[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden **PART** 11
Justice

Index Number : 106872/2010
CHANICE, RUSSELL
VS.
EMPIRE STATE BUILDING
SEQUENCE NUMBER : 002
DISMISS

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 in accordance with the annexed Memorandum Decision + Order.

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

FILED

APR 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 8, 2013

_____, **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**

[* 2]

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

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RUSSELL CHANICE,

INDEX #: 106872/10

Plaintiff

- against -

FEDERAL EXPRESS CORPORATION, EMPIRE STATE BUILDING COMPANY, LLC, and HUNTER ROBERTS CONSTRUCTION GROUPS,

Defendants.

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HUNTER ROBERTS CONSTRUCTION GROUP, LLC,

INDEX #: 591160/10

Third-Party Plaintiff

- against -

EJ ELECTRIC INSTALLATION COMPANY

Third-Party Defendant.

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HUNTER ROBERTS CONSTRUCTION GROUP, LLC, and EMPIRE STATE BUILDING COMPANY, LLC

INDEX #: 590670/11

Second Third-Party Plaintiffs

- against -

NEW YORK ELEVATOR & ELECTRICAL CORPORATION, now known as THYSSENKRUPP ELEVATOR CORPORATION,

Second Third-Party Defendants.

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JOAN A. MADDEN, J

In this personal injury action, defendant Federal Express Corporation ("FedEx") moves pursuant to CPLR 3211 to dismiss the complaint against it, arguing, *inter alia*, that it owes no duty to plaintiff. Plaintiff Russell Chanice ("Chanice") opposes the

motion, as do defendants Hunter Roberts Construction Group ("Hunter Roberts"), defendant Empire State Building Company LLC ("Empire State"), and third-party defendant E-J Electric Installation Co. ("E-J").

Background

Chanice seeks to recover damages for injuries that he allegedly sustained on June 8, 2009, when he as struck in the head by the top of a bi-parting elevator door. At the time of the accident, Chanice was working as an electrical construction worker for E-J, a subcontractor of Hunter Roberts, at 350 Fifth Avenue (a/k/a the Empire State Building). Empire State is the owner of the building in which the elevator is located, and Hunter Roberts was a contractor hired to perform certain renovation and construction work in the building. Second third-party defendant New York Elevator & Electrical Corporation, now known as Thyssenkrupp Elevator Corporation ("Thyssenkrupp"), operated and maintained the elevators at the building.

The complaint alleges, *inter alia*, that Chanice's injuries were caused by the negligence of Empire State and Hunter Roberts in the operation, repair, maintenance, and control of the elevator and premises, and by the failure of Hunter Roberts to provide a safe work place.

On December 30, 2010, Hunter Roberts commenced a third party action against E-J. Chanice subsequently moved to amend the complaint to add FedEx as a defendant. By decision and order dated January 12, 2012, the court granted plaintiff's motion, finding that plaintiff had adequately shown that his injuries were potentially caused by the negligence of the FedEx employee as supported by a video tape of the accident showing that the FedEx employee apparently pushed the button of the self-operating

freight elevator thus causing the biparting doors to close and strike Chanice in the head. While FedEx opposed the motion, as it was not yet a party, the court did not consider its arguments in opposition.

The amended complaint alleges, *inter alia*, that plaintiff's injuries were caused by the negligence of FedEx's agent and/or employee, who was in the elevator with Chanice at the time of the accident. It further alleges that this negligence includes failing to properly operate the elevator; failing to properly press buttons of the elevator door; operating the elevator with his back toward entrance; failing to observe whether or not anyone was entering the elevator before pressing the button to close elevator; and negligently closing the elevator doors.

FedEx now moves to dismiss the claim against it, asserting that Chanice has not alleged any specific actions attributable to FedEx, which could have caused the accident. Furthermore, FedEx contends that its employee merely pushed a button which triggered the closing of the elevator doors. FedEx also argues that even if by pushing the button its employee caused the accident, its employee did not owe any duty to Chanice, and that in cases where a person injured by a closing door is permitted to recover from such person, the tortfeasor is an employee whose job responsibilities include the duty of opening and closing doors, thus creating a relationship and attendant duty. FedEx argues that its courier was not an employee of Empire State or the building management company and therefore was not responsible for safely operating the elevator. FedEx argues that to find otherwise, would impose a duty on all passengers in an elevator to operate the doors carefully or to be subject to tort liability.

In opposition, Chanice argues that the FedEx courier voluntarily assumed the performance of a duty based on allegations that at the time of the accident the FedEx courier was operating the freight elevator. Chanice argues that FedEx overlooks the common law doctrine of assumption of duty, which requires a person who assumes a duty to act carefully under the reasonably prudent person standard. Chanice also asserts that the FedEx courier breached his duty by operating the controls of the elevator with his back towards the entrance of the elevator and without checking if anyone was attempting to enter the elevator before pressing the button to close the bi-parting doors.

Hunter Roberts and Empire State also oppose the motion, arguing that it should be denied as premature since no meaningful discovery has been conducted with FedEx. The co-defendants also assert that the FedEx courier voluntarily assumed a duty to Chanice when he purportedly decided to operate the freight elevator in the course of his employment for FedEx. Third-party defendant E-J similarly argues that FedEx has failed to demonstrate that it did not owe a duty to persons, such as plaintiff, who could foreseeably be injured by the actions of its employees.

In reply, FedEx argues that the doctrine of assumption of duty is inapplicable to the instant action because it requires reliance on the part of the plaintiff. FedEx asserts that there is no basis in law or policy to find that the FedEx courier owed a duty Chanice.

At oral argument on October 11, 2012, Chanice's counsel introduced the transcript and decision in Spielman v. Broadway Real Estate Services, et al, Index No. 112287/11 (Sup Ct NY Co. Aug.15, 2012), another action in which FedEx was sued in connection with injuries sustained in an elevator accident. In Spielman, plaintiff alleged that the action of FedEx's courier in using a passenger elevator with an overloaded

delivery cart caused that elevator to mis-level and resulted in injuries to the plaintiff. The court in Spielman denied FedEx's motion to dismiss, holding that its employee owed a duty to ensure that loads brought onto the elevator did not create an unreasonably dangerous condition.

In a two-page letter brief dated October 22, 2012, FedEx argues that Spielman is not dispositive here, since the injuries in this action were not allegedly caused by overloading the elevator.

Discussion

On a CPLR 3211 motion to dismiss, the court will, "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Nonnon v. City of New York, 9 NY3d 825, 827 (2007); quoting Leon v. Martinez, 84 NY2d 83, 87-88 (1994).

To sustain an action for negligence, a plaintiff must show "1) the existence of a duty on defendant's part as to plaintiff, 2) breach of this duty, and 3) injury to plaintiff as a result thereof." Akins v. Glens Falls School Dist., 53 NY2d 325, 333 (1981)(internal citations omitted) "[T]he threshold question in any negligence action is: does the defendant owe a legally recognized duty of care to plaintiff?" In re New York City Asbestos Litigation, 5 NY3d 486, 493 (2005), quoting Hamiton v. Beretta U.S.A. Corp. 96 NY2d 222, 232 (2001).

A duty relationship is required in a negligence action since otherwise a defendant would be subjected "to limitless liability to an indeterminate class of persons conceivably injured by any negligence in [the defendant's] act'" (Id., *quoting* Eiseman v. State, 70

NY2d 175, 188 (1987). Generally, a duty relationship arises only "where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." Hamiton v. Beretta U.S.A. Corp., 96 NY2d at 233. The critical common characteristic shared by these relationships is that "the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm [and]...the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." Id.

The court determines whether a duty exists "by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." Hamilton v. Beretta U.S.A. Corp, Id at 232 (internal quotations and citations omitted).

As FedEx points out, the cases holding a defendant potentially liable to a plaintiff for injuries caused by an elevator or train door involve circumstances in which the tortfeasor is an employee or agent of defendant whose responsibilities include operating the door at issue. See, e.g. Khalona v. New York City Transit Authority, 215 AD2d 630 (2d Dept 2005)(evidence supported finding that defendant Transit Authority liable where conductor closed door on passenger's foot); Towne v. City of New York, 278 AD 833 (2d Dept 1951)(defendants could be liable for passenger's injuries caused by being trapped in the train door); Balant v. Fifth Ave. 58/59 Acquisition Co., LLC, 17 Misc.3d

1126(A) (Sup Ct NY Co. 2007) (plaintiff injured by a freight elevator whose doors were closed by the elevator operator granted partial summary judgment as to liability against company that employed elevator operator). In this case, as the FedEx courier was not charged with operating the elevator but was merely a passenger, he owed no duty to plaintiff or other passengers on the elevator.

Moreover, while the courts have found that a defendant who overloads an elevator owes a duty to fellow passengers not to create unreasonably dangerous condition, liability in those cases is predicated on the assertion that by overloading an elevator the defendant causes the elevator to malfunction and injury to the plaintiff, a circumstance not present here. See Ruli v. Hiro Enter., 298 AD2d 256 (1st Dept 2002)(court held a general contractor could be liable for a maintenance worker's injuries and fact issues existed as to whether its negligence in using a lighter-capacity elevator to remove debris or in overloading it and not having a demolition worker remove the debris); Spielman supra (denying FedEx's motion to dismiss where its courier may have overloaded an elevator, causing it to mis-level and thus contributing to plaintiff's injuries).

The question remains, however, whether the FedEx employee assumed a duty to Chanice by pushing the button of the self-operated elevator causing the doors to close. "[A]lthough there initially there may be no duty, a person may voluntarily assume a duty." Gordon v. Muchnick, 180 AD2d 715, 715 (2d Dept 1992), *citing* Nallan v Helmsley-Spear, Inc., 50 NY2d 507 (1980) (additional citations omitted). "[G]ratuitous conduct may give rise to liability only when the defendant's affirmative action adversely affected the plaintiff and the defendant failed to act reasonably." Id. However, a

defendant can be held liable for breach of an "assumed duty" only where the plaintiff "show[s] reliance on the defendant's course of conduct, such that the defendant's conduct placed him or her in a more vulnerable position than he or she would otherwise have been in had the defendant done nothing." Richardson v. Lenox Terrace Development Associates, 41 AD3d 108, 109 (1st Dept 2007).

The opposing parties maintain that as there are unresolved factual questions relating to whether FedEx's employee assumed a duty to plaintiff to use reasonable care in closing the elevators doors, it is premature to dismiss the complaint. This argument is unavailing as while the FedEx employee's alleged act of pushing the close door button on the elevator may have contributed to plaintiff's injuries, unlike the cases relied on by plaintiff, there is no evidence that the FedEx employee took any affirmative action vis-a-vis the plaintiff or that plaintiff relied on the conduct of the FedEx employee. see e.g. Cohen v Heritage Motor Tours, Inc., 205 AD2d 105, 107 (2d Dept 1994)(issue of fact existed as to whether tour operator assumed a duty to plaintiff based on evidence that its employee directed plaintiff to walk across slippery stepping stones causing her to fall); Gordon v. Muchnick, 180 AD2d at 715 (finding triable issue of fact as to whether defendant assumed a duty of care to plaintiff where there was evidence that defendant while walking arm and arm with plaintiff guided her out of the cross walk and into a lane of traffic).

In the absence of an affirmative undertaking by the FedEx employee directed at plaintiff or reliance by plaintiff on the FedEx employee's conduct, it cannot be said that the FedEx employee assumed a duty to plaintiff to use reasonable care when pushing the elevator button.

In view of the above, it is

ORDERED that the motion to dismiss by defendant Federal Express Corporation is granted and all claims against Federal Express Corporation are dismissed, and the Clerk is directed to enter judgment accordingly in Federal Express Corporation; and it is further

ORDERED that the caption is amended to reflect the dismissal of the claims against Federal Express Corporation; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel for defendant Federal Express Corporation shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein; and it is further

ORDERED that the remaining parties shall appear for a previously scheduled status conference in Part 11, room 351, on May 23, 2013, at 9:30 am.

DATED: April 8 2013

ENTER:

J.S.C.