

Barnes v Astoria Fed. Sav. & Loan Assn.

2020 NY Slip Op 33941(U)

October 20, 2020

Supreme Court, Queens County

Docket Number: 702781/17

Judge: Rudolph E. Greco, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.
Justice

IAS Part 32

FILED

**10/20/2020
4:33 PM**

-----x
JAMES BARNES,

Index No. 702781/17

**COUNTY CLERK
QUEENS COUNTY**

Plaintiff,

Motion Date: 9/10/20

-against-

Motion Seq. No. 7

ASTORIA FEDERAL SAVINGS AND LOAN
ASSOCIATION and OTIS ELEVATOR COMPANY,

Defendants.
-----x

The following numbered papers read on this motion by defendant Otis Elevator Company (Otis Elevator), for an order pursuant to CPLR § 3211 (a)(7), dismissing the complaint, dismissing the third-party complaint, and dismissing all cross claims for failure to state a cause of action, for an order pursuant to CPLR § 3212, for summary judgment dismissing the complaint, dismissing the third-party complaint, and dismissing all cross claims, and for an order pursuant to CPLR § 3212, for summary judgment on Otis Elevator’s claim for contractual indemnification against defendant Astoria Federal Savings & Loan Association (Astoria Federal).

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF 157-181
Answering Affidavits - Exhibits	EF 183-187
Reply Affidavits	EF 188-193

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries that plaintiff James Barnes (plaintiff), allegedly sustained on or about October 6, 2016, at premises located at 30-10 38th Street, in the County of Queens (the subject premises). Astoria Federal allegedly owned, managed, controlled and maintained the subject premises. On or about October 20, 1999,

Otis Elevator and Astoria Federal entered into a written agreement to have Otis Elevator perform maintenance of a passenger elevator located within building at the subject premises. Plaintiff was allegedly an employee of non-party QSAC Incorporated, which operated as a business at the premises. Plaintiff has alleged that while he was alone in a passenger elevator descending to the first floor of the building at the premises, he was standing in the back, left corner of the elevator cab when a panel from the ceiling of the elevator fell and struck him, causing him to sustain personal injuries.

As is procedurally relevant on the instant motion, following commencement of the instant action, Astoria Federal commenced a third-party action against Otis Elevator alleging claims sounding in contractual indemnification, common-law indemnification and contribution, and failure to procure insurance. Plaintiff subsequently amended the complaint to add Otis Elevator as a party defendant. In Astoria Federal's answer to plaintiff's amended complaint, it has alleged cross claims against Otis Elevator sounding in common-law indemnification and contribution, contractual indemnification, and failure to procure insurance. In Otis Elevator's answer to plaintiff's amended complaint, it has alleged a cross claim against Astoria Federal sounding in contractual indemnification.

Otis Elevator has now moved to dismiss the complaint, the third-party complaint, and all cross claims, for failure to state a cause of action. In support of the branch of Otis Elevator's motion to dismiss plaintiff's complaint, Otis Elevator has argued that plaintiff has failed to state a viable cause of action against Otis Elevator, a service contractor, because plaintiff has failed to allege in the complaint that one of the three exceptions set forth in *Espinal v Melville Snow Contractors, Inc.*, (98 NY2d 136, 138 [2000]), was applicable.

CPLR § 3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; CPLR § 3026; *see Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]). "The elements of a cause of action sounding in negligence are the existence of a duty that the defendant owed to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injuries" (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 18 [2d Dept 2019]).

While "a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 138; *see Vogle v N. Country*

Prop. Mgt., LLC, 170 AD3d 1491 [3d Dept 2019]; *Dautaj v Alliance El. Co.*, 110 AD3d 839, 840 [2d Dept 2013]). “[A] contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a noncontracting third party” (*Bienaime v Reyer*, 41 AD3d 400, 403 [2d Dept 2007]; see *Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 857 [2d Dept 2018]). However, it is well settled that there are “three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties; and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely”(*Espinal v Melville Snow Contrs.*, 98 NY2d at 140 [internal quotation and citations omitted]; see *Nachamie v County of Nassau*, 147 AD3d 770, 774 [2d Dept 2017]).

The record in this matter contains, among other things, copies of the pleadings. After a careful reading of the allegations contained in the amended complaint, affording the complaint a liberal construction, accepting the facts alleged therein to be true, and granting plaintiff the benefit of every possible favorable inference, the court has concluded that plaintiff has sufficiently set forth facts to support a legally cognizable cause of action (see *Gorbatov v Tsirelman*, 155 AD3d at 836). Under the particular circumstances of this case, plaintiff’s allegations, including but not limited to, that Otis Elevator was contracted to supply services at the premises, that Otis Elevator was responsible for maintaining the subject elevator, that Otis Elevator owed plaintiff a duty which Otis Elevator breached by negligently failing to maintain the elevator in a reasonably safe condition, thereby causing damages to plaintiff, has sufficiently alleged a cause of action against Otis Elevator sounding in negligence (see *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d at 18; *Bd. of Managers of 136 St. Marks Place Condominium v St. Marks Place Condominiums, II, LLC*, 128 AD3d 877, 879 [2d Dept 2015]). Therefore, Otis Elevator has failed to satisfy its burden and it is not entitled to the dismissal of plaintiff’s complaint pursuant to CPLR § 3211 (a)(7).

With regard to the branches of Otis Elevator’s motion to dismiss the third-party complaint and all cross claims for failure to state a cause of action, Otis Elevator has failed to adequately address each of these causes of action in its motion in its papers. Therefore, Otis Elevator is not entitled to the dismissal of the third-party complaint or all cross claims pursuant to CPLR § 3211 (a)(7).

The court will now turn to the branches of Otis Elevator’s motion for summary judgment dismissing the complaint, the third-party complaint, and all cross claims. In support of the branch of its motion for summary judgment dismissing plaintiff’s complaint, Otis Elevator has argued that it did not owe a duty to plaintiff, that it did not breach a duty

because it did not create the alleged condition or have actual or constructive notice of it, and that none of the exceptions set forth in *Espinal v Melville Snow Contrs.*, (98 NY2d at 140), are applicable. “To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented” (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25 [internal quotes omitted]), and “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 demonstrate the absence of any material issues of fact” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25-26, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The record contains, among other things, plaintiff’s deposition testimony, the testimony of non-party Latrice Machin (Machin), who was an employee of Astoria Federal, the testimony of non-party James Hovestadt (Hovestadt), an employee of Otis Elevator, the affidavits of non-party Jon Halpern (Halpern), a professional engineer, the affidavit of non-party Patrick Carrajat (Carrajat), an elevator consultant, the affidavit of non-party Michael Sena (Sena), an elevator consultant, a copy of the written agreement between and Astoria Federal and Otis Elevator, as well as various records and invoices from Otis Elevator, including, but not limited to an invoice dated October 28, 2016.

Plaintiff testified that he worked at the subject premises on or about October 6, 2016, that he boarded the elevator at the premises on the third floor on that date, and that as the elevator was descending past the second floor, a ceiling panel from the elevator cab fell from directly above him and struck him, causing him injuries. Plaintiff further testified that he never noticed anything amiss in the elevator prior to his accident, that he never made any complaints to Otis Elevator, and that he gave statements to his employer and to an employee of Astoria Federal, following his accident.

Machin, testified that she was an employee of Astoria Federal and that she worked at the subject premises on the date of the instant accident. She further testified that on or about October 6, 2016, Astoria Federal has a written agreement for elevator maintenance with Otis Elevator, and that prior to October 6, 2016, she was not aware of any complaints that were made regarding the elevator. Machin also testified that she spoke to plaintiff immediately

following the accident, that plaintiff stated that a ceiling panel from the elevator cab fell and struck him and that she completed an accident report at that time.

Hovestadt testified that he was employed as an elevator mechanic with Otis Elevator, that he would perform regular maintenance on the elevator at the subject premises pursuant to Otis Elevator's contract with Astoria Federal, and that he reviewed the maintenance records for the subject elevator prior to testifying. He testified that on a prior occasion, on or about November 5, 2015, he was present at the subject premises as a result of a service call, at which time, he replaced an "escape hatch" which was a removable access panel that had fallen out of the ceiling of the elevator cab, that he did not replace it with a new hatch, but placed the existing hatch back into the ceiling of the elevator cab.

Hovestadt further testified that he recalled his visits to the premises for the service call on October 6 and 7, 2016, regarding an escape hatch that had fallen from the ceiling of the elevator, that when he arrived the hatch was missing from the elevator, and that he then re-installed the same hatch in the ceiling of the elevator cab. Hovestadt also testified that the hatch was not damaged, that he did not know what had actually caused it to fall, but that the mechanism on the escape hatch was in the locked position so it could not have fallen out of the ceiling without the use of force. He testified that although the repair or replacement of such an escape hatch was not covered under Astoria Federal's agreement with Otis Elevator, Otis Elevator did, in fact, perform such work on the elevator and that an invoice dated October 28, 2016, was generated for the repair of that particular ceiling panel.

Halpern, Otis Elevator's expert, stated in his affidavit that he reviewed various relevant documentation and inspected the subject elevator on February 28, 2019. Halpern concluded that Otis Elevator was not responsible for maintaining the ceiling panel involved in the accident and that, to a reasonable degree of engineering certainty, no acts or omissions of Otis Elevator caused or contributed to the subject accident because Otis Elevator maintained the subject elevator in accordance with the terms of the maintenance agreement and in accordance with industry standards.

Carrajat, plaintiff's expert, stated in his affidavit that he reviewed various relevant documentation, including Otis Elevator's maintenance records, and that despite Otis Elevator's argument that it was not responsible for maintaining the ceiling panel at issue or that it had no notice of the alleged condition, based upon Otis Elevator's records, Otis Elevator did, in fact, access the top of the elevator multiple times prior to the subject accident. Contrary to Halpern's conclusions, Carrajat concluded, to a reasonable degree of mechanical certainty, that plaintiff did not cause or contribute to the happening of the accident, that the hatch was not properly secured, and that Otis Elevator's failure to properly maintain the elevator and to repair the top of the car exit when such repair was necessary and

when Otis Elevator had performed work on the top of the elevator cab several times in the year prior to the accident, was the proximate cause of the subject accident.

Sena, Astoria Federal's expert, stated in his affidavit that he reviewed various relevant documentation, that while Astoria Federal's agreement with Otis Elevator excluded the maintenance of certain items, including "car enclosures" such as the ceiling panel, Otis Elevator, nevertheless, performed maintenance on the ceiling panel at issue on or about November 5, 2015, prior to the subject accident. He stated that even after the instant accident, the second incident of its kind, in which the same ceiling panel fell, Otis Elevator's employees noted that the panel was not damaged. Contrary to Halpern's conclusions, Sena concluded, to a reasonable degree of mechanical vertical transportation certainty, that Otis Elevator's failure to properly maintain the elevator and Otis Elevator's inadequate repair and replacement of the ceiling panel after it fell on November 5, 2015, was the proximate cause of the subject accident.

Based upon the evidence in the record before the court, Otis Elevator has failed to satisfy its prima facie burden on this branch of its motion (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). The conflicting evidence reflects that Otis Elevator has failed to eliminate all triable issues of material fact with regard to its liability for plaintiff's cause of action sounding in negligence (*see id.*; *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d at 18). A myriad of issues remain in this matter, at the very least, as to whether Otis Elevator owed a duty of care to plaintiff as a result of having performed work on the ceiling panel involved in the accident, whether Otis Elevator negligently performed said work and created the alleged condition, whether said repair work or Otis Elevator's other work on the top of the elevator cab should have provided Otis Elevator with notice of the alleged condition, and whether any action or inaction on the part of Otis Elevator was a proximate cause of the subject accident.

Moreover, as a result of this court's determination that plaintiff's pleadings sufficiently alleged that the exceptions set forth in *Espinal v Melville Snow Contrs.*, (98 NY2d at 140), applied in this matter, in order to establish its prima facie entitlement to summary judgment, Otis Elevator was also required to eliminate all triable issues of fact with regard to those exceptions (*see Rubistello v Bartolini Landscaping, Inc.*, 87 AD3d 1003, 1004-05 [2d Dept 2011]). However, the evidence has demonstrated that genuine issues of material fact exist with regard to whether Otis Elevator, in failing to exercise reasonable care in the performance of its duties that it performed pursuant to its agreement with Astoria Federal, launched a force or instrument of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 140; *Ramsey v Temco Serv. Indus., Inc.*, 179 AD3d 726, 727-28 [2d Dept 2020]; *Rubistello v Bartolini Landscaping, Inc.*, 87 AD3d at 1005). Therefore, in light of the above determinations, Otis Elevator is not entitled to summary judgment dismissing the complaint.

With regard to the branches of Otis Elevator’s motion for summary judgment dismissing the third-party complaint and all cross claims, upon a careful reading of Otis Elevator’s motion papers, the court has determined that Otis Elevator has failed to adequately address each of those causes of action in its papers. Thus, Otis Elevator is not entitled to summary judgment pursuant to CPLR § 3212, dismissing the third-party complaint and all cross claims.

Lastly, Otis Elevator has moved for summary judgment pursuant to CPLR §3212, on its cross claim for contractual indemnification against Astoria Federal and has argued that it is entitled to such pursuant to the terms of the maintenance agreement. ““A party’s right to contractual indemnification depends upon the specific language of the relevant contract”” (*Hanna v Milazzo*, 179 AD3d 907, 909 [2d Dept 2020], quoting *Gurewitz v City of New York*, 175 AD3d 658, 664 [2d Dept 2019]). ““[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor”” (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 659 [2d Dept 2014]; *Giannas v 100 3rd Ave. Corp.*, 166 AD3d at 857; *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Given the terms that have been set forth in Otis Elevator’s agreement with Astoria Federal, a copy of which has been included in the record, in particular, the language pursuant to which Astoria Federal agreed to hold harmless, defend, and indemnify Otis Elevator “against any claim or suit for personal injury ... arising out of this contract unless such ... injury arises from [Otis Elevator’s] sole negligence,” in light of the above determination that issues of fact remain as to whether Otis Elevator may or may not be liable in the happening of the subject accident, Otis Elevator is not entitled to the relief sought on this branch of its motion (*see Giannas v 100 3rd Ave. Corp.*, 166 AD3d at 857; *Konsky v Escada Hair Salon, Inc.*, 113 AD3d at 659).

Accordingly, Otis Elevator’s motion is denied in its entirety.

Dated: October 20, 2020



Rudolph E. Greco, Jr., J.S.C.

FILED

**10/20/2020
4:33 PM**

**COUNTY CLERK
QUEENS COUNTY**