Dzidowska v Related Cos., LP
2016 NY Slip Op 30048(U)
January 8, 2016
Supreme Court, New York County
Docket Number: 452293/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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BARBARA DZIDOWSKA,

Plaintiff,

Index No. 452293/14

-against-

DECISION/ORDER

THE RELATED COMPANIES, LP, 400 E 84TH STREET ASSOCIATES, LP, 1616 FIRST COMPANY, FUJITEC AMERICA, INC. d/b/a FUJITEC SERGE OF NEW YORK,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2
Answering Affidavits	3
Replying Affidavits.....	4,5
Exhibits.....	6

Plaintiff Barbara Dzidowska commenced the instant action to recover damages for injuries she allegedly sustained when she tripped and fell in an elevator. Plaintiff now moves for an Order pursuant to (1) CPLR § 3212 granting her summary judgment on the issue of liability against defendants The Related Companies, LP ("Related"), 400 E 84TH Street Associates, LP ("Associates"), 1616 First Company ("1616") and Fujitec America, Inc. d/b/a Fujitec Serge of New York ("Fujitec"); or, in the alternative; (2) CPLR § 3126 striking the answers of defendants Related, Associates and 1616 on the basis of spoliation and/or

withholding of necessary and vital evidence; or, in the alternative; (3) CPLR § 3126 resolving the issues of notice in favor of plaintiff and against defendants Related, Associates and 1616 for the spoliation of necessary and vital evidence and allowing discovery to proceed as to all other issues; or, in the alternative; (4) CPLR § 3126 granting a negative inference charge against defendants Related, Associates and 1616 at trial based on said spoliation and withholding of evidence. Defendants Related, Associations and 1616 cross-move for an Order pursuant to (1) Rules 3.4, 3.7 and 8.4 of the Rules of Professional Conduct, 22 NYCRR §§ 130-1.1, 130-1.2 and 202.7 and CPLR § 3103 (a) dismissing the complaint; (b) disqualifying Slawek Platta, Esq. and The Platta Law Firm from representing plaintiff in this matter; (c) granting them costs and legal fees incurred by defendants in having to address plaintiff's spoliation motion; and (d) granting them monetary and other sanctions which the court deems just and fair; and (2) CPLR § 3212 granting them summary judgment dismissing all claims and cross-claims asserted against defendants Related and 1616. The motions are resolved to the extent set forth below.

The relevant facts are as follows. The Strathmore is a condominium residential high-rise building with 180 units spread over approximately 45 floors and is located at 400 East 84th Street, New York, New York (hereinafter referred to as the "building," the "subject premises" or "The Strathmore"). Prior to July 11, 2011, Serge Elevators installed three elevators, numbered "1," "2," and "3" at the subject premises. At some point in 2001, defendant Fujitec purchased Serge Elevators. Plaintiff, who was employed by a tenant in the building, has affirmed that prior to July 11, 2011, she complained to The Strathmore's doorman that the elevator was not working properly and that it was dangerous. Plaintiff also asserts that many other tenants in the building complained to The Strathmore about the condition of the elevators, specifically elevator number 1 and that all

complaints were written down in The Strathmore's daily log book.

On or about July 11, 2011, plaintiff was at the subject premises when she alleges that she tripped and fell in one of the building's elevators and sustained serious injuries therefrom. Specifically, plaintiff asserts that she was in the lobby waiting for an elevator to arrive and that at approximately 1:03 p.m., elevator number 1 arrived and its door opened at which point the people who were in the elevator exited the elevator into the lobby. Plaintiff asserts that a woman got into the elevator, after which plaintiff followed the woman in at which point the floor of the elevator jumped up several inches causing plaintiff's foot to get caught on the raised portion of the elevator floor and fall into the elevator (the "accident").

Within days of her accident, plaintiff and her employer spoke with Nancy Nieves ("Nieves"), an employee of Related, the owner of the subject premises, seeking copies of the video footage from the date of her accident. However, plaintiff asserts that Nieves refused to provide her with the video footage. Thereafter, on or about July 20, 2011, plaintiff sent Related a letter asking it to preserve "any video footage related to cameras located in the elevator and/or the hallway at the lobby entrance to said elevator on July 11th, 2011...until formal discovery ordered by the Supreme Court." On or about November 28, 2011, plaintiff served defendants Related and Associates with a Notice to Produce seeking "any video footage related to the cameras located in the elevator and/or hallway at the lobby entrance to said elevator on July 11th, 2011." Thereafter, on or about December 8, 2011, plaintiff served Combined Demands on Related and Associates. On or about January 20, 2012, Related and Associates served plaintiff with their Response to Notice to Produce wich stated that "[t]he video footage of the alleged accident is annexed as Exhibit 'B' to Defendants' response to plaintiff's Combined Demands dated January 18, 2012," which was a twenty-seven minute nineteen second video from the lobby of the subject premises which depicts

the time of plaintiff's accident. However, no video footage from the camera located inside the elevator or from the camera located in the lobby from the hours before plaintiff's accident was produced.

On or about March 16, 2012, Related and Associates served a supplemental response to plaintiff's Combined Demands in which it provided only the portion of The Strathmore's daily log book from the date of the accident. On or about November 9, 2012, plaintiff moved to strike Related and Associates' answers for failure to provide certain discovery, including, *inter alia*, complete surveillance videos from both surveillance cameras for the date in question and complete copies of the log book for the subject premises. On or about February 21, 2013, after oral argument on the motion, an order was entered which, *inter alia*, directed Related and Associates "to provide entries referencing elevator #1 from the daily log book for: 6 months prior to date of loss" (the "February 2013 Order").

On or about March 19, 2013, Related and Associates served a response to the February 2013 Order which stated, in pertinent part, that "a search is underway referable to th[e] [demand for entries referencing elevator number 1 from the building daily log book from January 11, 2011 through July 11, 2011]." On or about January 6, 2014, Related and Associates served a supplemental response to the February 2013 Order which included an affidavit from Elizabeth Serrano, the Resident Service Specialist, detailing the efforts she undertook to search for the requested log book. Specifically, Serrano affirmed that

> [f]or a time period spanning approximately eight weeks myself along with current Resident Manager Sam Djokovic searched all the storage rooms within The Strathmore, all cabinets, closets and drawers located behind the front desk in the lobby of The Strathmore, the entire leasing office at The Strathmore and the entire resident managers office at The Strathmore. Despite my extensive search, I was unable to locate the 2011 daily log book.

On or about February 6, 2014, Harold Delancey, a private investigator hired by the plaintiff, visited the subject premises in an effort to locate the log books at issue and located the 2010 and 2011 daily log books in the main storage room of the subject premises. In his affidavit, dated June 16, 2015, Delancey affirmed that he easily located the log books as they were very visible and he made a video recording of the books and placed them back on the shelves in the storage room.

The court first turns to that portion of defendants Related, Associates and 1616's cross-motion for an Order pursuant to the Rules of Professional Conduct §§ 3.4, 3.7 and 8.4, 22 NYCRR §§ 130-1.1, 130-1.2 and 202.7 and CPLR § 3103 dismissing the complaint; disqualifying Slawek Platta, Esq. and The Platta Law Firm from representing plaintiff in this matter; and granting them monetary and other sanctions. As an initial matter, that portion of defendants' cross-motion for an Order disqualifying plaintiff's counsel from representing plaintiff in the instant action is denied. Defendants seek to disqualify plaintiff's counsel based on plaintiff's counsel's hiring of Delancey, the investigator, who visited the subject premises, unbeknownst to defendants, in an effort to locate the log book at issue and did indeed locate the 2010 and 2011 daily log books in the main storage room of the subject premises. Specifically, defendants assert that such conduct is the basis for disqualification pursuant to Rule 3.7(a) of the Rules of Professional Conduct which prohibits an attorney from serving as counsel "in a matter in which the lawyer is likely to be a witness on a significant issue of fact." Additionally, defendants rely on Rule 3.7(b)(1) which prohibits a lawyer from acting "as advocate before a tribunal in a matter if another lawyer in the lawyer's firm is likely to be called on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client." Indeed, the First Department has held that the disqualification of an attorney's firm as counsel is warranted if the attorney's testimony is

necessary. *See Hitzig v. Borough-Tel Service, Inc.*, 108 A.D.2d 677 (1st Dept 1985). However, here, plaintiff's counsel's testimony is not necessary in this action. Indeed, it is would only be relevant if defendants commenced an action against Delancey and/or plaintiff's attorney for trespass. It is undisputed that there is no claim of trespass in the instant action and defendants have failed to put forth any other reason why plaintiff's counsel would be called to testify in this action. Thus, defendants' cross-motion to disqualify plaintiff's counsel from representing plaintiff in this action is denied.

Further, that portion of defendants' cross-motion for an Order dismissing the complaint based on plaintiff's counsel's conduct is denied. Specifically, defendants seek to dismiss the complaint based on plaintiffs' counsel's involvement in hiring Delancey, encouraging him to unlawfully trespass upon defendants' premises and hiding the information found from Delancey's trespass, which, they argue, is prohibited by Rules 3.49(a) and 8.4(c) of the Rules of Professional Conduct which state that a lawyer may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation and that a lawyer may not suppress evidence or knowingly engage in illegal conduct. Additionally, defendants assert that the complaint should be dismissed because plaintiff's counsel has perpetrated a fraud on the court by withholding information about the log books for over a year and a half. However, even assuming defendants' allegations are true, defendants have failed to put forth any basis for their assertion that such allegations require the court to dismiss the complaint. Indeed, the Rules and cases cited by the defendants do not provide a basis for such relief.

Additionally, that portion of defendants' cross-motion for an Order granting them monetary sanctions against plaintiff's counsel based on plaintiff's counsel's conduct is denied as defendants have failed to put forth a sufficient basis for such relief.

The court next turns to that portion of plaintiff's motion for an Order pursuant to CPLR § 3212 granting her summary judgment on the issue of liability against defendants. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, plaintiff's motion for summary judgment on the issue of liability against defendant Fujitec is denied on the ground that there are issues of fact as to whether Fujitec is liable for plaintiff's injuries. It is well-settled that "[a]n elevator company that agrees to maintain an elevator 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." *McLaughlin v. Thyssen Dover Elevator Co.*, 117 A.D.3d 511 (1st Dept 2014)(citing *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 559 (1973)). In the instant action, the court finds that there remains a genuine issue of fact as to whether Fujitec failed to correct the condition of elevator number 1, of which it had knowledge, or failed to use reasonable care to discover and correct said condition which it should have found. Indeed, both plaintiff and defendant Fujitec have provided expert affidavits which offer conflicting theories about whether Fujitec adequately maintained and/or repaired the elevator at issue. Specifically, Patrick Carrajat, plaintiff's expert, affirms that elevator number 1 was inspected routinely by the New York City Department of Buildings and that violations were issued in 2006, 2007, 2009, twice in 2010 and on August 17, 2011, a month after

the accident; that Fujitec's records "reveal a pattern of operational problems and their inability to resolve them," specifically referring to outage issues "due to both leveling related and non-related issues," that "Fujitec failed to maintain elevator [number 1] adequately" and that such failures were " the proximate cause of the accident and injuries to the Plaintiff." However, Jon B. Halpern, Fujitec's expert, affirms that Fujitec personnel "took appropriate, logical and progressive steps to attempt to resolve the complaint[s]" it received about the elevator; that Fujitec's personnel "met or exceeded industry standards," that they investigated all complaints thoroughly and "performed remedial measures in a logical and sequential fashion to address" any complaints. Thus, there remains issues of fact precluding summary judgment against Fujitec at this time.

Additionally, plaintiff's motion for summary judgment on the issue of liability against defendants Related, Associates and 1616 is denied on the ground that there are issues of fact as to whether said defendants are liable for plaintiff's injuries. "A property owner has a nondelegable duty to passengers to maintain its building's elevator in a reasonably safe manner and may be liable for elevator malfunctions or defects causing injury to a plaintiff about which it has constructive or actual notice, or where, despite having an exclusive maintenance and repair contract with an elevator company, it fails to notify the elevator company about a known defect." *Isaac v. 1515 Macombs, LLC*, 84 A.D.3d 457, 458 (1st Dept 2011)(internal citations omitted). Here, this court finds that although defendants had notice of the recurring mis-leveling condition as it is undisputed that the elevator experienced a number of mis-leveling problems prior to plaintiff's accident, there remains a genuine issue of fact as to whether defendants failed to maintain the elevator in a reasonably safe manner based on the evidence that defendants called Fujitec after the elevator experienced said problem and required Fujitec to stay on site until the problem was fixed. Indeed, defendants have provided evidence that each time a complaint was made about the mis-leveling of

elevator number 1, defendants notified Fujitec, the elevator maintenance company, and that Fujitec always responded and fixed the issue, albeit temporarily. Charles Booth, Fujitec's Senior Elevator Mechanic, testified that five days prior to plaintiff's accident, the mis-leveling problem with the elevator was fixed and deemed resolved. Indeed, the work ticket for that work has an entry of "RTS" on July 6, 2011 which means that the elevator was "returned to service." In response, plaintiff has failed to provide evidence establishing that defendants failed to reasonably maintain the elevator between then and the date her accident occurred. As plaintiff has failed to show that defendants failed to maintain the elevator in a reasonably safe manner as a matter of law, she has failed to establish her right to summary judgment against defendants at this time.

That portion of plaintiff's motion for summary judgment against defendants based on the doctrine of *res ipsa loquitur* is also denied. "While the doctrine of res ipsa loquitur may be invoked against the defendant in an action involving a malfunctioning elevator, it may only be applied if it can be established that: (1) the occurrence...would not ordinarily occur in the absence of negligence; (2) that [at the time of the accident the elevator] was within the exclusive control of the defendant(s); and (3) nothing plaintiff did in any way contributed to the happening of the event." *Hodges v. Royal Realty Corp.*, 42 A.D.3d 350, 351-52 (1st Dept 2007)(internal citations omitted).

As an initial matter, plaintiff has failed to establish her right summary judgment against defendants Related, Associates and 1616 based on the doctrine of *res ipsa loquitur* as she has failed to establish that at the time of the accident, elevator number 1 was within defendants' exclusive control. Indeed, it is undisputed that control and maintenance of the elevator and the obligation to repair any operational issues affecting said elevator was exclusively assumed by Fujitec pursuant to its contract with defendants. Additionally, plaintiff has failed to establish her right to summary judgment against defendant Fujitec as she has failed to establish that the accident would not

ordinarily occur in the absence of negligence. Indeed, Fujitec has provided evidence that it fixed the mis-leveling problem with elevator number 1 days before plaintiff's accident and that it spent many hours troubleshooting and correcting the condition. Thus, it has not been established that the accident could not have occurred but for Fujitec's negligence.

As this court has found that there are issues of fact as to whether Related and 1616 are liable for plaintiff's injuries, that portion of defendants' motion for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing all claims asserted against defendants Related and 1616 is denied.

The court next turns to plaintiff's motion for an Order pursuant to CPLR § 3126 striking the answers of defendants Related, Associates and 1616, or, in the alternative, resolving the issues of notice in favor of plaintiff and against said defendants, or, in the alternative, granting a negative inference charge against said defendants at trial on the basis of spoliation and/or withholding of necessary and vital evidence. "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings, LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 45 (1st Dept 2012). A "'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence." *Id.* (internal citations omitted). In deciding whether sanctions for spoliation are appropriate, "courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness." *Duluc v. AC&L Food Corp.*, 119 A.D.3d 450, 451 (1st Dept 2014).

As an initial matter, plaintiff's motion for sanctions based on defendants' alleged spoliation of the 2011 log book is denied as the 2011 log book has not been destroyed and is currently in plaintiff's possession. Although defendants withheld production of the log book until plaintiff made the instant motion, defendants did produce said log book in September 2015 and there is no allegation that any relevant portion of the 2011 log book is missing.

However, plaintiff's motion for sanctions based on defendants' alleged spoliation and/or withholding of certain video footage is granted. Specifically, plaintiff seeks sanctions based on defendants' failure to produce any video footage recorded from the camera located inside elevator number 1 and the failure to produce the video footage from the camera located in the lobby of the subject premises depicting the hours prior to plaintiff's accident. Indeed, defendants' position has been that they have no other video footage in their possession from the date of the accident other than the approximately thirty minute video they provided to plaintiff during discovery which depicts only a few minutes before, during and after plaintiff's accident, from the video camera in the lobby of the subject premises. Here, this court finds that plaintiff has established her entitlement to sanctions based on defendants' spoliation and/or withholding of said video footage as plaintiff has demonstrated that defendants, who had control over said video footage, had an obligation to preserve said footage as plaintiff requested its preservation shortly after the accident and repeatedly demanded said footage throughout discovery; that the failure to produce the video footage or the destruction of same was done with a "culpable state of mind" based on the testimony of Andy Colon, The Strathmore's Resident Manager, that he made copies of the video footage from the camera located inside the lobby as well as from the camera located inside elevator number 1 and that he gave the copies of said footage to Nieves, an employee of Related; and finally, that the video footage is relevant to plaintiff's claim in that it could show actual or constructive notice of the

condition on the part of defendants and that it would show, and indeed, according to Colon, did show, plaintiff walking into the elevator and tripping when the elevator suddenly jumped up.

Defendants' assertion in opposition that plaintiff's spoliation motion should be denied based on the February 2013 Order is without merit. The February 2013 Order was entered in response to plaintiff's motion to strike defendants' answer for failing to provide certain discovery and defendants' cross-motion for a protective order. Defendants assert that because plaintiff's motion to strike sought sanctions based on defendants' failure to provide the video footage at issue here, the February 2013 Order is law of the case and must be adhered to. However, the February 2013 Order does not resolve the issue. Specifically, the only relevant portion of the February 2013 Order states that plaintiff's "motion to strike is denied without prejudice w/ leave to renew before trial judge for any remedy/ies as to destruction of evidence" and nowhere else in the February 2013 Order does it state what video footage plaintiff is or is not entitled to. Thus, as plaintiff has established that defendants' failure to produce or destruction of the video footage from the camera located in elevator number 1 and the video footage from the camera located in the lobby of the subject premises from the hours prior to plaintiff's accident constituted spoliation and/or withholding of necessary evidence, the court finds that plaintiff is entitled to sanctions against defendants. However, based on the fact that defendants have provided some video footage which shows plaintiff falling in the elevator, the court declines to impose the extreme sanctions of striking defendants' answers or resolving the issues of notice in favor of plaintiff and instead determines that the more appropriate sanction is a negative inference charge against defendants Related, Associates and 1616 at trial on the basis of said spoliation and/or withholding of evidence.

Finally, that portion of defendants' cross-motion for an Order granting them costs and legal fees incurred in having to address plaintiff's spoliation motion is denied as this court has granted in

part plaintiff's spoliation motion and thus, found that it had merit.

Accordingly, plaintiff's motion and defendants' cross-motion are resolved as set forth herein. This constitutes the decision and order of the court.

Dated: 1/8/16

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.