 FILED Mar 24 2014 Bronx County Clerk

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

ERNESTINA LOVE-EVANS,

Plaintiff,

-against-

GOODMAN MANAGEMENT CO., INC., LENRU APARTMENT CORP., and ELTECH INDUSTRIES, INC.,

Defendants.

Index No. 309628/09

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to _5_ read on this motion, for summary judgment

No On Calendar of 01/07/14	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	2,4
Replying Affidavit and Exhibits	5
Affidavit	
Memorandum Of Law	3
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Eltech Industries, Inc., (Eltech), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against it and moves for indemnification against defendants, Goodman Management Co., Inc., (Goodman), and Lenru Apartment Corp., (Lenru). As a preliminary matter, plaintiff's argument that Eltech's motion is defective because Eltech's attorney engages in legal argument in his affirmation rather than in a memorandum of law, is unavailing. First, such practice is common place. Second, the case cited by plaintiff, *Armendariz v Tiramisu Rest.*, 170 A.D.2d 334 [1st Dept 1991], is a reversal of the motion Court's levying of a $25 and $10 sanction on each side for placing legal argument in an attorney's affirmation.

This action arose as a result of personal injuries sustained by plaintiff, when she entered a mis-leveled elevator backwards and tripped on the elevator and fell. Plaintiff estimated that the elevator was two to two and one-half inches above the floor level.

Lenru is the owner of the subject building. Plaintiff was a tenant in the building. Goodman is the managing agent of the building. Eltech is the company under contract by Lenru/Goodman to service the elevators.

Eltech provided ample evidence that there were no prior complaints regarding the mis-leveling of the pertinent elevator. Plaintiff testified she had never seen the elevator mis-leveled before her accident. The superintendent of the building has no recollection of any complaints about mis-leveling before plaintiff fell. John Maguire of Eltech testified that Eltech had not received any complaints about mis-leveling. The Lenru Co-op board president testified she did know of any complaints about the elevator for a year prior to plaintiff's fall. Mr. Goodman, president of Goodman Management Co., Inc., testified that he did not know of any complaints about mis-leveling. The elevator mechanic for Eltech, Mr. Bryan testified he did not remember getting any calls about the elevator for a year prior to the accident.

Therefore, Eltech has established with uncontroverted evidence that it did not have notice of a mis-leveling problem with the elevator. There is no evidence of any complaints regarding the mis-leveling of the elevator. (*Gjonaj v Otis El. Co.*, 38 A.D.3d 384 [1st Dept 2007]). Plaintiff's expert opines that a provision in the contract between Eltech and Lenru/Goodman indicates that "Eltech had notice of the propensity of this elevator to mis-level and yet assumed the risk by taking it on maintenance." However, there is no evidence whatsoever of complaints regarding mis-leveling, yet plaintiff's expert opines as to notice. "If the expert's conclusions lack foundation in the record and are speculative, the affidavit will not raise questions of fact sufficient to preclude summary judgment" (*Santoni v. Bertelsmann Property, Inc.*, 21 A.D.3d 712, 715 [1st

Dept 2005]). "The only proof of liability plaintiff offered was wholly conclusory expert testimony, unsupported by any factual basis." (*Seong Sil Kim v New York City Tr. Auth.*, 27 A.D.3d 332, 335 [1st Dept 2006]).

> Eltech met its prima facie burden with evidence that it had not received any misleveling complaints from [the owner] and that no problems relating to misleveling were indicated in the inspection and service records it kept for the one-year period preceding the accident (see *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). In opposition, plaintiff failed to raise an issue of fact by presenting evidence that there had been a misleveling problem before her accident (see *Meza v 509 Owners LLC*, 82 AD3d 426 [2011]).
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> (*San Andres v 1254 Sherman Ave. Corp.*, 94 A.D.3d 590, 591 [1st Dept 2012]).

While lack of notice provides Eltech with grounds for dismissal of the complaint as against it, it is also entitled to dismissal of the complaint on contractual grounds. There is a provision in the service contract between Eltech and Lenru/Goodman that provides in pertinent part that the "owner...retains all responsibility for maintaining the leveling operation of the cars at floor landings." This language is similar to the language in *Figueroa v East 168th St. Assoc., L.P.*, 71 A.D.3d 456 [1st Dept 2010], that "clearly placed responsibility for the misleveling elevator on the owner, not ... the service company." Id. at 457. Plaintiff attempts to distinguish *Figueroa*, by pointing out that the elevator service company in *Figueroa* had advised the owner to upgrade the elevator to eliminate the problems with mis-leveling. However, it is clear from the wording of the decision that the service company's advice to upgrade the elevator was additional weight for the First Department's decision, rather than integral and a necessary component of its decision.

There are "three conditions necessary for applying res ipsa loquitur--(first) an event not ordinarily occurring without someone's negligence; (second) caused by an

instrumentality within the defendant's exclusive control, and (third) not due to any voluntary action or contribution by plaintiff," *(Corcoran v Banner Super Mkt.*, 19 N.Y.2d 425, 426 [1967]). Given plaintiff's backwards entry into the elevator, the third condition for the application of res ipsa loquitur is not met.

With respect to Eltech's claim for contractual indemnification, Eltech relies on paragraph 10 of the general provisions of the contract. However, Lenru/Goodman agreed to indemnify Eltech exclusively in the event of findings of culpability under the doctrine of res ipsa loquitur. Res ipsa loquitur is inapplicable given plaintiff's method of entry into the elevator.

With respect to Eltech's claim for common law indemnification, it relies on paragraph 10 in the specifications section of the contract. However, paragraph 10 of the specifications merely provides in pertinent part that Lenru/Goodman retains responsibility for the "leveling operation" of the elevator. There is no agreement to provide attorneys fees or court costs. Furthermore, "A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification." *Mathis v Central Park Conservancy, Inc.,* 251 AD2d 171 [1st Dept 1998]). Plaintiff's complaint is a negligence cause of action. There is no vicarious liability alleged nor argued.

Lenru/Goodman cross-claim against Eltech for common law and contractual indemnification. However, there are absolutely no contractual provision providing for contractual indemnify, and therefore contractual indemnity does not lie. With respect to common law indemnity, there is no vicarious liability alleged nor any evidence to support vicarious liability. Therefore, under *Mathis* common law indemnity does not lie.

Accordingly, that branch of Eltech Industries, Inc.'s motion that seeks summary judgment dismissing the complaint and all cross-claims as against it is granted. That branch of Eltech Industries, Inc.'s motion that seeks common law and contractual indemnity against co-defendants is denied. Searching the record under CPLR 3212(b), the cross-claims of Eltech Industries, Inc. for contractual and common law indemnification are dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: MAR 1 4 2014

J.S.C.

KENNETH L. THOMPSON, JR.