NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

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JOSEPHINE MEDINA,

Plaintiff,

-against-

Index No. 306883-2012

Decision and Order

RIVERBAY CORPORATION, VER-TECH ELEVATOR CO., INC. and ALLIANCE ELEVATOR COMPANY,

Howard H. Sherman
J.S.C.

Defendants

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The following papers numbered 1 to 7 read on this motion noticed on January 10, 2013 and duly submitted on the Motion Calendar of March 29, 2013.

	PAPERS NUMBERED	
Notice of Motion-Exhibits and Affirmation Annexed	1	2
Answering Affidavit and Exhibits	4	5
Replying Affidavit and Exhibits	7	
Memoranda of Law	3	6

Upon the foregoing papers this motion by defendants A-I Elevator Technologies, Inc. ("A-I Elevator) s/h/a Ver-Tech Elevator Co., Inc. ("Ver-Tech Elevator "), and Alliance Elevator Company ("Alliance Elevator") for : 1) an order pursuant to CPLR 3211(a)(1) and (7) dismissing and severing the plaintiff's amended complaint against A-I Elevator, or alternatively, 2) for summary judgment in favor of A-I dismissing and severing the amended complaint and cross-claims against it, or 3)an order pursuant to CPLR

3211(a)(1)(7) and (8) dismissing and severing the amended complaint against Ver-Tech Elevator as no such jural entity exists, or 4) for an order amending the caption to reflect the correct name of A-I and to delete Ver-Tech is decided as set forth below.

Facts and Procedural Background

Plaintiff seeks damages for personal injuries alleged to have been sustained on December 29, 2011, when an elevator door abruptly closed causing her to trip and fall. The incident occurred within residential premises owned by defendant Riverbay Corporation ("Riverbay") within the Co-Op City residential development.

By contract with Riverbay for the period January 1, 2010[1] through July 22, 2010, defendant Ver-Tech Elevator was required to provide maintenance services for the elevators in Co-Op City. In July , 2010 , the service contact was assigned to Elevator Ventures Corporation (Elevator Ventures").

In August 2012, plaintiff commenced this action asserting one negligence cause of action against Riverbay, and Ver-Tech Elevator, and Elevator Ventures premised on the ownership, maintenance , control , management, operation , inspection and servicing of the subject elevator.

In October, Alliance Elevator Company, Inc. s/h/a Elevator Ventures Corporation ("Alliance") answered the complaint, Elevator Ventures, no longer existing, having merged into Alliance. The answer asserted twenty-four affirmative defenses and interposed cross-

[1] The contract was awarded pursuant to a bidding process, with the Order to Proceed established as of 01/01/10.

claims for indemnification and contribution against Riverbay.

A-I Elevator Technologies, Inc. s/h/a Ver-Tech Elevator Co Inc. ("A-I Elevator") also served an answer in October, which asserted twenty-six affirmative defenses and interposed a cross-claim for contribution and indemnification against Riverbay.

By supplemental summons dated November 20, 2012, Elevator Ventures was deleted as a party defendant, and Alliance added.

In December 2012, Riverbay served its answer to the amended complaint interposing cross-claims against Ver-Tech Elevator and Alliance for common law and contractual indemnification and for breach of the obligation to procure insurance.

Motion

A-I Elevator and Alliance move alternatively for CPLR 3211(a)(1) and (7) dismissal and severance of the complaint and cross-claims as asserted against A-I Elevator, or alternatively for an award of summary judgment dismissal on the grounds that at the time of the accident, A-I Elevator neither owned, nor operated, nor maintained or controlled, the subject elevator, the service contract with Riverbay having been assigned in July 2010.

Defendants also seek dismissal of the claims against Ver-Tech as it is not a jural entity.

Alternatively, if it is determined that the claims continue, defendants request that the caption be amended to reflect the correct name of the party defendant, i.e., A-I Elevator Technologies, Inc.

The motion is supported by records certified by the State of New York Department of State, including as filed on 8/17/10, a Certificate of Amendment of the Certificate of Incorporation of the previous day, whereby Ver-Tech Elevator's corporate name was changed to "A-I Elevator Technologies, Inc." In addition, the motion is supported by the affidavit of Donald Gelestino ("Gelestino"), A-I Elevator's president and chief executive officer. Gelestino also served in the same capacity for Ver-Tech. In pertinent part, he attests that following the July 2010 sale by Ver-Tech Elevator of its servicing contracts, including those with Riverbay, Ver-Tech Elevator changed its name to A-I Elevator. The service contracts were assigned with the approval of Riverbay, to the purchaser, Elevator Ventures. [2]

Copies of the contracts and the assignment are annexed as exhibits, as is the New York State Division of Housing and Community Renewal Change Order executed by Ver-Tech Elevator and Riverbay in December 2010.

In opposition, **plaintiff** submits a copy of a January 31, 2012 letter from Riverbay advising plaintiff's counsel that their elevators "are currently serviced by Ver-Tech Elevators." In addition, it is argued that as Ver-Tech had an agreement to service the elevators, the change in corporate identity does not relieve A-I Elevator of this contractual obligation. It is maintained that the moving papers fail to sustain defendants' burden to

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[2] Elevator Venture subsequently merged with defendant Alliance [Affidavit of Donald Gelestino ¶ 9]. A copy of the Certificate of Merger as certified by the Secretary of State of the State of Delaware is annexed as Exhibit C.

prove that the documentary evidence submitted resolved all issues as a matter of law. Nor, it is argued, do defendants established entitlement to 3211(a)(7) relief as the pleadings state a cognizable cause of action.

In opposition, Riverbay contends that as minimal discovery has been conducted, the motion for dispositive relief is premature, especially as the complete contract and all insurance policies required to have been procured have yet to be procured.

Riverbay also argues that since it is yet unclear on this record whether the elevator malfunction alleged was caused by a repair , or by a part installation by Ver-Tech Elevator prior to the July 2010 assignment, so is the issue as to whether Ver-Tech "may be liable for all or part of plaintiff's incident and damages."

Finally, Riverbay maintains that the motion must be denied as procedurally defective as lacking an attorney's certification pursuant to 22 NYCRR 130-1.1(a).[3]

In reply, defendants argue that plaintiff's papers in opposition fail to address their showing that Ver-Tech Elevator is not a jurial entity subject to suit, and contend that documentary evidence including the complete contract demonstrates dispositively that with the owner's consent, Riverbay's contractual relationship with A-I Elevator terminated nearly eighteen months before the incident, and as a matter of law, at the time of the incident, the service contractor owed plaintiff no duty of care.

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[3] The Notice of Motion filed with the court incorporates such a certification.

Discussion and Conclusions

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence relied on by the defendants must "conclusively establish" the defense to the asserted claims as a matter of law (see, Leon v Martinez, 84 NY2d 83, 88; 638 NE2d 511 [1994]; David v. Hack, 97 A.D.3d 437, 438; 948 N.Y.S.2d 583 [1st Dept. 2012]).

As here, for purposes of a dispositive motion by an elevator maintenance company no longer contractually obligated to service and/or repair the subject elevator, " a plaintiff must be able to point to specific evidence from which it may be reasonably inferred that such company, while its contract was in effect, was negligent in the discharge of its duties, and that such negligence was causally related to the accident." Karian v. G & L Realty , LLC., 32 A.D.3d 261,264, 820 NYS2d 231 [1st Dept. 2006].

Upon review of the record here, it is submitted that the moving defendants have by documentary evidence conclusively established defendant's defense that at the time of the accident, and for a period of seventeen months prior to it, A-1 Elevator f/k/a/ Ver-Tech Elevator neither owned, nor maintained, nor controlled , nor managed or operated, nor contractually was obligated either to inspect or to service the subject elevator, and that since the assignment of July 2010, defendant Alliance Elevator assumed the obligations of the maintenance contract.

Where, as here, the defendants have presented documentary evidence, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he has stated one (see, Leon v. Martinez, 84 N.Y.2d 83, 88 638 N.E.2d 511 [1994]; see also , Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17 [1977]

In opposition to this showing neither plaintiff nor Riverbay come forward with any documentation to refute defendants' conclusive showing of the July 2010 assignment , or to evidence any theory posited here that the causative defect might be attributed to Ver-Tech Elevator's negligence in discharge of its contractual duties between January and July 2010.

It is submitted that such documents , including work orders and repair requisitions for the subject elevator would be retained by the owner and be readily available for its review, and not within the exclusive knowledge of the movant (see, Voluto Ventures, LLC v. Jenkens & Gilchrist ParkerChapin, LLP., 44 A.D.3d 557, 843 NYS2d 630 [1st Dept. 2007]).

For the reasons above-stated, the motion is granted pursuant to CPLR 3211(a)(1).

This constitutes the decision and order of this court.

Dated: January 2, 2014

Howard H. Sherman