

Lam v 39 Cam, LLC

2013 NY Slip Op 31000(U)

May 7, 2013

Supreme Court, New York County

Docket Number: 112571/2007

Judge: Martin Shulman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **MARTIN SHOLMAN**
J.S.C.
Justice

PART 1

Index Number : 112571/2007
LAM, ELAINE MAN
vs
39 CAM LLC
Sequence Number : 002
SUMMARY JUDGMENT

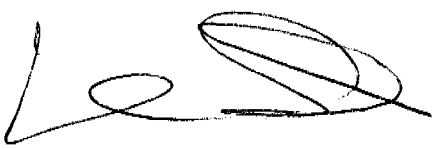
INDEX NO. 112571/07
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion ~~to~~ for summary judgment
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-W No(s) 1
Answering Affidavits — Exhibits A-D No(s) 2,3
Replying Affidavits Exh-A No(s) 4,5

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

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

FILED
MAY 09 2013
COUNTY CLERK'S OFFICE
NEW YORK



Dated: May 7, 2013

MARTIN SHOLMAN
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 1

ELAINE MAN LAM,
Plaintiff,

-against-

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

Index No. 112571/2007
Motion Seq. 002 & 003
DECISION & ORDER

39 CAM, LLC, CAMMEBY'S REALTY CORP.,
CAMMEBY'S MANAGEMENT COMPANY,
LLC,
Third-Party Plaintiffs,

-against-

MAINCO ELEVATOR CO.,
Third-Party Defendant.

Third-Party Index No.
591000/2007

FILED

MAY 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

39 CAM, LLC, CAMMEBY'S REALTY CORP.,
CAMMEBY'S MANAGEMENT COMPANY,
LLC,
Second Third-Party Plaintiffs,

-against-

SCHINDLER ELEVATOR CORPORATION,
Second Third-Party Defendant.

Second Third-Party
Index No. 590576/2008

MARTIN SHULMAN, J.S.C.:

Motion sequences 002 and 003 are hereby consolidated for decision. In this personal injury action, second third-party defendant Schindler Elevator Corporation (Schindler) moves, pursuant to CPLR 3212, for summary judgment in its favor dismissing the second third-party complaint (Mot. Seq. 002). Defendants, third-party plaintiffs and second third-party plaintiffs 39 Cam, LLC, Cammeby's Realty Corp. and

Cammeby's Management Company, LLC (Cam Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, dismissing second third-party defendant Schindler's counterclaims for indemnification and contribution, or, in the alternative, granting them common-law indemnification and/or contribution as against Schindler (Mot. Seq. 003). Because the outcome of the second third-party action may depend on the disposition of the original action, the Cam Defendants' motion for summary judgment shall be examined first.

FACTUAL BACKGROUND

Plaintiff was allegedly injured on March 10, 2005 at 39 Broadway, New York County (the Building), when the doors of elevator car number 3 closed on her arm as she was entering. She claims to have suffered injuries to her right elbow, right arm, right wrist, shoulders and spine. The complaint serially identifies each Cam Defendant as the Building's owner, operator and/or manager.

Plaintiff commenced the instant action on September 18, 2007. The complaint asserts causes of action for negligence individually against each Cam Defendant (first, second and third), and for nuisance against the Cam Defendants collectively (fourth). Mot. Seq. 002, Exh. A.

The Cam Defendants filed the third-party complaint on November 9, 2007, asserting causes of action for negligence (first), common-law and/or contractual contribution (second) and common-law and/or contractual indemnification (third) against Mainco Elevator Co. (Mainco), which has failed to answer or appear. The third-party complaint claims that Mainco had a contract to maintain, service and repair the elevators in the Building at the time of the incident. The second third-party complaint

[* 4]

was filed on June 30, 2008, asserting causes of action for negligence (first), common-law and/or contractual contribution (second), and common-law and/or contractual indemnification (third) against Schindler. Mot. Seq. 002, Exh. C. The second third-party complaint claims that Schindler had a contract to service, maintain and repair the elevators in the Building at the time of the incident.

Previously, on March 31, 2006, plaintiff commenced an action against the Cam Defendants under New York County index number 104386/2006. That complaint charged that she was injured on April 1, 2003 when the doors of elevator car number 4 at the Building suddenly closed as she was entering it on the twelfth floor. She alleged injuries to her right elbow, right arm and right wrist. The Cam Defendants subsequently commenced a third-party action against Mainco, which had a contract to maintain the Building's elevators at the time of the incident. On December 20, 2011, this court granted motions dismissing the complaint and the third-party complaint. Mot. Seq. 002, Exh. U.

At a court conference on November 15, 2011, plaintiff was ordered to file a note of issue on or before December 30, 2011. *Id.*, Exh. V. As of January 23, 2013 when Schindler filed its motion for summary judgment, plaintiff had not done so.

EVIDENCE

Plaintiff was deposed on January 5, 2010. Motion, Exh. H (Lam Transcript).¹ The questioning began with the first incident on April 1, 2003. Plaintiff said that, prior to that incident, some people on an elevator in the Building "said, you know, you have to

¹ While the Lam Transcript references Lam's prior deposition on October 14, 2009, none of the parties has provided a transcript thereof. Lam Transcript at 6.

be careful of the door. They close so fast. Door close on you.” *Id.* at 17. She did not know the people. They were not addressing her, “but I was in there and I listen to what they said.” *Id.* at 20-21. She recalled that she was stuck between the doors of elevator car number 4 for “[f]ifteen minutes or longer” on April 1, 2003. *Id.* at 28. Consequently, she “remember[ed] touching the door every time I go into the elevator door” in order to keep the door open. *Id.* at 32.

Plaintiff testified that, on March 10, 2005, the doors to elevator car number 3 were open as she approached. *Id.* at 51. One man was already in the elevator. She said that she asked him to hold the doors but he did not. *Id.* at 56. He seems to have ignored her throughout the incident. *Id.* at 130, 132. Plaintiff testified that, as she entered the elevator car, the doors closed on her.² *Id.* at 56-57. She recalled that she fell against the far wall of the elevator, which then ascended. *Id.* at 66-68, 73. She got off on the 12th floor, where her office was located. The other passenger got off before she did. She went to her desk briefly and then went to an emergency room, where she was seen by a physician. She was given a prescription but no X-rays were taken. She went home afterwards. She said that the incident left her with no bruises. *Id.* at 157. Plaintiff underwent physical therapy regularly after the first incident and she continued after the second. In April 2009, she had surgery on her neck.

² While the complaint claimed that plaintiff “sustained[ed] serious injuries to her right elbow, right arm and right wrist” (Complaint, ¶ 23), she testified that the elevator door closed on her left side and “[h]it my left shoulder” (Lam Transcript at 127). She responded negatively when asked “did your right elbow contact any part of the elevator” and “did your right shoulder contact any part of the elevator.” *Id.* at 83.

* 6]

Willie Al-hammami (Al-hammami), a lobby attendant, completed an incident report based on information from plaintiff and Ron Going, the other elevator passenger. Mot. Seq. 002, Exh. S. Al-hammami wrote that plaintiff "told me that Elevator # 3 door closed on her arm and didn't open up." *Id.* at 2. He reported that she said that she was going to see her doctor and turned down his offer to seek medical assistance. *Id.* "Ms. Lam said that this is the second time this has happened." *Id.* The lobby attendant reported that he shut down the elevator car, called the New York City Department of Buildings (DOB) and called Schindler. According to the report, when "Inspector Waters," from DOB arrived, Al-hammami and the inspector spoke to Going, who was employed by another tenant in the Building. Going's account, as conveyed by Al-hammami, is inadmissible hearsay. No further mention of Going is made.

Schindler was the exclusive maintenance and service company for the Building's elevator in 2005. O'Reilly Aff. at 9; Mot. Seq. 002, Exh. M. Angelo Giamboi (Giamboi), a mechanic employed by Schindler for over 20 years, testified on May 27, 2010. Mot. Seq. 002, Exh. J (Giamboi Transcript). Giamboi had worked on the Building's elevators for the two years prior that Schindler was under exclusive contract. Generally, his communications with the Schindler office were conducted through a telecommunications device that he referred to as a "field link." *Id.* at 14-15.

Giamboi responded to a service call at the Building on the day of the incident, checked the indicated elevator car, found no problem and returned it to service. *Id.* at 29. While Giamboi had no independent recollection of the incident, he concluded that "there was no problem with the door," from reading the computerized incident report

* 7]

Schindler produced. *Id.* at 38. According to the incident report, "Inspector Waters" investigated the incident with Giamboi. *Id.* at 36. When shown a service ticket summarizing his visit in response to the reported incident, apparently a more concise record than the incident report, Giamboi acknowledged that it contained no indication that any repair or parts replacement took place. *Id.* at 45; Mot. Seq. 002, Exh. N. Giamboi was shown nine pages of service operation work reports, all dealing with elevator car number 3, collected by Schindler, including the service ticket for the incident. *Id.* at 53-54; Mot. Seq. 002, Exh. L. None reported any problems with the safety edge of elevator car number 3's doors.

James Waters (Waters), the DOB inspector, testified on June 29, 2010 that he visited the Building on the day of the incident to inspect elevator car number 3.³ Mot. Seq. 002, Exh. K (Waters Transcript). While he had no specific recollection of his visit that day, he said that he carries a gauge with him on elevator inspections that measures the closing force of the car doors. *Id.* at 33-34. A measurement exceeding 26 foot-pounds per second results in a violation. *Id.* at 34.

Waters said that an elevator car door's reopening device is tested literally by hand. A mechanical mechanism is allowed to close on the inspector's hand. If the door does not retract, a violation is issued and the elevator car shut down. *Id.* at 35. The operation of an electric eye is tested by placing a hand in the gap between the closing doors. If the doors do not stop and reopen, again a violation is issued and the elevator

³ By coincidence, Waters also inspected the Building's car number 4 after plaintiff's report of an accident on April 1, 2003. On that occasion, he "found no hazardous condition," although he issued a violation for another infraction, according to his inspection report. Waters Transcript at 14-16, 22-23.

car taken out of service. *Id.* at 36. A document retrieved from DOB's web site reported on his visit that "no violation warranted for complaint at time of inspection." *Id.* at 18-20; Mot. Seq. 002, Exh. T.

Robert Trambino (Trambino), a property manager with Cam Management, testified on May 27, 2010. Mot. Seq. 002, Exh. I (Trambino Transcript). Trambino had no personal knowledge of the incident but he reviewed documents before testifying, including an accident report prepared by Al-hammami. *Id.* at 6-7. Trambino acknowledged that no entry about the incident was made in the Building's log book, which was produced at his deposition. *Id.* at 22. He said that his firm had an elevator consultant to deal with all elevator-related issues in the four buildings in the vicinity that Cam Management managed at the time of the incident. *Id.* at 11-12.

Trambino testified that Schindler "replace[d] the existing mechanical edge[s] on the elevator doors] with the new electronic safety edge[s]," pursuant to a contract executed on May 5, 2004. *Id.* at 18; Mot. Seq. 002, Exh. P. Trambino said that the work was done at about the time of the contract. Trambino Transcript at 17-18.

The Cam Defendants submit the affidavit of Patrick A. Carrajat (Carrajat), "an elevator consultant," though not a licensed professional engineer. Carrajat states that he inspected the premises, reviewed the pleadings, the discovery responses (which included the elevator car's service records) and all the deposition transcripts. Carrajat aff, ¶ 6. He concludes that there is no evidence that the door closing mechanism was defective or broken at the time of the incident. *Id.*, ¶ 8.

Schindler, in its motion, submits an affidavit from Jon Halpern (Halpern), a licensed professional engineer. Mot. Seq. 002, Exh. R. Halpern states that he reviewed the documents and transcripts of testimony submitted by the parties and inspected the subject elevator. Halpern Aff. at 2. He concludes "that the elevator in question was maintained, serviced, inspected and, when necessary, repaired by the defendant, SCHINDLER ELEVATOR CORPORATION, in a reasonable and acceptable manner and in accordance with all applicable safety and industry standards." *Id.* at 2-3.

ANALYSIS

The Cam Defendants' Summary Judgment Motion – Mot. Seq. 003

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

To establish a prima facie case of negligence, "a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within

which to correct or warn about its existence.” *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st Dept), *affd* 64 NY2d 670 (1984). Actual notice arises when the defendant “create[s] or exacerbate[s] the conditions that caused plaintiff’s accident. . . .” *Blair v Richards*, 63 AD3d 610, 610 (1st Dept 2009). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986); *Piacquadro v Recine Realty Corp.*, 84 NY2d 967, 969 (1994) (“‘general awareness’ that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff’s fall”).

About two years apart, plaintiff allegedly suffered nearly-identical injuries under nearly-identical circumstances at her place of work. Significantly, she claimed that the doors of two different elevator cars closed on her arm and elbow unexpectedly. Otherwise, the record is free of any similar complaints from any source about elevator car number 3. Plaintiff’s assertion that she overheard a conversation about the hazardous condition of the Building’s elevators generally, sometime prior to April 1, 2003, is of no consequence here. *San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 591 (1st Dept 2012) (“Her assertion that she overheard, as she passed by, snippets of complaints made to the building superintendent [about the elevator] by unidentified neighbors is hearsay and therefore insufficient alone to defeat summary judgment”). Plaintiff’s allegation is more attenuated than that in *San Andres* because

plaintiff does not place anyone associated with the Cam Defendants in the overheard conversation.

Schindler's mechanic and a DOB inspector, who arrived shortly after the incident, found no problems with the elevator car, which was put out of service as soon as plaintiff informed Al-hammami, the lobby attendant, of the incident. Halpern, Schindler's expert, opined that the elevator was maintained, serviced, inspected and repaired in a reasonable manner, in accordance with all applicable safety and industry standards. Carrajat, the Cam Defendants' expert, stated that there was no evidence that elevator car number 3 was defective at the time of the incident. The equipment failure, if any, was transitory, and the Cam Defendants were never on notice of a defective condition. Under those circumstances, they were never presented with the opportunity to prevent injuries to plaintiff or any other elevator passenger. *Mitchell v New York Univ.*, 12 AD3d 200, 201 (1st Dept 2004) ("The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken").

Plaintiff relies upon the doctrine of *res ipsa loquitur* to hold the Cam Defendants responsible for her damages.

The doctrine of *res ipsa loquitur*, which may be invoked against a defendant that exclusively maintained an allegedly malfunctioning elevator, allows the factfinder to infer negligence from the mere happening of an event where the plaintiff presents evidence (1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event.

Miller v Schindler El. Corp., 308 AD2d 312, 313 (1st Dept 2003) (citations omitted).

In the instant action, however, plaintiff seeks to apply the doctrine of res ipsa loquitur to the Building's owners and managers, without any evidence that they had exclusive control of the elevator cars. No one disputes Schindler's role in maintaining, servicing and repairing the elevators under contract, which insulates defendants from the application of res ipsa loquitur.

[W]hile [defendant], as [owner's] agent, retained ownership of the elevators, it did not have anything to do with their maintenance or operation which would warrant the conclusion they did something, or failed to do something, that caused this accident. In sum, [defendant] did not exercise such a degree of control over the building's elevators to allow for the application of res ipsa loquitur to establish its liability for this accident.

Hodges v Royal Realty Corp., 42 AD3d 350, 352 (1st Dept 2007) (citations omitted).

Without resort to res ipsa loquitur, plaintiff must demonstrate actual or constructive notice to defendants of a hazardous condition, which she has been unable to do. The complaint charges that each defendant "had notice and knowledge of the existence of the dangerous condition of the Elevator for a long period of time before the accident hereinafter described." Complaint, ¶¶ 25, 49 and 75. Plaintiff offers no facts in support of these assertions. Accordingly, the Cam Defendants' motion for summary judgment dismissing the first, second and third causes of action for negligence is granted.

The fourth cause of action alleges that "the negligent maintenance and repair of the elevator constituted a nuisance." *Id.*, ¶ 81. The Cam Defendants do not address this in their summary judgment motion. However, since the complaint only announces, but fails to state a cause of action for nuisance, the issue should be resolved at this time. "Where a nuisance arises solely from negligence, the nuisance and negligence

elements may be so intertwined as to be practically inseparable and any attempt to separate them is a useless task." *Morello v Brookfield Constr. Co., Inc.*, 4 NY2d 83, 90 (1958) (internal quotation marks and citation omitted). "Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct." *Berenger v 261 W. LLC*, 93 AD3d 175, 182 (1st Dept 2012). Plaintiff has not provided any proof of the Cam Defendants' negligence and the attempt to identify an element of nuisance in their conduct is unavailing. Accordingly, the fourth cause of action for nuisance is dismissed.

The Cam Defendants, as second third-party plaintiffs, also move to dismiss second third-party defendant Schindler's counterclaims for indemnification and contribution, or, in the alternative, granting them common-law indemnification and/or contribution as against Schindler. The Cam Defendants argue that, in the absence of their negligence, Schindler does not have a basis to recover from them. "Consistent with the equitable underpinnings of common-law indemnification, our case law 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); *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept 1999) ("The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party"). In fact, with the complaint's dismissal, no one is being held liable for damages. Therefore, the Cam Defendants' motion to dismiss Schindler's

counterclaims is granted. Coincidentally, the Cam Defendants' application for common-law indemnification and/or contribution as against Schindler is denied as moot.⁴

Schindler's Summary Judgment Motion – Mot. Seq. 002

Schindler moves, pursuant to CPLR 3212, for summary judgment in its favor dismissing the second third-party complaint and all claims as against it. The second third-party complaint was the Cam Defendants' attempt to deflect responsibility for any of plaintiff's alleged injuries from the incident of March 10, 2005. It raised the charges that Schindler's carelessness, recklessness and negligence caused plaintiff's alleged injuries, if any carelessness, recklessness and/or negligence were involved. As discussed above, there are no triable issues of fact ascribing negligence in the servicing, maintenance and/or repair of the Building's elevator car number 3 as pertains to the March 10, 2005 incident. Thus, Schindler's motion for summary judgment dismissing the second third-party complaint is granted.

Accordingly, it is

ORDERED that second third-party defendant Schindler Elevator Corporation's motion for summary judgment dismissing the second third-party complaint is granted, and the second third-party complaint is dismissed with costs and disbursements to said

⁴ In their second third-party complaint, the Cam Defendants assert that their maintenance agreement with Schindler was in full force at the time of the incident and, since any injuries plaintiff suffered "were the direct and proximate result of the carelessness, recklessness, and negligence" of Schindler, they were entitled to common-law and/or contractual contribution, and common-law and/or contractual indemnification from Schindler. Second Third-Party Complaint, ¶ 16. In its partial opposition to Schindler's summary judgment motion (below), the Cam Defendants withdrew their contractual indemnification claim and submitted a stipulation of discontinuance to that effect. Warshaw Opp. Aff., n 1 and Exh. A.

second third-party defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs (Mot. Seq. 002); and it is further

ORDERED that the portion of defendants, third-party plaintiffs and second third-party plaintiffs 39 Cam, LLC, Cammeby's Realty Corp. and Cammeby's Management Company, LLC's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants, third-party plaintiffs and second third-party plaintiffs as taxed by the Clerk of the Court upon submission of an appropriate bill of costs (Mot. Seq. 003); and it is further

ORDERED that the portion of said defendants, third-party plaintiffs and second third-party plaintiffs' motion for summary judgment dismissing second third-party defendant Schindler's counterclaims for indemnification and contribution is granted (Mot. Seq. 003); and it is further

ORDERED that the portion of said defendants, third-party plaintiffs and second third-party plaintiffs' motion for summary judgment granting common-law indemnification and/or contribution as against Schindler is denied as moot (Mot. Seq. 003); and it is further

ORDERED that the Clerk shall enter judgment accordingly.

The foregoing is 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
May 7, 2013



HON. MARTIN SHULMAN, J.S.C.

FILED

MAY 09 2013