

Shannon v New York Times Bldg., LLC
2018 NY Slip Op 32238(U)
September 12, 2018
Supreme Court, New York County
Docket Number: 150709-2012
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 32

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 ROBERT E. SHANNON,

Plaintiff,

Index No. 150709-2012
 Motion Seq: 001, 002, 003

-against-

THE NEW YORK TIMES BUILDING, LLC, THE NEW YORK
 TIMES BUILDING CONDOMINIUM, THE NEW YORK TIMES
 COMPANY BOARD OF MANAGERS, THE NEW YORK TIMES
 COMPANY, FOREST CITY RATNER COMPANIES, LLC,
 FOREST CITE BOARD OF MANAGERS, FIRST NEW YORK
 PARTNERS MANAGEMENT, LLC and FUJITEC AMERICA,
 INC.,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

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 Motion Sequence Numbers 001, 002 and 003 are consolidated for disposition. The motion (MS001) by plaintiff for summary judgment on the issue of liability is denied and defendant Fujitec America, Inc.'s ("Fujitec") cross-motion for summary judgment is denied. The motion (MS002) for summary judgment by the remaining defendants (the "Building Defendants") is denied. Plaintiff's motion (MS003) to amend the complaint to seek punitive damages is granted.

Background

This case concerns an alleged elevator accident. On December 30, 2011, plaintiff got in the elevator at his office on the on the 46th floor at 620 Eighth Avenue in Manhattan. This particular elevator was express, meaning it traveled to the first floor without any stops. During

the ride, a hoist cable broke and plaintiff claims that the elevator plunged down the elevator shaft *thirty stories* before purportedly stopping short near the 11th floor. Plaintiff remained in the elevator for an hour and a half before the FDNY rescued him. Plaintiff did not seek immediate medical attention and told the rescue crew that he was fine.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make 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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff’d* 99 NY2d 647, 760 NYS2d 96 [2003]).

In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 825, 37 NYS3d 750 [2016] [internal quotations and citation omitted]).

Plaintiff’s Motion & Fujitec’s Cross-Motion

Plaintiff moves for summary judgment on liability on the ground that *res ipsa* applies. Plaintiff insists that he bears no comparative negligence— he simply rode in the elevator— and that he suffered severe injuries when the elevator plunged over 30 stories. Plaintiff also stresses that defendants received notice of the elevator’s defective condition through an inspection that occurred months prior to the accident. A DOB inspection report dated August 26, 2011 (about four months before the accident) directed that the elevator be repaired and identified hoist ropes as being defective (NYSCEF Doc. No. 49).

Defendant Fujitec opposes and cross-moves for summary judgment dismissing plaintiff’s claims and all cross-claims against it. Fujitec admits that plaintiff was stuck in an elevator, that the cable broke, that the elevator made an emergency stop and that plaintiff was extricated by the FDNY. However, Fujitec insists that no defendant was negligent and that the elevator incident could not have caused any injuries because the elevator’s safety mechanisms are designed to prevent free falls and, in this case, the safety mechanisms properly engaged. Fujitec also points to the report of Dr. Andrew Casden who insists that plaintiff’s injuries are degenerative and not the result of a traumatic elevator accident.

The Court denies both plaintiff’s motion and Fujitec’s cross-motion for summary judgment because there are issues of fact relating to what actually occurred in the elevator that

day. Plaintiff claims that his injuries were caused by an elevator free fall and related sudden stop (NYSCEF Doc. No. 35, ¶ 4). The defendant claims there was no free fall – a thirty floor free fall and sudden stop would have caused immediate catastrophic injuries necessitating an ambulance to the nearest emergency room. And so while a cable did break, the question this Court cannot resolve on summary judgment is whether the cable breaking was a substantial factor in causing plaintiff's claimed injuries. The plaintiff claims it did by causing a free fall; the defendant claims that because the safety mechanisms kicked in, there was no free fall. Because both stories cannot be true, there must be a trial and summary judgment is denied.

Plaintiff's purported expert¹ insists that the hoist cables broke due to reports of "rouge," which he claims demonstrates that the cables were worn (*see* NYSCEF Doc. No. 36).

Fujitec submits the affidavit of John B. Halpern, an engineer, who claims that elevator could not "free fall" for 30 floors because "the elevator is equipped with nine steel hoist cables" and "It is utterly impossible for the elevator to have gone into a 'free fall' because of a sudden failure of only one of the nine steel hoist cables" (NYSCEF Doc. No. 87, ¶ 36). Mr. Halpern theorizes that even if the elevator did go into a free fall "it would trigger the overspeed governor and mechanical device . . . causing the elevator to stop" (*id.* ¶ 37). He concludes that "for a free fall to have occurred in this incident, it would have required the failure of all nine of the steel hoist cables, along with a failure of the overspeed governor or the 'safeties'" (*id.* ¶ 38). There is no allegation that all nine cables and the governor failed here.

¹Plaintiff claims he is an expert; defendant disagrees. This Court takes no position on this issue.

There is no question that the cable broke and that plaintiff is free from negligence.

Plaintiff had to be rescued from the elevator by the FDNY and Kenneth Gorman (a Fujitec repair mechanic) testified that there was a broken cable on top of the elevator (NYSCEF Doc. No. 43 at 25). What is not clear is whether the free fall and sudden stop took place. This is an issue of fact because without the free fall and sudden stop, the Court cannot find Fujitec or the Building Defendants liable. The fact that an elevator stopped during a descent does not automatically support a finding of summary judgment on liability. Put another way, whether the free fall occurred is central to plaintiff's version of events and that issue is in dispute. Simply because a single hoist cable broke does not mean that a cause of action for negligence against defendants exists; there must be injuries, and the cable breaking must be a substantial factor in causing those injuries.

This is not solely an issue of damages because it directly relates to how the incident occurred and the purported cause of plaintiff's injuries. Fujitec does not merely claim that plaintiff is exaggerating his alleged injuries, it claims that plaintiff could not have suffered any injuries whatsoever if only one hoist cable broke. As suggested by Fujitec's expert Stacy Imler, "An emergency stop by the subject elevator exposes passengers such as plaintiff to very minimal accelerations, and therefore minimal forces which do not cause injury. As a descending elevator comes to a stop, one might feel a brief sensation of feeling heavier than normal, as the upward force applied by the floor of the elevator slows to a stop" (NYSCEF Doc. No. 88 ¶¶ 34-35). It cannot be that case that any time an elevator stops and FDNY intervention is required, a passenger is awarded summary judgment on a negligence claim regardless of whether an injury

occurs; as stated above, a causal relationship between the injury and the defect is an essential element of a negligence cause of action.

The Court reviewed the surveillance video of the incident and it also compels the Court to deny both plaintiff's motion and Fujitec's cross-motion. The video shows plaintiff entering the elevator at 9:57:50 a.m. At 9:58:20 a.m., the lights in the elevator flicker and plaintiff disappears from the bottom of the video screen. Seven seconds later, plaintiff reappears on screen standing up and appears to call the help button on the elevator. This video does not conclusively show a "free fall"² or a sudden stop. Plaintiff did not get thrown around the elevator as one might expect after a thirty-story free fall and sudden stop. And plaintiff shows no obvious ill effects from the incident while waiting for help to arrive; he stands around and appears to take pictures or videos with his phone. But the surveillance video does show that something clearly happened to the elevator that caused plaintiff to disappear from the screen and the lights to flicker. The Court cannot make a definitive determination from the video.

Fujitec's claim that it should be entitled to summary judgment because inspectors looked at these steel hoist cables and found them to be fine is denied. The fact is that a hoist cable broke and Fujitec was responsible for maintaining the elevators. A jury must decide whether it believes that the cable breaking caused a free fall and a sudden stop or whether the elevator's safety mechanisms engaged and simply stopped the elevator when the cable broke.

The Court also rejects plaintiff's claim that the Building Defendants are liable under a theory of res judicata due to a DOB violation issued *after* the accident occurred (*see*

²The Court questions whether it would be possible to observe a free fall from a video taken *inside* an elevator.

e.g., NYSCEF Doc. No. 50). A violation of Administrative Code of City of N.Y. § 28-301.1, a general non-specific safety provision, does not constitute a finding that the Building Defendants were negligent for plaintiff's alleged injuries. There is no dispute the elevator malfunctioned and needed subsequent repairs. The violation does not suggest that the elevator plummeted 30 stories.

Res Ipsa

If he chooses, plaintiff may present his theory of negligence to the jury utilizing a theory of res ipsa. "In order to submit a case to a trier of fact based on [res ipsa], a plaintiff must establish that the event (1) was of a kind that ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant and (3) was not due to any voluntary action or contribution on the part of the plaintiff" (*Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 276-77, 896 NYS2d 22 [1st Dept 2010] [internal quotations and citation omitted]).

Here, there is no question that the type of event plaintiff alleges occurred (an elevator free fall) does not occur in the absence of negligence. Both Fujitec and the Building Defendants had control over the elevator and plaintiff is free from negligence. However, the jury must decide whether it credits plaintiff's contention that the elevator fell for over thirty floors or defendants' claim that the such an event could not have occurred given the elevator's safety mechanisms. Moreover, even if the jury believes the safety mechanisms would prevent a free fall, then the jury must decide whether the safety mechanisms failed on the day of this incident, causing a free fall.

The Building Defendants' Motion

The Building Defendants (MS002) move for summary judgment dismissing plaintiff's complaint and all cross-claims against it. They claim that they cannot be held liable because they were not on notice of a defective condition and retained Fujitec to perform any required maintenance for the elevators. The Building Defendants insist that Fujitec had a contract that required it to be on location five days a week for a total of 40 hours a week. The Building Defendants also claim that they are entitled to indemnification from Fujitec because the maintenance contract required Fujitec to maintain the elevators.

In opposition, plaintiff insists that the Building Defendants need not have notice to be held liable for a defective elevator and argue that, in any event, they did have notice from an independent inspection and from a DOB violation from August 2011.

Fujitec also submits opposition and asserts that the contract relied upon by the Building Defendants expired prior to the incident. Fujitec also asserts that the Building Defendants have not shown that they are free from negligence. Fujitec points out that the Building Defendants retained the ability to shut down an elevator if it was deemed unsafe and that an independent elevator consulting firm (Joseph Neto) was retained by the Buildings Defendants to do performance evaluations for the elevators.

The Building Defendants' motion is denied. As an initial matter, for the reasons stated above, there is an issue of fact relating to whether the elevator entered a free fall and suddenly stopped. With respect to the Building Defendants' claim that they ceded all responsibility to Fujitec, that is belied by the fact that DOB issued a notice of violation stating that the hoist cable needed to be repaired *to the Building Defendants* in August 2011, just four months prior to the

accident. Accordingly, there is a question of fact as to whether the Building Defendants had notice of a potential problem with the elevator—a problem which, according to plaintiff, caused him injuries. The Building Defendants do not specifically address why this DOB violation does not raise an issue of fact regarding their notice.

And the Building Defendants hired their own independent elevator consultant to look at the elevator. The Neto report informed the Building Defendants that there were traces of rouge in sections of hoist ropes and that the condition should be monitored (NYSCEF Doc. No. 17, 20). Setting aside the parties' disagreements about the significance or meaning of rouge, the fact is that the Building Defendants were alerted to issues with the hoist cables in the months leading up to the incident. The Court cannot grant them summary judgment under these circumstances.

Indemnification

With respect to the indemnity issue, the Court denies the branches of the Building Defendant's motion and Fujitec's cross-motion relating to indemnification. Neither party is entitled to common law indemnification because there has been no finding of liability.

And the Court cannot grant contractual indemnification to the Building Defendants because the Building Defendants did not meet their prima facie burden to show that they had a contract with Fujitec containing an indemnification clause that was in effect at the time of the accident. The three year maintenance contract between the parties expired on November 1, 2011 (*see* NYSCEF Doc. No. 78 at 000005); this accident happened on December 30, 2011.

In their moving papers, the Building Defendants observe that "While Fujitec may claim that the terms of the contract expired, this claim is belied by the fact that Fujitec continued to provide service as before" (NYSCEF Doc. No. 83 at 21). They point to a December 2011

invoice referencing the contract (NYSCEF Doc. No. 82). That single invoice is not enough to show that the parties continued the contract because it fails to establish a pattern. Notably absent from the Building Defendants' submissions are invoices from November 2011, January 2012 and beyond. And the Court has no idea whether the December 2011 invoice (or any other subsequent invoice) was paid. The Court cannot find that the parties continued to abide by an expired contract based on a single invoice. Moreover, section 2.1 of the contract clearly states that any renewal must be executed by both parties and no renewal was presented to the Court.

Amendment

Plaintiff moves to amend the verified complaint to include a claim for punitive damages. Plaintiff theorizes that punitive damages are appropriate because a violation was issued concerning the elevator's hoist cable four months prior to the accident and no corrective action was taken. Plaintiff argues that it is seeking amendment at this late stage of the litigation because it received a copy of this violation from Fujitec on May 30, 2017. Plaintiff also contends that this amendment will not prejudice defendants because no new facts are alleged.

In opposition, the Building Defendants claim that plaintiff filed the Note of Issue after receiving a copy of the violation, which prevents further discovery relating to the proposed punitive damages claim. They insist that they would be prejudiced if the amendment were permitted but do not say what discovery they might need.

Fujitec contends that there is no conduct alleged that could support a punitive damages claim. Fujitec also argues that it would be prejudiced by this amendment and that plaintiff offers no excuse for its late motion.

The Court grants plaintiff's motion. As an initial matter, any delay in making the motion was caused by defendants in failing to turn over the violation until seven years into the case. Fujitec appears to admit this point, stating in its opposition memo that "Admittedly, the disclosure was delayed and could have been made earlier" (NYSCEF Doc. No. 184). The Court makes no finding that the delayed disclosure was intentional, it simply provides a rational justification for amending at this stage of the litigation.

And this violation permits plaintiff to seek punitive damages. The fact is that a violation was mailed to the building's address identifying issues with hoist cables four months prior to an incident *in which a hoist cable broke*. There is no evidence that any maintenance was done to address the issues identified in the violation notice. A jury could find that failing to take any corrective action after receiving this notice deserves punitive damages. Of course, plaintiff will have to convince the jury that ignoring the notice demonstrates a wanton disregard for public safety.

Summary

In this case, the parties present starkly divergent theories of the incident. Plaintiff maintains he was a passenger in an elevator that plummeted over thirty stories before stopping short. Defendants acknowledge that a hoist cable on the elevator broke and that the FDNY had to rescue plaintiff, but insist there was no free fall and that the elevator's safety mechanisms prevented a free fall. On a motion for summary judgment, the Court cannot decide which account is more credible. A jury will have to decide what happened that day and if it was a substantial factor in causing plaintiff's alleged injuries.

Accordingly, it is hereby

ORDERED that the motion (MS001) by plaintiff for summary judgment is denied and the cross-motion for summary judgment by defendant Fujitec America, Inc. is denied; and it is further

ORDERED that the motion (MS002) by the remaining defendants for summary judgment is denied; and it is further

ORDERED that the motion (MS003) by plaintiff for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiff shall e-file the proposed amended complaint as a separate document labeled "amended complaint" on NYSCEF; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

Dated: September 12, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH