Cortes v Schindler El. Corp.
2018 NY Slip Op 31668(U)
March 15, 2018
Supreme Court, New York County
Docket Number: 162517/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---X
LUBIA CORTES,

Plaintiff,

-against-

SCHINDLER ELEVATOR CORPORATION,

Defendant.
---X

DECISION/ORDER

Index No.: 162517/2014

Mot. Seq. 001

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendant Schindler Elevator Corporation ("Defendant"), now moves pursuant to CPLR 3212 for summary dismissal of the complaint ("Complaint") of plaintiff, Lubia Cortes ("Plaintiff").

Factual Background

Plaintiff was an employee of Bellevue Hospital at the time of her accident. Plaintiff alleges that on November 19, 2013, she was transporting a portable electrocardiogram ("EKG") machine from the 20th to the 19th floor of Bellevue Hospital using the elevator designated "U2." The EKG machine was attached to a cart. Plaintiff further alleges that when the elevator stopped it misleveled approximately three feet above the 19th floor. Plaintiff alleges that she pushed the EKG machine in order to exit the subject elevator and did not see that the elevator was misleveled. Plaintiff further alleges that the EKG machine began to topple out of the elevator, but that she held onto the cart preventing it from falling to the floor causing her to become injured. Plaintiff filed the Complaint alleging negligence, including under the doctrine of *res ipsa loquitor*.

Defendant's Motion

In support of its motion for summary dismissal of the Complaint, Defendant argues it did not have actual or constructive notice of the alleged defective condition of the subject elevator. Specifically, Defendant contends that the maintenance and service records of the elevators and the deposition testimony of an employee of Defendant, Demir Bajramoski ("Bajramoski") establishes that the elevator was working properly.

Plaintiff's Opposition

In opposition, Plaintiff argues that the doctrine of *res ipsa loquitor* applies here, since Defendant had an "exclusive and comprehensive" service and maintenance duty with respect to the elevators at Bellevue Hospital, including the subject elevator. In support of her argument, Plaintiff cites to the Master Services Agreement Site Services Agreement entered into between Johnson Controls, Inc. ("Johnson"), a building management company managing Bellevue Hospital, and Defendant ("Agreement"), and the testimony from Bajramoski indicating that from 2005 through 2013, Defendant was the only elevator maintenance company that serviced the elevators in Bellevue.

Additionally, Plaintiff argues that Defendant had actual notice of the defective condition of the subject elevator. Specifically, the affidavit of Plaintiff indicates that she observed the subject elevator mislevel prior to her accident and that she reported the problem to the elevator mechanics. In further support, Plaintiff submits the affidavit of Carol Garcia ("Garcia"), an employee of the New York City Department of Corrections who was working at Bellevue Hospital and witnessed Plaintiff's accident, wherein she affirms that she observed the subject elevator mislevel prior to Plaintiff's accident, and informed the elevator mechanics of the condition and that she observed the elevator mislevel on the date of Plaintiff's accident. Plaintiff

also submits the affidavit of Melvin Hicks, an employee at Bellevue hospital who indicated that he observed the elevators "U1" and "U2" not working on several occasions and observed people getting stuck inside the elevators.

Plaintiff further argues that Defendant is not entitled to summary dismissal, since Defendant failed to submit evidence regarding its maintenance procedures regarding the subject elevator. Specifically, Plaintiff contends that the maintenance and service records from November 19, 2012 through the date of Plaintiff's accident do not indicate that the elevator was regularly inspected and maintained prior to or after the date of the accident. Moreover, Defendant argues that Plaintiff failed to submit service reports that state exactly when the subject elevator was last serviced.

Defendant's Reply

In reply, Defendant argues that Plaintiff, first, failed to overcome Defendant's proofs concerning its lack of exclusive control over the subject elevator, and second, failed to submit sufficient proof of Defendant's control. Specifically, Defendant argues that it was not the owner or manager of the subject building. Moreover, Defendant argues that the Agreement does not indicate that Defendant had exclusive control over subject elevator, since it provides only that Defendant is an "independent contractor" and permits Johnson to hire other entities to perform work. Defendant contends that the Agreement establishes that Defendant was a subcontractor at Johnson's direction. Additionally, Defendant argues that the affidavits submitted by Plaintiff fail to demonstrate that Defendant had notice of the defective condition, since they fail to specifically indicate that they complained to Defendant's employees about the defective condition of the subject elevator. Moreover, Defendant Plaintiff fails to rebut the maintenance and service records submitted by Defendant demonstrating that the elevators had no history of misleveling.

Discussion

The proponent of the motion for summary judgment must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR § 3212 [b]; *VisionChina Media Inc. v. Shareholder Representative Services, LLC*, 109 A.D.3d 49 [1st Dept 2013]). This standard requires that the movant make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v. Greenberg*, 95 A.D.3d 474 [1st Dept 2012]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes *a prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 A.D.3d 709 [1st Dept 2012], citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *IDX Capital, LLC v. Phoenix Partners Group*, 83 A.D.3d 569 [1st Dept 2011]).

Notice

"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 Assoc.*, 32 N.Y.2d 553, 559 [1973]; *see Isaac v. 1515 Macombs, LLC*, 84 A.D.3d 457 [1st Dept 2011]; *Casey v. New York Elevator & Elec. Corp.*, 82 A.D.3d 639, 640 [1st Dept 2011]).

Here, Defendant established its *prima facie* burden of entitlement to summary dismissal of the Complaint by submitting evidence demonstrating that it did not have notice of the alleged misleveling condition and that the elevator was working in proper order on the date of Plaintiff's accident (*see Dzidowska v. Related Companies, LP*, 157 A.D.3d 447, 447 [1st Dept 2018]; *Gjonaj v. Otis El. Co.*, 38 A.D.3d 384, 385 [1st Dept 2007]; *Santoni v. Bertelsmann Prop. Inc.*, 21 A.D.3d 712, 713 [1st Dept 2005] *Fiermonti v. Otis Elevator Co.*, 94 A.D.3d 691, 691–692 [2d Dept 2012]). Defendant submitted the deposition testimony of Bajramoski, an elevator technician employed by Defendant on the date of Plaintiff's accident. Bajramoski testified that he would perform "routine maintenance" of the elevators in Bellevue Hospital, including the subject elevator, which included: performing a visual inspection of the elevator, riding the elevator to ensure it is operating correctly, making sure that operations are correct, performing a visual inspection of the controller and machinery, and inspecting and replacing contacts and relays (Sonageri Aff., Ex. D, Bajramoski Trans., 30:22-31:21; 32). Bajramoski testified that he would perform routine maintenance "usually on a daily basis" (*id.*, 31:17). He also testified that he would ride all the elevators everyday (*id.*, 45:7-8). Bajramoski further testified that he did not receive any complaints of the subject elevator misleveling for a year prior to the incident and he never observed the subject elevator misleveling (*id.*, 54:18-55:2; 61:6-17)

In opposition, Plaintiff rebuts Defendant's *prima facie* showing of entitlement to summary judgment by submitting Plaintiff and Garcia's affidavits. Plaintiff's affidavit indicates

that she witnessed the subject elevator mislevel numerous times in the six months preceding he accident, and that she informed "elevator maintenance people in Bellevue Hospital of these problems" (Natz Opp. Aff., Ex., C, Plaintiff Aff., 3). Garcia's affidavit states that she observed the subject elevator mislevel on a number of occasions a few days prior to Plaintiff's accident, and "informed elevator mechanics working at Bellevue Hospital Center at least two to three days prior to [the date of Plaintiff's accident] that the [subject] elevator had misleveled on a number of occasions" (Natz Opp. Aff., Ex., D, Garcia Aff., 1). Garcia further stated that she observed the subject elevator "mislevel a number of times on [the date of Plaintiff's accident] prior to [Plaintiff's] accident" (*id.*, 2). Accordingly, the statements made in Garcia's affirmation conflict with Bajramoski's testimony that Defendant did not receive any complaints that the subject elevator was misleveled prior to the date of Plaintiff's accident, and, thus, creates an issue of fact as to whether Defendant had actual notice of the alleged defective condition (*see San Andres v. 1254 Sherman Ave. Corp.*, 94 A.D.3d 590, 591 [1st Dept 2012]; *Cortes v Central Elev.*, 45 A.D.3d 323 [1st Dept 2007]; *Ianotta v Tishman Speyer Props.*, 46 AD3d 297 [1st Dept 2007]; *Santoni v. Bertelsmann Prop., Inc.*, 21 A.D.3d 712 [1st Dept 2005]).

Additionally, the maintenance and service records do not demonstrate that Defendant's did not have notice of the misleveling condition. Under the heading "work description" the records for the week leading up to Plaintiff's accident state, "performed preventive, maintenance, including routine visual inspection of equipment," but they do not indicate whether the subject elevator was inspected at anytime prior to or on the date of Plaintiff's accident[1] (*see* Sonageri Aff., Ex. E., Response to DNI, Maintenance and Service Records, 11-282). Additionally, the service records do not indicate that the subject elevator was functioning properly. Moreover, the

[1] The Court notes that the maintenance and service records for the date of Plaintiff's accident and the previous date indicate that an elevator technician other than Bajramoski performed the "work."

accuracy of the service records is called into question by Garcia and Plaintiff's affidavits, since the records do not address the complaints regarding misleveling.

Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* may be invoked against a defendant in an action involving an allegedly malfunctioning elevator, where is it shown that the event is of a kind that does not ordinarily occur in the absence of negligence; the accident must be caused by an instrumentality within the exclusive control of the defendant; and nothing plaintiff did in any way contributed to the happening of the event (*see Hodges v Royal Realty Corp.*, 42 AD3d 350, 351 [1st Dept 2007]). As to the second prong, the "[e]vidence "must afford a rational basis for concluding that the cause of the accident was probably 'such that the defendant would be responsible for any negligence connected with it (*Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 227 [1986] [internal quotation marks omitted]; *see Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494 [1997]; *Ezzard v. One E. River Place Realty Co., LLC*, 129 A.D.3d 159, 165 [1st Dept 2015] [noting that "a full service contract to maintain an elevator provides a sufficient predicate for the element of control as against the maintenance company"], citing *Hodges*, 42 A.D.3d 350).

Plaintiff has also raised an issue of fact as to whether Defendant is liable under the doctrine of *res ipsa loquitor*. At the outset, the Court notes that the only dispute as to the application of *res ipsa loquitor* is whether Defendant had exclusive control over the service and maintenance of the subject elevator. Here, the Agreement and Bajramoski's testimony create an issue of triable fact as to Defendant's "exclusive control" of the subject elevator. First, under the Agreement Defendant was required to oversee elevator maintenance and service at Bellevue Hospital, including the subject elevator (*see* Sonageri Aff., Ex. E., Response to DNI, Agreement,

320-342). The Agreement further indicates that the "entire control and direction of such business and operations shall be and shall remain with [Defendant]" (*id.*, ¶25). Next, the testimony of Bajramoski supports Plaintiff's argument that Defendant had exclusive control over the repair and maintenance of the subject elevator. Specifically, Bajramoski testified that Defendant's elevator technicians were the only elevator mechanics to service the subject elevator for the years of 2005 through 2013 (Sonageri Aff., Ex. D, Bajramoski Trans., 21:22-22:2), and that Defendant's employees performed daily inspections and routine maintenance of the subject elevator and would have other mechanics make repairs to the subject elevator, if necessary (*id.*, 29:2-9; 30:5-21; 31:11-21) (*see Gutierrez v. Broad Fin. Ctr., LLC*, 84 A.D.3d 648, 649 [1st Dept 2011]; *Owens v. Stevenson Commons Assoc., L.P.*, 64 A.D.3d 517, 517 [1st Dept 2009]). Defendant's reply does not address Bajramoski's testimony.

Additionally, the provision in the Agreement requiring Defendant to seek Johnson's permission prior to engaging a subcontract and permitted Johnson to direct Defendant to replace a subcontractor providing services specific in the Agreement does not, in and of itself, suggest that Johnson asserted control over the maintenance and repair of the subject elevator (*see* Agreement, ¶15). Moreover, the record is void of any evidence suggesting that any other entity was permitted to or actually performed service, maintenance or repair to the subject elevator. Accordingly, an issue of fact exists as to whether Defendant had exclusive control of the subject elevator and the application of *res ipsa loquitor*.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant, Schindler Elevator Corporation, for summary dismissal of the Complaint of Plaintiff is denied. It is further

ORDERED that defendant, Schindler Elevator Corporation shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: March 15, 2018

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.