

<b>Hunce v Bronxville Glen S. Condominium</b>
2020 NY Slip Op 35152(U)
August 17, 2020
Supreme Court, Westchester County
Docket Number: Index No. 69384/2018
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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MARIE HUNCE,

Plaintiff,

Index No. 69384/2018

– against –

**Motion Seq. 2, 3, & 4**

BRONXVILLE GLEN SOUTH CONDOMINIUM, BARHITE & HOLZINGER, INC. and BRONXVILLE GLEN SOUTH ASSOCIATES and THYSSENKRUPP ELEVATOR CORPORATION,

**DECISION & ORDER**

Defendants.  
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In an action to recover damages for personal injuries (1) the defendants Bronxville Glen South Condominium and Barhite & Holzinger, Inc. move for summary judgment, pursuant to CPLR 3212, dismissing the complaint and for summary judgment on their cross claims against ThyssenKrupp Elevator Corporation (motion sequence # 2); (2) the plaintiff moves for summary judgment on the complaint (motion sequence # 3); and (3) the defendant ThyssenKrupp Elevator Corporation moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it (motion sequence #4):

**Papers Considered**

**NYSCEF Doc. No. 45-84; 87-101; 107-137**

1. Notice of Motion/Affirmation of Robin B. Baer, Esq./Exhibits A-K;
2. Affirmation of Matthew F. Rice, Esq. in Opposition/Exhibits 1-7;
3. Affirmation of Karen L. Wagner, Esq. in Opposition/Exhibits A-G;
4. Reply Affirmation of Robin B. Baer, Esq.
5. Amended Notice of Motion/Affirmation of Matthew F. Rice, Esq./Exhibits 1-10;
6. Affirmation of Robin B. Baer, Esq. in Opposition/Exhibits A-D;
7. Affirmation of Karen L. Wagner, Esq. in Opposition/Exhibits A-E;
8. Reply Affirmation of Matthew F. Rice, Esq.
9. Notice of Motion/Affirmation of Karen L. Wagner, Esq./Exhibits A-M;
10. Reply Affirmation of Karen L. Wagner, Esq.

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## Factual and Procedural Background

Plaintiff sustained injuries on July 18, 2017, when she stepped into a mis-leveled elevator on the 7<sup>th</sup> floor at her condominium causing her to trip and fall.

Bronxville Glen South Condominium is the owner of the building. Barhite & Holsinger, Inc. is the management company responsible for overseeing the day-to-day operations of the building (collectively referred to as Bronxville). ThyssenKrupp Elevator Corporation is the elevator maintenance company.

Plaintiff commenced this action seeking damages for personal injuries against Bronxville and ThyssenKrupp. Bronxville asserted cross claims against ThyssenKrupp for common law and contractual indemnification and for failure to procure insurance.

Plaintiff testified that she was leaving her apartment on the date of the accident waited for the elevator. When the elevator door opened, she began to walk into the elevator. By the time she realized the elevator was not level it was too late and she tripped striking the wall. Plaintiff testified that her foot tripped on the threshold of the elevator cab which was approximately three inches higher than the floor.

Luis Andrade, the building superintendent, testified that there were two elevators in the building. Plaintiff's accident occurred in the elevator to the left side. If Andrade received a complaint about the elevators, he would contact ThyssenKrupp. Prior to plaintiff's accident, Andrade received complaints from residents on the 7<sup>th</sup> floor about the elevator in question mis-leveling. Andrade also observed the off-leveling of the elevator himself on a few occasions. Andrade advised Barhite of the issue.

Andrade testified that on December 2, 2016, the left elevator was stuck on the fourth floor. On April 10, 2017, the right elevator was not balanced and was bouncing. On June 16, 2017, the left elevator was not responding on the 3<sup>rd</sup> floor. On July 10, 2017, he contacted ThyssenKrupp about a leveling problem with the elevator. On July 13, 2017, there was a complaint about the left elevator bouncing on the 4<sup>th</sup> floor and not leveling. Andrade testified that ThyssenKrupp did not advise Andrade that the elevator should be taken out of service after the July 13<sup>th</sup> service call.

Andrade testified that at times, the machine room in the building was too hot. However, Andrade testified that prior to plaintiff's accident, no one ever told him that the heat in the machine room caused problems with the elevators. After plaintiff's accident, he was advised by ThyssenKrupp that the machine room was too hot and he installed an exhaust fan in the machine room.

Louis Millan was a service superintendent for ThyssenKrupp. He testified that if an elevator was not leveling properly, the technician should check to see if the machine room is too hot. Over 90 degrees is too hot for a mechanical room. Millan inspected the building on July 19, 2017, after plaintiff's accident. As soon as the door to the mechanical room opened, he felt the heat. Millan testified that the excessive heat in the mechanical room contributed to the mis-leveling of the elevator.

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Robert Sherwood was the service technician for ThyssenKrupp. He performed routine maintenance on the elevator on July 10, 2017. He noticed excessive heat from the motor room at that time and told the super. Sherwood again responded to the building on July 11, 2017. He observed the elevator mis-leveling on that date. He went to the motor room on that occasion and observed excessive heat in the room. He did not put that on the ThyssenKrupp ticket because that is a building responsibility and he did not mark building responsibilities on the tickets. Sherwood testified that he told the super about the issue and suggested the installation of air conditioning or ventilation in the motor room. According to Sherwood, the super was very dismissive about it. Sherwood also observed a space heater in the motor room that would not turn off. He suggested that the super trip the circuit breaker to turn the space heater off.

Sherwood returned to the building after another call on July 13, 2017. He again observed the elevator mis-leveled and excessive heat in the motor room and discussed this with the super. He never recommended taking the elevator out of service because he had told Andrade how to remedy the excessive heat condition.

### Discussion

Plaintiff moves for summary judgment on the complaint on the grounds that the defendants had notice of the mis-leveling of the elevator prior to her accident and failed to take the elevator out of service or put up warning signs. Plaintiff argues that the defendants were all made aware of the condition on June 16, 2017, July 11, 2017, and July 12, 2017, and that unsuccessful repairs were attempted.

Bronxville moves for summary judgment dismissing the complaint insofar as asserted against them. Bronxville argues that it did not have notice of any dangerous or defective condition with the elevator prior to plaintiff's accident and that it did not create the alleged condition.

ThyssenKrupp moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. ThyssenKrupp argues that even if the elevator mis-leveled, it was not due to any negligence on its part. Excess heat in the machine room, which is the responsibility of the building, is a well-known cause of elevator malfunction, particularly mis-leveling. Even if there was any mis-leveling, it was within the half-inch allowance of the Americans with Disabilities Act standards.

In opposition, plaintiff submits an expert affidavit of Patrick A. Carrajat, an elevator consultant. Carrajat states that while excessive heat can contribute to leveling issues, there are other more common causes such as motor-generator carbon brushes, wrong grade carbon brushes, and insufficient brush holder spring tension.

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233 [1976]). "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective

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condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (*Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560 [2d Dept 2005]).

A defendant moving for summary judgment in a negligence case has the initial burden of establishing, prima facie, that it neither created the dangerous condition that allegedly caused plaintiff's injury nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see *Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560 [2d Dept 2005]; *Drago v DeLuccio*, 79 AD3d 966 [2d Dept 2010]). A defendant has constructive notice of a defect when the defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Rubin v Cryder House*, 39 AD3d 840 [2d Dept 2007]).

Bronxville and Barhite failed to demonstrate entitlement to judgment as a matter of law. However, plaintiff demonstrated entitlement to judgment as a matter of law against the Bronxville and Barhite.

The evidence demonstrates that prior to plaintiff's accident, there were several service calls made to the building due to problems with the elevator, including mis-leveling. Sherwood testified that on several occasions he advised Andrade, the building super, that the motor room was too hot and suggested ways to alleviate the issue. The excessive heat in the motor room was a contributing factor to the mis-leveling of the elevator. Thus, plaintiff demonstrated, as a matter of law, that Bronxville and Barhite either created the defective condition or had actual or constructive notice of the dangerous or defective condition. In opposition, Bronxville and Barhite failed to raise a triable issue of fact.

"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" (*Daconta v Otis El. Co.*, 165 AD3d 753, 753 [2d Dept 2018] quoting *Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]).

Plaintiff demonstrated entitlement to judgment as a matter of law against ThyssenKrupp by submitting evidence establishing that it had knowledge of and failed to use reasonable care to correct the mis-leveling condition of the elevator. ThyssenKrupp failed to raise an issue of fact in opposition.

Bronxville also moves for summary judgment on its cross claims against ThyssenKrupp. Bronxville argues that it is entitled to contractual and common law indemnification from ThyssenKrupp who was the exclusive elevator maintenance and repair company for the building. Bronxville also argues that ThyssenKrupp breached the contract by failing to procure the proper insurance.

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ThyssenKrupp opposes Bronxville's motion for summary judgment and argues that issues of fact exist as to the contract between the parties.

Bronxville submits a one-page indemnification provision between ThyssenKrupp and Barhite, dated February 16, 2010, which provides, in pertinent part:

Contractor agrees to indemnify, defend and hold harmless Clients and/or Managing Agent from any liability, loss, or other claim, including expenses and attorneys' fees, related to ... personal injuries ... arising out of or in connection with the performance of the work by the Contractor, its agents, servants, subcontractors or employees, except to the extent of any fault attributed to the Clients and/or Managing Agent.

Bronxville does not attach an accompanying affidavit verifying that the indemnification provision is part of the contract between the parties. ThyssenKrupp submits an affidavit of Timothy Hind, its branch manager, who states that the only operative contract between the parties effective in July 2017, was the master maintenance agreement which is attached to the affidavit. Therefore, issues of fact exist as to the contract agreement between the parties in effect on the date of plaintiff's accident.

Moreover, even considering the indemnification provision was in effect, issues of fact exist as to each parties' negligence. Issues of fact exist as to whether there was excessive heat in the motor room, which was controlled by the building, that caused the elevator to malfunction, and whether Andrade had notice of such condition.

A violation, dated July 20, 2017, was issued to Bronxville by the City of Yonkers for a failed elevator inspection. The City of Yonkers, upon its investigation, found that the machine room was excessively hot; the elevators were past due for their annual testing; and the incident was not properly reported to the City.

ThyssenKrupp submits an expert affidavit of Patrick McPartland, P.E., who has over 40 years of experience in the elevator industry. McPartland reviewed the documentary evidence and attests that the elevators in the building were original to the construction in or about 1980. The motor room, or machine room, houses the machine selector and generator which control the speed, acceleration, deceleration, and leveling of the elevator. McPartland states that it is known practice that the machine room is the responsibility of the building not the elevator contractor. Excess heat in the machine room is a well-known cause of mis-leveling elevators. Because the heat levels fluctuate during the day, the elevator may not mis-level in the morning but may do so as the heat increases throughout the day. McPartland reviewed videos of the elevator on the date of plaintiff's accident and observed it was used without incident. He also observed that to the extent it is noticeable in the video (which the Court does not have a copy of), the elevator was compliant with the ADA Code which defines a level elevator at plus or minus one-half-inch above the floor sill.

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Bronxville submits an expert affidavit of Michael Sena. Sena states that had excessive heat been discovered in the motor room, it was ThyssenKrupp's obligation to inform Bronxville and that it failed to meet this obligation. Sena opines that ThyssenKrupp did not properly maintain and repair the subject elevator which caused plaintiff's accident.

Andrade attests that no one from ThyssenKrupp ever informed him that the motor room was too hot prior to plaintiff's accident or suggested that a fan or air conditioner be installed. He also stated that the space heater in the motor room was not working and he was not informed by anyone at ThyssenKrupp that the space heater was in the on position.

It is clear from the contradictory affidavits and expert opinions that triable issues of fact exist as to the negligence of the parties precluding summary judgment on the cross claims.

Accordingly, it is

**ORDERED** that the branch of the motion of the defendants Bronxville Glen South Condominium and Barhite & Holzinger, Inc. for summary judgment, pursuant to CPLR 3212, dismissing the complaint is **DENIED** (motion sequence # 2); and it is further

**ORDERED** that the branch of the motion of the defendants Bronxville Glen South Condominium and Barhite & Holzinger, Inc. for summary judgment, pursuant to CPLR 3212, on their cross claims against ThyssenKrupp Elevator Corporation is **DENIED** (motion sequence # 2); and it is further

**ORDERED** that the plaintiff's motion for summary judgment on the complaint against the defendants Bronxville Glen South condominium, Barhite & Holzinger, Inc., and ThyssenKrupp Elevator Corporation is **GRANTED** (motion sequence # 3); and it is further

**ORDERED** that the motion of the defendant Thyssenkrupp Elevator Corporation moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is **DENIED** (motion sequence #4).

Counsel for all parties are directed to appear in the **Settlement Conference Part, room 1600**, for further proceedings, at a date and time to be provided.

Dated: White Plains, New York  
August 17, 2020

  
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HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – 2/Hunce v. Bronxville Glen South Condominium