Santapau v Brownstone Too Condo
2020 NY Slip Op 31371(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 157680/2014
Judge: Nancy M. Bannon

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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ARLENE SANTAPAU,

Plaintiff,

- v -

BROWNSTONE TOO CONDO, BROWNSTONE TOO CONDOMINIUM ASSOCIATION, MAXWELL-KATES INC., ROTAVELE ELEVATOR INC.,

Defendant.

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INDEX NO. 157680/2014

MOTION DATE 10/31/2019, 10/31/2019, 10/31/2019

MOTION SEQ. NO. 006 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 191, 214, 215, 216

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 217, 254

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 212, 213

were read on this motion to/for STAY.

In this personal injury action, the plaintiff alleges that she tripped and fell while exiting a mis-leveled elevator in the building located at 310 West 120th Street in Manhattan. The plaintiff commenced the action against defendants Brownstone Too Condo, Brownstone Too Condominium Association, the building's owner, and Maxwell-Kates, Inc., its managing agent (collectively the building defendants), as well as Rotavele Elevator, Inc. (REI). The building defendants and REI each filed cross-claims against each other. REI moves for summary judgment dismissing both the complaint and the cross-claims against it by the building defendants (MOT SEQ 006). The building defendants move for summary judgment dismissing the complaint and the cross-claims of REI against them (MOT SEQ 008). The plaintiff did not oppose MOT SEQ 006 but opposed MOT SEQ 008. The building defendants and REI opposed each other's respective motions to dismiss the cross-claims against them. In MOT SEQ 009, the plaintiff seeks to vacate her default in filing opposition papers to MOT SEQ 006, and to stay

decision on that motion and for an extension to submit opposition. The defendants opposed that motion. All of the motions are denied.

The plaintiff alleges that, at approximately 6:15 P.M. on December 22, 2013, she injured her leg because she slipped on the grate of an elevator in the building and the toe of her ankle boot became lodged in the gap between the floor of the lobby and the mis-leveled floor of the elevator cab. The defendants dispute that the elevator was misleveled and claim that the defendant simply slipped without any negligence on their part. They argue that any gap was not a dangerous condition and that if the plaintiff's toe was caught in the gap between the elevator and lobby floor, it was only because the toe of her shoe was narrower than the gap between the elevator and the landing was level and necessary to afford sufficient clearance for the elevator to operate. The defendants further contend that they were not on notice of any dangerous or defective conditions with the elevator, misleveling or otherwise. Thus, even if the elevator did mislevel as claimed here, they did not have notice in advance of the accident so as to provide any opportunity to repair it and prevent her injury.

The amended complaint alleges two causes of action sounding in common law negligence against all of the defendants. The complaint does not plead any claim of negligence based on a theory of res ipsa loquitor.

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." 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." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). 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.'" Bronx-Lebanon Hospital Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

An owner of an apartment building has a nondelegable duty to keep its premises in good repair, and that duty includes elevator maintenance. See Bonifacio v 910-930 S. Blvd., 295 AD2d 86, 91 (1st Dept. 2002); Cole v Homes for the Homeless Inst., Inc., 93 AD3d 593 (1st Dept. 2012). As such, a defendant in an elevator malfunction case is liable if it had notice, actual or constructive, of the alleged malfunction and failed to notify the elevator maintenance company of a malfunction. See Levine v City of New York, 67 AD3d 510 (1st Dept. 2009). Likewise an elevator maintenance 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 Assocs., 32 N.Y.2d 553, (1973)

When moving for summary judgment, a defendant in an elevator malfunction case 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 malfunction, 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 Isaac v 1515 Macombs, LLC, 84 AD3d 457 (1st Dept. 2011); Bazne v Port Auth. of New York and New Jersey, 61 AD3d 583 (1st Dept. 2009); Santoni v Bertelsmann Prop, Inc., 21 AD3d 712 (1st Dept. 2005); San Andres v 1254 Sherman Ave. Corp., 94 AD3d 590 (1st Dept. 2012); Luciano v Deco Towers Assoc. LLC, 92 AD3d 606 (1st Dept. 2012); Meza v 509 Owners LLC, 82 AD3d 426 (1st Dept. 2011); Cortes v Cent. El., Inc., 45 AD3d 323 (1st Dept. 2007). A defendant is not entitled to summary judgment on notice grounds where there is a failure to present sufficient evidence regarding specific inspection of the elevators. See Stewart v World Elevator Co, Inc., 84 A.D.3d 491, 495, 922 N.Y.S.2d 375, 378 (1st Dept. 2011).

With regard to REI's motion for summary judgment, REI submits an attorney affirmation annexing, *inter alia*, the pleadings, the plaintiff's Bill of Particulars, the elevator contract between Maxwell-Kates and REI, the deposition transcripts of its maintenance supervisor, Patrick McCuhan, the building's superintendent, Marcelo Cevallos, the building's porter and doorman, John Henry, who was the doorman on duty the night of the accident, and a video from the elevator camera. Additionally, REI's attorney affirmation also annexes its elevator maintenance service contract with Maxwell Kates, and documents purporting to be the history reports of REI's maintenance servicing of the building's two elevators in the year preceding the accident. These submissions, however, fail to demonstrate, *prima facie*, the absence of triable issues of fact.

One such triable issue of fact is whether REI had constructive notice of the potentially dangerous misleveling condition in the elevator. See Ardolaj v Two Broadway Land Co., 276 AD2d 264 (1st Dept. 2000); compare Palladino v New York City Hous. Auth., 173 AD3d 1196 (2nd Dept. 2019). McCuhan, REI's maintenance supervisor, was the sole witness who testified on REI's behalf. In his deposition testimony, McCuhan admits that REI's elevator maintenance contract obligated REI to inspect the elevator on a monthly basis and that the proper procedure was to inspect the elevator's leveling system. However, McCuhan's testimony did not establish that REI fulfilled its obligation to inspect the elevators on a monthly basis. McCuhan could not authenticate any of the maintenance history reports that were annexed to REI's attorney affirmation. On the contrary, McCuhan testified that he had no personal knowledge of how these history reports were generated and could not verify if the reports were even generated or created by REI. McCuhan's testimony, without actual knowledge of events or what actually was done, is not sufficient to satisfy the plaintiff's burden on summary judgment. See De La Cruz v Lettera Sign & Elec. Co., 77 AD3d 566 (1st Dept. 2010).

Additionally, when reviewing these purported history reports, McCuhan could not explain why only nine maintenance inspections were listed when REI was obligated to perform 12 inspections, *i.e.* one each month. McCuhan also could not discern from these reports if REI had inspected one or both of the building's elevators at each visit or if REI ever inspected the elevators' leveling system sufficient to defeat summary judgment. See Stewart v World Elevator Co, Inc., supra; see also Bruni v. Macy's Corp. Servs., Inc., 134 A.D.3d 870,(2nd Dept. 2015). Thus, summary judgment must be denied regardless of the sufficiency of the plaintiff's opposition papers. See Winegrad v New York Univ. Med. Ctr., supra; see also Troina v Canyon Donuts Jericho Turnpike, Inc., 166 AD3d 706 (2nd Dept. 2018).

The building defendants similarly fail to meet their prima facie burden (MOT SEQ 008). They offer no affidavits, deposition testimony or other evidence in admissible form showing that any of their employees actually inspected the elevator prior to the accident or that they had ever inquired with REI to ensure that it inspected the elevator's leveling system in accordance with their maintenance contract. Additionally, the building defendants submit the deposition testimony of Jason Henry stating that he was the building's doorman at the time of the accident and saw the accident on the elevator camera in real time. Although the video submitted by the defendants shows that another passenger was blocking the elevator camera from clearly showing the plaintiff's fall, Henry testified that it looked to him that the plaintiff's shoe was caught in a gap between the elevator and the lobby floor. He avers that he ran his feet across the

threshold of the elevator after the accident and did not feel any misleveling. However, there is still a triable issue of fact inasmuch as Henry's testimony directly conflicts with the plaintiff's testimony that she felt a misleveling of the elevator with her foot when she fell and requires a credibility determination that cannot be made on a motion for summary judgment. See Ezzard v One E. Riv. Lace Realty Co., LLC, 129 AD3d 159 (1st Dept. 2015); see also McFadden v. Bruno, 37 AD3d 177 (1st Dept. 2007).

Additionally, the affidavit of Thomas Santapau raises an issue of fact in opposition. He was present at the time of the accident and walked out of the elevator ahead of his wife without incident, but avers that he observed a 1 ½ inch misleveling of the elevator cab and the lobby floor. This is consistent with Arlene Santapau's account. Thus, there are triable issues of fact as to whether the elevator misleveled and whether the building defendants were on notice of same.

The plaintiff opposes the building defendants' motion for summary judgment claiming, for the first time, that the misleveling of the elevator creates an inference of negligence under the doctrine of res ipsa loquitor. However, as the defendants correctly point out, the plaintiff did not raise *res ipsa loquitor* in their pleadings or in their Bill of Particulars. In Yousefi v Rudenth Realty, LLC, 61 AD3D 677 (2nd Dept. 2009), the court, under similar circumstances held that because of the plaintiff's "inexcusable delay" in presenting res ipsa loquitor as a "new theory of liability" it was proper for the court not to consider the theory. Id. at 678. However, the court need not reach the timeliness of the plaintiff's raising of res ipsa loquitor as a theory of liability because the defendants correctly argue that any reliance by the plaintiff on res ipsa loquitor would be misplaced. In Cortes v Central Elevator, Inc., 45 AD3d 323 [1st Dept. 2007], the First Department declined to permit the plaintiff to apply the doctrine of res ipsa loquitor in an elevator misleveling case because, as is the case here, the proof submitted shows that "the plaintiff's fall could have occurred in the absence of negligence and could have been caused by a misstep on his part." Id. at 324; see also Meza v 509 Owners LLC, supra.

Finally, as to the portions of the defendants' summary judgment motions directed at their respective cross-claims for indemnification, the only grounds they assert in their papers for dismissing those cross-claims is that the plaintiff has failed to establish their respective negligence. Since it has yet to be determined whether REI or the building defendants were negligent, and the parties have made no definitive showing here that they could resolve that issue in this motion, the respective portions of the summary judgment motions which are

addressed to the defendants' cross-claims are denied. See Miranda v Norstar Building Corp., 79 AD3d 42 (3rd Dept. 2010).

In light of REI's failure to meet its *prima facie* burden to establish entitlement to summary judgment dismissing the complaint, MOT SEQ 009, wherein the plaintiff moves to vacate her default in opposing MOT SEQ 006 and to extend her time to file opposition papers is moot.

Accordingly, it is,

ORDERED that the motion of Rotavele Elevator, Inc. (MOT SEQ 006) for summary judgment dismissing the complaint and the cross-claims asserted against it is denied; and it is further,

ORDERED that the motion of defendants Brownstone Too Condo, Brownstone Too Condominium Association, and Maxwell-Kates, Inc. (MOT SEQ 008) for summary judgment dismissing the complaint and defendant Rotavele Elevator, Inc.'s cross-claim against them is denied; and it is further,

ORDERED that the plaintiff's motion (MOT SEQ 009) to stay the court's decision on (MOT SEQ 006) and vacate its default in opposing the motion and extending its time to respond to (MOT SEQ 006) is denied, and it is further

ORDERED that the parties shall contact chambers to schedule a settlement conference on or before June 30, 2020.

This constitutes the Decision and Order of the court.

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

5/14/2020
DATE

CHECK ONE:							
		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER