McKnight v Fifth Lenox Terrace
2018 NY Slip Op 32221(U)
September 10, 2018
Supreme Court, New York County
Docket Number: 151455/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JOHNNA MCKNIGHT,

Plaintiff,

-against-

FIFTH LENOX TERRACE, P.S. MARCATO ELEVATOR CO., INC. and THE OLNICK ORGANIZATION, INC.,

Defendants.

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DECISION/ORDER

Index no. 151455/2016

Mot seq. Nos. 005 & 006

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

MEMORANDUM DECISION

This is an action for personal injury. In motion sequence 005, defendants Fifth Lenox Terrace (Fifth Lenox) and the Olnick Organization, Inc. (Olnick) (together, the Fifth Lenox defendants) move, pursuant to CPLR 3212, for summary dismissal of the Complaint of Plaintiff, Johnna McKnight (Plaintiff), as well as all cross claims against them. In the alternative, the Fifth Lenox defendants move for summary judgment on its cross claims for contractual and common-law indemnification against Marcato Elevator Co., Inc. (Marcato). In motion seq. No. 006, Marcato moves for summary dismissal of the Complaint and all cross-claims as against it. Motion seq. Nos. 005 and 006 are consolidated for joint disposition.

Factual Background

Plaintiff alleges that on April 12, 2014, she was injured when she tripped and fell as a result of an unleveled elevator at 470 Lenox Ave., New York, New York (premises). Fifth Lenox is the owner of the premises where Plaintiff fell, while Olnick is the management company for the building. Fifth Lenox and Marcato, an elevator maintenance company, entered into a

maintenance contract (Contract), wherein Marcato agreed to perform elevator maintenance on the elevators located in the premises, including the subject elevator.

At the time of her accident, Plaintiff was employed as a home health aide and was working at the subject building (Flippinger Aff., Ex., I, 11:23-25; 32:13-15). Plaintiff testified that she entered the elevator on the sixth floor and descended to the first floor (*id.*, 41:6-23; 52:6-19). Plaintiff further testified that when the elevator came to a stop at the first floor, she exited the elevator and fell. Plaintiff described that her first step out of the elevator felt as if she was "stepping off a curb" (*id.*, 59:9-23). Plaintiff further testified that after she fell, she observed that the subject elevator was "raised two to three inches" from the lobby floor, and she saw the elevator "going down a little" (*id.*, 66:4-17; 62:24-65:4).

Discussion

Summary Judgment

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Defective Condition and Notice

"A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a *prima facie* demonstration that it neither created the hazardous condition nor had actual or constructive notice of its existence" (*Smith v. Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011]). Whether a

defective condition exists depends on the circumstances of each case, and is thus generally a factual question for the finder of fact (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]; *Budd v. Gotham House Owners Corp.*, 17 A.D.3d 122 [1st Dept 2005]).

At the outset, an issue of fact exists as to whether the subject elevator was misleveled at the time of Plaintiff's accident. Marcato's argument that there is no evidence that the subject elevator misleveled is without merit, as Plaintiff specifically testified that she observed the elevator misleveled immediately after she fell. Moreover, Marcato's argument that Plaintiff's e-mail to Fifth Lenox describing her accident failed to indicate that the elevator was mislevelled does not raise an issue of fact as to whether a defect was present. After Plaintiff's accident, Raymond Lyte (Lyte), Olnick's employee, and the doorman at the premises at the time of Plaintiff's accident, asked Plaintiff to submit an "incident report" to Fifth Lenox. Plaintiff thereafter submitted an e-mail to Fifth Lenox wherein she wrote, "I fell off the middle elevator when I was getting off some how the piece were [sic] the door open I fell over and landed on the floor" (Solari Aff., Ex., F). Plaintiff's e-mail correspondence to Fifth Lenox does not contradict her testimony that she observed the elevator being mislevelled.

However, both the Fifth Lenox defendants and Marcato demonstrate, *prima facie*, that they neither created nor had actual or constructive notice of the alleged defective condition causing the subject elevator to mislevel. Neither the Fifth Lenox defendants nor Marcato received complaints regarding misleveling of the subject elevator prior to Plaintiff's accident. The Fifth Lenox defendants submitted the deposition testimony of Lyte, Olnick's doorman,

wherein he testified that he has never received any complaint regarding mislevelling of the subject elevator and that if an elevator malfunctioned, he would take the elevator out of service and call Marcato (Flippinger Aff., Ex. K, 17; 11:14; 22:4-13; 23:14-20). Lyte further testified that he did not shut down the subject elevator or call Marcato immediately after Plaintiff's accident because the elevator was working and "there was no need to" (*id.*, 49:9-20). Moreover, Marcato submits the testimony Andrew Trapani (Trapani), a vice president of Marcato, wherein he testified that he was not aware of any complaints of misleveling of the subject elevator (Flippinger Aff., Ex. L, 29:25-30:6).

Additionally, there is no evidence suggesting that the alleged misleveling condition was visible or existed prior to Plaintiff's accident. Specifically, John Halloran (Halloran), a service mechanic employed by Marcato, testified that he performed routine maintenance at the premises once or twice per month, and that he last performed maintenance five days before Plaintiff's accident, on April 7, 2014 (Flippinger Aff. Ex. N, 20:20-21:6). Halloran further testified that maintenance included riding the elevators and checking to see whether the elevators were properly leveling on the subject elevator (*id.* 15:19-16:11). Additionally, Plaintiff testified that she never observed the subject mislevel in the four years she worked at the subject building (Flippinger Aff., Ex., I, 83:2-84:22).

In opposition, Plaintiff fails to raise an issue of fact as to whether defendants had notice of the alleged defective condition. Plaintiff argues that an issue of fact is raised by Halloran's testimony. Specifically, Plaintiff argues that Halloran's testimony was contradictory, in that Halloran failed to remember what was wrong with the elevator on April 11, 2014, the day prior to Plaintiff's accident, while simultaneously testifying that there was no misleveling involved with the adjustment of the door operator. Plaintiff's argument is meritless.

Halloran specifically testified that the April 11, 2014 work performed on the subject elevator did not relate to misleveling. Halloran stated that the April 11 work on the subject elevator included shutting down the elevator, adjusting the door operator, and riding the elevator to make sure the door was opening properly (Flippinger Aff. Ex. N, 26:10-22; 28:4-12; 30:7-25; 31:2-7). While Halloran indicated that he did not look for a leveling problem, he confirmed that he would have addressed a misleveling issue if one existed (*id.*, 31:8-15: 32:22-33:4). Halloran further stated that the BIN history report[1] documenting his work on the subject elevator the day before Plaintiff's accident does not indicate a misleveling issue (*id.*, 33:8-15). Importantly, Halloran testified that according to BIN history report from April 11, the adjustment of the door operator did not involve any misleveling (*id.*, 23:16-24). Of further significance, Trapani testified that the door operator, which controls the operation of the car doors, is irrelevant to the leveling of the elevator (Flippinger Aff., Ex. L, 29:17-24). This, there is no evidence suggesting that the April 11 repair of the subject elevator was related to a misleveling condition.

Accordingly, defendants did not have notice of the alleged defective condition. However, in order for the Court to determine whether Plaintiff's negligence claim should be dismissed, and how to dispose of the branches of the motions relating to the cross claims between Marcato and the Fifth Lenox defendants, the Court must first address Plaintiff's argument that the doctrine of *res ipsa loquitur* precludes summary dismissal of the Complaint.

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

[1] According to Trapani, the BIN history report includes information related to a service call, such as the information about the call from the building to Marcato and information from the technician that responded (Flippinger Aff., Ex. L, 8:12-16; 24:16-25).

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 for the first prong, the Appellate Division, First Department has long held that "[t]he misleveling of an elevator does not ordinarily occur in the absence of negligence" (*Dzidowska v. Related Companies*, LP, 157 A.D.3d 447, 448 [1st Dept 2018], quoting *Rojas v. New York El. & Elec. Corp.*, 150 A.D.3d 537, 537–538 [1st Dept 2017]; *Ezzard v. One E. River Place Realty Co., LLC*, 129 A.D.3d 159, 163 [1st Dept 2015]).

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*, 129 A.D.3d at 165 [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).

Here, Plaintiff has raised an issue of fact as to whether Marcato is liable for negligence under the doctrine of *res ipsa loquitor*. According to the Contract, Marcato was required "provide full comprehensive maintenance and repair services" for the subject elevator (Solari Aff. Ex. A, 1.1A), and provide material and replacement parts, provide all labor, supervision, tools, supplies, including a mechanic for preventative maintenance and emergency repairs. Moreover, Trapani, Marcato's Vice President, testified that the Contract was a "full service contract" that covers regular, monthly, maintenance and typical service calls (Flippinger Aff., Ex. L 32:9-13; 34:14-24). Additionally, Lyte, the doorman employed by Olnick, testified that if

an elevator malfunctioned, Fifth Lenox would contact Marcato (Flippinger Aff., Ex. K, 17; 11:14).

However, the Fifth Lenox defendants may not be held liable for Plaintiff's injuries under the doctrine of *res ipsa*. Pursuant to the Contract, Fifth Lenox transferred full responsibility for the maintenance of the elevator to Marcato (*see Ezzard*, 129 A.D.3d at 165 [holding that "where an owner has transferred full responsibility for the maintenance of an elevator to another, the owner is not in control of the instrumentality causing the accident, and *res ipsa loquitur* does not apply to the owner"]; *Levine v. City of New York*, 67 A.D.3d 510, 511 [1st Dept 2009]). Moreover, the fact that Fifth Lenox maintained the ability to shut down an improperly working elevator is, on its own, insufficient to establish that Fifth Lenox's actions were negligent.

Cross-Claims

Marcato alleged in its answer that the Fifth Lenox defendants are liable to it for contribution, common-law negligence, and contractual negligence. Marcato's cross-claims for contribution and common-law indemnification against the Fifth Lenox defendants are dismissed, as the Fifth Lenox defendants are not liable for Plaintiff's accident. As for contractual indemnification, this claim must be dismissed as Marcato fails to submit a contractual provision entitling it to indemnification.

The Fifth Lenox defendants brought cross claims for contribution, as well as common-law and contractual indemnification. The claims for common-law indemnification and contribution are dismissed as moot. As to contractual indemnification, the Fifth Lenox defendants seek from Marcato "any amounts that are found against [the Fifth Lenox defendants] in favor of the plaintiff" (Fippinger Aff. ¶62). Thus, the Fifth Lenox defendants' claim for contractual indemnification is also moot, as they no longer face liability for Plaintiff's accident.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of the motion of defendants Fifth Lenox Terrace (Fifth Lenox) and the Olnick Organization, Inc. (Olnick) for summary dismissal of the Complaint (mot. seq. 005) is granted, and the Complaint is dismissed as against Fifth Lenox and Olnick. It is further

ORDERED that the branch of Fifth Lenox and Olnick's motion seeking summary judgment on its cross-claim for indemnification against defendant P.S. Marcato Elevator Co., Inc. (Marcato) is denied as moot. It is further

ORDERED that the branch of Marcato's motion seeking summary dismissal of the Complaint (mot. seq. 006) is denied. It is further

ORDERED that the branch of the Marcato's motion seeking dismissal of Fifth Lenox and Olnick's cross claims against it is granted, and these cross claims are dismissed without prejudice; it is further

ORDERED that counsel for Fifth Lenox and Olnick 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: September 10, 2018

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

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