

Florez v 215 E. 68th St. L.P.

2022 NY Slip Op 30687(U)

March 4, 2022

Supreme Court, New York County

Docket Number: Index No. 152831/2018

Judge: Arlene Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

MARIA FLOREZ,

Plaintiff,

- v -

215 EAST 68TH STREET L.P., 215 EAST 68TH STREET
LLC,RUDIN MANAGEMENT COMPANY INC.,OTIS
ELEVATOR COMPANY

Defendants.

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INDEX NO. 152831/2018
MOTION DATE 03/02/2022
MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 145, 147, 148, 149, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 265, 266, 267, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284

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

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

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

Motion Sequence Numbers 001, 002 and 003 are consolidated for disposition. The motion (MS001) by defendant Otis Elevator Company ("Otis") for summary judgment dismissing this case as against it and on its cross-claims for contribution and common law

indemnity is granted in part.¹ The motion (MS002) by defendants 215 East 68th Street L.P., 215 East 68th Street LLC and Rudin Management Company, Inc. (collectively the “Rudin Defendants”) for summary judgment on their cross-claims against Otis and to dismiss the cross-claims against them is denied. The motion (MS003) for partial summary judgment on liability by plaintiff is denied.

Background

This personal injury action arises out of injuries plaintiff suffered due to an allegedly misleveled elevator. Plaintiff was working as a housekeeper on October 25, 2017 at a building owned and run by the Rudin Defendants and was cleaning an apartment for one of the residents. Plaintiff testified that the apartment she was cleaning was on the third floor and that she was coming up from the laundry room in the basement (NYSCEF Doc. No. 71 at 35-37). She explained that she took the service elevator up and that the incident happened on her third trip up from the laundry room (*id.* at 113). The elevator in question is a service elevator that is operated manually by an employee of the Rudin Defendants. These defendants contracted with Otis for maintenance and repairs of the elevators in the building.

Plaintiff testified that as she walked out of the elevator on the third floor, her right foot got caught and she fell (NYSCEF Doc. No. 72 at 66). She admitted that she did not notice whether the elevator was level with the third floor as she was exiting the elevator, but after she fell, she claims the elevator was five inches lower than the floor (*id.* at 66-68).

The Parties’ Claims

Plaintiff moves for partial summary judgment on liability as to all defendants. She claims that defendants have a non-delegable duty to maintain a safe elevator and that the elevator was

¹ The Court recognizes that plaintiff filed an untimely opposition to MS001 but because Otis filed a reply, the Court sees no reason not to consider this opposition and issue a decision on the merits.

clearly misleveled. She adds that Otis undertook an affirmative duty to keep the elevator safe by performing routine and emergency maintenance on various occasions prior to plaintiff's accident. Plaintiff argues that defendants had both actual and constructive notice that the elevator was having issues. She points out that construction workers had a hard time getting their cart off the elevator that day due to the misleveling issue.

Plaintiff argues that she had numerous issues with the elevator over the prior year and that the elevator operator (since it was a service elevator) was present and aware of the problem. She also contends that the elevator had received numerous repairs for getting stuck on floors, or in between floors, or not stopping flush with a floor in the year prior to plaintiff's accident.

In opposition, the Rudin Defendants claim that the incident report for plaintiff's accident says the elevator was half an inch below the floor. They point to their expert's affidavit, Mr. Chen, who claims that video of the incident shows that there was no misleveling at all. Mr. Chen argues that this elevator, when functioning normally, was permitted to be half an inch above and below and was not required to relevel unless the vertical distance exceeded 1 inch (NYSCEF Doc. No. 178 at 9). He insists applicable regulations permitted a tolerance of half an inch and that is what the elevator was here (*id.* at 10). The Rudin Defendants also argue that they had no notice of any misleveling nor did they create the alleged defect.

Otis also offers opposition and claims that the video shows there was no negligence on Otis' part. It also argues it had no notice of any purported dangerous condition and that its repair records do not show any leveling issues for the six months prior to the incident. Otis offers its own expert affidavit from Mr. McPartland who also claims the elevator was level with the landing when plaintiff fell (NYSCEF Doc. No. 245, ¶ 14). Mr. McPartland observes that Otis checked the elevator out following the accident found it not to be misleveled although he

acknowledged that the elevator was used after the incident, but before this inspection (*id.* ¶ 20).

Otis also moves for summary judgment on similar grounds (MS002).

In reply, plaintiff emphasizes that an employee of the building (Mr. Velez) operated the elevator at all times and that he was supposed to reach report to a superior (Mr. Cira) who would contact Otis if there were any problems. Plaintiff maintains that Mr. Velez admitted at his deposition that he had to manipulate the door on two occasions prior to the accident in order to get the elevator to properly function.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). “Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury” (*id.*). A court must examine “the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury” (*id.* at 978).

“A property owner has a nondelegable duty to passengers to maintain its building's elevator in a reasonably safe manner and may be liable for elevator malfunctions or defects causing injury to a plaintiff about which it has constructive or actual notice or where, despite having an exclusive maintenance and repair contract with an elevator company, it fails to notify the elevator company about a known defect. 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” (*Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458, 922 NYS2d 354 [1st Dept 2011] [internal quotations and citations omitted]).

The Court denies plaintiff's motion for partial summary judgment and grants Otis' motion for summary judgment. With respect to plaintiff's claim, the video submitted along with the motions is simply inconclusive regarding whether the elevator was below the third floor when plaintiff fell. Plaintiff's assertion that the elevator was five or six inches below the floor is

not reflected in the video. The Court observes that the experts offered by defendants claim the video shows that there was no misleveling of the elevator. And while the video clearly shows that plaintiff fell, it does not show a clear and obvious actionable defect. The video, which is jumpy and taken from a single angle, does not support summary judgment; clearly, there is an issue of fact with respect to whether there was a dangerous condition.

The parties all admit that the elevator operator continued to use the elevator right after the incident (which happened around 1 p.m.) until around 2:30 when an Otis repair person checked the elevator. This prevented any measurement of the alleged defect at the time of the accident. The Court cannot simply look at this surveillance footage and somehow know whether the elevator was misleveled. The jurors must consider plaintiff's version of events and the video. They can also consider other evidence, such as the testimony of the elevator operator (Mr. Velez) who claims that he had no idea why plaintiff fell (NYSCEF Doc. No. 74 at 57).

The Court also observes that in the video (at 7:48), another passenger in a black shirt points to the threshold of the elevator to another passenger after the accident occurred. This person witnessed the accident but apparently was not deposed. A fact finder might think the person was telling another passenger about the accident that had just occurred, that the elevator was misleveled, or something else. This is yet another point for a fact finder to consider.

Plaintiff's reliance on the doctrine of *res ipsa loquitur* does not compel the Court to grant her motion. Although plaintiff is correct that this doctrine is often invoked with respect to elevator malfunctions (*Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015] [finding that elevator malfunctions do not normally occur in the absence of negligence]), the fact is that, here, plaintiff did not conclusively prove that there was an elevator malfunction and therefore is not entitled to summary judgment. A jury might ultimately agree

with her version of events but there is no evidence to find, as a matter of law, that there was something wrong with the elevator.

However, the Court grants Otis' motion for summary judgment dismissing plaintiff's claims against it because plaintiff failed to raise an issue of fact with respect to Otis' requisite notice. Plaintiff did not show that Otis had actual or constructive notice of the purported misleveling. "[P]laintiff failed to produce evidence of a prior problem with the elevator that would have provided notice of the specific defect that allegedly caused the elevator to mislevel on the date of her accident or offer any expert evidence that [Otis] could have discovered the defect through the exercise of reasonable care" (*Isaac*, 84 AD3d at 459 [citations omitted]).

As best this Court can tell, the only prior mention of a misleveling problem or repair was from December 2016 (NYSCEF Doc. No. 75 at 98, 191 [Otis' deposition]). The accident here happened on October 25, 2017. That is simply too long to find that Otis had sufficient notice of a misleveling issue. That there were other issues or repairs to the elevator does not mean Otis had specific knowledge of a misleveling problem or should have discovered such an issue. Plus, plaintiff did not submit an expert affidavit to oppose the experts offered by defendants who contend there was no misleveling issue at all. Plaintiff's alleged observations and complaints about the elevator were not made to anyone at Otis; at most, they were made to the elevator operator (an employee of the Rudin Defendants).

Rudin Defendants and Otis

Having found that Otis was not negligent as a matter of law, the Court dismisses all claims against this defendant, including the cross-claim alleged by the Rudin Defendants. Moreover, that renders Otis' cross-claims against the Rudin Defendants for contribution and

common law indemnification as moot. Because Otis is now out of the case, there is no need for it to pursue either of these theories.

The Court observes that the Rudin Defendants’ motion only sought relief against Otis; it did not seek any relief against plaintiff. Their motion is denied for the reasons set forth above—because Otis is not negligent, the Rudin Defendants are not entitled to indemnification or contribution from Otis.


Accordingly, it is hereby

ORDERED that the motion (MS001) by defendant Otis Elevator Company for summary judgment dismissing this case and on its cross-claims for contribution and common law indemnity is granted only to the extent that all claims against it are severed and dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the motion (MS002) by defendants 215 East 68th Street L.P., 215 East 68th Street LLC and Rudin Management Company, Inc. (collectively the “Rudin Defendants”) for summary judgment on their cross-claim against Otis and to dismiss the cross-claims against them is denied; and it is further

ORDERED that the motion (MS003) for partial summary judgment as to liability by plaintiff is denied.

3/4/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: