Kay v West 23rd St. Owners Corp.
2017 NY Slip Op 31543(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 157021/2014
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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CHRISTINE KAY,

Plaintiff,

- v -

WEST 23RD STREET OWNERS CORP., VINTAGE REAL ESTATE SERVICES, LTD, B.P. ELEVATOR CO., INC.

Defendant.

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INDEX NO. 157021/2014

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this application to/for

Upon the foregoing documents, it is

Defendant B. P. Elevator Co., Inc. ("ELEVATOR") seeks an order granting summary judgment dismissing a personal injury action brought by Plaintiff Christine Kay. Plaintiff and Co-Defendant West 23rd Street Owners Corp. ("OWNERS") oppose.

FACTS

Plaintiff alleges that she sustained personal injuries following an incident at her residence on April 14, 2014. Plaintiff was a resident of Apartment 4D on the fourth floor of a six-story residential apartment building located at 410 West 23rd Street. The building has one elevator that services all six floors.

Plaintiff testified at her examination before trial that on April 14, 2014, she left her apartment around 6:30 a.m. to take her dog for a walk. Plaintiff called the elevator from the fourth

floor and entered the elevator without issue. As she was exiting the elevator at the lobby level, Plaintiff took approximately three to four steps before her left foot hit the top edge of the lobby floor and she fell on her right arm. Her left sneaker had come off her foot and was caught in the gap between the lobby floor and the elevator and was preventing the elevator door from closing. Although after her fall Plaintiff did not pay close attention to the size of the gap between the lobby floor and the elevator, Plaintiff estimates that the gap was approximately three to four inches based on the part of her sneaker that was stuck in the gap.

Plaintiff testified that she had observed the elevator not leveling with the lobby floor "dozens of times," with the elevator sometimes landing lower than the lobby floor and sometimes higher than the lobby floor. Plaintiff also recalls bringing the elevator's leveling problems to the attention of Renis Lami, the building's superintendent, in the fall of 2013.

Plaintiff brought suit on July 17, 2014 against Defendants, ELEVATOR and OWNERS, alleging that she sustained severe and personal injuries as a result of Defendants' negligence in failing to maintain the subject elevator in a reasonably safe condition.

At the time of the incident, ELEVATOR's former mechanic, Brian Dineen, had been the primary mechanic performing monthly maintenance work on the subject elevator since April 2013. He testified at his examination before trial that he became a mechanic in 1993, after an apprenticeship, by training with a mechanic and working on elevator maintenance and repair. He estimates that approximately ten percent of the elevators that he had worked on since 2014 were single speed, like the subject elevator.

Mr. Dineen described the subject elevator as a single speed AC elevator with an alternating current motor. According to Mr. Dineen, factors such as weight, heat, cold, and changes in voltage affect the leveling of the elevator. During maintenance, Mr. Dineen would adjust the leveling of the subject elevator if he determined that he was able to do so. He also testified that to better control the

stopping of the elevator, the subject elevator would have to be replaced with either a variable voltage alternating current (VVAC) or variable voltage variable frequency (VVVF) elevator.

Mr. Dineen testified that he had visually observed misleveling on the subject elevator while performing maintenance in the past, although he could not say how many times. He was called to examine the subject elevator on the day of the incident, but did not recall if he noticed any leveling issues that day.

The maintenance contract dated November 15, 2012 between ELEVATOR and OWNERS states that ELEVATOR does not assume responsibility for "failures, mishaps or accidents" attributable to the leveling of a single speed elevator. ELEVATOR also submitted a bid to OWNERS to modernize the elevator on July 25, 2013. However, OWNERS chose to award the bid to another vendor and notified ELEVATOR of its decision by email on March 27, 2014.

DISCUSSION

On a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion. *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 824 (2014). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence to demonstrate the absence of any material issues of fact. *Id.* at 833. Once the moving party makes this showing, the burden shifts to the opposing party to raise a triable issue of fact. *Id.*

I. RES IPSA LOQUITUR

ELEVATOR failed to tender sufficient evidence to establish that *res ipsa loquitur* is inapplicable in this case. An elevator company's negligence may be inferred "if the 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 which is within the defendant's control; and (3) it is not due to any voluntary action or contribution on the plaintiff's part." *Ezzard v. One East River Place Realty Co.*, 129 A.D.3d 159, 162 (1st Dep't 2015). A defendant may "rebut

this inference by presenting different facts or otherwise arguing that the jury should not apply the inference in a particular case." *Id.* Additionally, the requirement of exclusive control by the defendant is met when "the probability that the negligent act was caused by someone other than the defendant is so remote that it is fair to permit an inference that the defendant is the negligent party." *Cameron v. H.C. Bohack Co.*, 27 A.D.2d 362, 364 (2d Dep't 1967).

New York courts have held that the misleveling of an elevator does not ordinarily occur in the absence of negligence. *See, e.g., Gutierrez v. Broad Fin. Ctr., LLC*, 84 A.D.3d 648, 649 (1st Dep't 2011); *Dickman v. Stewart Tenants Corp.*, 221 A.D.2d 158, 158 (1st Dep't 1995).

The doctrine of *res ipsa loquitur* has been held inapplicable where "plaintiff's fall could have occurred in the absence of negligence and could have been caused by a misstep on his part," but has been applied where evidence showed that the misleveling of an elevator was of "sufficient magnitude to be substantially beyond the acceptable tolerance." *Meza v. 509 Owners LLC*, 2010 N.Y. Misc. LEXIS 1938, at *6 (N.Y. Sup. Ct., New York County, Apr. 27, 2010) (internal quotations omitted), *aff'd*, 82 A.D.3d 426 (1st Dep't 2011); *see also Burgess v. Otis Elev. Co.*, 114 A.D.2d 784, 786 (1st Dep't 1985).

ELEVATOR argues that Plaintiff cannot rely on *res ipsa loquitur* to infer negligence because the misleveling could have occurred in the absence of negligence, the accident could have occurred due in part or wholly because of Plaintiff's own negligence, and Plaintiff has not offered sufficient evidence to show that the magnitude of misleveling was beyond the acceptable range for a single speed elevator. ELEVATOR further argues that it did not exercise exclusive control over the leveling of the elevator because it disclaimed all liability related to leveling under its maintenance contract with OWNERS.

Plaintiff argues, however, that ELEVATOR did have exclusive control of the subject elevator through its contract, and that ELEVATOR has not tendered any evidence to establish that Plaintiff's accident would not occur on a properly maintained elevator in the absence of negligence.

ELEVATOR has failed to tender sufficient evidence to demonstrate the absence of any material issues of fact because it has not submitted evidence to establish that the subject accident would not occur on a properly-maintained elevator in the absence of negligence. *See Gutierrez v. Broad Fin. Ctr., LLC* at 649 (1st Dep't 2011) (reasoning that "[t]he alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence; deposition testimony and an elevator maintenance agreement established that defendant had exclusive control over the inspection, maintenance and repair of the subject elevator; and the record is devoid of any evidence that plaintiff contributed to the misleveling of the elevator").

II. ELEVATOR'S NEGLIGENCE

ELEVATOR did not tender sufficient evidence to establish that it used reasonable care to correct the subject elevator's misleveling condition. "An elevator company which agrees to maintain an elevator in safe operating condition 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." *Rogers v. Dorchester Associates*, 32 N.Y.2d 553, 559 (1973). Additionally, an elevator maintenance company cannot exempt itself from liability for its own negligence. *See id.* at 564; *Yakima Tingling v. C.I.N.H.R., Inc.* 120 A.D.3d 570, 571 (2d Dep't 2014). Such a contractual provision is voided by § 5-323 of the General Obligations Law, which prevents an "independent contractor from exempting itself from liability for its own negligence for work performed in maintaining real property or appurtenances to real property." *Rogers v. Dorchester Associates*, 32 N.Y.2d at 564. However, "a contractual clause that purports to do so may be enforced where the party to be indemnified is found to be free of any negligence." *Yakima Tingling v. C.I.N.H.R., Inc.* 120 A.D.3d at 571 (internal quotations omitted). In *Yakima Tingling v. C.I.N.H.R., Inc.*, the court denied summary judgment to a nursing home claiming that the elevator maintenance company improperly indemnified the nursing home for its negligence and a grant of

summary judgment would be premature without a determination as to negligence. 120 A.D.3d at 570-71.

Furthermore, in *Wilhelm v. Apartments*, the court denied summary judgment to an elevator maintenance company that had a provision in its contract limiting liability for the elevator's misleveling "for reasons that cannot be revealed by the ordinary maintenance offered in the contract." 2011 WL 2514012 (N.Y. Sup. Ct., Queens County, June 16, 2011). The court held that the elevator maintenance company did not submit evidence sufficient to demonstrate that it exercised "reasonable care in performing its maintenance obligations and that the reason for the misleveling could not be revealed by the ordinary maintenance under the contract." *Id.*

In its motion, ELEVATOR argues it is entitled to summary judgment because there is no evidence that the subject elevator misleveled due to a defect or that such a defect would have been discovered with reasonable care and corrected without replacing the elevator. ELEVATOR argues that the only way it could have lessened the risk of misleveling was by modernizing the elevator from a Single Speed AC Elevator to a variable speed elevator. ELEVATOR further argues that there is no evidence it could have corrected the misleveling because while it routinely inspected the elevator, it also warned OWNERS that misleveling problems are unavoidable in single speed elevators and recommended that OWNERS modernize their elevator to prevent leveling problems. ELEVATOR also argues that OWNERS is responsible for any misleveling of the subject elevator because the maintenance contract between ELEVATOR and OWNERS states ELEVATOR is not liable for any misleveling of the subject elevator.

Plaintiff argues that there are questions of fact regarding whether ELEVATOR's maintenance of the subject elevator was a proximate cause of Plaintiff's accident. Plaintiff claims that ELEVATOR has not tendered any maintenance logs, inspection reports, or other documentation showing that ELEVATOR did all it could to discover and correct the misleveling of the subject elevator. Plaintiff also argues that ELEVATOR assumed responsibility for the subject

elevator by entering into a maintenance contract with OWNERS, and therefore, assumed the risk of misleveling. In addition, Plaintiff argues that the contract created the duty to adequately maintain the subject elevator in a safe condition and that this duty was breached when ELEVATOR failed to take the subject elevator out of service.

The court finds that ELEVATOR has not tendered sufficient evidence to warrant summary judgment. There remains a question of fact regarding whether ELEVATOR used reasonable care to correct the subject elevator's misleveling condition. There also remains a question of fact regarding whether ELEVATOR assumed responsibility of the elevator by entering into a maintenance contract with OWNERS despite having a clause in their contract that disclaims ELEVATOR's liability for any misleveling of the subject elevator

CONCLUSION AND ORDER

For the reasons stated above, ELEVATOR's motion for an order granting summary judgment should be denied because there remain questions of fact yet to be resolved. Accordingly, it is

ORDERED that B. P. Elevator Co., Inc.' motion for an order granting summary judgment is denied.

This constitutes the decision and order of the court.

7/21/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE