Caiola v New York SMSA, LP
2017 NY Slip Op 32507(U)
November 27, 2017
Supreme Court, New York County
Docket Number: 153389/14
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

----------X

LORRAINE CAIOLA,

Index No. 153389/14

Plaintiff,

- against -

NEW YORK SMSA, LP, d/b/a VERIZON WIRELESS,

Defendant.

----------X

NEW YORK SMSA, LP, d/b/a VERIZON WIRELESS,

Third-Party Plaintiff,

- against -

THE DURST ORGANIZATION INC., ONE BRYANT PARK, LLC and SCHINDLER ELEVATOR CORPORATION,

Third-Party Defendants.

----------X

Gerald Lebovits, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion 001, defendant Schindler Elevator Corporation (Schindler) moves under CPLR 3212 for summary judgment dismissing all claims against it as third-party defendant.

In motion 002, defendant New York SMSA, LP, d/b/a Verizon Wireless (Verizon), moves under CPLR 3212, (1) for summary judgment dismissing the complaint, and (2) for summary judgment on its third-party complaint for common law indemnification from Schindler.

Plaintiff brought this action against Verizon, alleging that she was injured when a rear door in the elevator located in a "Verizon Wireless Store," and in which she was a passenger, opened, causing her to fall.

Verizon is the owner of the Verizon Wireless Store located at 125 West 42nd Street in New York County (the premises) (amended complaint, ¶ 3). On December 28, 2013, allegedly, a Verizon employee authorized three women, including plaintiff, to use a lavatory within the premises. Allegedly, the employee directed them to a nearby elevator to access Verizon's

lavatory on another floor (*id.*, ¶ 21). The three women entered the elevator, and plaintiff went directly to the back of the elevator and turned so that her back, and the backpack she was wearing, faced the rear of the elevator, unaware that the elevator had a rear door (*id.*, ¶¶ 22, 23, 25). As plaintiff's back and backpack were resting in proximity or in contact with the rear door of the elevator, the rear door suddenly and unexpectedly opened when the elevator reached the designated floor (*id.*, ¶ 25). The sudden opening caused plaintiff to lose her balance and fall backwards striking her head, spine, and elbow resulting in injuries (*id.*, ¶ 26). Plaintiff claims that her injuries are because of Verizon's negligence.

In her verified bill of particulars, plaintiff specified that Verizon's negligence includes: (1) maintaining an unreasonably unsafe elevator; (2) failing to warn the public in general, and plaintiff in particular, of the elevator's rear door that opens at different levels; (3) failing to comply with existing federal, state and local statutes, laws, codes, and ordinances; and (4) failing to have an attendant stationed in the elevator.

In its third-party complaint, Verizon alleges that, pursuant to agreements entered into with the third-party defendants, the third-party defendants agreed to defend, indemnify, and hold harmless Verizon for damages, including the damages plaintiff alleges in this action. Verizon seeks contractual indemnification (first cause of action); common law indemnification (second cause of action); and contribution (third cause of action).

Verizon argues that it is entitled to summary judgment as a matter of law, dismissing the amended complaint, because it did not breach any duty owed to plaintiff regarding the accident. Also, it contends that if it is not granted summary judgment, then it is entitled to common law indemnification from third-party defendant Schindler who manufactured, installed, and maintains the elevator under contracts with the building owner.

Schindler argues that: (1) the record establishes that no evidence exists of any malfunction of the elevator at the time of the accident, and plaintiff's claim is based on the allegation of improper signage and lack of warning about the presence of the rear door; (2) no evidence exists in the record of actual or constructive notice of the allegedly defective condition that caused the accident; and (3) there is no statutory, code, or common law requirement that an elevator with front and rear doors have signage posted regarding the rear door.

In opposition to both motions, plaintiff argues that defendants failed in their burden to demonstrate as a matter of law that they did not breach their duty to plaintiff and the general public to reasonably and safely maintain the elevator. Allegedly, defendants created a dangerous condition, had actual and constructive notice of the same, and launched an instrument of harm and increased the risk of danger to plaintiff. She asserts that a jury could reasonably find that defendants' negligence was at least a proximate, if not the sole, cause of the accident. Moreover, plaintiff contends, there are numerous issues of fact in this case of first impression of a rear opening elevator door without warning.

For the reasons discussed below, Verizon's motion is granted to the extent of dismissing the amended complaint. Schindler's motion is denied as academic.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Verizon has made the requisite showing.

> "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence"

(*Tagle v Jakob*, 97 NY2d 165, 169 [2001] [internal citations omitted]). Such is the case here.

As a preliminary matter, none of the parties identified any New York decisions involving the precise issues raised here, and the court is not aware of any. In a decision issued by a court in Massachusetts, however, the court stated: "The elevator doors that opened up in the rear of the elevator were a condition that would be open and obvious to a person of ordinary intelligence and there was no duty to warn that they might open" (*Maynard v Benjamin's Restaurant, Inc.*, 60 Mass App Ct 1127, 806 NE2d 472 2004 WL 829497, *1 [2004]).

> "Although property owners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware, they have no duty to protect or warn, and a court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous"

(*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 542-543 [1st Dept] [internal citation omitted], *lv denied* 22 NY3d 855 [2013]). Moreover, if the complained of condition does not pose a reasonably foreseeable hazard, the open and obvious doctrine is irrelevant (*Jones v Presbyterian Hosp. in City of N.Y.*, 3 AD3d 225, 226-227 [1st Dept 2004] ["There is no claim that the stairs were structurally unsafe, no claim that some debris on them caused plaintiff to fall, and no claim that the carpeting was tattered in a way that snagged his foot. Nor does plaintiff complain of the adequacy of the lighting in the auditorium. He does not even argue that he was unaware he had to step down from his row to the aisle. Rather, he effectively claims that he miscalculated the number of steps he had to descend."]).

Verizon established its "prima facie entitlement to judgment as a matter of law by demonstrating that the alleged condition was readily observable by the reasonable use of the plaintiff's senses, and was not inherently dangerous" by submitting, among other things, an expert affidavit stating that the elevator complied with applicable elevator codes (*see Dadon v 102-30 66th Rd. Co-Op Owner's, Inc.*, 90 AD3d 976, 976 [2d Dept 2011] [holding that where plaintiff alleged that defendants negligently permitted natural sunlight to enter the lobby ("an optical confusion"), defendants demonstrated prima facie entitlement to judgment in that the

alleged condition was readily observable by the reasonable use of plaintiff's senses, and a licensed engineer's affidavit stated that the lobby's condition complied with applicable building codes]).

Verizon submitted the expert affidavit of Michael Sena, a partner in Murray & Sena, LLC, and a self-described "vertical transportation (elevator)" consultant. Sena states that he has more than 30 years of experience in the elevator industry, and holds various licenses related to elevator maintenance and inspection. He also states that he is familiar with all applicable administrative codes, rules, and regulations relating to the design, installation, and maintenance of elevators in the City of New York (Sena aff, ¶¶ 1-2).

Sena describes the elevator as measuring 51 inches wide by 47 inches deep with a weight capacity of 2,100 pounds, and servicing two floors in the premises, the ground floor, which is the first floor, and the basement floor, which is the "Cl" floor. The elevator has two cab doors, the front cab door which opens when the elevator is at the first floor into the retail space, and the rear cab door on the opposite side, which opens when the elevator is at the Cl floor into an open area in the basement (*id.*, ¶ 6).

Sena states that the rear cab basement floor door is identical in appearance to the front cab ground floor door. The doors are located directly across the elevator cab from one another. He submitted photographs of the elevator, and opines that they clearly depict the rear cab basement floor door as set back approximately three inches from the rear wall of the elevator cab. He opines further that the presence of the rear cab basement floor door is obvious and readily apparent upon the opening of the front cab ground floor door (*id.*, ¶ 7).

Sena avers that the elevator complies with all applicable codes, rules, and regulations imposed by the New York City Building Code and the American Society of Mechanical Engineers "A17.1 Safety Code for Elevators and Escalators." The location of doors in an elevator are dictated by a building's architectural layout, and there is no applicable code, rule, regulation, or standard that prohibits elevators from having two cab doors which open in the front and rear of the elevator cab. Further, he opines, there is no applicable code, rule, regulation, or standard which imposes a duty to warn elevator passengers that there are two opposite cab doors that open in an elevator or as to which elevator cab door will open when the elevator arrives at the selected floor (*id.*, ¶ 10).

Photographs of the elevator support the expert's assertion that the rear door is set back several inches, and is readily observable (*see* exhibit M to affirmation of Peter M. Canty, Esq.]). As such, Verizon has established that the condition was "open and obvious and, as a matter of law, was not inherently dangerous" (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009]).

Moreover, in support of its own motion, Schindler submitted the expert affidavit of Jon Halpern, "a professional engineer, duly licensed by the State of New York, and a consulting engineer in the field of vertical transportation, which includes matters of design, construction,

installation, maintenance and repair of elevators, escalators, and other devices" (Halpern aff, ¶ 1). Halpern's opinion is consistent with Sena's opinion.

Halpern describes the elevator as a "2-stop roped hydraulic elevator serving the lobby and lower level with a front opening on the first floor and rear opening at the lower level that was installed around 2009." He states that, "to a reasonable degree of engineering certainty," no evidence exists of any malfunction with the elevator on the date of plaintiff's accident, and no failure to maintain the elevator caused the incident. In addition, the design of the elevator complied with the New York City Building Code and the ASME A17.1-Safety Code for Elevators and Escalators and all industry standards regarding any required signage or warnings regarding the existence of both front and rear openings (*id.*, ¶ 8).

Having demonstrated a prima facie case of entitlement to judgment as to negligence, the burden thus shifts to plaintiff to demonstrate the existence of a genuine material issue of act to require a trial of the action (*Alzarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff has not met her burden.

The circumstances present here are akin to a trip-and-fall accident: "To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Julianne Oldham-Powers v Longwood Cent. Sch. Dist.*, 123 AD3d 681, 681-682 [2d Dept 2014]). Plaintiff has not presented any evidence to show that Verizon had notice of a dangerous condition involving the elevator, in that, as discussed above, the photographs show that the rear wall was not continuous, and that the rear door was recessed by several inches. The record does not contain evidence of a prior injury or incident involving the opening of the rear door. Because there is no evidence of a design defect "[d]efendant cannot be held liable for failing to warn of a condition if it was not on notice that the condition was dangerous" (*McKee v State of New York*, 75 AD3d 893, 895 [3d Dept 2010] [finding that claimant was injured when she fell after tripping on an elevated doorway sill located at the main entrance to a building; defendant had no notice, because its employee testified that no accidents had been reported concerning the subject doorway in at least eight years prior to claimant's fall]; (*Jones v Great Am. Grocery Store*, 234 AD2d 940, 940 [4th Dept 1996] [holding that plaintiff failed to establish a prior similar incident at any of defendant's stores]).

Plaintiff submitted excerpts of examination before trial (EBT) testimony of one of her two companions in the elevator, indicating that the presence of only one operating panel, next to the front facing door, led to her surprise when the rear door opened (*see* affirmation in opposition at 45-53 [Carrie Rinker EBT testimony]). Nevertheless, as discussed above, two experts testified that the elevator complied with all applicable codes, rules, and regulations. Significantly, as discussed above, photographs in the record supports the expert's assertion that the rear door is set back several inches, and is readily observable (*see* exhibit M to affirmation of Peter M. Canty, Esq.]).

Plaintiff did not submit any expert testimony. To be sure, expert testimony is not required where the issue of fact is "within the ken of the ordinary juror" (*Johnson v Village of Saranac Lake*, 279 AD2d 784, 785 [3d Dept 2001]). Here, however, concerning the design of the elevator, which is not "within the ken of the ordinary juror," the lack of expert support for plaintiff's assertion of negligence results in a failure to create an issue of fact (*see David v Makita U.S.A.*, 233 AD2d 145, 146 [1st Dept 1996] ["Since plaintiffs failed to present any expert testimony indicating that the use of a removable blade guard rendered the saw not reasonably safe for its intended use, they have failed to establish a triable issue of fact as to their claim that this feature constituted negligent design"]; *accord Warech v Trustees of Columbia Univ.*, 203 AD2d 53, 54 [1st Dept 1994] ["Without the guidance of expert testimony, the jury was left to speculate as to the necessity for padding and its potential for attenuating injury such as that sustained by plaintiff. Such determination requires consideration of the nature of the game, the premises used, and the standards maintained by similar facilities"]; *cf. Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92-93 [1st Dept 2011] [noting that plaintiff's theory of "optical confusion" was supported by the affidavit of plaintiff's expert engineer stating that the concrete on the sidewalk and the walkway were similar shades of gray and, although the walkway's edge was painted with a red line on the surface of the transition riser and upper horizontal edge, the paint in front of defendant's store was "very worn"]).

Plaintiff's counsel states that based upon photographic evidence, there "is a metal stripping or saddle separating the back of the elevator and the basement floor that only becomes present when the rear door opens" (affirmation in opposition at 12). Although counsel for plaintiff states that "the metal tracking as the rear door opened obviously played a critical part in the fall" (affirmation in opposition at 14), this assertion is without probative value (*Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 605 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]). Moreover, even if he were qualified to render such opinion, he does not opine that the metal tracking was defective or negligently designed.

Plaintiff's counsel also states that based on photographic evidence, the rear elevator door appears to consist of two panels and there is a seam on the door (affirmation in opposition at 14). He emphasizes that the wall where the rear door is located does not have an adjoining control panel, which would otherwise alert the user of a rear door. The opinion of counsel, that the elevator design was defective, is speculative, and he fails to cite any regulations, facts, or data in support of this conclusion. Even if counsel were qualified to render an expert opinion, the conclusion he sets forth does not raise a triable issue of fact (*see e.g. Hartnett v Chanel, Inc.*, 97 AD3d 416, 419 [1st Dept], *lv denied* 19 NY3d 814 [2012] [finding the opinion of plaintiff's expert, that the design was defective, was speculative, because he failed to cite to any regulations, facts or data in support of his conclusion, and as such was not sufficient to raise a triable issue of fact]; *Delgado v County of Suffolk*, 40 AD3d 575, 576 [2d Dept 2007] [same]; *Ioffe v Hampshire House Apt. Corp.*, 21 AD3d 930, 931 [2d Dept 2005] [same]).

"The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances" (*Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 761 [2d Dept 2011] [internal quotation marks and citation omitted]). A condition that is

ordinarily apparent by making reasonable use of the senses "may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiff's attention is otherwise distracted" (*Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [1st Dept 2004] [internal quotations marks omitted]). In this regard, plaintiff argues that "[I]t is well known to this Honorable Court that users of elevators are often stuffed in elevators like sardines with the users pressed against the elevator walls ...." However, this is not that situation.

Plaintiff contends that Verizon was negligent because its employees gave plaintiff and her two companions permission to use the elevator that had a rear opening door without informing them of such. Verizon alleges otherwise, thereby creating an issue of fact as to this issue. For purposes of this motion, the court accepts plaintiff's contention that Verizon employees directed plaintiff to use the elevator. For the reasons discussed above, however, the dispositive issue in the action does not depend on the contention as to the involvement of Verizon's employees. Thus, viewing the proof in the light most favorable to plaintiff as the nonmovant (*Gurfein Bros. v Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]), the court concludes that plaintiff failed to demonstrate the existence of material issues of fact as to Verizon's potential liability. Verizon has established that the condition was "open and obvious and, as a matter of law, was not inherently dangerous" (*Burke*, 60 AD3d at 559).

Lastly, Schindler's motion for summary judgment dismissing all claims against it as third-party defendant is denied as academic (*see Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 293 [1st Dept 2008] [trial court denied as moot all portions of defendants' cross motions relating to indemnification. Appellate Court reinstated the claims because plaintiff's claims were also reinstated]). Based upon the dismissal of the complaint, the third-party complaint is dismissed. Hence, Verizon's request for summary judgment on its third-party complaint for common law indemnification from Schindler is denied.

Accordingly, it is

ORDERED that the motion (001) by Schindler Elevator Corporation for summary judgment dismissing all claims against it as third-party defendant is denied as academic; and it is further

ORDERED that the motion (002) by New York SMSA, LP, d/b/a Verizon Wireless for summary judgment is granted to the extent of dismissing the amended complaint, and is otherwise denied; and it is further

ORDERED that based upon the dismissal of the amended complaint, the third-party complaint is dismissed; and it is further

ORDERED that New York SMSA, LP, d/b/a Verizon Wireless must serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter

judgment accordingly.

Dated: November 27, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.