Polini v Schindler Elevator Corp.
2014 NY Slip Op 31964(U)
July 28, 2014
Sup Ct, New York County
Docket Number: 107572/11
Judge: Donna M. Mills

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58
Justice

IVANA POLINI,

Plaintiff,

-v-

SCHINDLER ELEVATOR CORPORATION, et al.,

Defendants.

INDEX NO. 107572/11

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL NO.

The following papers, numbered 1 to ____ were read on this motion for ____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	
Replying Affidavits	

CROSS-MOTION: ✓ YES ____ NO

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

FILED

RESOLVED IN ACCORDANCE WITH THE ATTACHED ORDER.

JUL 29 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/28/14

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

IVANA POLINI,

Plaintiff,

- against -

SCHINDLER ELEVATOR CORPORATION, PALACE 43 LLC, and DB PROPERTIES INC.,

Defendants.

INDEX NO. 107572/11

DECISION/ORDER

DONNA M. MILLS, J.:

In this personal injury action, plaintiff Ivana Polini seeks summary judgment on the issue of liability against defendant, Schindler Elevator Corporation ("Schindler"). Schindler opposes the motion and cross-moves for summary judgement dismissing plaintiff's complaint in its entirety, as well as all cross-claims.

This action arises out of a December 14, 2010, incident at premises known as 511 5th Avenue, New York, NY. Plaintiff, an IDB employee on duty, claims that a wood panel fell onto her after exiting an elevator at the lobby floor at the aforementioned location, while employees of defendant Schindler Elevator Corporation ("Schindler") were replacing a video monitor. There is no dispute that employees of Schindler removed the wood panel and leaned it against a wall before it fell and hit the plaintiff on the side of her head.

On March 5, 2013, Ralph DiGioia appeared for an examination before trial on behalf of Schindler. Mr. DiGioia, who was an employee of Schindler testified that on December 14, 2010, he and another employee were sent to the subject premises to complete a job that involved replacing the video monitor in the lobby. The video monitor they were replacing was located in the lobby of the premises on the wall between the first two of three

elevators. In order to replace the video monitor, Mr. DiGioia testified that they had to remove a panel off the wall to access the mounting for the monitor. After removing the wood panel and leaning it against the wall between the same two elevators the video monitor was mounted on, Mr. DiGioia stated that he felt the wood panel which he described as approximately 7' in height and 24" wide, was stable, and that it remained leaning in that position for 15-20 minutes and up until the time of the accident. He further testified that the accident occurred when a gust of wind came in the lobby from the front door and caused the panel to fall and strike the plaintiff as she exited the elevator, while she and was looking down at her phone.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders

v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

Where, as here, a plaintiff's injuries allegedly stem from a dangerous condition on the premises, a contractor may be liable in common-law negligence if it has control over the work site and either created or had actual or constructive notice of the dangerous condition (see *Van Salisbury v. Elliott–Lewis,* 55 A.D.3d 725, 867 N.Y.S.2d 454; *Azad v. 270 5th Realty Corp.,* 46 A.D.3d 728, 848 N.Y.S.2d 688; *Keating v. Nanuet Bd. of Educ.,* 40 A.D.3d 706, 835 N.Y.S.2d 705). Schindler's own witness testified at his deposition that while in the process of replacing the video monitor for the elevator n the lobby on December 14, 2010, he and his co-worker removed the wooden panel from the wall and leaned it against the wall between two of three elevators. He further testified that they did not utilize barricades or tape for the area, nor were there any warnings of any nature as to this dangerous condition. As such plaintiff has established a prima facie case that by removing the panel and placing it against the wall in this manner without warnings or barricades, Schindler created a dangerous condition that did not exist prior to their performing their task.

In opposition to the plaintiff's prima facie showing of its entitlement to summary judgment, Schindler failed to raise a triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562-563 [1980]; *Gershman v Habib,* 37 AD3d 530 [2007]). Schindler argues that it had no duty of care towards plaintiff and cannot be held liable for its employees negligent actions because removing the panel was allegedly outside the scope of its contract with the owners of the premises, and plaintiff was not a party to the contract.

In general, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). However, under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract (*see Church v Callanan Indus., supra; Espinal v Melville Snow Contrs., supra*). Moreover, a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury (see *H.R. Moch Co. v Rensselaer Water Co.* (247 NY 160, 167 [1928]). There are three circumstances under which a party who enters into a contract to render services may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, "launch[es] a force or instrument of harm;" (2) where the plaintiff detrimentally relies upon the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Church v Callanan Indus., supra* at 111-112; *Espinal v Melville Snow Contrs., supra* at 140). Here, in opposition to the motion for summary judgment and in moving for summary judgment, Schindler failed to establish, prima facie, that it did not create or exacerbate a dangerous condition so as to have launched a force or instrumentality of harm (*id.* at 140, 746 N.Y.S.2d 120, 773 N.E.2d 485; *Rina v. Windemere Home Owners Assn., Inc.*, 66 A.D.3d 756, 757, 887 N.Y.S.2d 231; *Cornell v. 360 W. 51st St. Realty, LLC*, 51 A.D.3d 469, 857 N.Y.S.2d 124; *Prenderville v. International Serv. Sys., Inc.*, 10 A.D.3d 334, 337, 781 N.Y.S.2d 110).

Schindler also claims that plaintiff's accident was not foreseeable and occurred due to an "Act of God" which was described as an unprecedented gust of wind knocking over the panel. The act of God defense is an affirmative defense that requires defendant to show that plaintiff's losses and injuries were "occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight" (*Tel Oil Co. v. City of Schenectady,* 303 A.D.2d 868, 871, 757 N.Y.S.2d 121 [3rd Dept.2003] [internal quotation marks and citation omitted]). While a strong gust of wind may be a strong force of nature, the fact that plaintiff's damage was occasioned during the strong gust of wind in the building lobby does not automatically give rise to an act of God defense. As *Tel Oil* instructs, defendant must also "demonstrate that the act of God' was the sole and immediate cause of the injury and that [it was] free from any contributory negligence" (*id*). In that regard, this Court has already found that Schindler's employees may have been potentially liable in placing the wood panel against the wall, which resulted in plaintiff's injuries.

Accordingly it is

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is granted against the defendant Schindler Elevator Corporation; and it is further

ORDERED that the defendant Schindler Elevator Corporation's cross-motion for

summary judgment is denied in its entirety.

Dated: 7/28/14

ENTER:

J.S.C.