SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 59

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SUHEE GOODLOW,

Plaintiff,

-against-

724 FIFTH AVENUE REALTY LLC, DAVID FRANKEL REALTY, INC., DUNWELL ELEVATOR ELECTRICAL INDUSTRIES, INC. and LANDMARK ELEVATOR CONSULTANTS, INC.,

Defendants.

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Index No. 31688/08
Motion Calendar Nos. 20, 21
January 28, 2013

DECISION AND ORDER
Jack M. Battaglia
Justice, Supreme Court

Recitation in accordance with CPLR 2219 (a) of the papers submitted on the motion of defendants 724 Fifth Avenue Realty LLC and David Frankel Realty, Inc. for an order, among other things, pursuant to CPLR 3212, dismissing the Verified Complaint as against them; and the cross-motion of defendant Dunwell Elevator Electrical Industries, Inc. for an order, among other things, presumably pursuant to CPLR 3212, dismissing the Verified Complaint as against it:

- Notice of Motion for Summary Judgment
  Affirmation in Support
  Exhibits 1-12
- Notice of Cross-Motion
  Affirmation in Support
- Affirmation in Opposition
  Exhibits A-C
- Affirmation in Opposition
- Affirmation in Partial Opposition to Cross-Motion
- Reply
- Reply Affirmation
  Exhibit A

The Verified Complaint of plaintiff Suhee Goodlow alleges that she sustained personal injuries on March 3, 2008 when "[s]he was in an elevator" at 724 Fifth Avenue, New York County, and "[t]he elevator dropped and moved up and down" (*see* Verified Complaint ¶ 42.) In her Verified Bill of Particulars she alleges that she "was struck by the elevator door," and that Defendants were negligent, among other things, "in causing, permitting and allowing the aforesaid elevator to mislevel . . . suddenly and uncontrollably without warning," and "in failing to prevent the . . . elevator . . . mislevelling suddenly and uncontrollably without warning." (*See* Verified Bill of Particulars ¶¶ 11, 12.)

With this motion, defendants 724 Fifth Avenue Realty LLC and David Frankel Realty, Inc. (the "Building Defendants"), the owner and managing agent, respectively, of the property at 724 Fifth Avenue seek an order, among other things, pursuant to CPLR 3212, dismissing the Verified Complaint as against them, as well as all cross-claims, and granting them judgment on their cross-claims against defendant Dunwell Elevator Electrical Industries, Inc. for contractual and common-law indemnification. With a purported "cross-motion," Dunwell also seeks dismissal of the Verified Complaint as against it, purportedly pursuant to 3212, as well as all cross-claims.

First, to the extent that Dunwell's motion seeks dismissal of the Verified Complaint as against it, the motion must be denied as untimely. Plaintiff filed her note of issue on June 8, 2012. Dunwell's motion was not served until September 10, 2012, beyond the 60-day deadline imposed by Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, and Dunwell makes no showing of good cause for non-compliance. (*See Deberry-Hall v County of Nassau*, 88 AD3d 634, 635 [2d Dept 2011]; *Popalardo v Marino*, 83 AD3d 1029, 1030 [2d Dept 2011].)

To the extent, however, that Dunwell's motion seeks dismissal of the cross-claims asserted against it by the Building Defendants, it tracks the same subject matter as their motion, and will be considered. (*See Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d 737, 738-39 [2d Dept 2011]; *Whitehead v City of New York*, 79 AD3d 858, 860 [2d Dept 2010].) In support of its motion, Dunwell relies on the same material that the Building Defendants rely on in support of their motion.

"A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact." (*Guiffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) The movant must "tender . . . evidentiary proof in admissible form" (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1076 [1979].) "Once this showing has been made, 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." (*See Guiffrida v Citibank Corp.*, 100 NY2d at 81.)

In support of their motion, the Building Defendants submit, among other things, a transcript of the examination before trial of Plaintiff, which is neither certified by the reporter, nor signed by the deponent or shown to have been submitted to her for review pursuant to CPLR 3016; two transcripts of the examination before trial of Peter Schweitz, produced by the Building Defendants for deposition, one of which is both signed by the deponent and certified by the reporter, the other of which is not signed by the deponent but certified by the reporter; and a transcript of the examination before trial of Al Milo, produced by Dunwell for deposition.

Since the transcripts of the examinations of Mr. Schweitz and Mr. Milo were certified by the reporter, and were submitted directly or indirectly (in the case of Dunwell) by the party who

produced the deponent, they are admissible as evidence on these motions. (*See Vetrano v Kokolakis Contr., Inc.*, 100 AD3d 984, — [2d Dept 2012].) But the transcript of Plaintiff's examination before trial is not admissible as evidence on this motion. (*See Matter of Delgatto*, 82 AD3d 1230, 1231 [2d Dept 2011]; *Martinez v 126-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902 [2d Dept 2008]; *Delishi v Property Owner (USA) LLC*, 31 Misc 3d 661, 665-66 [Sup Ct, Kings County 2011].)

Nonetheless, Plaintiff and the Building Defendants agree that Plaintiff alleges being struck by closing elevator doors as she was entering the middle elevator on the fifth floor of the building (*see* Affirmation in Support ¶ 10; Affirmation in Opposition ¶ 7.) The Court, therefore, accepts that description of the mechanism of Plaintiff's alleged injury for purposes of these motions, and treats the allegations of elevator "misleveling" as inapposite.

"A property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect . . . , or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect." (*Tucci v Starrett City, Inc.*, 97 AD3d 811, 812 [2d Dept 2012]; *Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011]; *Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 883 [2d Dept 2010]; *Greene v City of New York*, 76 AD3d 508, 508-09 [2d Dept 2010].) There is no contention on the Building Defendants' motion that defendant David Frankel Realty, Inc. would not be liable to Plaintiff under the same circumstances. (*See Rogers v Dorchester Assoc.*, 32 NY2d 553, 563 [1973].)

"As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof but must affirmatively demonstrate the merits of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004] [quoting *Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 (4th Dept 1992)]; *see also River Ridge Living Ctr., LLC v ADL Data Sys., Inc.*, 98 AD3d 724, 725-26 [2d Dept 2012].) A defendant in a premises liability action, therefore, must establish, at least *prima facie*, the basis for an affirmative defense, or must negate, at least *prima facie*, as essential element of the plaintiff's cause of action. (*See Shafi v Motta*, 73 AD3d 729, 730 [2d Dept 2010]; *Vittorio v U-Haul Co.*, 52 AD3d 823, 823 [2d Dept 2008]; *Falah v Stop & Shop Cos., Inc.*, 41 AD3d 638, 639 [2d Dept 2007]; *DeFalco v BJ's Wholesale Club, Inc.*, 38 AD3d 824, 825 [2d Dept 2007].)

Here, the Building Defendants contend, "Plaintiff's Complaint Should Be Dismissed Because 724 Fifth Was Not Negligent and *Res Ipsa Loquitur* Does Not Apply to the Facts of This Case" (*see* Affirmation in Support ¶¶ 20-32.) The Court notes that no express contention or showing is made on behalf of defendant David Frankel Realty, Inc. In any event, the Building Defendants' pointing out that Plaintiff cannot rely on the doctrine of *res ipsa loquitur* to make her *prima facie* case on liability does not carry the movant's burden on this motion, even if they are correct (*see Feblot v New York Times Co.*, 32 NY2d 486, 494-96 [1973]; *Levine v City of New York*, 67 AD3d 510, 511 [1st Dept 2009]; *Lasser v Northrop Gumman Corp.*, 55 AD3d 561, 562 [2d Dept 2008]; *Cox v Pepe-Fareri One, LLC*, 47 AD3d 749, 749-50 [2d Dept 2008];

Johnson Noveau El. Indus., Inc., 38 AD3d 611, 613 [2d Dept 2007]; *Graham v Wohl*, 283 AD2d 261 [1st Dept 2001]; *but see Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 298-99 [1st Dept 2007].)

Moreover, "in all negligence cases the fact of negligence can be proven circumstantially"; "[i]f the jury believes that the [elevator] door closed the way plaintiff testifies, then that is circumstantial evidence that the mechanism which controlled it may have been defective or poorly maintained." (*See Feblot v New York Times Co.*, 32 NY2d at 494-95; *see also Rogers v Dorchester Assoc.*, 32 NY2d at 559 ["*res ipsa loquitur* aside, circumstantial evidence of sufficient probative force to infer negligence"].)

The Building Defendants contend that "[t]he evidence in the case establishes that the elevator door was functioning properly before and after the accident and that, even if a defect existed, 724 Fifth did not have actual or constructive notice of such defect" (*see* Affirmation in Support ¶ 30.) Movants do not relate any of the "Facts" as they see them (*see id.*, ¶¶ 8-19) to either their contention that the elevator was not defective or their contention that, if defective, they had no notice of it, leaving it to the Court to speculate as to which of the evidence submitted might support one or the other contention.

As to the contention that the elevator was not defective on the date of the alleged incident, the Building Defendants summarize the deposition testimony of Peter Schweitz, described as the "building manager," "responsible for the day-to-day operations," that, when informed of the incident, he called "Paul," a "mechanic" with Dunwell, who inspected the elevator door in Mr. Schweitz's presence and reported that "everything was in the benchmarks of the elevator codes." (*See* Affirmation in Support ¶ 12.) "[T]he mechanic had a gauge that checks the pressure of the door when it is closing, and the speed was checked – everything was operating normally."

The opinion of "Paul," the "mechanic," is of course, purely hearsay to the extent it is offered to show that the elevator was not defective on the date of the incident. There is no testimony by "Paul," by deposition or affidavit, as to his opinion. Moreover, although an employee of an elevator maintenance contractor may qualify to render expert opinion if he possesses "sufficient skill, knowledge and experience in elevator maintenance and repair to support an assumption that his opinion . . . [is] reliable," the Building Defendants "failed to submit evidence demonstrating that ["Paul"] possesse[s] such skill, knowledge and experience." (*See Schecter v 3320 Holding LLC*, 64 AD3d 446, 450 [1st Dept 2009].) Although a contemporaneous inspection may be sufficient to establish *prima facie* that an elevator was not defective if the inspection is performed by, say, a governmental inspector (*see Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2d Dept 2010]), "Paul's" reported opinion is conclusory, and does not "cite to any specific elevator safety code provisions" (*see Greene v City of New York*, 76 AD3d at 509].)

As to actual notice, Mr. Schweitz testified that, prior to the date of the alleged incident, there were no complaints that the subject elevator had malfunctioned; he had never been advised that "anyone was struck by the elevators"; he never had to call Dunwell "to perform work on the

elevator doors"; and no repairs had been made to the doors in the subject elevator, which "has a history of operating properly." (*See* Affirmation in Support ¶¶ 12, 14.) Although it appears that on the date of the alleged incident Mr. Schweitz was a person who would have received information about a complaint or problem (*see Scheifla v Benckmark Mgmt. Corp.*, 221 AD2d 815, 816 [4th Dept 2000]), he had only been the building manager "since 2008" (*see* Affirmation in Support ¶ 12), and the alleged incident occurred on March 3, 2008. The Building Defendants point to no evidence that would show the likelihood of his becoming aware of complaints and problems before 2008, nor does he "indicate the sources (e.g. documents he may have searched or reviewed, or persons he consulted) of his familiarity with" the history of elevator performance (*see Barraillier v City of New York*, 12 AD3d 168, 169 [1st Dept 2004]; *see also Dempsey Inter-continental Hotel Corp.*, 126 AD2d 477, 479 [1st Dept 1987]; *Whitfield v City of New York*, 16 Misc 3d 1115 [A], 2007 NY Slip Op 51433 [U], [Sup Ct, Kings County 2007], *aff'd* 48 AD3d 798 [2d Dept 2008].)

As to constructive notice, where a malfunctioning elevator door "was apparent for a sufficient length of time prior to the accident to have permitted the [building owner] to discover and remedy it," notice will be found. (*See Lesman v Weinrib*, 221 AD2d 601, 602 [2d Dept 1995].) "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." (*Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 880 [2d Dept 2012] [internal quotation marks and citation omitted]; *see also Pechman v Vista at Kingsgate Section II*, 97 AD3d 732, 733-34 [2d Dept 2012].) The rule is not limited to transient conditions. (*See Levine v Amverserve Assn., Inc.*, 92 AD3d 728, 729 [2d Dept 2012]; *Jackson v Jamaica First Parking, LLC*, 91 AD2d 602, 603 [2d Dept 2012].) "Refere[nce] to general inspection practices of the premises in question" is not sufficient. (*See id.*)

The Building Defendants do not point to any evidence as to the last inspection prior to the March 8, 2008 incident that would have detected any defect in the mechanism controlling the doors of the subject elevator. Documents described as "Dunwell maintenance records" (*see* Affirmation in Support ¶¶ 13, 15) are included among the motion papers, including a report dated February 14, 2008 stating only, "Performed maintenance on elev." The records are not shown to be admissible as evidence, perhaps as business records, so that they might be considered in support of the motion (*see* CPLR 4518 [a]; *JP Morgan Chase Bank, N.A. v RADS Group, Inc.*, 88 AD3d 766, 767 [2d Dept 2011]; *Shafi v Motta*, 73 AD3d at 730]; *Whitfield v City of New York*, 48 AD3d at 799.)

Perhaps more importantly, the Building Defendants do not point to any inspection record, even as supplemented with the explanation of a qualified expert, that reports an inspection that would have detected a defect in the subject elevator as alleged here. The deposition testimony of Al Milo, Dunwell's President, as described by movants (*see* Affirmation in Support ¶ 17), addresses only general monthly inspection and maintenance.

The Building Defendants have "failed to establish [their] prima facie entitlement to judgment as a matter of law on the issue of the defect alleged by the plaintiff by showing either that the elevator was not in a defective condition at the time of the plaintiff's accident, or that it lacked constructive notice of the defect which allegedly caused the plaintiff's injuries." (*See Hudson v Tower El.*, 60 AD3d 906, 907 [2d Dept 2009]; *Bonifacio v 910-930 S. Blvd. LLC*, 295 AD2d 86, 91 [1st Dept 2002].)

Although the Court need not consider Plaintiff's opposition (*see Hudson v Tower El.*, 60 AD3d at 907), the Court notes that Plaintiff submits the Expert Affidavit of Patrick A. Carrajat, who describes himself as an "elevator consultant" and "elevator expert." Among other things, Mr. Carrajat asserts that applicable industry guidelines and practice, incorporated into the New York City Building Code, delineate requirements for both door speed and closing force, "dictate that door closing force be tested annually at a minimum," and establishes the "maximum closing force for a passenger elevator is thirty foot pounds of force," but that the Dunwell maintenance records he reviewed, presumably those provided by movants here, do not show compliance by Dunwell (*see* Expert Affidavit ¶ 7 [b], [e].) An Affidavit of Dunwell's President submitted in reply states that the required testing was done and that "the elevator door closing force was 28 pounds which was well within the code guidelines" (*see* Affidavit ¶ 5), but no evidence in admissible form is provided.

To the extent, therefore, that the Building Defendants seek dismissal of the Verified Complaint as against them, the motion is denied.

Turning to the cross-claims alleged against Dunwell in the Building Defendants' Verified Answer to Complaint With Cross Claims, the movants make no showing that Dunwell failed to obtain liability insurance coverage for the benefit and in the name of the Building Defendants, or that Dunwell failed to take good care of and make necessary repairs to the premises. To the extent, therefore, that the motion seeks judgment on the Third and Fourth Cross-Claims, it is denied.

To the extent that the Building Defendants seek judgment on the first alleged cross-claim, seeking common-law indemnification or contribution, the motion must be denied as premature in the absence of a determination as to the respective fault, if any, of Defendants. (*See Rogers v Dovchester Assoc.*, 32 NY2d at 562-66; *Montolio v Negev LLC*, 86 AD3d 483, 484 [1st Dept 2011]; *Spinelli v Vornado Burnside Plaza, LLC*, 85 AD3d 897 [2d Dept 2011]; *Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635, 636 [1st Dept 2010].)

The Second Cross-Claim seeks indemnification pursuant to a provision of Elevator Maintenance Contract Specifications (Full Service) dated December 1, 2002, which requires that Dunwell indemnify the building owner "on account of injury to persons . . . arising out of the performance of" the parties' contract, "except from and against . . . claims and demands arising solely and directly out of the negligence" of the building owner. "[A] contract assuming an obligation of indemnification must be strictly construed to avoid reading into it a duty which the

parties did not intend to be assumed." (*Talapin v One Madison Ave. Condominium*, 63 AD3d 909, 911 [2d Dept 2009].)

The Court assumes for purposes of the Building Defendants' motion that they have shown *prima facie* the absence of "active negligence" on their part, such that they may seek indemnification from Dunwell pursuant to the indemnification provision. (*See Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d at 300.) But indemnification must still be shown to be called for by the language of the contractual provision. The Building Defendants make no showing of any negligence of Dunwell; indeed, they show no act or omission by Dunwell that contributed to the alleged incident. Unless "arising out of the performance of" the parties' contract is understood to mean that Dunwell's obligation to indemnify applies to any claim that alleges injury by reason of the operation of an elevator, there is no *prima facie* showing of coverage under the contractual indemnification provision. Such an interpretation of the provision, which would, in effect, make Dunwell an insurer against any claim that involves an elevator, is not required by the language of the provision, and cannot be adopted without, at least, evidence that the parties so intended. There is no such evidence on this motion.

To the extent, therefore, that the Building Defendants seek a judgment of conditional indemnification on their Second Cross-Claim, the motion is denied.

To the extent that Dunwell's cross-motion seeks dismissal of the cross-claims of the Building Defendants, it, too, must be denied. Dunwell makes no showing in support of this aspect of its cross-motion, beyond what would follow from its showing in support of dismissal of Plaintiff's Verified Complaint as against it. As noted above, Dunwell relies on the same material that is submitted and relied upon by the Building Defendants in support of their motion.

"An 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." (*Rogers v Dorchester Assoc.*, 32 NY2d at 559; *see also Devito v Centennial El. Indus., Inc.*, 90 AD3d 595, 596 [2d Dept 2011].) Based as it is on the same material that has been found insufficient to make a *prima facie* showing for dismissal of the Verified Complaint as against the Building Defendants, Dunwell's cross-motion is insufficient to establish Dunwell's freedom from fault for purposes of making a *prima facie* showing for dismissal of any cross-claim, and that assumes that the contractual indemnification provision requires Dunwell's fault.

The motion and cross-motion are denied.

March 4, 2013

Jack M. Battaglia
Justice, Supreme Court

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