SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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JODY DOMAN

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 160077/13

P.S. MARCATO ELEVATOR CO., INC.,
MIDBORO MANAGEMENT, INC., and
ELLIVKROY REALTY CORP.

Defendants

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NANCY M. BANNON, J.:

I. Background

In this personal injury action, the plaintiff alleges that she sustained injuries when she tripped and fell while exiting a misleveled elevator in her cooperative apartment building. She commenced the action against Ellivkroy Realty Corp., the building owner, and Midboro Management, Inc., its managing agent (the building defendants), as well as P.S. Marcato Elevator Co., Inc. (Marcato), which had an exclusive, full-service maintenance contract to provide elevator maintenance and repair services in the building. The complaint alleges theories of negligence and res ipsa loquitor. The building defendants together answered the complaint denying liability, and cross-claimed against Marcato for both common-law and contractual indemnification. The building defendants now move for summary judgment dismissing the complaint insofar as asserted against them and on their cross claims for common-law and contractual indemnification. Since the building defendants' submissions reveal the existence of triable issues of fact, they failed to establish their prima facie entitlement to judgment as a matter of law, and the motion must be denied.

II. Discussion

It is well settled that the proponent of a motion for summary judgment pursuant to CPLR 3212 must establish its entitlement to such relief as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the

absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

An owner of an apartment building has a "nondelegable duty under Multiple Dwelling Law § 78 to keep its premises in good repair" (Bonifacio v 910-930 S. Blvd., 295 AD2d 86, 91 [1st Dept 2002]), and that duty "includes elevator maintenance." Id.; see Cole v Homes for the Homeless Inst., Inc., 93 AD3d 593, 595 (1st Dept 2012). A plaintiff who seeks to hold an owner or its managing agent liable for injuries caused by a defective elevator must ultimately prove either that (1) the owner or managing agent created the condition or had actual or constructive notice of the defect, but failed to take appropriate steps to remedy the problem or (2) the doctrine of res ipsa loquitur is applicable. See Ezzard v One E. Riv. Place Realty Co., LLC, 129 AD3d 159, 162-163 (1st Dept 2015). Thus, a property owner can be held liable "where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect." Tucci v Starrett City, Inc., 97 AD3d 811, 812 (2nd Dept 2012). "Acts of omission, of course, constitute active negligence as well as acts of commission, where there is an affirmative duty to act." Colon v Board of Educ. of City of N.Y., 11 NY2d 446, 451 (1962); see Jordan v County of Schoharie, 46 AD2d 716, 716 (3rd Dept 1974). A failure timely to notify an elevator repair company of a known and specific defect in the leveling of the elevator is, in the context of this case, a species of active, rather than passive, negligence. See Schrold v City of New York, 273 App Div 872, 872 (2nd Dept 1948), affd 298 NY 738 (1948).

Alternatively, "[r]es ipsa loquitur permits a factfinder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part. If a plaintiff establishes these elements, then the issue of negligence should be given to a jury to decide." Ezzard v One E. Riv. Place Realty Co., LLC, supra, at 162-163 (citations omitted). The First Department has

articulated "a long established jurisprudence . . . recognizing that elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur" (id. at 163), particularly with respect to incidents of misleveling. See Gutierrez v Broad Fin. Ctr., LLC, 84 AD3d 648, 649 (1st Dept 2011); Dubec v New York City Hous. Auth., 39 AD3d 410, 412, (1st Dept 2007); Ardolaj v Two Broadway Land Co., 276 AD2d 264 (1st Dept 2000); Dickman v Stewart Tenants Corp, 221 AD2d 158 (1st Dept 1995); Burgess v Otis El. Co., 114 AD2d 784, 786 (1st Dept 1985), affd 69 NY2d 623, 625 (1986). In addition, exclusive possession and control by the building defendants need not be absolute, and the concept is not to be rigidly applied. Rather, as long as their possession and control are of such a character that the probability that the negligent acts complained of were committed by someone else is so remote that it is fair to permit an inference that they were negligent, they are deemed to have exclusive control. See De Witt Properties, Inc. v City of New York, 44 NY2d 417, 426 (1978).

In support of their motion, the building defendants submitted, among other things, a transcript of the deposition testimony of one of the owner's employees, Jorge Ramirez, who testified that, only 12 days prior to the plaintiff's accident, the subject elevator misleveled, and that he knew of one other occasion prior to the accident when that elevator misleveled. Ramirez further testified that, prior to the plaintiff's accident, he had told the managing agent that this particular elevator was giving him "trouble. More trouble than usual," and asked the managing agent why it "couldn't . . . have that elevator fixed once and for all."

In opposition to the motion, the plaintiff submitted a copy of an incident report, on the managing agent's form, with respect to the earlier of the two misleveling incidents described by Ramirez. That report was dated seven months prior to plaintiff's accident, and describes an incident in which another tenant reported being injured when the subject elevator misleveled and she tripped coming out of the elevator. The plaintiff also submitted a daily logbook kept by the building's doorman. Although the logbook reflects that Marcato had been called to work on the elevator several times in the year prior to the accident, there is no evidence as to whether these service visits were for regular maintenance or whether the building defendants notified Marcato of the specific defect

Thus, the building defendants' submissions reveal the existence of triable issues of fact as to whether they had actual notice of the defective condition of the elevator prior to the plaintiff's accident (see Ruiz-Hernandez v TPE NWI Gen., 106 AD3d 627, 627-628 [1st Dept 2013]), and fail to establish that they notified Marcato of a specific, known defect. The building defendants also failed to establish, prima facie, the inapplicability of the doctrine of res ipsa loquitur. See id. The misleveling of an elevator is the type of occurrence that is unlikely to

transpire in the absence of negligence (see Gutierrez v Broad Fin. Ctr., LLC, supra), the fact that other building tenants and visitors might have used the subject elevator is insufficient, standing alone, to establish that the building defendants did not exercise exclusive control over that elevator in between service calls by Marcato (see De Witt Properties, Inc. v City of New York, supra, at 426; see generally Burgess v Otis El. Co., supra, at 787; Weeden v Armor El. Co., 97 AD2d 197, 206 [2nd Dept 1983]), and there is no proof that the plaintiff caused the defective condition in the elevator.

Thus, that branch of the building defendants' motion which is for summary judgment dismissing the complaint insofar as asserted against them must be denied, regardless of the sufficiency of the plaintiff's opposition papers, which, in any event, raise additional triable issues of fact warranting the denial of that branch of the motion.

"Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is vicarious." Balladares v Southgate Owners Corp., 40 AD3d 667, 671 (2nd Dept 2007). Conversely, "a party which has actually participated in the wrongdoing is not entitled to indemnification." Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc., 45 AD3d 792, 796 (2nd Dept 2007). A party must demonstrate the absence of negligence on its part to establish a prima facie claim for indemnification (Balladares v Southgate Owners Corp., supra, at 671). Contrary to the building defendants' contention, they have failed to demonstrate the absence of active negligence on their part, and have not shown that their potential liability here is merely based on a statutory duty to keep their premises in good repair or on their vicarious liability for Marcato's purported negligence. See Rogers v Dorchester Assoc., 32 NY2d 553 (1973). Since their submissions reveal the existence of a triable issue of fact as to whether their active negligence in failing to notify Marcato of specific, known defects in the condition of the elevator contributed to the subject accident (see Cole v Homes for the Homeless Inst., Inc., 93 AD3d at 595; cf. Ortiz v Fifth Ave. Bldg. Assoc., 251 AD2d 200, 201-202 [1st Dept 1998]), they have failed to establish their prima facie entitlement to judgment as a matter of law, and that branch of their motion which was for summary judgment on their cross claim for common-law indemnification must be denied.

The building defendants also submitted their elevator service contract with Marcato, which recites, in relevant part, that "nothing in this agreement shall be construed to mean that [Marcato] assumes any liability on account of accidents to persons or property except those directly due to the negligent acts of [Marcato] or its employees, and that the [building defendants'] own responsibility for accidents to persons or property while riding in or about the elevators referred to is in no way affected by this agreement." By its terms, this provision does

not purport to completely indemnify Marcato for its own negligent acts and, hence, is enforceable. See General Obligations Law § 5-322.1(1); Miranda v Norstar Bldg. Corp., 79 AD3d 42, 49-50 (3rd Dept 2010). Contrary to the building defendants' contention, the subject contract does not "unmistakably" provide that the parties agreed to allocate all liability for any injury occurring in connection with the use of the elevator to Marcato notwithstanding the absence of evidence that Marcato contributed to the cause of the liability. Martinez v Benau, 103 AD3d 545, 546 (1st Dept 2013); see Tonking v. Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 (2004); Pope v. Safety & Quality Plus, Inc., 111 AD3d 911, 913 (2nd Dept 2013); Miranda v Norstar Bldg. Corp., supra, at 51. Indeed, the contract purports to effect precisely the opposite of the building defendants' characterization, inasmuch as Marcato accepted liability for its own negligence, while the contract relieved Marcato of liability for the building defendants' negligence, and imposed liability on the building defendants for their own negligence to the extent provided by law.

Consequently, the building defendants have failed to establish their prima facie entitlement to judgment as a matter of law on their cross claim for contractual indemnification, and that branch of their motion must be denied.

III. Conclusion

The summary judgment motion of defendants Ellivkroy Realty Corp. and Midboro Management, Inc. is denied in its entirety as the movants have not demonstrated entitlement to that relief.

Accordingly, it is,

ORDERED that the motion of defendants Ellivkroy Realty Corp. and Midboro Management, Inc., seeking summary judgment dismissing the complaint insofar as asserted against them and on their cross claims for common-law and contractual indemnification is denied.

This constitutes the Decision and Order of the court.

Dated: April 19, 2016

HON. NANCY M. BANNON, JSC