

Rivera v Slade Indus., Inc.

2019 NY Slip Op 33580(U)

December 5, 2019

Supreme Court, New York County

Docket Number: 156304/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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RAUL RIVERA, INDEX NO. 156304/2016
Plaintiff, MOTION DATE N/A
MOTION SEQ. NO. 002

- v -

SLADE INDUSTRIES, INC, DECISION + ORDER ON MOTION
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59 were read on this motion to/for DISMISS

The motion for summary judgment by defendant is denied.

Background

Plaintiff worked as a corrections officer at Lincoln Correctional Facility ("Lincoln") in Manhattan. He claims that on September 24, 2015, he was at Lincoln when he was hurt while riding the elevator. Plaintiff asserts that he entered the elevator on the ground floor and pressed the button for the ninth floor. He maintains that as the elevator went from the eighth floor to the ninth floor, the elevator stopped, began to shake and it suddenly descended before stopping between the seventh and eighth floors.

Plaintiff insists that he called for help and was stuck in the elevator for a little over an hour. He observed that the lights inside the elevator were on while he waited to be rescued and the ninth-floor call button and indicator light remained lit during this time.

Defendant maintained the elevator and moves for summary judgment. Slade argues that the elevator malfunctioned because there was generator testing conducted by Lincoln and that it

had no notice about this testing. Defendant concludes that the loss of power from the generator testing caused the issues described by plaintiff.

Defendant also attaches an affidavit from its expert, who concludes that “the incident was cause [sic] solely due to the actions of Lincoln Correctional Facility” and that “no failure to maintain or repair the subject elevator by Slade caused or contributed to this incident” (NYSCEF Doc. No. 44, ¶¶ 18, 19). Defendant’s expert noted that “The cause of the incident was solely related to the loss of power to the elevator . . . due to the testing of the emergency power generators” (*id.* ¶ 11).

In opposition, plaintiff offers his own expert’s affidavit which concludes that the incident “was not caused by a simple loss of power but by some other elevator malfunction that caused the tripping of the rope gripper and required a subsequent reset” (NYSCEF Doc. No. ¶ 22). “[I]t is my opinion that there is no conclusive proof of a building-wide power failure” (*id.* ¶ 23). Plaintiff’s expert noted “the fact that Mr. Ryan (a technician for defendant) had to restore power to the elevators after Mr. Rivera was removed from the elevator car by Fire Department personnel can also be explained by the rescue workers having cut the power to prevent any possible operation of the elevators while they were trying to extract him” (*id.* ¶ 24).

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], *affd* 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]).

Here, there is clearly an issue of fact as to whether plaintiff's alleged injuries arose from an elevator malfunction caused by defendant or from the loss of power caused by Lincoln's purported generator testing. While defendant insists that it did not need to make any repairs to the elevator after plaintiff was rescued, that does not mean that the incident was solely caused by Lincoln. Plaintiff's undisputed testimony is that the elevator was nearly up to the ninth floor when it stopped for about 10-15 seconds and started shaking before dropping to the between the seventh and eighth floors. Plaintiff's expert contends that account (along with plaintiff's assertion that the call button light and lights in the elevator remained on) cannot be ascribed to a loss of

power. Defendant’s reply essentially asks this Court to ignore plaintiff’s expert. Unfortunately, the Court cannot pick which expert it believes on a motion for summary judgment.


Moreover, as plaintiff points out in opposition, the testimony from Mr. Ryan (Slade’s elevator technician) contains inconsistencies about defendant’s theory that the accident was caused exclusively by the generator testing (see NYSCEF Doc. No. 40 at 29-30, 38 [observing that no reason other than generator testing explained why the power was cut from the elevator and then claiming that the power was on in the facility when he arrived]). Plaintiff’s expert insists that this assertion—that the power for the building was on but the main line power for the elevators was out— is inconsistent with a power failure stemming from a building-wide generator testing (NYSCEF Doc. No. 54, ¶ 19).

The Court also observes that there is no evidence from Lincoln about whether it was conducting generator testing on that day. That leaves both plaintiff and defendant to make educated guesses about the cause of the accident. Because they disagree and offer substantive explanations for their views on the cause of the accident, the Court must deny defendant’s motion.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment dismissing this case is denied.

12.5.19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE