

Turner v Pride & Servs. El. Co., Inc.

2022 NY Slip Op 33010(U)

September 8, 2022

Supreme Court, New York County

Docket Number: Index No. 151428/2019

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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NORMA TURNER,

Plaintiff,

- v -

PRIDE & SERVICES ELEVATOR CO., INC., TRANSEL
ELEVATOR & ELECTRIC, INC., TRANSEL ELEVATOR
INDUSTRIES, INC., TEI GROUP AND ELECTRIC, INC., TEI
GROUP, INC., WEWITT LLC, KONE, INC.

Defendant.

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INDEX NO. 151428/2019

MOTION DATE 05/03/2022

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

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

In this personal injury action, defendant Kone, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on February 17, 2016 in which plaintiff tripped due to a misleveled elevator at 119 West 56th Street in Manhattan. Docs. 1, 177. Plaintiff commenced the captioned action against Pride & Service Elevator Co., Inc., Transel Elevator & Electric, Inc., Transel Elevator Industries, Inc., TEI Group and Electric, Inc., TEI Group, Inc., Wewitt LLC, and Kone, Inc. (Kone) on February 9, 2019. Doc. 1.1 By order entered June 23, 2021, this Court granted plaintiff's motion to amend the complaint to name CEMD Elevator Corp., CEMD Elevator

1 Plaintiff has discontinued its claims against Pride & Service Elevator Co., Inc., Transel Elevator & Electric, Inc., Transel Elevator Industries, Inc., TEI Group and Electric, Inc., and TEI Group, Inc. Doc. 142.

Corp. d/b/a/ City Elevator, and City Elevator as defendants (collectively City Elevator). Doc. 157. Plaintiff alleged that the named defendants were negligent in maintaining the elevator in question. Docs. 1, 177.

Kone now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, Kone asserts that it entered into an asset purchase agreement (APA) with City Elevator on July 28, 2016 pursuant to which Kone purchased “some” service contracts from City Elevator. Doc. 173 at par. 18. Kone insists, however, that it “did not purchase all prior liabilities” regarding the elevators and that the APA specifically provided that Kone would not be responsible for any personal injury occurring prior to the closing date. Doc. 173 at par. 18. Additionally, Kone maintains that it did not begin to maintain the subject elevator until September 1, 2016, the date of the closing on the APA, which was months after the alleged accident. Doc. 173 at par. 19. Kone insists that it did not maintain or have sole control over the elevator in question on the date of the incident, and thus owed plaintiff no duty. Doc. 173 at par. 20; Doc. 174 at 2. It also asserts that City Elevator was responsible for maintaining the elevator on the date of the incident. Doc. 173 at par. 21.

In support of the motion, Kone submits the affidavit of Joanna Cicio, a Senior Administrative Associate at Kone, who attests that: she is familiar with Kone’s elevator service and maintenance records; she has personal knowledge of Kone’s business and business practices; Kone did not repair, maintain, inspect, modernize, or install the elevator at any time before the incident; City Elevator was the elevator maintenance company at the time of the accident; Kone entered into the APA with City Elevator on July 28, 2016; pursuant to the APA, Kone agreed to purchase certain assets and contracts from City Elevator; the closing on the APA occurred on September 1, 2016, on which date Kone began to maintain the elevator; Kone did not agree to

purchase all of City Elevator's liabilities; and Kone did not do any work on the subject elevator on the date of the accident. Doc. 175.

In opposition to the motion, plaintiff, relying on *Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983), argues that Kone fails to establish its prima facie entitlement to summary judgment since it does not establish that it has no successor liability as a matter of law. Doc. 178 at 3-4. Plaintiff also asserts that the motion is premature because the depositions of the defendants have not been conducted and she is entitled to question Kone and City Elevator regarding Kone's potential successor liability. Doc. 178 at 4.

In reply, Kone argues that the motion is not premature because plaintiff fails to offer any evidentiary basis on which to suggest that discovery may lead to relevant evidence. Doc. 182. It further asserts that the APA and Cicio affidavit establish that it did not have sole control over the elevator on the day of the incident and that it has no successor liability. Doc. 182.

LEGAL CONCLUSIONS

A party moving for summary judgment "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). 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 moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

A corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction [was] entered into fraudulently to escape such obligations" (*Schumacher*, 59 NY2d at 245). Where, as here, a successor corporation moves for summary judgment on the ground that it is not liable for the debts of its predecessor, it is required to establish that none of the foregoing exceptions applies (*See Menche v CDx Diagnostics, Inc.*, 199 AD3d 678, 680 [2d Dept 2021] [citation omitted]). Since Kone has failed to make this showing, its motion must be denied regardless of the sufficiency of the opposing papers.

Kone's motion is founded principally upon Cicio's affidavit and the APA it entered into with City Elevator. Although Cicio represents in her affidavit that she is familiar with Kone's maintenance contracts (Doc. 175), she does not state that the APA attached to Kone's motion is a true and accurate copy of the said agreement (*See AQ Asset Mgt. LLC v Levine*, 128 AD3d 620, 621-623 [1st Dept 2015]) or that she is familiar with the signature on the APA or has personal knowledge of the execution of the document or the contents thereof (*See A.F. Supply Corp. v Perfect Lock & Sec., Inc.*, 143 AD3d 747, 748 [2d Dept 2016]). Thus, Kone has failed to properly authenticate the APA. Although plaintiff does not specifically raise this authentication issue in opposition to the motion, this Court finds that it, too, warrants the denial of the motion since, as noted above, a failure to establish one's prima facie entitlement to summary judgment warrants denial of the motion regardless of the sufficiency of the opposing papers.

Additionally, the motion is premature. CPLR 3212(f) provides that:

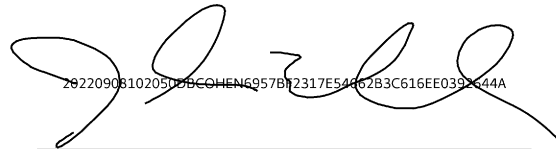
Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Here, plaintiff correctly asserts that summary judgment in favor of Kone would be premature at this juncture since the defendants, including Kone, still have not been deposed (*See Burke v Yankee Stadium, LLC*, 146 AD3d 720, 721 [1st Dept 2017]). Additionally, Cicio admits that the copy of the APA attached to the motion is redacted and, as plaintiff notes, also missing several schedules which were supposed to be annexed to it. Although Kone cites the case of *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615 (2d Dept 1999) for the proposition that summary judgment “cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence”, this Court finds that the missing and redacted portions of the APA proffered by Kone provide such an evidentiary basis upon which to deny the motion as premature since they potentially relate to Kone’s successor liability. Notably, Kone does not even address the redactions or missing schedules in its reply papers.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendant Kone, Inc. is denied with leave to renew at the conclusion of discovery.

9/8/2022
DATE



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DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE