

<b>Toribino v NR Prop. 2 LLC</b>
2017 NY Slip Op 32429(U)
October 12, 2017
Supreme Court, Bronx County
Docket Number: 307368/08
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX  
-----X  
GUILLERMO TORIBINO,

Index No.: 307368/08  
Motion Calendar No.: 24&25  
Motion Date: 4/3/17

Plaintiff,

-against-

NR PROPERTY 2 LLC, MILLENNIUM ELEVATOR, INC.  
and AL-AN ELEVATOR MAINTENANCE CORP.,

Defendants.

-----X  
NR PROPERTY 2 LLC,

Plaintiff,

Third-Party Index No.:  
84192/09

-against-

METROPOLITAN PARKING GROUP, LLC

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion, Affirmation in Support, and Exhibits thereto.....</b>	<b>1</b>
<b>Affirmation in Support &amp; Opposition .....</b>	<b>2</b>
<b>Affirmation in Opposition .....</b>	<b>3</b>
<b>Affirmation in Opposition.....</b>	<b>4</b>
<b>Reply Affirmation.....</b>	<b>5</b>
<b>Reply Affirmation.....</b>	<b>6</b>
<b>Reply Affirmation.....</b>	<b>7</b>
<b>Notice of Motion, Affirmation in Support, and Exhibits thereto.....</b>	<b>8</b>
<b>Affirmation in Opposition.....</b>	<b>9</b>
<b>Affirmation in Opposition.....</b>	<b>10</b>
<b>Reply Affirmation.....</b>	<b>11</b>

Motions decided as follows: Upon deliberation of the application duly made by defendant/third-party plaintiff, NR PROPERT 2 LLC (hereinafter “NR”), by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, dismissing plaintiff’s Complaint and any and all cross-claims asserted against NR, and granting NR indemnity against both AL-AN ELEVATOR MAINTENANCE CORP. (hereinafter “AL-AN”) and METROPOLITAN PARKING GROUP, LLC (hereinafter “METRO”), is heretofore denied. Upon deliberation of the application duly made by defendant, AL-AN, by **NOTICE OF MOTION**, pursuant to CPLR §3212, granting AL-AN summary judgement, dismissing plaintiff’s Complaint and any and all cross-claims asserted against it, is heretofore denied.

This is action concerns personal injuries sustained by plaintiff as a result of an alleged July 11, 2008 accident that occurred while plaintiff was operating a freight elevator at the premises known as 4168 Broadway, Bronx, New York (hereinafter “subject premises”). Plaintiff was operating the elevator in the scope of his employment as parking attendant with METRO. The subject premises were owned by NR and MS Realty Services (hereinafter “MS Realty”) served as the property manager. The subject premises housed a multi-story parking garage. METRO operated the parking facility pursuant to a lease entered into with NR. Motor vehicles were moved up and down the floors of the parking facility with the use of three freight elevators. Two contracts were entered into between NR and AL-AN, one regarding maintenance of the freight elevators and one concerning modernization of the elevators. On the date in question, plaintiff claims to have been severely injured in the course of his employment when a freight elevator door fell on his right foot.

It should be noted at the outset that NR’s application must be denied as untimely. Pursuant to a June 9, 2016 Order by the Honorable Judge Betty Stinson, “parties time to *file* summary judgment motions is extended to 120 days from the date of this order.” The language of that Order is clear. NR did not *file* their motion until October 13, 2016, after the window provided by Judge Stinson had closed. As NR has failed to demonstrate good cause for the untimeliness of its motion, it must be denied. See Brill v. City of New York, 2 N.Y.3d 648, 781 N.Y.S.2d 681(2004).

A party seeking summary judgement must demonstrate, *prima facie*, entitlement to judgement as a matter of law by presenting sufficient evidence to negate any material issue of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851. If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence demonstrating the existence of factual issues requiring a trial. See Zuckerman v. City of New York, 49 NY.2d 557 (1980).

As to cases involving elevators, to succeed on a motion for summary judgment, evidence must be presented to demonstrate that defendant had a duty to keep the elevator in a reasonably safe condition, breached that duty by failing to maintain or repair the dangerous condition, and that the condition caused the injury. See Ianotta v. Tishman Speyer Properties, Inc., 46 A.D.3d 297 (1<sup>st</sup> Dept. 2007). Evidence must also be presented proving that defendant created or had actual or constructive notice of the defect. See Rivera v. Merrill Lynch/WFC/L/Inc, 84 A.D.3d 524 (1<sup>st</sup> Dept. 2011).

Here, AL-AN has failed to make a *prima facie* showing of entitlement to summary judgement. A maintenance contract between NR and AL-AN for the freight elevators, which was in effect at the time of the accident, provides in pertinent part, under the section entitled “SOLE RESPONSIBILITY”:

“The maintenance work shall be performed by elevator technicians directly employed by Contractor (AL -AN), who are experienced and skilled in maintain automatic group control elevators similar to those to be maintained under this Agreement and shall not be assigned or transferred to any agent or Sub-Contractor.”

Moreover, the contract provides:

“It is mutually agreed that Contractor shall not be under any obligation hereunder to make any and all repairs or replacements except those incidental to the normal operation of the machinery, and that the Contractor is not required under this agreement to make repairs or replacements necessitated by malicious damage, fire, including electrical fire, which are the result of causes beyond Contractors control. All repairs if necessitated by this paragraph will be performed at a fee not to exceed the standard rate in effect at the time service is performed. It si mutually agreed that Contractor shall make any and all repairs or replacements of damaged equipment caused by Contractor’s or an Sub Contractor’s improper repair or failure to repair, negligent or willful acts of omissions or default under the Contract Documents.”

A June 20, 2016 Order by Judge Stinson took into consideration control over the elevators at issue, and what the scope of the maintenance contract was. Judge Stinson specifically held:

“First, contrary to movant’s assertions, here, there is no issue as to who maintained the elevator at the time of the instant accident, and thus, who controlled it for the purposes of repair. To be sure, AL-AN exchanged the contract between itself and NR, which clearly indicates that all maintenance responsibility for the elevators located within 4168 was AL-AN’s. As such, at the time of this accident, AL-AN maintained the elevator and controlled it for that purpose; a fact which AL-AN concedes by pointing to the contact as evidence of its maintenance obligations In fact, the contract, provided by AL-AN in opposition to movant’s motion is dated January 2008 was identified as the contract in effect on the date of plaintiff’s accident by Mr. Comer at his deposition (portions of which are also provided by AL-AN), and charges AL-AN with comprehensive maintenance of the elevators within 4168. Thus movant is not entitled to the post-accident records sough on the grounds that issues of maintenance and control abound.”

Jorge Palacios testified on behalf of METRO at his Examination Before Trial (hereinafter “EBT”). Mr. Palacios was employed by METRO at the time of the incident and was the shift supervisor. Mr. Palacios

testified that if repairs needed to be made to any of the elevators located at the subject premises, the procedure was for a worker to inform the METRO supervisor and for the METRO supervisor to call the elevator company. The shift supervisor could also call the elevator company. Mr. Palacios testified that if there was a problem with the elevator while he was working, he would call AL-AN directly. He also testified that there was always something wrong with the doors of the elevators and he testified that he called AL-AN as a result of the doors not working properly. He testified that problems with the doors existed for years. Mr. Palacios testified that he would sometimes make repairs to the doors when it was "something simple" and would not contact AL-AN on those occasions, but he indicated that AL-AN was aware that they were being done. Mr. Palacios also testified that prior to the date of the incident, there were problems with the elevator doors on the same elevator where plaintiff's accident occurred. He also believed that in the six (6) months prior to the date of accident, he informed AL-AN of problems with elevator doors on more than ten occasions. He testified that he did not have authority to take the elevators out of service.

Plaintiff testified at his EBT that he had made three (3) to four (4) prior complaints about the top door of the elevator coming off the track. He made the complaints as a result of witnessing the top doors coming off the track.

Non-party witness, Octavio Pinales testified at his EBT that he worked as a parking attendant during the time of the accident. Mr. Pinales testified that he noticed issues with the track of the elevator doors at least two (2) to three (3) times per week." He testified that after making complaints to his supervisor that he witnessed the elevator company come to work on the elevator. He further testified that "one knew that at any moment something could happen..." and that "[t]hose elevators, the truth is, those elevators were not fit for human work, too dangerous."

Christopher Plath testified on behalf of NR property. Mr. Plath was employed by MS Realty. Mr. Plath testified that NR property entered into an exclusive maintenance contract with AL-AN with respect to the elevators. The agreement provided that AL-AN was to perform monthly inspections and maintenance and AL-AN was to provide the building with inspection reports. He testified that when METRO needed service they would call AL-AN directly. When AL-AN was not responsive, METRO would contact MS Realty, who would contact AL-AN. He testified that MS Realty would receive such calls roughly once a week. Mr. Plath testified that NR also entered into a written modernization contract with AL-AN.

Work ticket printouts between the period of January 2008 to August 2008 indicate that on numerous occasions, work tickets were generated demonstrating work done on the elevator in question. It appears that door repairs were done and elevators were temporarily shut down.

Handwritten service tickets indicate that nine (9) days prior to the accident, work was done on the subject elevator. More specifically, it indicates that "resecured (sic) repaired, and adjusted lockarm and interlocks on basement, 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> fl. Hatchway doors. Repairs broken wiring in L/S/D shaft. Interlock wiring Box. Resecured (sic) 1<sup>st</sup> fl. Hatchway door strike post. Checked operation."

Here, it cannot be said, as a matter of law, that AL-AN is entitled to summary judgement. The evidence set forth by way of testimony and the contract itself, demonstrate that it was AL-AN, who had control over the elevator, was duty bound to keep it in repair and reasonably safe. It should be noted as an aside, that Judge Stinson, as per her June 20, 2006 Order, specifically held that there is “no issue as to who maintained the elevator at the time of the instant accident, and thus, who controlled it for the purposes of repair.”

Moreover, AL-AN has failed to demonstrate that it did not owe the plaintiff any duty so as to impose liability on them by plaintiff, who was a third-party non-contracting party. See Espinal v. Melville Snow Constr., 98 N.Y.2d 136 (2002). The exceptions to the non-liability to a third-party non-contracting party are: (1) where the contractor launches a force of harm; (2) where the non-contracting third party detrimentally relies on the acts of the contracting party; and (3) where the contractor were such that they entirely displaces the landowner’s duty to maintain the premises. Espinal, *supra*.

As previously discussed it appears, at the very least, issues of fact exist that AL-AN entirely displaced the landowner’s duty to maintain the elevators as per the comprehensive maintenance agreement. Moreover, issues of fact exist of whether AL-AN launched the instrument of harm. By way of testimony by Mr. Palacios, Mr. Pinales and plaintiff, as well as the work and maintenance records produced, issues of fact clearly exist as to whether the elevator at issue should have been taken out of service due the constant issues that plagued them.

Finally, AL-AN has not demonstrated, as a matter of law, that it did not have notice of the alleged dangerous condition. The evidence by way of EBT testimony and document exchanges indicate that AL-AN received phone calls to come to the subject premises to repair and maintain the elevators and that they were exclusively under contract to do so. It appear from the evidence presented that AL-AN was at the subject premises on a routine basis and performed work on the elevators, including the elevator in question, and generated over one hundred (100) tickets from January 21, 2008 up to the date of the accident. It is noted that the elevator at issue had been shut down in July, 2008 and that in the month prior to the accident, AL-AN performed work to the subject elevator’s doors, adjusted wiring on the control board, adjusted the lock arm and interlocks, repaired wiring in the L/S/D shaft and re-secured the first floor hatchway door strike post. Moreover, the testimony from Mr. Palacios demonstrated that AL-AN was notified of the malfunctioning door on the subject elevator on several occasions and that the issue was ongoing.

It cannot be said, as a matter of law, that AL-AN should not have had notice of the allegedly unsafe condition. Even assuming, AL-AN did make a *prima facie* showing, issues of fact clearly exist as to whether AL-AN should have known about the allegedly dangerous condition. Moreover, AL-AN’s expert, Jon Halpern, did not examine the door or the elevator in question prior to the modernization. Without such inspection or the production of post-accident records, there is no evidence that could support Halpern’s conclusion that Mr. Palacios was solely responsible for the malfunctioning elevator. Even, if Halpern’s

Affidavit is to be considered as not speculative, issues of fact as to the cause of the accident and whether AL-AN knew or should have known about the dangerous condition continue to exist, precluding this Court from granting summary judgement.

Accordingly, it is:

ORDERED that the Motion made by defendant/third-party plaintiff, NR PROPERT 2 LLC, for an Order, pursuant to CPLR §3212, dismissing plaintiff's Complaint and any and all cross-claims asserted against it and granting NR PROPERT 2 LLC indemnity against both AL-AN ELEVATOR MAINTENANCE CORP. and METROPOLITAN PARKING GROUP, LLC, is heretofore denied. It is further

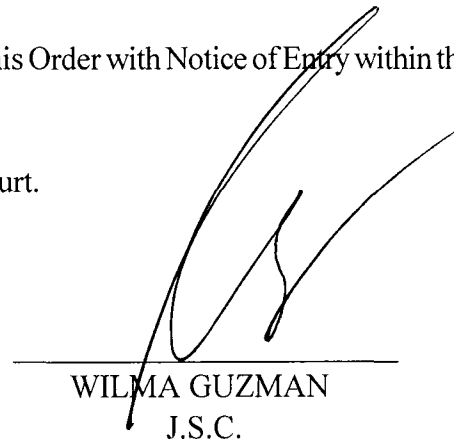
ORDERED that Motion made by AL-AN ELEVATOR MAINTENANCE CORP., pursuant to CPLR §3212, granting them summary judgement, dismissing plaintiff's Complaint and any and all cross-claims asserted against them, is heretofore denied

ORDERED that NR PROPERT 2 LLC shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated:

10/12/17

  
WILMA GUZMAN  
J.S.C.