

Morris v Centennial El. Indus., Inc.
2019 NY Slip Op 32834(U)
September 20, 2019
Supreme Court, Kings County
Docket Number: 515343/2015
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 20th day of September, 2019.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

RAYSHAWNDA MORRIS, A_H_ by his m/n/g
RAYSHAWNDA MORRIS, RAYSHAWNDA MORRIS,
Individually, S_H_ by his m/n/g RAYSHAWNDA MORRIS,
RAYSHAWNDA MORRIS, Individually,
- against -

Plaintiffs,

CENTENNIAL ELEVATOR INDUSTRIES, INC., GRENADIER
REALTY CORP., JOHN DOE (name being fictitious) as
General Partner of BAY PARK ONE COMPANY LIMITED
PARTNERSHIP, CONEY ISLAND SITE 4A-1 HOUSES, INC.,
NEW YORK CITY HOUSING AUTHORITY,
Defendants.

Index No.:515343/2015

Motion Seq. #s 10 & 11

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation & Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation & Exhibits	2
Affirmation in Opposition to Motion & Exhibits	3
Affirmation in Opposition to Cross-Motion & Exhibits	4
Reply Affirmation to Motion	5

Upon the foregoing papers Defendant, Centennial Elevator Industries Inc. (Centennial), moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment in its favor and dismissing the Complaint, all cross-claims and counter-claims against it. Grenadier Realty Corp., Bay Park One Company Limited Partnership and Coney Island Site 4A-1 Houses, Inc. (collectively, the Grenadier Defendants), cross-move pursuant to CPLR § 3212 for an order granting summary judgment in their favor and dismissing the Complaint and any cross-claims by Co-Defendant Centennial and awarding it indemnification and defense costs.

Background

Plaintiffs filed the summons and complaint in the instant action on or about December 18, 2015 seeking damages for personal injuries. The parties do not dispute that Plaintiffs were passengers in the elevator known as "Passenger Elevator #2" located within the residential apartment building at 2750 West 33rd Street Brooklyn, New York on January 12, 2015. According to Rayshawnda Morris' deposition testimony she was with her two sons, Co-Plaintiffs, A_H_ and S_H_, when they entered the subject elevator planning to go to the 11th floor.

There were three other passengers on the elevator at that time and buttons were pressed for the 3rd, 7th and 11th floors. Ms. Morris stated that the elevator reached the 3rd floor without incident and one of the other passengers exited. However, as the elevator began ascending, she heard a noise that got louder as they reached the 5th floor. Just prior to the doors opening on the 7th floor "something hit the elevator¹" on the right side and this caused it to swing to the left, hitting what felt like a brick wall. As the elevator cab was swinging back and forth, the light went out at first and then began to sizzle. Finally, the elevator door opened on the 7th floor. A_H_ was approximately 11 years old on the day the incident occurred & 14 years old when he was deposed.² A_H_'s deposition testimony supported his mother's account of the incident.³

Both movants, Centennial and the Grenadier Defendants, submit the Affidavit of Jon B. Halpern, P.E. (Professional Engineer). Mr. Halpern states that the incident could not have

¹ P. 52, line 12 of Rayshawnda Morris' EBT taken on 6/12/18 & annexed as Exhibit "F" to the moving papers.

² P. 9, line 20 of A_H_'s EBT taken on 6/12/18 & annexed as Exhibit "G" to the moving papers.

³ Id. at p.17-19.

occurred as described by Plaintiffs and in fact, was a mechanical impossibility. Based upon his review of Centennial's maintenance records, Mr. Halpern further opines that, had the incident occurred the way it was described by Plaintiffs, a major repair would have been necessary to put the elevator back in operation and no such repair was performed. Mr. Halpern further stated that the maintenance/repair record indicated work was performed on January 6, 2015 to an unidentified elevator. However, according to Mr. Halpern the work was performed on Passenger Elevator #1.

Centennial submits two separate documents reflecting repair and maintenance records for dates June 24, 2014 through February 22, 2015 and June 2, 2014 through January 23, 2015, respectively. The first document is referred to as "Completed Listing by Account/Unit"⁴ and omits page 1 of the three-page document. The second document is entitled "Completed Ticket Summary Listing"⁵, a ten-page document, but only pages 4 through 9 were submitted. Additionally, both documents contain several redactions. Counsel for Plaintiffs made a standing objection to the redactions during depositions. Centennial alleged that they made redactions to anything in the maintenance records that either referred to repairs made post incident or involved Passenger Elevator #1.

Richard Santoliquido, a Centennial employee who worked as a maintenance mechanic at the time of the subject incident, reviewed the maintenance records at his deposition. Mr. Santoliquido's testimony contradicted the conclusions drawn by Mr. Halpern. Specifically, Mr. Santoliquido testified that the unidentified elevator that was repaired on January 6, 2015 was

⁴ Exhibit "1" annexed to the moving papers.

⁵ Exhibit "1" annexed to the moving papers.

most definitely elevator #2.⁶ This discrepancy raises the question as to whether or not Mr. Halpern reviewed both repair/maintenance documents. Additionally, some dates appear on one of the maintenance records and not on the other. Finally, this Court notes that the redactions themselves, even if proper, are inconsistent. Some entries even though redacted clearly indicate that they refer to elevator #1. However, in many of the other entries, even the the elevator # has been redacted as well as the work performed.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. *CPLR 3212[b]; Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 (1998); Zuckerman v City of New York, 49 NY2d 557, 562 (1980)*. The movant must therefore offer sufficient evidence in admissible form to demonstrate the to eliminate all material questions of fact. *Alvarez v Prospect Hosp, 68 NY2d 320 (1986); Zuckerman v City of New York, supra at 562; Friends of Animals, Inc v Associated Fur Mfrs, Inc, 46 NY2d 1065 (1979)*. The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ Med Ctr, 64 NY2d 851 (1985)*. Further, the credibility of the parties is not an appropriate consideration for the Court. *S.J. Capelin Assocs, Inc v Globe Mfg Corp, 34 NY2d 338 (1974)* and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment. *Benincasa v Garrubbo, 141 AD2d 636, 637(2d Dept 1988)*.

Plaintiffs submitted an Affidavit by Patrick A. Carrajat, an elevator consultant and expert. Mr. Carrajat does not address the issues raised by Co-Defendants' expert, Mr. Halpern.

⁶ P. 132, lines 10-22 of Mr. Santoliquido's EBT taken on 6/19/18 annexed as Exhibit "H" to the moving papers.

Co-Defendants argue that the Court should disregard Mr. Carrajat's Affidavit and cite to several other cases where courts have done just that. However, the Court agrees with Mr. Carrajat, that merely relying upon Ms. Morris' description of the incident at her deposition, taken some three and one-half years after the incident, is an insufficient basis to grant a motion for summary judgment.

"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." *Moskowitz v Nouveau El. Indus., Inc.*, 50 Misc 3d 1211(A) (Sup Ct, Queens Cnty 2016), citing *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 559 (1973); *Fanelli v. Otis El. Co.*, 278 A.D.2d 362 (2d Dept 2000). The property owner continues to owe a nondelegable duty to elevator passengers to maintain its buildings' elevators in a reasonably safe manner even when an elevator maintenance company has been employed. *Dykes v Starrett City, Inc.*, 74 AD3d 1015, 1016 (2d Dept 2010), citing *Rogers v. Dorchester Assoc.*, *supra* at 559. Additionally, an inference of negligent inspection and repair in the maintenance of an elevator may be inferred from evidence of prior malfunctions. *Dykes v Starrett City*, *supra* at 1016, citing *Rogers v. Dorchester Assoc.*, *supra* at 557, 559; *Liebman v. Otis El. Co.*, 127 A.D.2d 745 (2d Dept 1987).

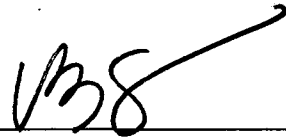
In the instant action the evidence is clear that the subject elevator malfunctioned frequently. It is unclear which of the two maintenance/repair documents Mr. Halpern reviewed. Those documents were redacted and could not rule out as a matter of law what repairs were made to elevator #2 after the accident. Co-Defendants have failed to eliminate questions of fact regarding the operation of elevator #2 or that they had no actual or

constructive notice of any alleged defective condition. ***Orahovac v CF Lex Assoc., 147 AD3d 968, 969 (2d Dept 2017)***. This failure to make a prima facie showing of entitlement to judgment as a matter of law requires the denial of the motions, regardless of the sufficiency of the opposition papers. ***Winegrad v New York Univ. Med. Ctr., supra at 853***.

The parties' remaining contentions are without merit. Accordingly, Co-defendants' motions are denied in their entirety.

This is the Decision and Order of the Court.

ENTER,



LOREN BAILY-SCHIFFMAN

JSC

HON. LOREN BAILY-SCHIFFMAN

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