Hanson v 836 Broadway Assoc.
2019 NY Slip Op 32482(U)
August 23, 2019
Supreme Court, New York County
Docket Number: 161649/2014
Judge: Robert David Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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CYNTHIA HANSON,

Plaintiff,

- v -

836 BROADWAY ASSOCIATES, 836 BROADWAY REALTY CORP., HYDE PARK ANTIQUES, LTD. And SLADE INDUSTRIES, INC.,

Defendants.

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INDEX NO. 161649/2014

MOTION DATE 05/21/2019, 05/21/2019

MOTION SEQ. NO. 004, 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 142, 143, 144, 145, 147

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 140, 141, 146, 148

were read on this motion to/for JUDGMENT - SUMMARY.

In this action, in which plaintiff Cynthia Hanson ("plaintiff") alleges that she tripped and fell while entering an elevator, defendants Slade Industries, Inc. (Slade) and 836 Broadway Associates and 836 Broadway Realty Corp. (together, 836 Broadway) move for an order granting summary judgment dismissing the complaint pursuant to CPLR 3212.[1] For the reasons stated below, both motions are denied.

BACKGROUND

Plaintiff alleges that, on July 2, 2013, she was injured in a freight elevator (elevator) at the premises located at 836 Broadway in Manhattan (the building). 836 Broadway owns the building. Slade was retained pursuant written contract to maintain the elevators at the building.

Plaintiff, who worked at the building, testified that, while stepping into the elevator, on the sixth floor of the building, she went "flying" into the elevator's back wall, hit her head above her right eye, and fell to the floor. Plaintiff testified that she did not look down at the floor when she entered the elevator, and was looking toward the back of the elevator after she fell. Plaintiff stated that the elevator floor was higher than the regular floor, and that she realized this as she

[1] Slade has filed motion sequence no. 004 and 836 Broadway has filed motion sequence no. 005.

was flying into the elevator wall. Plaintiff further stated that, after she fell, she observed the height differential between the elevator's floor and the hallway floor, which she stated was 1.5 to 2 inches. Plaintiff testified that, prior to her accident, there were times when the elevator had not landed properly.

836 Broadway produced witness Genaro Esposito, who testified that he is known as "the super of the building." (NYSCEF doc. no. 86 at 10.) Esposito also testified that he regularly inspected the elevator, riding it from the second to the first floor, at or before 9 a.m., and that he and other building maintenance personnel used the elevator during the day of the accident. Esposito testified that the elevator experienced misleveling problems, but he could not specifically remember when. Esposito stated that the elevator misleveling was dramatic at times, and up to two inches, and other times there was minor misleveling, of an inch, and that the elevator probably misleveled prior to 2013 (NYSCEF doc no. 86 at 74-76, 142-147). Esposito further stated that elevator problems would be logged when the elevator was shut down for a substantial period of time, but that minor misleveling problems were not logged. Esposito testified that, when minor misleveling occurred, he would ride the elevator, which would self-correct. Esposito further testified that if the elevator did not self-correct, he called Slade for service.

Another witness produced by 836 Broadway, Juan Nieves,[2] a porter at the building, responsible for sweeping the elevator, did not recall ever having a discussion with Esposito about the elevator misleveling, or hearing anything about a problem with the elevator. Nieves testified that, if there was a problem with the elevator, he would speak with Esposito, who would call the elevator service company. Nieves stated that he rode the elevator to the sixth floor once a month, during which he noticed no problems, but did not otherwise work above the second floor.

The manager of the building, Rachel Karr, testified that she rode the elevator once or twice a day and did not recall that it ever misleveled. Karr stated that no one advised her that the elevator misleveled.

Slade produced Robert Rolon, an elevator mechanic, for a deposition. Rolon testified that Slade employees check the leveling of the subject elevator, on every floor, every time they perform monthly maintenance. He further testified that the elevator was old, would self-correct its own misleveling, and that its ability to level properly is affected by the cold, heat and humidity, and whether or not the elevator ran a lot.

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[2] At oral argument for a prior motion in this action, sequence number 003, 836 Broadway conceded that Nieves and Esposito, although employed by a different company, were working on behalf of 836 Broadway, so that notice to either Nieves or Esposito constitutes notice to 836 Broadway (NYSCEF doc no. 73, 81 and 134 at 2-3 [order of this court dated November 11, 2018]).

Jose Caraballo, an elevator maintenance mechanic also produced by Slade, testified that he believed that he had performed maintenance on the freight elevator from 2010 to 2013.[3] Caraballo testified that he would check the elevator's brake, and its proper operation and stopping accuracy by riding in the elevator, and making sure that it was not misleveled when it stopped. Caraballo stated that he did not receive a misleveling complaint for the elevator during the year prior to the incident alleged here. Caraballo testified that misleveling of one-quarter to one-half of an inch is acceptable, and that he never detected a problem with the elevator brake, but that the failure to properly adjust the brake would affect the elevator's leveling.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "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 University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (id.). Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012]). "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff . . . the court on a summary judgment motion must indulge all available inferences . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002]).

I. 836 Broadway and Slade Fail to Make a Prima Facie Showing That Plaintiff Cannot Identify the Cause of Her Fall

836 Broadway and Slade argue that they are entitled to summary judgment in their favor. 836 Broadway argues that it is entitled to summary judgment because plaintiff is unable to identify the cause of her accident and, therefore, can only speculate that the elevator misleveled, or as to 836 Broadway's negligence, and that there is no evidence that the elevator misleveled. Slade argues that plaintiff did not see what caused her to fall.

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[3] Esposito testified that the name of the Slade elevator maintenance person for the building at the time of the incident was Winston. Rolon testified that the name of the person was Winston Heins and Nieves testified that it was Roberto.

These defendants ignore that plaintiff testified that, after she fell, she observed misleveling, of approximately 1.5 to 2 inches (NYSCEF Doc No. 85 at 59-60). In addition, in response to the question of whether or not her foot came into contact with anything or whether she stepped down when entering the elevator, plaintiff testified that the elevator was higher than the regular, hallway, floor, "indicating," and that she realized this when she went flying into the wall (*id.* at 52-53). Accorded the benefit of all favorable reasonable inferences, as is required on this motion, plaintiff's testimony must be viewed as indicating that she felt the elevated elevator cabin floor, with her foot, or otherwise sensed the height differential as she was falling (*see Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992] [court must draw all reasonable inferences in favor of the nonmoving party]; *see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). 836 Broadway challenges plaintiff's credibility, asserting that, based upon plaintiff's testimony, that she was facing the back wall of the elevator, she could not have *seen* misleveling at the elevator's entrance. Assuming, arguendo, an inconsistency in plaintiff's testimony,[4] issues of credibility are not subject to resolution on this motion (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004] ["Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions"] [internal quotation marks and citation omitted]).

II. Slade and 836 Broadway Fail to Make a Prima Facie Showing That They Lacked Actual or Constructive Notice of the Dangerous Condition

836 Broadway and Slade contend that the complaint should be dismissed because they did not create a dangerous condition and had no actual or constructive notice of an elevator misleveling defect.

As with all common areas, an owner of a building has a non-delegable duty to maintain its elevators in a safe condition (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 562 [1973]; *Dykes v Starrett City, Inc.*, 74 AD3d 1015, 1016 [2d Dept 2010]; *see also Backiel v Citibank, N.A.*, 299 AD2d 504, 505 [2d Dept 2002]). Even if a premises owner cedes all responsibility for elevator maintenance and repair to an independent contractor, that owner may still be liable if it had notice of the alleged malfunction and failed to notify the independent contractor (*Levine v City of New York*, 67 AD3d 510, 510 [1st Dept 2009]; *Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2d Dept 2006]).

In elevator malfunction cases, similar to escalator malfunction cases, a premises owner makes a prima facie showing of a lack of constructive notice by presenting evidence that, pursuant to a regular inspection schedule reasonably calculated to discover the potential condition, it had no notice of the malfunction at the time of the last inspection and that there were no related complaints prior to the accident (*see Isaacs v Federated Dept. Stores, Inc.*, 146 AD3d 762, 764 [2d Dept 2017]; *Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714 [1st Dept 2005]; *Bazne v Port Auth.*

[4] Defendants have not definitively demonstrated that plaintiff could not have, at some point, visually observed the misleveling in any way, such as by turning her head, or shifting the angle of her head. Under the circumstances here, it is for a jury to determine the significance of plaintiff's testimony that her shoes were not damaged.

of New York and New Jersey, 61 AD3d 583, 583 [1st Dept 2009]; *San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 591 [1st Dept 2012]; *Luciano v Deco Towers Assoc. LLC*, 92 AD3d 606 [1st Dept 2012]; *Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011]; *Cortes v Cent. El., Inc.*, 45 AD3d 323, 323-24 [1st Dept 2007]; *Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2d Dept 2010] *Tashjian v Strong & Assoc.*, 225 AD2d 907, 908 [3d Dept 1996].) Mere reference to a generalized inspection procedure without evidence of any specific inspection is insufficient to establish a lack of constructive notice (*see id.*; *see also Brum v Macy's Corp. Services, Inc.*, 134 AD3d 870, 871 [2d Dept 2015]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [1st Dept 2010] [testimony of those without actual knowledge of events, or framed in the conditional tense of what a witness would have done, without demonstration of what actually was done, is generally insufficient to meet summary judgment burden]).

To meet its burden, 836 Broadway relies on Nieves' and Esposito's testimony that they rode the elevator daily and, thus, would have noticed elevator misleveling and taken corrective measures. 836 Broadway asserts that Esposito and Nieves did not report any misleveling on the date of the accident, which, it contends, "proves that there were no issues regarding misleveling on the day of the accident" (NYSCEF doc no. 111, at 6, ¶ 13). 836 Broadway also relies on testimony demonstrating that Slade conducted monthly inspections in which it checked the elevator's leveling, and that both Slade and 836 Broadway did not receive any misleveling complaints about the elevator.

836 Broadway's reasoning is misguided, as the absence of Nieves' or Esposito's report of misleveling on the date of the incident is insufficient to make a prima facie showing of a lack of notice on this motion for summary judgment. 836 Broadway also essentially ignores Esposito's testimony about the elevator misleveling prior to the incident, and that such problems would not be logged at all unless the elevator was shut down. 836 Broadway did not provide evidence as to the temporal relationship between the date of plaintiff's accident and any misleveling that Esposito witnessed, and did not demonstrate that misleveling was not an ongoing or recurring problem with the elevator (*see Dzidowska v Related Cos.*, LP, 157 AD3d 447, 447 [1st Dept 2018]).

In *Santoni v Bertelsmann Prop., Inc.* (21 AD3d 712, 713 [1st Dept 2005]), cited by 836 Broadway, an elevator company employee testified that he inspected the elevators once a week, providing details of the inspection, which related to alleged faulty elevator doors. The *Santoni* court found that defendants submitted sufficient evidence to demonstrate that they had no notice of any problem with the elevator on the day that the plaintiff was injured. The testimony upon which 836 Broadway relies in moving does not establish, as a matter of law, the condition of elevator on the date of the incident, or the preceding days. Rather, Esposito's testimony raises a material question of fact concerning whether 836 Broadway and Slade had notice of the dangerous condition which cannot be resolved on this motion.

Concerning Slade's motion, 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 NY2d 553, 559 [1973]; *McLaughlin v*

Thyssen Dover El. Co., 117 AD3d 511 [1st Dept 2014] [same]; *see also* Oral Arg. Tr. at 24:22-25:07 [counsel for Slade admitting that it had a duty to plaintiff to prevent the alleged accident]).

To meet its burden, Slade relies on Caraballo's testimony that he did not receive complaints about elevator misleveling in the year prior to plaintiff's fall. However, from the testimony of Slade's witness, Rolon, that the elevator's leveling was affected by environmental factors, such as weather or use, an inference may be drawn that Slade had knowledge of elevator misleveling problems. Slade does not sufficiently address the issue of whether or not it could have, or should have, abated any misleveling issue through its services, provides no maintenance records to demonstrate that the elevator was in working order at its maintenance visit prior to the incident, and, in fact, did not address the date of its last inspection of the elevator, to show its proximity to the incident (*see Dzidowska v Related Cos.*, LP, 157 AD3d at 448; *see also* Oral Arg. Tr. at 10:08-18 [counsel for Slade admitting there is no evidence as to what work, if any, Slade performed "with respect to inspections or work knowing that the elevator is running hot and cold"]).[5] Consequently, a determination, that Slade properly performed its work, and did not create or have notice of an elevator brake or other defect that would affect elevator leveling, cannot be made on this record. Slade's contention, that Esposito's testimony is not conclusive as to when he witnessed elevator misleveling, impermissibly points to perceived gaps in plaintiff's evidence (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 406 [1st Dept 2018] [moving party may not obtain summary judgment by pointing to gaps in opposition's evidence]).

Moreover, it is well established that "[t]he misleveling of an elevator does not ordinarily occur in the absence of negligence," and accordingly Slade's notice of the dangerous condition can be inferred on this motion pursuant to the doctrine of res ipsa loquitur (*Rojas v New York El. & Elec. Corp.*, 150 AD3d 537, 537-38 [1st Dept 2017]); *Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015] ["Thus, while there is no proof of actual or constructive notice in this case, res ipsa loquitur can still support plaintiff's claim against [the elevator maintenance company]"]. Given that there is evidence of the elevator misleveling prior to the accident, 836 Broadway and Slade's evidence of a generalized policy of inspections is insufficient to establish entitlement to summary judgment (*Ardolaj v Two Broadway Land Co.*, 276 AD2d 264, 265 [1st Dept 2000]; *see also Casey v New York El. & Elec. Corp.*, 82 AD3d 639, 640-41 [1st Dept 2011] ["There are also questions of fact as to what the owner and managing agent knew about the condition of the elevator, preventing a finding at this stage, that any action or inaction of New York Elevator could not have been the proximate cause of the accident"]).

Lastly, this Court notes that both 836 Broadway and Slade seek dismissal of all cross-claims but do not offer any reason for their dismissal other than that the complaint should be dismissed in its entirety. As such, these respective branches of 836 Broadway and Slade's motions are denied.

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[5] Caraballo testified generally as to some of the work that he would have performed relating to the elevator, but he was not certain that he was the only person from Slade who worked on the elevator during the time period before plaintiff fell.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendant Slade Industries, Inc. (Seq. 004) and the motion by defendants 836 Broadway Associates and 836 Broadway Realty Corp. (Seq. 005), both for summary judgment pursuant to CPLR 3212, are denied; and it is further

ORDERED that counsel for plaintiff Cynthia Hanson shall file a copy of the instant decision and order on NYSCEF with notice of entry within twenty (20) days.

The foregoing constitutes the decision and order of this Court.

8/23/2019
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE