Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

MANUEL FAJARDO,
Plaintiff,

-against-

MAINCO ELEVATOR & ELECTRICAL CORP., et al.,
Defendants.

Index Number 3085/11

Motion Dates August 1, 2013 & December 18, 2013

Motion Cal. Numbers 49, 69 & 70

Motion Seq. Nos. 8, 9 & 10

The following papers numbered 1 to 53 read on this motion by defendant Bronx Center For Rehabilitation and Healthcare, LLC (Bronx Center) to strike defendant Mainco Elevator & Electrical Corporation's, sued herein as Mainco Elevator Service Co. (Mainco), answer and to extend the time to move for summary judgment, or in the alternative, to amend this court's prior order, dated April 22, 2013, to compel the deposition of non-party Luanne McChesney (McChesney); by separate notice of motion by Bronx Center for summary judgment dismissing the complaint and Mainco's cross claims and to remove Bronx Center from the caption; by separate notice of motion by Mainco for summary judgment dismissing the complaint and all cross claims and counter claims and for summary judgment on its cross claims against Bronx Center; by separate notice of cross motion by Mainco to strike the answer and cross claims asserted against it by Bronx Center, to preclude Bronx Center from offering evidence of Mainco's liability at the time of trial and for an adverse inference to be made against Bronx Center at the time of trial, or in the alternative, compelling Bronx Center to produce its expert for deposition and an exchange of information; and by separate notice of cross motion by defendant Underbruckner Realty Co., LLC (Underbruckner) for summary judgment against plaintiff Manuel Fajardo (plaintiff) and Bronx Center.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits 1-13
Notices of Cross Motion - Affidavits - Exhibits 14-21
Answering Affidavits - Exhibits 22-38
Reply Affidavits 39-53

Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

This is an action to recover for personal injuries that plaintiff allegedly sustained on March 14, 2008, at premises located at 1010 Underhill Avenue, in Bronx County. The premises was owned by Underbruckner and operated as a nursing home by Bronx Center pursuant to a lease agreement. Mainco was the repair company hired by Bronx Center to service the elevator involved in the subject accident. Plaintiff was employed as a porter by Bronx Center and was allegedly injured when an elevator cable of a sidewalk freight elevator snapped and the elevator cab, along with plaintiff, were caused to fall.

Bronx Center has moved to strike Mainco's answer and to extend the time to move for summary judgment, or in the alternative, to compel the deposition of McChesney. Mainco has cross-moved to strike the answer and cross claims asserted against it by Bronx Center, to preclude Bronx Center from offering evidence of Mainco's liability at the time of trial and for an adverse inference to be made against Bronx Center at the time of trial, or in the alternative, to compel Bronx Center to produce its expert for deposition and an exchange of information.

Bronx Center and Mainco have respectively demonstrated that disclosure is outstanding that may yield relevant material evidence in the instant matter. In light of Bronx Center's and Mainco's substantial compliance with disclosure and both of their respective alleged failures to produce witnesses and/or evidence, Bronx Center is not entitled to an to an order striking Mainco's answer. Similarly, Mainco is not entitled to have Bronx Center's answer and cross claims stricken or to preclude Bronx Center from offering evidence of Mainco's liability at the time of trial and for an adverse inference to be made against Bronx Center at the time of trial. In order to have the parties expeditiously complete all disclosure in this case, Mainco must produce McChesney and Bronx Center must produce its expert, Michael Robinson for depositions and exchange of evidence within thirty (30) days of service of a copy of this order with notice of entry. Since Bronx Center has moved for summary judgment, the branch of its motion seeking an extension of the time to file such motions is denied.

Bronx Center has moved for summary judgment dismissing the complaint and Mainco's cross claims. Bronx Center has argued that plaintiff was its employee and, thus, that plaintiff's claims are barred by Workers' Compensation Law § 11. Workers' Compensation Law § 11 prohibits an employer's liability for contribution or indemnity. Workers' Compensation Law § 11 provides that an employer's liability is limited to workers' compensation benefits when an employee is injured while acting within the scope of his or her employment, unless a written contract for indemnification existed prior to the injury or the employee suffered a "grave injury" as defined in Workers' Compensation Law § 11 (*see Fleming v Graham*, 10 NY3d 296, 299 [2008]; *Bovis v Crab Meadow Enterprises, Ltd.*, 67 AD3d 846, 847-848 [2009]; *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

In support of this branch of its motion, Bronx Center has presented evidence, including the testimony of Jeff Sicklick (Sicklick), its administrator. Sicklick testified that although he is a direct employee of Bronx Center, at times on his paycheck his employer has been named as non-party Bronx Center Management, which is allegedly merely a payroll company employed by Bronx Center. Bronx Center has also presented evidence that plaintiff was supervised by its employee, Simon Feuer (Feuer). In opposition, plaintiff has presented his "W-2" tax statement demonstrating that his employer is listed as non-party Bronx Center Management, Inc. However, Bronx Center has failed to present admissible evidence of what its relationship was to Bronx Center Management, Inc. Moreover, Sicklick testified that employees he hired were employed by Bronx Center, that he did not actually know the name of the payroll company and that he did not know of any written agreement between the payroll company and Bronx Center. In addition, Feuer, whose testimony is also in the record, testified that the payroll company was named "Weber." Thus, issues of fact remain as to whether plaintiff was an employee of Bronx Center.

Bronx Center has argued that plaintiff was a special employee. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]; *see Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662 [2005]). Although whether an individual is a special employee is usually a question of fact, such a determination may be made as a matter of law where the relevant facts are undisputed and present no triable issues of fact (*see Thompson v Grumman Aerospace Corp*,, 78 NY2d at 557-558). Many factors are considered in determining whether a special employee relationship exists, including "who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of

the special employer's or the general employer's business" (*Schramm v Cold Spring Harbor Lab.*, 17 AD3d at 662). Although no single factor is decisive, a significant factor is "who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 558; *Soto v Akam Assoc., Inc.*, 61 AD3d 665, 665-666 [2009]; *Schramm v Cold Spring Harbor Lab.*, 17 AD3d at 662).

In light of the conflicting evidence in the record, as discussed above, which affects the determination as to whether plaintiff was Bronx Center's employee or special employee, issues of fact remain as to this branch of Bronx Center's motion. Considering the various factors involved in making a determination as to whether plaintiff was a special employee, such a decision cannot be made on this motion for summary judgment (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557-558). Furthermore, Bronx Center has failed to demonstrate that plaintiff did not suffer a "grave injury" as defined in Workers' Compensation Law § 11 (*see Fleming v Graham*, 10 NY3d 296, 299 [2008]), and as discussed above, various disclosure remains outstanding that prohibits summary relief at this juncture. Therefore, Bronx Center is not entitled to the relief sought on these branches of its motion.

Bronx Center has argued that plaintiff's action of placing his foot on the elevator cab was an intervening, superceding cause of the accident. "To establish a prima facie case, plaintiff must show that 'defendant's negligence was a substantial cause of the events which produced the injury' " (*Kush v City of Buffalo*, 59 NY2d 26, 32–33 [1983], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). "An intervening act will be deemed a superseding cause and will serve to relieve [a] defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant ... When, however, the intervening act is a natural and foreseeable consequence of a circumstance created by defendant, liability will subsist" (*Kush v City of Buffalo*, 59 NY2d at 33, *see Gardner v Perrine*, 101 AD3d 1587, 1587-1588 [2012]).

In support of this branch of its motion, Bronx Center has relied upon, among other things, plaintiff's deposition testimony, in which plaintiff admitted that he placed his foot on the top cross-bar of the elevator cab when it failed to fully emerge from the ground in an effort to talk to his co-workers in the basement level to ascertain what the problem was with the elevator. However, Bronx Center also relied upon the deposition testimony of non-party Neftali Anadon (Anadon), who presented a different version of events. Anadon testified that he observed plaintiff get into the elevator car and forcefully jump up and down on the car and then on plaintiff's third jump, plaintiff and the elevator abruptly

fell down the shaft. In opposition, plaintiff presented evidence that the cause of the elevator's fall may have been due to the failure of the mechanics of the elevator, in particular, the failure of the hoist cable. In light of the conflicts in the record as to how the accident actually happened and, thus, the apportionment of potential liability between the parties, summary relief is precluded at this juncture (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Therefore, Bronx Center is not entitled to the relief sought on this branch of its motion.

In response to plaintiff's action, Mainco has alleged cross-claims against Bronx Center for contribution, common-law and contractual defense and indemnification and for failure to procure insurance. Bronx Center has moved for summary judgment dismissing Mainco's cross claims and has argued that no agreement exists that would require Bronx Center to defend or indemnify Mainco, to hold Mainco harmless or to provide Mainco with insurance coverage. In opposition, Mainco has relied upon a copy of its contract with Bronx Center, dated May 1996, and a copy of its proposal from March 2007, both pre-dating plaintiff's accident.

That agreement provided, on its face, that Bronx Center agreed to indemnify, hold Mainco harmless and provide reasonable attorneys fees and expenses for any expense Mainco may incur due to its obligations under the contract. The March 2007 proposal expressly stated that Bronx Center agreed to name Mainco as an additional insured on its liability policy. As such, based upon the evidence in the record, Bronx Center has failed to satisfy its burden on this branch of its motion and thus, summary relief is precluded (*see Smalls v AJI Indus., Inc.*, 10 NY3d at 735; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Next, the court will turn to Mainco's motion for summary judgment dismissing the complaint and all cross claims and counter claims. It has argued that it does not owe a duty to plaintiff because any work under its agreement with Bronx Center was limited to exclude the elevator components at issue in this case and that it was not negligent. The record contains, among other things, a copy of Mainco's "Full Maintenance Agreement" with Bronx Center," the affidavit of Patrick Carrajat (Carrajat), a statement from Michael Robinson (Robinson), an elevator consultant and a copy of the 2007 repair proposal by Mainco. Based upon the evidence, including the fact that Mainco's 2007 repair proposal was to install hoist cables, that approximately one year later plaintiff's accident involved said cables, and that Robinson and Carrajat both concluded that the failure of the hoist cable was a proximate cause of the subject accident, issues of fact remain, at least, as to whether Mainco was liable in the happening of the accident (*see Smalls v AJI Indus., Inc.*, 10 NY3d at 735; *Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, Mainco is not entitled to summary relief at this juncture.

Mainco has also moved for summary judgment on its cross claims against Bronx Center for defense, indemnification and for failure to procure insurance. In light of the above determination that issues of fact remain as to Mainco's alleged negligence, it is not entitled to summary relief on the branch of its motion on its cross claims for defense and indemnification (*see Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 705 [2007]).

As to Mainco's cross claim for failure to procure insurance, Mainco has failed to point to adequate evidence in admissible form in order to demonstrate that no such insurance was procured on its behalf (CPLR 3212 [b]). Therefore, the court need not look to the opposition papers and Mainco is not entitled to summary relief on this branch of its cross motion.

Underbruckner has cross-moved for summary judgment dismissing plaintiff's complaint and has argued that it was an out-of-possession owner of the subject premises and that the elevator involved in the accident was not subject to the provisions of the Administration Code of the City of New York. "An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute or regulation imposing liability, a contractual provision placing the duty to repair on the landlord, or by a course of conduct by the landlord giving rise to a duty" (*Notskas v Longwood Assoc., LLC*, 112 AD3d 599 [2013]).

While Underbrucker has argued that the elevator at the premises is not subject to the Administration Code of the City of New York because it existed prior to 1985, its has failed to adequately demonstrate its argument through admissible evidence.

In support of its motion, Underbruckner has relied upon a copy of the lease agreement it had with Bronx Center. The record also contains an agreement between Underbruckner and non-party The Federal Department of Housing and Urban Development (HUD), dated April 4, 2006. The lease agreement provided that it would not retain any responsibility or duty to repair, maintain or alter the premises and that Bronx Center assumed full and sole responsibility for such. However, the lease agreement also provided that Underbruckner retained the right of re-entry to the premises and to perform inspections and repairs. The April 2006 HUD agreement specifically provided, in an elevator addendum, that Underbruckner would provide for maintenance and replacement of all elevator equipment.

"In the absence of a duty to make repairs, the reservation of a right to enter and make repairs is insufficient to impose liability, unless a duty to repair is imposed by statute" (*Bautista v 85th Columbus Corp.*, 976 NYS2d 806, 712 [2013]; *see Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 [2012]). In his bill of particulars, plaintiff

has alleged that Underbrucker violated the Administration Code of the City of New York section 27-987, which provides general requirements as to elevators and that Underbruckner violated Multiple Dwelling Law § 78, which provides in pertinent part, that an owner has a statutory duty to maintain premises in good repair. Multiple Dwelling Law § 78 extends to include elevators on a premises (*see Wagner v Grinnell Hous. Dev. Fund Corp.*, 260 AD2d 265, 266 [1999]). Under the circumstances in the instant matter and based upon the evidence in the record, Underbruckner has failed to satisfy its prima facie burden on its cross motion of demonstrating that it did not owe a duty to plaintiff and that it did not retain a right to re-enter the premises along with an alleged violation of a statute (*see Bing v 296 Third Ave. Group, L.P.*, 94 AD3d at 414). Therefore, Underbruckner is not entitled to the relief sought on this branch of its cross motion.

Underbruckner has also moved for summary judgment on its cross claim for contractual indemnification against Bronx Center. In light of Underbruckner's failure to satisfy its burden as to the complaint and the issues of fact that remain as to its own alleged liability, any decision as to its cross claim for contractual indemnification against Bronx Center would be premature and impermissible at this juncture (*see Gil v Manufacturers Hanover Trust Co.*, 39 AD3d at 705).

Accordingly, the branches of the motion by Bronx Center to strike Mainco's answer and to extend the time to move for summary judgment are denied . The branch of Bronx Center's motion seeking the alternative relief of compelling the deposition of McChesney is granted. Bronx Center's motion for summary judgment dismissing the complaint, dismissing Mainco's cross claims and removing it from the caption is denied in its entirety. The branch of the motion by Mainco for summary judgment dismissing the complaint and all cross claims and counter claims is denied. The branch of Mainco's motion for summary judgment on its cross claims against Bronx Center is denied. The branches of the cross motion by Mainco to strike the answer and cross claims asserted against it by Bronx Center, to preclude Bronx Center from offering evidence of Mainco's liability at the time of trial, and for an adverse inference to be made against Bronx Center at the time of trial are denied while the branch of Mainco's cross motion seeking the alternative relief of compelling Bronx Center to produce its expert for deposition and an exchange of information is granted. The cross motion by Underbruckner for summary judgment against plaintiff and on its cross claims against Bronx Center is denied in its entirety.

Dated: February 21, 2014

Howard G. Lane, J.S.C.