SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MARION TUCHMAN and BENJAMIN TUCHMAN,

Plaintiffs,

-against-

Index No. 152642/12

DECISION/ORDER

EAST RIVER HOUSING CORPORATION, CENTURY ELEVATOR MAINTENANCE CORPORATION and CAMBRIDGE SECURITY SERVICES CORP.,

Defendants.

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HON. CYNTHIA S. 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
Affidavits in Opposition.....	2,3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiffs commenced the instant action seeking to recover for injuries allegedly sustained by plaintiff Marion Tuchman while exiting one of the elevators in the building in which she resides. Defendant Cambridge Security Services Corp. ("Cambridge") now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' complaint and any and all cross-claims and counterclaims asserted against Cambridge. For the reasons set forth below, Cambridge's motion is granted.

The relevant facts are as follows. Plaintiff alleges that on or about December 21, 2011, she tripped and fell while exiting one of the elevators in the building in which she resides, located at 568

Grand Street, New York, New York (the "subject premises" or "building"). Specifically, plaintiff testified that as she was walking out of the elevator, her foot got caught on something and she tripped and fell (the "accident"). Although plaintiff testified that she could not be certain what it was she tripped over, she testified that she witnessed the elevator mis-level prior to her accident.

The subject premises is owned by defendant East River Housing Corporation ("East River") and the elevators in the subject premises were maintained by defendant Century Elevator Maintenance Corporation ("Century") pursuant to an agreement between Century and East River. Cambridge is a security company hired by East River which provides security officers who are stationed in the lobby of the subject premises and who provide and deny access to the public and tenants in the building who attempt to enter the subject premises.

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 Wayburn v. Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). 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.*

In the instant action, Cambridge has established its *prima facie* right to summary judgment dismissing the complaint and any and all cross-claims and counterclaims asserted against it on the ground that it does not owe plaintiffs a duty with respect to the elevators in the subject premises. As an initial matter, Shulie Wolman, East River's Assistant General Manager, testified that

Cambridge did not have any maintenance responsibilities or any duty whatsoever with regard to the elevators. Further, Ralph Martell, Cambridge's Senior Vice President, testified that Cambridge had its security officers stationed in the lobby of the building only to provide and deny access to the public and to the tenants in the building and the security officers had no duty to maintain, check on, monitor or inspect the elevators in the building. Thus, as Cambridge has established that it did not owe plaintiff a duty with regard to the elevators, Cambridge's motion for summary judgment must be granted.

In response, plaintiffs and the other defendants have failed to raise an issue of fact sufficient to defeat Cambridge's motion for summary judgment. Century and plaintiffs assert that there is an issue of fact as to whether Cambridge owes plaintiff a duty with regard to the elevators based on testimony that Cambridge security guards were present in the lobby of the building twenty-four hours a day, seven days a week; that Cambridge security guards filled out incident reports when someone in the building had an issue with the elevators; that Cambridge security guards could see the building's elevators on security cameras while they were stationed in the lobby; that Cambridge security guards would notify the building if there was an incident with the elevators; that tenants in the building routinely made complaints to Cambridge security guards if an issue arose with an elevator; and that Cambridge security guards had, in the past, shut down an elevator if it was not working and affixed an "out of order" sign to the elevator. However, such assertion is without merit as plaintiffs have failed to establish that such testimony, without more, imposes a duty upon Cambridge to maintain the elevators, especially considering Century had a full-service contract with East River pursuant to which Century was responsible for maintaining the elevators.

Additionally, plaintiffs' assertion that Cambridge's motion should be denied because there is

an issue of fact as to Cambridge's liability under the doctrine of *res ipsa loquitur* is without merit. "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; 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). Here, plaintiffs have failed to raise an issue of fact as to whether Cambridge is liable to plaintiffs under the doctrine of *res ipsa loquitur* on the ground that they have failed to provide any evidence that at the time of the accident, the elevator was within the exclusive control of Cambridge. In fact, all of the evidence in the record before the court establishes that the elevators were not within the exclusive control of Cambridge.

Further, to the extent plaintiffs contend that Cambridge's motion for summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1st Dept 2008). Plaintiffs assert that they have recently demanded certain documents and depositions from Cambridge and that "[i]t is reasonably calculated that [this discovery], once produced, will, raise a question of fact as to Defendant Cambridge's involvement, duty, and liability...." However, plaintiffs have failed to establish any basis that the discovery they seek at this late date might lead to relevant evidence. Depositions have already been conducted, the testimony from which establishes that Cambridge's security officers owed no duty to plaintiffs with regard to the elevators in the building, and plaintiffs

have not established what depositions, if any, they would need that would lead to relevant evidence not already in the record. Further, the reports and logbooks requested by plaintiffs were provided by Cambridge in February 2016 and even if they were still outstanding, plaintiffs have failed to establish that the production of same would lead to relevant evidence showing that Cambridge's security officers owed plaintiff a duty with regard to the elevators.

Accordingly, Cambridge's motion is granted and the action is hereby dismissed as against Cambridge only. This constitutes the decision and order of the court.

Dated: 5/24/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.