Lopez v Transel El. & Elec. Inc.
2020 NY Slip Op 31084(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 154199/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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TOMAS LOPEZ

Plaintiff,

- v -

TRANSEL ELEVATOR & ELECTRIC INC.,

Defendant.

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INDEX NO.	154199/2015
MOTION DATE	08/14/2019
MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

In this personal injury action, the plaintiff, a facilities manager, alleges that he sustained injuries on April 22, 2014, when a freight elevator he was riding in at 505 Park Avenue came to a hard and sudden stop. Defendant Transel Elevator, Inc. (TEI) maintains the elevator pursuant to a maintenance contract with the building's managing agent and the plaintiff's employer, Cushman & Wakefield, Inc. TEI moves (i) for summary judgment dismissing the complaint pursuant to CPLR 3212 and (ii) to dismiss the complaint pursuant to CPLR 3211(1) and (7). The plaintiff opposes the motion. The motion is denied.

It is well settled that the movant on 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." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form. See Zuckerman v City of New York, 49 NY2d 557 [1980]) The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). In deciding a summary judgment motion, the court must be mindful that summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be

granted where there is any doubt about the issue. See Bronx-Lebanon Hospital Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990).

TEI has failed, prima facie, to eliminate material triable issues of fact that would demonstrate its entitlement to judgment as a matter of law. "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). In support of its summary judgment motion, TEI submits, *inter alia*, the complaint, the answer, the plaintiff's deposition transcript, the deposition transcript of TEI by its foreman Richard Hovestadt, the elevator service contract between TEI and Cushman and Wakefield, documents purporting to be TEI's work tickets documenting its service calls for the elevators in the building and an affidavit from an engineer, Jon Halpern, who purports to be the plaintiff's expert witness.

The plaintiff testified at his deposition that on April 22, 2015, he entered a freight elevator at 505 Park Avenue on the 19th floor to go down to the basement. Shortly after he boarded the elevator, "he pressed the basement button and all of a sudden, the elevator started going down and it hit something, then suddenly it hit the brakes, and caus[ed] him pain after that, a sudden stop." He further testified that he heard a "clipping sound, like something hit something and that's when it went into that hard stop situation." The plaintiff testified that shortly after the elevator made its hard stop, it it opened on the third floor where he exited. The plaintiff also testified that this particular elevator had a prior history of hard stops that had occurred during that year that he complained about and recorded in the building's log books. It is undisputed that TEI has a contract with Cushman and Wakefield to maintain the elevators at the building.

The deposition testimony of TEI's foreman, Hovestadt, fails to refute this testimony. Hovestadt testified that the night before the Lopez's alleged accident, TEI performed a service call on the elevator. The inspection revealed multiple errors with the elevator, and Hovestadt could not rule out that one such error was that the elevator was experiencing hard or sudden stops. Nor did TWI present any other conclusive evidence that it was aware of similar dangerous defendants. Rather, TEI submitted an affidavit from an engineer, Jon Halpern, who purports to be an expert witness. Halpern's affidavit does not state that it was mechanically impossible for the elevator to have come to a hard stop as described by the plaintiff in his

deposition testimony. Instead, he merely opines that TEI maintained the elevator on a regular basis in accordance with industry standards and that TEI purportedly had no prior notice of the elevator stopping hard prior to the April 22, 2014 incident when Mr. Lopez claimed to have been injured. This conflicting testimony raises triable issues of fact as to whether (i) the elevator came to a hard or sudden stop that caused or aggravated the plaintiff's injuries and (ii) whether TEI was on actual or constructive notice of a prior history with defects in this elevator that caused hard and sudden stops. See Remekie v 740 Corp., 52 AD3d 393 (1st Dept. 2008). Although defendant presented evidence that the elevator was not malfunctioning immediately after the incident, plaintiff's testimony to the effect that a malfunction actually occurred and the defendant's inability to refute the Lopez's testimony that TEI was on actual notice of prior incidents of hard and sudden stops in the elevator is sufficient to create a triable issue of fact as to whether TEI was on notice of an unsafe condition in the elevator. See Dzidowska v Related Cos. LP, 157 AD3d 447 (1st Dept 2018).

The plaintiff also correctly argues that there is a triable issue of fact as to whether the doctrine of *res ipsa loquitur* applies here to support the inference that the alleged hard and sudden stop of the elevator was the result of negligence. *Res ipsa loquitor* permits a factfinder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part. If a plaintiff establishes these elements, then the issue of negligence should be given to a jury to decide." Ezzard v One E. Riv. Place Realty Co., LLC, 129 AD3d 159, 162-163 (1st Dept.2015).

In fact, in a similar case, Miller v Schindler Elevator Corporation, 308 AD2d 312 (1st Dept. 2003), the Appellate Division denied summary judgment on the grounds that res ipsa loquitor would apply where a passenger claimed to have been injured because an elevator made a hard stop. The First Department held as follows:

> On this record, plaintiff is entitled to invoke the doctrine based on her testimony that the elevator began falling when she pushed the button for the basement, which testimony must be treated as true on defendant's motion for summary judgment. Although defendant presented competent, albeit conclusory, evidence that the elevator was not malfunctioning immediately after the incident, plaintiff's testimony to the effect that a malfunction actually occurred is sufficient to create a triable issue of fact. We note that defendant has not offered expert evidence to

> the effect that the occurrence as described by plaintiff is a physical or mechanical impossibility.

Id. at 313.

Here, a trier of fact could reasonably conclude that all three elements of *res ipsa loquitor* have been satisfied. Unlike the plaintiff in Miller, whose fall was allegedly caused by her flipping the emergency brake switch, there is no claim that the plaintiff contributed to the elevator's hard stop. Additionally, the Appellate Division has held that a factfinder could conclude that an elevator coming to a hard stop such as the one at issue, is the type of occurrence that does not ordinarily occur in the absence of negligence. See Galante v New York City Housing Auth., 146 A.D.3d 640. (1st Dept. 2017). As in Miller, TEI has not offered expert evidence to the effect that the occurrence as described by plaintiff is a physical or mechanical impossibility.

As to the final element, exclusive possession and control by TEI need not be absolute for *res ipsa loquitor* to apply to TEI, and the concept is not to be rigidly applied. Rather, as long as their possession and control are of such a character that the probability that the negligent acts complained of were committed by someone else is so remote that it is fair to permit an inference that they were negligent, they are deemed to have exclusive control. See DeWitt Properties, Inc. v City of New York, 44 NY2d 417 (1978). The parties' submissions reveal the existence of a triable issue of fact as to whether TEI had exclusive possession and control over the elevator. The plaintiff accurately states that the service contract between TEI and the building allows the building to perform repairs on the elevator without notice to TEI. However, the defendant fails to proffer evidence that the building ever performed its own renovations on the elevator. Instead, what the record submitted by TEI reflects is that TEI had a long history of inspecting the elevator and conducted an inspection the day before the accident that may have revealed hazardous conditions concerning hard or sudden stops. Thus, a fact finder could conclude that the probability that negligent acts were committed by someone else were so remote that it is fair to permit the inference that TEI was negligent because they were in exclusive control of the elevator. See Feblot v New York Times Co., 32 NY2d 486 (1973).

Lastly, the branch of the defendants' motion seeking dismissal under CPLR 3211(a)(1) and (7) must be denied. TEI did not include in its answer any defense based upon CPLR 3211(a)(1). CPLR 3211(e) provides that a defense grounded in documentary evidence is waived if not raised in either a pre-motion answer or in a responsive pleading is deemed

waived. Thus, to the extent that TEI is arguing a defense grounded in documentary evidence, it is waived. Contrary to TEI's contention, the plaintiff has also sufficiently pleaded a cognizable claim for negligence, which is the only cause of action in the complaint. Specifically, the plaintiff has pleaded (1) existence of a duty on TEI's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury. See Merino v New York City Tr. Auth., 218 A.D.2d 451, 457. (1st Dept. 1996), affd. 89 N.Y.2d 824 (1996).

Accordingly, it is hereby

ORDERED that the defendant's motion, which is for summary judgment dismissing the complaint pursuant to CPLR 3212 and to dismiss the complaint pursuant to CPLR 3211(a) is denied in its entirety and it is further

ORDERED that the parties shall appear for a settlement conference on August 27, 2020 at 3 p.m.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/27/2020
DATE

NANCY M. BANNON, 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