Napolitano v Jackson "78" Condominium
2017 NY Slip Op 31787(U)
August 8, 2017
Supreme Court, Suffolk County
Docket Number: 10-22087
Judge: Denise F. Molia
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SHORT FORM ORDER

COPY

INDEX No. 10-22087
CAL. No. 16-00725OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 9-19-16 (002) (003)
ADJ. DATE 2-10-17
Mot. Seq. # 002 - MG
003 - MG

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PATRICIA NAPOLITANO,

Plaintiff,

- against -

JACKSON "78" CONDOMINIUM, CONDO UNITS, LP, MPJ REALTY, LLC, SLJ PROPERTY MANAGEMENT, LLC, GOTHAM ELEVATOR INSPECTION, INC., and ALL BOROUGH ELEVATOR LLC,

Defendants.

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Upon the following papers numbered 1 to 14 read on these motions for summary judgment ; Notices of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 11 ; Replying Affidavits and supporting papers 12 - 14 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the pending motions (002 and 003) are combined herein for disposition; and it is

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ORDERED that the motion (002) for summary judgment by defendant Gotham Elevator Inspection, Inc. is granted and the complaint and any cross claims asserted against it are hereby severed and dismissed; and it is further

ORDERED that the motion (003) for summary judgment by defendants The Jackson "78" Condominium, MPJ Realty, LLC and SLJ Property Management, LLC is granted and the complaint is hereby severed and dismissed as to these defendants.

Plaintiff commenced this action seeking to recover damages for personal injuries she sustained on August 15, 2009, when she was allegedly caused to trip and fall as a result of the elevator mis-leveling in the building at 35-50 78th Street in Jackson Heights, New York (the "building"). The building is owned by defendant The Jackson "78" Condominium (the "Owner" or the "Condominium") and managed by defendant SLJ Property Management, LLC ("SLJ Management").[1] Defendant All Borough Elevator, LLC ("All Borough") had the contract to maintain the subject elevator. Gotham Elevator Inspection, Inc. entered an agreement with the Condominium's disclosed agent (not a party herein) as the third-party contractor to witness the mandated annual inspection known as a Category 1 or ELV 3 inspection and test.[2] Charles Miraglia ("Miraglia"), an elevator mechanic at Gotham, witnessed the Category 1 inspection.

In the complaint as amplified by the bill of particulars, plaintiff alleges she sustained serious injuries as a result of the defendants' negligence. The complaint does not differentiate between the purportedly negligent acts committed by each defendant but sets forth as to all defendants allegations which include: negligent ownership, management, operation, maintenance, control, inspection and repair of the elevator; permitting the elevator to become and remain in disrepair thereby creating a trap-like condition; and failing to make proper and timely inspections of the elevator. Plaintiff alleges both actual and constructive notice of the mis-leveling based on the defendants' regular and continuous presence at the building prior to the subject incident. Plaintiff also relies on the doctrine of res ipsa loquitur.

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[1]In May 1999 a management agreement for the building was entered between MPJ Realty, LLC and the Condominium. Leonard Jacobs was the vice president of MPJ Realty and his father, Sidney Jacobs who passed away in 2004, was the president. In January 2009, the management company changed to SLJ Management, of which Jacobs is the president, with the duties and responsibilities set forth in the May 1999 agreement remaining the same.

[2]Section 28-304.6.1 of the Administrative Code, captioned, "Inspection and testing entities," provides, as pertinent, that "[t]he required periodic [elevator] inspections shall be made by the department [of buildings], except that one inspection and test for elevators and escalators shall be made between January first and December thirty-first of each year on behalf of the owner by an approved agency in accordance with this code and with rules promulgated by the commission. Required inspection and tests performed on behalf of the owner shall be performed by an approved agency in accordance with rules of the department and witnessed by a approved agency not affiliated with the one performing the test" (***Del Valle v Fujitec***, 2014 WL 1279754 [Sup Ct NY County], 2014 Slip Op 30731[U]).

In its answer defendant Gotham Elevator Inspection, Inc. ("Gotham") denies liability, asserts affirmative defenses and interposes a cross claim against its co-defendants seeking contribution and indemnification. Similarly, in their combined answer, defendants MPJ Realty, LLC ("MPJ Realty"), SLJ Management and the Owner deny liability, assert affirmative defenses and interpose cross claims against defendants Gotham, All Borough, and Condo Units, L.P. seeking contribution, common-law and contractual indemnification and damages for breach of contract in failing to procure insurance. Discovery has been completed and the note of issue filed. The instant motions for summary judgment ensued.

In support of its motion, Gotham submits, among other documents, the pleadings, deposition transcripts and elevator service agreements. In addition to the same transcripts and documents, the Owner, MPJ Realty and SLJ Management (hereinafter the "Movants" when referred to collectively) submit a CD which contains surveillance footage of the elevator from the day of the alleged accident, a work order dated June 19, 2009 and an expert affidavit.

Plaintiff opposes the motions, arguing that the testimonial and documentary evidence submitted raise material questions of fact requiring a trial. In opposition, plaintiff relies on her own deposition testimony as well as her affidavit and the affidavits of her mother, Sheila Ball, and an expert, and numerous elevator service and maintenance documents. All Borough has not opposed the motions and has not submitted a contemporaneous motion for relief.

The following is gleaned from the expert affidavits and deposition of Miraglia. At the time of plaintiff's alleged accident, the building had one single-speed, alternating current motor with a shaft door which is manually opened to enter the cab. Such elevators are stopped by a brake and do not contain leveling devices or have a level functioning. The stopping accuracy is variable and determined by such factors as the weather (i.e., temperature and humidity), the amount of weight in the elevator, the direction of travel, the elevator's usage, adjustment of its brakes and regular maintenance. In the type of elevator at issue, a differential of two to three inches in the level between the elevator and the floor on which the elevator stopped is within normal limits.

Plaintiff testified that on the night of the accident, at approximately 10:00-10:30 pm, she, with her 2-year old daughter and mother, entered the building and proceeded to the elevator in the lobby. Plaintiff's mother pulled open the door to the elevator and walked in without incident. Plaintiff followed her mother carrying her daughter in her arms and as she entered the elevator tripped and fell into her mother who caught her. Plaintiff testified that before the elevator door closed, she looked to see what had caused her to trip, and observed a three- to four-inch difference between the floor of the elevator and the floor of the lobby. Plaintiff, however, admits that she did not report her accident to any of the defendants or their representatives.

Miraglia testified that he was the witness for the Category 1 inspection and test on the subject elevator conducted on August 12, 2009. Miraglia testified that LCD Elevator (not a party herein) performed the inspection and test. Based on Miraglia's testimony, though deficiencies were found, none impacted or effected leveling of the elevator. Miraglia testified that had the elevator shown signs of mis-leveling, he would have taken it out of service. He also testified that the elevator was given an unsatisfactory rating, but explained upon questioning that any violation of a category or deficiency in a device listed on the Category 1

report or test, even a light bulb being out (which one was), would warrant an unsatisfactory; thus, such rating did not equate to the safety of an elevator. Miraglia further testified that a log is required to be maintained in the elevator motor room in which to document dates of inspections and maintenance performed. The log was not in the motor room or presented to Miraglia on the date of the Category 1 inspection, and such violation was a basis for the unsatisfactory rating.

The complaint as asserted against Gotham must be dismissed. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs., Inc.***, 98 NY2d 136, 138, 746 NYS2d 120 [2002]; *see* ***Quinones v City of N.Y.***, 105 AD3d 932, 963 NYS2d 370 [2d Dept 2013]). There are three exceptions under with a duty of care to a non-contracting third party may arise:

> (1) where the contracting party, in failing to exercise reasonable care in the execution of the contract, creates an unreasonable risk of harm to others, or exacerbates that risk; (2) where a plaintiff detrimentally relies on the defendant's continued performance of a contractual obligation; and (3) where the contracting party comprehensively agrees to assume and displace the promisee's safety-related obligations [internal quotation marks and citations omitted] (***Espinal v Melville Snow Contrs., Inc.***, *supra*).

Miraglia testified that he only witnessed the Category 1 inspection and test conducted by LCD Elevator on August 12, 2009. As a mere witnessing agent, Gotham cannot be held to have assumed a duty to plaintiff as clearly none of the three *Espinal* exceptions applies (*see* ***Quinones v City of N.Y.***, *supra*; ***Bauerlein v Salvation Army***, 74 AD3d 851, 805 NYS2d 215 [2d Dept 2010]). In opposition plaintiff does not raise an issue of fact, and does not address Gotham's motion. Any claims for indemnification asserted against Gotham are also summarily dismissed as such a claim cannot stand independently of potential liability of the indemnitor (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]). Therefore, Gotham's motion is granted.

As to the motion by the Movants, as an initial matter, the court has not considered the CD containing the surveillance footage. A videotape may be authenticated by the testimony of a witness to the recorded events, or of an operator, installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape accurately represents what was before the camera. Furthermore, "[e]vidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering" (***People v Patterson***, 93 NY2d 80, 84, 688 NYS2d 101 [1999]; ***Read v Ellenville Nat'l Bank***, 20 AD3d 408, 409, 799 NYS2d 78 [2nd Dept 2005]).

Here, there is no attempt by the Movants to lay an appropriate evidentiary foundation for the CD containing the surveillance footage. The affirmation of Movants' counsel describes Exhibit 3 as a disc containing video from the interior of the subject elevator and states that plaintiff can be observed entering the elevator at approximately 19:02:53 on the day of the incident. The affirmation, however, does not set forth the basis for counsel's knowledge, and the Movants' papers do not contain any other sworn statements pertaining to the CD and its contents.

It is well settled that liability for an elevator defect, whether it be imposed upon the owner or the management company, is premised upon prior actual or constructive notice of the defect (***Rogers v Dorchester Assocs.***, 32 NY2d 553, 347 NYS2d 22 [1973]; ***Tucci v Starrett City, Inc.***, 97 AD3d 811, 949 NYS2d 419 [2d Dept 2012]; ***Cilinger v Arditi Realty Corp.***, 77 AD3d 880, 911 NYS2d 75 [2d Dept 2010]). If the property owner hires an elevator company to maintain the elevators, liability can be found against the owners or managing agents if they received notice of a defect and failed to notify the elevator company about it (***Cilinger v Arditi Realty Corp.***, *supra;* ***Oxenfeldt v 22 N. Forest Ave. Corp.***, 30 AD3d 391, 816 NYS2d 563 [2d Dept 2006]). Here, the Movants established, prima facie, that they neither created nor had actual or constructive notice of the subject elevator mis-leveling (*see* ***San Andres v 1254 Sherman Ave. Corp.***, 94 AD3d 590, 942 NYS2d 104 [1st Dept 2012]; *see generally* ***Kawka v 135-55 35th Realty, LLC***, 139 AD3d 677, 31 NYS3d 173 [2d Dept 2016]; *cf* ***Urman v S & S, LLC***, 85 AD3d 897, 925 NYS2d 186 [2d Dept 2011]). The representatives deposed on behalf of SLJ Management and the Owner each testified that he was not aware of any defective condition and did not have prior actual or constructive notice of the subject elevator mis-leveling.

Specifically, Leonard Jacobs, the president of SLJ Management, testified that SLJ Management handles the day-to-day operations of the building and reports to the Owner. The duties of SLJ Management's employees, as is relevant here, consist of performing regular inspections at least once a week of the common areas which include the elevator. The elevator inspections are for cleanliness and to ensure that it is working. Any maintenance or service issues discovered during a weekly inspection are reported to the building superintendent or porter, and the elevator service/maintenance company. Jacobs also testified that for the year prior to the alleged accident he was not aware of any complaints or issues regarding the elevator mis-leveling.

The superintendent of the building, Milton Rivera, who is employed by the Owner, testified that he inspected the building, including the elevator, twice a day seven days a week. Rivera also testified that during the three years prior to the alleged accident, he never observed the elevator mis-level in the lobby or on any other floor, never received a complaint regarding the elevator mis-leveling, and was never advised of any accident occurring in the elevator. Similarly, the porter in the building, Fausto Quezada, also employed by the Owner, testified that he uses the elevator every day and has never experienced or received any complaints of mis-leveling.

Robert Shaw, the president of All Borough who worked more than 30 years as an elevator mechanic, was deposed regarding the maintenance and service of the subject elevator. Shaw testified the subject elevator was part of his monthly route;however, he did not recall dates of inspections or maintenance and was not aware of any documents to which he could refer to refresh his recollection. Shaw testified that the elevator mechanics at All Borough did not use a check sheet when inspecting or servicing an elevator, but set forth the custom and practice implemented by him and mechanics of the company. He also testified that a ticket book was used to generate work orders to service and maintain all elevators. Although Shaw could only testify as to All Borough's usual custom and practice, he stated that if during an inspection the elevator mis-leveled, adjustments would be made or parts replaced immediately; the problem would not be ignored.

In opposition, plaintiff failed to raise an issue of fact as to whether the Movants' had notice of the alleged defect. The work tickets proffered which show that the elevator previously mis-leveled are

insufficient to raise an issue of fact in light Miraglia's testimony that the elevator did not mis-level during the Category 1 inspection conducted three days prior to plaintiff's alleged accident. Plaintiff's assertion and that of her mother's that they were told by their relative, and heard other occupants of the building complaining about the elevator mis-leveling is hearsay and thus insufficient alone to defeat summary judgment (***San Andres v 1254 Sherman Ave. Corp.***, *supra*; ***Stock v Otis El. Co.***, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]). Her mother's assertion that she observed the elevator mis-level in the past also fails to raise an issue of fact because she admittedly did not report her observation to the Owner, SLJ Management or representatives (*see* ***Narvaez v New York City Hous. Auth.***, 62 AD3d 419, 878 NYS2d 724 [1st Dept], *lv denied* 13 NY3d 703, 886 NYS2d 366 [2009]; *cf.* ***Urman v S & S, LLC***, *supra*). Further, the affidavit by plaintiff's expert dated December 22, 2016, over seven years after the alleged incident, is insufficient to raise an issue of fact (***San Andres v 1254 Sherman Ave. Corp.***, *supra*; ***Stock v Otis El. Co.***, *supra*).

The doctrine of res ipsa loquitur is not applicable to the Movants because plaintiff failed to demonstrate that her alleged accident was one that would not ordinarily occur in the absence of someone's negligence, or that the Movants had exclusive control of the elevator (***Tucci v Starrett City, Inc.***, *supra*; ***Meza v 509 Owners, LLC***, 82 AD3d 426, 918 NYS2d 78 [2d Dept 2011]).

Accordingly, the motions for summary judgment are granted.

Dated: 8-8-17

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**