Marsielle v ARC NYC1140Sixth LLC
2020 NY Slip Op 35406(U)
January 8, 2020
Supreme Court, Kings County
Docket Number: Index No. 503172/18
Judge: Lawrence Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of January, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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EDDY MARSIELLE,
Plaintiff,

- against -

ARC NYC1140SIXTH LLC,
CENTENNIAL ELEVATOR INDUSTRIES, INC.,
and "JOHN DOE," said name being fictitious and unknown,
Defendants.

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DECISION AND ORDER

Index No. 503172/18

Mot. Seq. 4-5

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KINGS COUNTY CLERK
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The following e-filed papers read herein: NYSCEF No.:

Notice of Motion, Affirmation (Affidavit), and Exhibits Annexed	57-69, 70-78
Opposition Affirmation (Affidavit) and Exhibits Annexed	81-83, 84-85, 87-90, 91-92
Reply Affirmation and Exhibits Annexed	94, 95-96

In this action to recover damages for personal injuries, defendant Centennial Elevator Industries, Inc. (Centennial) moves in Seq. No. 4 for an order granting it summary judgment dismissing all claims and cross claims as against it. Defendant ARC NYC1140Sixth LLC (ARC) moves in Seq. No. 5 for an order granting it summary judgment dismissing all claims and cross claims as against it, and further granting it summary judgment on its cross claims against Centennial and "John Doe." Plaintiff Eddy Marsielle (plaintiff) opposes both motions.

Background

In the morning of June 27, 2017, Centennial, under the contract with ARC, was inspecting the elevators in a commercial building owned by ARC (the building). Centennial's inspection required a visit to the elevator pits located in the basement of the building. A hallway in the basement (the hallway) led to the doors to the elevator pits (the

access doors). Always locked except when in use, the access doors were located alongside one wall of the hallway and were separated by a short distance from each other. Only the building personnel, including plaintiff as a freight elevator operator, had keys to the access doors. At the request of Centennial's apprentice mechanic, one named Joseph Hotaling (Hotaling), plaintiff unlocked both access doors and departed from the basement. When they were unlocked, Hotaling opened one of the access doors (the access door) and went inside. Plaintiff, upon returning to the basement in approximately 20 minutes to obtain his medication from the locker room, noticed that it was partially open.[1] Plaintiff continued walking toward the access door, unaware that Hotaling was behind it and about to open it wide enough to enable him to step out into the hallway. As plaintiff was approaching the access door, it swung outward suddenly, hitting him with sufficient force on the face and ribs so as to propel him toward the opposite wall. Hotaling did not (and could not) see plaintiff until he was able to let himself out into the hallway; he only felt some resistance behind the access door as he was opening it outward.

A post-accident examination of the accident site by the building's chief engineer discovered the presence of a handwritten note on the back of the access door. The handwritten note, made by a marker, warned users to "open [the access] door slowly" (Rosario EBT tr at page 56, lines 17-25). Hotaling, though, did not notice any writing on the back of the access door (Hotaling EBT tr at page 62, lines 19-22).

The defense experts measured the access door and hallway during their separate post-accident inspections. Centennial's expert, Herbert Weinstein, P.E., measured the width of

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[1] Hotaling's recollection is at odds with plaintiff's pretrial testimony. According to Hotaling, he closed the access door completely when he had entered it (Hotaling EBT tr at page 61, lines 17-21).

the access door at 35-3/4", the width of the hallway with the access door *fully closed* at 46-1/2", and the width of the hallway with the access door *fully open* at 10-3/4" (Weinstein Affidavit, dated Aug. 7, 2019, ¶¶ 4-5). ARC's expert, Michael Cronin, P.E., measured the width of the access door at 42" and the width of the hallway with the access door *fully closed* at 46"; notably, he did *not* measure the width of the hallway with the access door open, either fully or partially (Cronin Affidavit, dated Aug. 16, 2019, ¶ 3).

On Feb. 15, 2018, plaintiff commenced the instant action against, among others, Centennial and ARC (collectively, defendants).[2] Defendants interposed separate answers asserting cross claims against each other. After discovery was completed and a note of issue was filed, the instant motions were timely served.

Plaintiff's Claims Against Centennial

"Because 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 Contrs., Inc.*, 98 NY2d 136, 138 [2002]). Where a contractor has entered into a contract to render services, it may only be held to have assumed a duty of care to nonparties to the contract where, among other things, "the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm" (*Espinal*, 98 NY2d at 140 [internal quotation marks and alteration omitted]).

Here, plaintiff's claims against Centennial are predicated on a duty to use reasonable care in opening the access door which adjoined the public hallway. Even assuming that

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[2] The remaining named defendant is a fictitious "John Doe." Plaintiff has not moved under CPLR 1024 to substitute Hotaling in place of the "John Doe" defendant.

Centennial has met its burden of showing that Hotaling was not negligent, plaintiff has controverted that showing by pointing to evidence that the access door struck him with sufficient force to propel him toward the opposite wall, despite a warning on the back side of the access door to open it slowly (*see e.g. Matos v Shelter Rock Homes, Inc.*, 130 AD3d 883, 884 [2d Dept 2015]; *Ramos v New York City Tr. Auth.*, 90 AD3d 492 [1st Dept 2011]; *Gramegna v Rubsam & Horrman Brewing Co.*, 252 App Div 777 [2d Dept 1937]). The presence of the handwritten warning on the back of the access door defeats Centennial's argument that the accident was unforeseeable (*see Rosado v Phipps Houses Servs., Inc.*, 93 AD3d 597 [1st Dept 2012]). Accordingly, the branch of Centennial's motion for summary judgment dismissing plaintiff's claims as against it is denied.

Plaintiff's Claims Against ARC

"[L]andowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" (*Tagle v Jakob*, 97 NY2d 165, 168 [2001] [footnote omitted]). "Liability can be imposed upon a landowner . . . who creates a dangerous condition on the property, or had actual or constructive notice of the dangerous condition" (*Springer v Washington Mut. Bank*, 114 AD3d 928, 929 [2d Dept 2014]). "To constitute constructive notice, a dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and remedy it" (*Gauzza v GBR Two Crosfield Ave. Ltd. Liability Co.*, 133 AD3d 710, 711 [2d Dept 2015] [internal quotation marks omitted]).

Here, the record raises a triable issue of fact as to whether ARC created the defective condition based on its placement of the outward swinging access door in the narrow hallway.

The affidavit of Centennial's expert[3] demonstrates that when the access door is fully open, the remaining width of the hallway is less than the minimum clearance of 36" required by sections 157 and 158 (1) of chapter 5, article 8 of the 1922 Building Code[4] (*see Buscemi v Chefford Auto. Parts, Inc.*, 255 App Div 1014 [2d Dept 1938]; *Stasinos v S.K.I. Realty, Inc.*, 2016 NY Slip Op 30771[U], *11 & n 2 [Sup Ct, NY County 2016]; *see also Zeder v Church of St. Stanislaus*, 275 App Div 796, 797 [1st Dept 1949]).

ARC's contention that the access door was not defective misses the point. What matters is that the hallway in the area of the access door was not wide enough, in violation of the 1922 Building Code, to accommodate passersby when someone was opening it from the inside. Hence, the presence of the handwritten warning on the back of the access door.

ARC's alleged violation of the 1922 Building Code regarding the width of the hallway in the area of the access door is crucial in distinguishing the facts of this case from those of the "swinging door" and "sudden slam" decisions (*see e.g. Ramos v City of New York*, 67 AD3d 982, 983 [2d Dept 2009] ["the cause of the plaintiff's injury was the act of a student, rather than an alleged defect in the classroom door"]; *Rotkowitz v Atlantic Hotel Corp.*, 36 AD2d 977 [2d Dept 1971] [judgment in favor of defendant, in action for injuries sustained by plaintiff when struck by a swinging door at hotel owned by defendant, would be affirmed, notwithstanding exclusion of testimony concerning spontaneous declaration of

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3. Plaintiff's opposition to ARC's motion incorporates the opinion of Centennial's expert. Plaintiff's allegations of negligence are not limited to the access door and include the hallway (*see* Verified Bill of Particulars as to ARC, dated Aug. 15, 2018, ¶¶ 4-5; Verified Bill of Particulars as to Centennial, dated Aug. 15, 2018, ¶ 5).

4. The 1922 Building Code is applicable because the certificate of occupancy for the building was first issued in 1926.

waitress who was coming through door at time of the accident to the effect that she was sorry she had struck plaintiff], *affd without opinion* 29 NY2d 889 [1972]; *Cejka v R.H. Macy & Co.*, 3 AD2d 535, 536 [1st Dept 1957] [the "plaintiff's accident was not caused by any negligence or dereliction of duty on the part of defendant, but rather by the inconsiderate and unexpected conduct of another patron"], *affd without opinion* 4 NY2d 785 [1958]; *Pardington v Abraham*, 93 App Div 359, 361 [2d Dept 1904] [the plaintiff's accident "is attributable . . . not to any fault of the defendants, but rather to the hasty carelessness of a third person over whose movements and conduct they had no control"], *affd for reasons stated below* 183 NY 553 [1906]).

Plaintiff's comparative negligence, if any, "is not a defense to the cause of action of negligence, because it is *not* a defense to any element (duty, breach, causation) of [his] prima facie cause of action for negligence, . . . but rather [is] a diminishment of the amount of damages" (*Rodriguez v City of New York*, 31 NY3d 312, 320 [2018] [emphasis in the original]).

Accordingly, the branch of ARC's motion for summary judgment dismissing plaintiff's claims as against it is denied.

ARC's Cross Claims Against Centennial

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Sellitti v TJX Cos., Inc.*, 127 AD3d 724, 725 [2d Dept 2015]). Here, the indemnity provision in the full service elevator contract between ARC and Centennial was triggered by the accident, as plaintiff's claim arose out of Centennial's work (*see Barnes v New York City Hous. Auth.*, 43 AD3d 842, 844 [2d Dept 2007], *lv dismissed* 9 NY3d 1002 [2007]; *Ezzard v One East River Place Realty Co., LLC.*, 137 AD3d 648, 649

[1st Dept 2016]). Nevertheless, ARC has failed to establish its freedom from negligence so as to entitle it to summary judgment on its cross claims against Centennial for contractual defense and indemnity, as well as for common-law indemnity (*see Reynolds v County of Westchester*, 270 AD2d 473, 474 [2d Dept 2000]; *see also Mikelatos v Theofilaktidis*, 105 AD3d 822, 824 [2d Dept 2013]). Accordingly, the remaining branches of Centennial's and ARC's respective motions which are for summary judgment on ARC's cross claims against Centennial are denied.

Conclusion

Based on the foregoing and after oral argument, it is

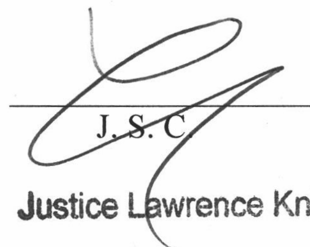
ORDERED that Centennial's motion in Seq. No. 4 and ARC's motion in Seq. No. 5 are *both denied in their entirety*; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry and shall electronically file an affidavit of service thereof with the Kings County Clerk.

The parties are reminded of their next scheduled appearance in JCP-1 on Jan. 30, 2020.

This constitutes the decision and order of the Court.

E N T E R,



J.S.C.

Justice Lawrence Knipel

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