

Del Valle v Fujitec Am., Inc.

2014 NY Slip Op 30731(U)

March 20, 2014

Supreme Court, New York County

Docket Number: 100568/12

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 100568/2012
DEL VALLE, OSCAR E.
vs.
FUJITEC AMERICA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 100568/12
MOTION DATE 12/5/14
MOTION SEQ. NO. 001

The following papers, numbered 1 to 20, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-18
Answering Affidavits — Exhibits initial app _____ | No(s). 19
Replying Affidavits _____ | No(s). 20

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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

MAR 26 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/20/14

[Signature]
JOAN M. KENNEY J.S.C.

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

- 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: IAS PART 8

----- X
OSCAR E. DEL VALLE,

Plaintiff,

DECISION AND ORDER
Index No. 100568/2012

- against-

FUJITEC AMERICA., INC., BOCA GROUP
INTERNATIONAL, INC., AKAM ASSOCAITES,
INC., THE FUTURE CONDOMINIUM, BOARD
OF MANAGERS OF THE FUTURE CONDOMINIUM,
and 32ND STREET REALTY, LLC,
Defendants.

----- X
JOAN M. KENNY, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This personal injury action results from an alleged sudden stop in an elevator on August 23, 2011, in a condominium apartment building known as The Future Condominium at 200 E. 32d Street (the Condominium) in Manhattan.

The verified complaint alleges that the plaintiff was caused to fall to the elevator floor, suffering severe personal injuries. The complaint also alleges that both the Condominium and nonmoving defendant 32nd Street Realty, LLC (32nd Street Realty) own the building that houses the elevator. In their respective answers, the Condominium admits that it is the owner, and 32nd Street Realty denies knowledge whether it is the owner.

The undisputed cause of the incident, as determined by the NYC Department of Buildings (DOB) accident report (exhibit K to Morris aff) on the day of the incident, is that at least one strand or lay of the steel governor cable broke, unraveled and

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jammed in the governor sheave or pulley, stopping the elevator. Contemporaneous photographic evidence shows the cable jammed in the sheave with the unraveled strand preventing it from passing through the sheave (see exhibit L to Morris aff).

Plaintiff alleges that defendants Fujitec America, Inc. (Fujitec), the elevator company that maintained and regularly inspected the elevator, and defendant Boca Group International, Inc. (Boca), the independent company that witnessed the inspections as required by § 28-304.6.1. of the Administrative Code of the City of New York (Administrative Code)¹, were negligent in failing to discover alleged excessive wear and breaks in the strands of the governor cable, and that Fujitec was negligent in failing to require that the cable be replaced.

In motion sequence no. 001, the Condominium, and its managing agent, Akam Associates, Inc. (Akam), move for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross claims as against them, and awarding them judgment on their

¹ Section 28-304.6.1, captioned, "Inspection and testing entities," provides, as pertinent, that "[t]he required periodic [elevator] inspections shall be made by the department [of buildings], except that one inspection and test for elevators and escalators shall be made between January first and December thirty-first of each year on behalf of the owner by an approved agency in accordance with this code and with rules promulgated by the commissioner. Required inspections and tests performed on behalf of the owner shall be performed by an approved agency in accordance with rules of the department *and witnessed by an approved agency not affiliated with the one performing the test* [emphasis supplied]."

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respective cross claims for conditional common-law indemnity against Fujitec and Boca.

In motion sequence 002, Boca moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against Boca.

Plaintiff Oscar E. Del Valle cross-moves, pursuant to CPLR 3212, for partial summary judgment of liability against Fujitec.

Neither Fujitec nor defendant 32nd Realty, LLC has submitted a contemporaneous motion for relief.

Pursuant to the terms of an "extended full maintenance agreement," between Akam and Fujitec (exhibit M to Laird aff), Fujitec agreed to perform inspection and maintenance services for the elevator. There is no express provision indemnifying Akam, the condominium, or 32nd Street Realty.

Pursuant to the terms of a consulting agreement between Akam and Boca (exhibit L to Laird aff), Boca agreed to serve as the witnessing agent for the periodic inspections and testing of the elevators as required by section 28-304.6.1. of the Administrative Code.

In January 2011, Gelu Dumitru (Dumitru), the elevator mechanic employed by Fujitec, performed the annual inspection of the elevator and found no reason to replace the cable. On July 1, 2011, Dumitru again inspected the governor cable, and again found no cause for replacement of the cable. On July 28, 2011,

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the governor cable was again inspected, this time by the DOB, and no reason to replace it was discovered.

The DOB inspected the elevator one hour after the incident, and concluded that it was caused by a worn and frayed governor cable. Dumitru testified at his deposition that he inspected the broken cable several days after the accident, and did not see any breaks in the cable other than the broken strand (exhibit H to Laird aff at 119). Fujitec replaced the broken cable approximately 10 days after the accident (see exhibit G to Wade aff at 56).

On October 9, 2012, more than a year after the incident, an inspection of the frayed cable was conducted, attended by the two experts who submitted affidavits on these motions, Bernard T. Hughes (Hughes), the expert retained by the Condominium, and Jon B. Halpern (Halpern), the expert retained by Fujitec, at which Dumitru was also present.

Plaintiff alleges that Fujitec allowed the governor cable to become worn and frayed, causing the accident. Plaintiff relies on the finding by the DOB, based on an inspection one hour after the incident, that a worn and frayed governor cable caused the accident (see exhibit K to Morris aff). It is undisputed that the incident resulted from the breaking and unraveling of at least one strand of the governor cable. Plaintiff alleges that Fujitec and Boca were negligent in failing to discover that the

cable was worn.

Plaintiff relies upon the expert affidavit of Hughes, submitted on behalf of the Condominium, for his opinion that the strands of the governor cable were worn and broken in various places, and a proper inspection would have revealed these defects and resulted in the replacement of the cable. Hughes states in his affidavit: "[b]ased on my observations, the subject governor cable showed signs of wear. There was deterioration of the governor cable strands which resulted in breakage. The strands were worn and broken in various places and should have been seen by visual and/or manual inspection" (exhibit 1 to Morris aff, ¶ 5). Hughes opines that "[a] proper inspection would reveal that the governor cable should have been replaced prior to the accident" (*id.*, ¶ 6).

Plaintiff contends, based on Hughes's inspection of the cable more than a year after the incident, that the cable was "so worn and broken in various places that it would be visible and something a mechanic should be looking for in performing a proper monthly visual inspection" (see Sallay aff, ¶ 17). Plaintiff concludes that the "only reasonable conclusion is that [the inspector] either failed to perform the inspections he says he did, or he did so in a negligent manner . . ." (*id.*).

Plaintiff's direct causes of action for negligence against Boca and Fujitec must be dismissed under the rule of *Espinal v*

Melville Snow Contrs., Inc. (98 NY2d 136 [2002]). Under *Espinal*,

"While a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party, the Court of Appeals has identified three circumstances in which a duty of care to noncontracting third parties may arise out of the contractual obligation or the performance thereof. Those are: (1) where the contracting party, in failing to exercise reasonable care in the execution of the contract, creates an unreasonable risk of harm to others, or exacerbates that risk; (2) where a plaintiff detrimentally relies on the defendant's continued performance of a contractual obligation; and (3) where the contracting party comprehensively agrees to assume and displace the promisee's safety-related obligations [internal quotation marks and citations omitted]"

(*Fernandez v Otis El. Co.*, 4 AD3d 69, 72-73 [1st Dept 2004]; see also *Hernandez v Pace El. Inc.*, 69 AD3d 493, 494-95 [1st Dept 2010]).

Prior to *Espinal*, it was "well settled that an elevator maintenance company owes a duty of care to members of the public" (*Alsaydi v GSL Enters., Inc.*, 238 AD2d 533, 534 [2d Dept 1997]). An elevator maintenance company that agreed to maintain an elevator in safe operating condition owed a duty to elevator passengers with whom it was not in privity of contract, "to use reasonable care to discover and correct a condition which it ought to have found" (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Sanzone v National El. Inspection Serv.*, 273 AD2d 94 [1st Dept 2000]) (holding that conducting an inspection mandated

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by the City of New York resulted in the assumption of a duty to users of the elevator).

In *Hernandez* (69 AD3d 493), the Appellate Division, First Department, applied the rule of *Espinal* to an elevator accident, holding that an elevator service contractor "does not owe a non-contracting third party a duty of care, and none of the exceptions to this rule apply in this case" (*id.* at 494-495). The decision affirmed the IAS court's finding that the elevator service company's contract with the owner "was not so comprehensive and exclusive as to displace the [owner's] obligations to maintain the elevators in a safe condition" (*id.* at 495).

Subsequently, the Appellate Division, First Department, stated, in *Casey v New York El. & Elec. Corp.* (82 AD3d 639 [1st Dept 2011]), that the rule of *Rogers v Dorchester Assoc.*, 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" (82 AD3d at 640), applies, apparently without regard to *Espinal*, but that the duty is limited "to cases where, pursuant to contract, the elevator company has assumed 'exclusive control' of the elevator at the time of the accident" (*id.*).

Thus, unless plaintiff can demonstrate that one of the three *Espinal* exceptions applies, there is no direct duty owed by an elevator maintenance company to passengers of the elevator. The usual procedure in personal injury cases involving elevators is to recover against the building owner, based on its nondelegable duty to maintain the premises, and then the building owner seeks common law, and possibly also contractual indemnification, against the elevator maintenance company "to which it had delegated fully its responsibilities for the maintenance of elevators" (*Rogers v Dorchester Assoc.*, 32 NY2d at 566).

In the present context, having consented to the dismissal of this action against the Condominium, for the reasons stated below, plaintiff must demonstrate that any of the three exceptions in *Espinal* apply, in order for a duty to be imposed upon either Fujitec or Boca.

The Motion of Akam and the Condominium

Counsel for plaintiff states in his affirmation that plaintiff does not oppose the motion by the Condominium and Akam for summary judgment because of the existence of a full-service maintenance contract between Akam and Fujitec (see Sallay affirmation, ¶ 5). Therefore, the motion is granted and the complaint is dismissed as against Akam and the condominium. The cross claims of Fujitec and Boca for common law indemnification are also dismissed. A claim for indemnification cannot stand

independently of potential liability of the indemnitor (see *Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012]).

Boca's Motion

Boca's motion for summary judgment dismissing the complaint is granted. The Boca agreement provides, under "Scope of Services," as follows: "(1) [Boca] shall not perform the test procedures, but shall only be a witness as per NYC building code requirements" (exhibit L to Laird aff).

Stephen Spampinato (Spampinato), the Boca employee who witnessed the July 1 2011 inspection, testified at his deposition that, as an added service, he inspected the cable for cracks, and measured it with digital calipers in three separate places.

Plaintiff argues that Boca assumed a duty to plaintiff by undertaking to inspect and measure the cable. Under the rule of *Espinal*, there is no merit to plaintiff's contention.

Plaintiff has not submitted sufficient evidence to establish as a matter of law that any of the three *Espinal* exceptions applies to Boca, especially in light of the fact that Boca was merely a witnessing agent, not the party performing the inspection.

The exposure of Boca as witnessing agent is less than that of Pace Elevator Company in *Hernandez v Pace El., Inc.* (21 Misc 3d 1113[A], 2008 NY Slip Op 52065 [U] [Sup Ct, NY County 2008],

affd 69 AD3d 493 [1st Dept 2010]), which was held not to be liable to an elevator passenger. Pace had been retained by the City of New York to perform elevator inspections, but had no duty to maintain or repair the elevator at issue, which allegedly stopped suddenly, injuring the plaintiff. Repairs to the elevator were made by an employee of the owner. Under these circumstances, Justice Gische granted Pace's motion to dismiss on the basis of the standards announced in *Espinal*. In affirming, the Appellate Division, First Department, held that an elevator "service contractor does not owe a noncontracting third party a duty of care, and none of the exceptions to this rule apply" (69 AD3d at 494).

As a mere witnessing agent, Boca cannot be held to have assumed a duty to plaintiff because none of the three *Espinal* exceptions applies.

Plaintiff's Cross Motion

Plaintiff, relying upon *Morejon v Rais Constr. Co.* (7 NY3d 203, 209 [2006]), contends that he is entitled to partial summary judgment, on liability only, against Fujitec because the undisputed evidence establishes as a matter of law that, under the doctrine of *res ipsa loquitor*, an unescapable inference arises that Fujitec was negligent in failing to maintain the elevator.

Plaintiff's cross motion for partial summary judgment of

liability against Fujitec is denied. The existence of a duty is a threshold issue of law (see *Church v Callanan Indus.*, 99 NY2d 104, 110-111, [2002]). Plaintiff has not presented sufficient evidence to establish as a matter of law that any of the three *Espinal* exceptions applies, or that Fujitec owes a duty directly to plaintiff (see *Hernandez v Pace Elevator Inc.*, 69 AD3d at 494-495).

Fujitec's alleged failure to discover the worn cable constitutes only the failure to become "an instrument for good," and did not rise to the requisite level of "launch[ing] a force or instrument of harm" (*Altinma v East 72nd Garage Corp.*, 54 AD3d 978, 980 [2d Dept 2008]; see also *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]), which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party (see *Bauerlein v Salvation Army*, 74 AD3d 851, 856 [2d Dept 2010]).

There is no evidence that plaintiff detrimentally relied upon Fujitec's performance of its duties.

The evidence does not establish as a matter of law that the Fujitec contract was sufficiently comprehensive and exclusive to entirely displace the owner's duty to maintain the premises safely (see *Espinal v Melville Snow Contractrs., Inc.*, 98 NY2d at 140).

Fujitec agreed to "perform regular and systematic

maintenance examinations to include lubrication, adjustment, cleaning, and when conditions warrant, repair and replacement of" numerous components of the elevator, including the governor cable (exhibit M to Laird aff at II [a] [3]). The contract lists a series of excluded items that are not relevant to the governor cable, and it does not require Fujitec to perform all required maintenance, or to "use all reasonable care to maintain the elevator equipment in proper and safe operating condition" (*Rogers v Dorchester Assoc.*, 32 NY2d at 558). The contract does not require Fujitec to perform all services necessary to keep the elevator in safe operating condition, as in *Dorchester*. Rather, it requires Fujitec to perform certain specified services, including maintaining the governor cable, and excludes any maintenance obligation for other parts of the elevator, including: car doors, hoistway enclosures, hoistway doors ... elevator controls, handrails, removable car panels, cylinders, plungers ... and all equipment other than provided by [Fujitec] ..." (Exhibit M to Laird aff at III).

Fujitec did not, as a matter of law, "assume 'exclusive control' of the elevator at the time of the accident" (*Casey v New York El. & Elec. Corp.* (82 AD3d at 640)).

Because plaintiff has failed to demonstrate his entitlement to judgment as a matter of law by showing that any of the *Espinal* exceptions applies, the burden does not shift to Fujitec to

demonstrate the existence of triable issue of fact, and it is unnecessary to consider Fujitec's opposition papers (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Plaintiff's motion is therefore denied.

Accordingly, it is

ORDERED that the motion (sequence no. 001) of defendants, Akam Associates, Inc., and The Future Condominium, Board of Managers of the Future Condominium, is granted, with the express consent of plaintiff's counsel, to the extent of dismissing the verified complaint and all cross claims as against them, with costs and disbursements, as taxed by the clerk of the court, upon presentment of a proper bill of costs; and it is further

ORDERED that the motion (sequence no. 002) of defendant Boca Group, International, Inc. is granted, and the complaint, and all cross claims, are dismissed, as against Boca, with costs and disbursements, as taxed by the clerk of the court, upon presentment of a proper bill of costs; and it is further

ORDERED that the cross motion of plaintiff Oscar E. Del Valle is denied; and it is further

ORDERED that the remainder of this action is severed and shall continue as against defendants Fujitec America, Inc., and 32 Realty, LLC and the parties are to proceed to mediation/trial forthewith; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: March 20, 2014

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JOAN M. KENNEY
J.S.C.