marcato's price, and that a new gate switch had to be installed. It is undisputed that neither Winoker nor Broadway contacted NY Elevator with respect to the gate replacement and that, before the accident, the gate was not replaced or repaired.

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Koch further testified that while he worked in the Building, he did not see that the gate switch was taped up, and the first time he learned about the taped-up gate switch was after the accident. Apparently, Koch was informed in July 2008 by one of building's employees, George Soto, that someone taped up the gate switch. Koch told both Soto and Mr. Casey not to place any tape on the gate switch, and Koch personally never saw the gate switch taped up even though he rode the freight elevator almost every day.

In opposition, Casey relies on an affidavit by Koch, signed on October 22, 2008. In his affidavit, Koch states that "Both NY Elevator and Winoker were ... aware that the gate switch were [sic.] taped over and not properly functioning." Additionally, Casey offers an affidavit of Patrick Carrajat, an elevator mechanic, who states that if NY Elevator was aware of the taped-up gate switch, then NY Elevator's "failure to notify the [DOB] as to this ... condition was a departure from good and accepted elevator service practice in the City of New York." However, there is no evidence that Koch or anyone else reported to NY Elevator that the gate switch was taped-up. Additionally, two other elevator companies and an elevator consultant inspected the freight elevator and did not report this issue either to Winoker or to the DOB.

Koch's conclusory statement in his affidavit that NY Elevator was aware of the existence of the taped-up switch, without any details as to how NY Elevator purportedly acquired this information or other evidentiary basis for this statement, cannot create an issue of fact. *See J.A.O. Acquisition Corp. v. Stavitsky,* 18 A.D.3d 389, 391 (1st Dept.

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2005)("bald assertions, without evidence to support them, are insufficient to oppose a motion for summary judgment").

Therefore, NY Elevator made a prima facie showing that as a matter of law it owed no duty of care to Mr. Casey with respect to the broken gate switch, because: (1) the broken gate and broken gate switch did not exist in August of 2007 when NY Elevator conducted the last annual inspection; (2) no probative evidence was presented that NY Elevator had notice of the taped-up gate switch; and (3) NY Elevator made a proposal to Winoker to replace the east-facing gate, but it was not accepted. Casey has failed to raise an issue of fact. Accordingly, Casey's claim against NY Elevator, to the extent it is based on the broken east-facing gate and taped-up gate switch, is also dismissed.

As a result, Casey's claims against NY Elevator are dismissed with respect to the two out of three defects that, according to the DOB Report, caused Mr. Casey's accident.

Winoker's Summary Judgment Motion

Winoker contends that Casey's claims asserted against it are barred by Workers' Compensation Law Sections 11 and 29(6).

Under WCL Sections 11 and 29 (6), a plaintiff's receipt of workers' compensation benefits as an employee is his or her exclusive remedy, which bars him or her from bringing a negligence action against his or her employer. *See e.g. Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 560 (1991).

> [A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of

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wages and for maintaining workers' compensation and other employee benefits. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. [T]he determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact." *Thompson,* 78 N.Y.2d at 557-558.

"Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive. While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work. " *Thompson,* 78 N.Y.2d at 558. In addition, "the method of payment; the right to discharge; the furnishing of equipment; and the nature and purpose of the work" should be considered, (*Gannon v. JWP Forest Elec. Corp.*, 275 A.D.2d 231, 232 [1st Dept. 2000]), as well as "all essential, locational and commonly recognizable components of the [employee's] work relationship." *Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 359 (2007). "Of primary importance amongst these factors is the degree of control the alleged special employer has over the work." *Gannon*, 275 A.D.2d at 232.

A contractual provision that defines the employer "does not displace judicial assessment of the employee's actual relationship of the employee's actual relationship with [a particular entity] to ascertain the special employment status for worker's compensation purposes and consequences." *Thompson*, 78 N.Y.2d at 559-560.

Here, a management agreement between Broadway and Winoker provides, in relevant part, that Winoker agrees "to supervise the work of, and to hire and discharge employees ... [A]ll employees are in the employ of [Broadway] solely and not in the employ of [Winoker]." It is undisputed that Winoker paid the Building staff salaries from Broadway's funds.

The deposition testimony of witnesses for Winoker and Broadway show that Winoker was in charge of hiring, firing, and supervising the staff who worked in the building. Ms. Razzo-West of Winoker testified that she supervised the staff by giving them assignments and setting work priorities, visited the Building regularly to make sure that job assignments were completed, was responsible for their work schedules, addressed individual staff members' grievances, and approved sick and personal days.

Razzo-West further testified that, over the summer of 2008, when she was directed by Broadway to reduce the building staff by one person, she interacted with a labor union on this issue, met with Koch and Casey to discuss Casey's potential termination, offered Casey another position at a different building managed by Winoker, and met with them again to decide that Koch would quit his job and Casey would take Koch's position.

Koch also testified that Razzo-West provided day-to-day supervision and that Koch reported to her.

Accordingly, Winoker has demonstrated that it exercised control over the manner, details, and ultimate result of the building employees' work, including Casey's.

Therefore, Winoker demonstrated that Broadway has surrendered, and turned over to Winoker, control over these aspects of Casey's employment. Hence, as a matter of law, Winoker was Casey's special employer. *See e.g. Gannon*, 275 A.D.2d at 232.

It is undisputed that the workers' compensation policy in question provided coverage to Broadway and to Winoker as a special employer, and that, following the accident, the estate of Mr. Casey has been receiving monthly workers' compensation payments. Under the WCL, Casey's claims against Winoker are barred. *See Thompson*, 78 N.Y.2d at 560 (1991); *see also Gannon*, 275 A.D.2d at 233, and Casey's complaint as against Winoker is dismissed.

However, the court finds that given the existence of issues of fact as to the extent of Broadway and/or Winoker's negligence, if any, in causing Mr. Casey's accident, any contractual indemnification claims based on the Winoker/Broadway management agreement are not dismissed.

Broadway's Summary Judgment Motion

NY Elevator impleaded Broadway. CPLR 1007, in relevant part, provides that a defendant may proceed against "a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." *See also Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 883 (2nd Dept. 2011). "The liability must be one rooted in indemnity or contribution." *BRC Elec. Corp. v. Cripps*, 67 A.D.2d 899, 900 (2d Dept. 1979). Accordingly, in determining the viability of third-party claims,

courts consider whether third-party plaintiffs have claims in contribution or indemnification against third-party defendants.

The right to indemnification can be premised on a contract, such as an indemnification agreement, or arise by operation of law. *See e.g. Broyhill Furniture Indus., Inc. v. Hudson Furniture Galleries, LLC*, 61 A.D.3d 554, 556 (1st Dept. 2009). At common law, a party can seek indemnification only if it was not negligent and its liability is vicarious and it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 895 (1st Dept. 2003).

As to contractual indemnification, in light of the determination that there was no contract between NY Elevator and Broadway for the maintenance of the freight elevator, NY Elevator is not entitled to a contractual indemnification. As to common law indemnification, even if NY Elevator is found to not be negligent with respect to the by-passed lock, there are no grounds to hold NY Elevator vicariously liable for Mr. Casey's injuries and death. Hence, NY Elevator would not be entitled to the common law indemnification as well. *See e.g. Broyhill Furniture Indus., Inc.*, 61 A.D.3d at 556).

The same analysis applies to NY Elevator's cross claim against Winoker for common law indemnification, which is dismissed.

CPLR 1401, in relevant part, provides that:

> two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful

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> death, may claim contribution among them whether or not an action has been brought ... against the person from whom contribution is sought.

"[A]pportionment rights among wrongdoers arise when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person." *Garrett v. Holiday Inns*, 58 N.Y.2d 253, 258 (1983)(internal quotation marks and citation omitted). Given the existence of the aforementioned issues of fact as to the extent of the parties' negligence, if any, in causing Mr. Casey's accident, the determination of the issue of contribution at this juncture is premature.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant New York Elevator & Electrical Corporation for summary judgment (motion sequence number 004) is granted to the extent that plaintiff's claims that are based on the broken spring in the manual lever and the by-passed gate switch inside the freight elevator cab are dismissed, and any corresponding counterclaims or cross claims for contractual or common law indemnification asserted against it are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant Winoker Realty Co., Inc. for summary judgment (motion sequence number 005) is granted to the extent that the complaint and all cross claims asserted against defendant Winoker Realty Co., Inc. are dismissed, with

the exception of any cross claims asserted against it for contribution, and any cross claim by Broadway 36th Realty, LLC against it for contractual indemnification; and it is further

ORDERED that the motion of third-party defendant Broadway 36th Realty, LLC for summary judgment (motion sequence number 006) is granted only to the extent that all claims for common law indemnification asserted against it are dismissed, and the claim of third-party plaintiff New York Elevator & Electrical Corporation for contractual indemnification is dismissed; and it is further

ORDERED that the remaining claims shall be severed and shall be tried.

This constitutes the decision and order of the Court.

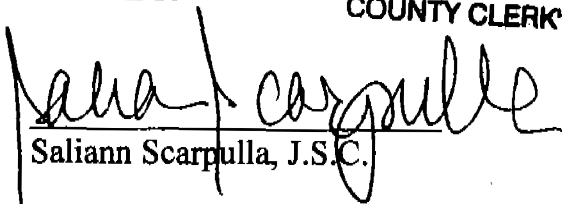
FILED

JUL 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
July 19, 2012

ENTER:



Saliann Scarpulla, J.S.C.