Diaz v 2 Broadway Ground Lease Trust
2023 NY Slip Op 31818(U)
May 30, 2023
Supreme Court, New York County
Docket Number: Index No. 162756/2014
Judge: Denise M. Dominguez
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** — ***Justice*** **PART** **21**

INDEX NO. 162756/2014

MOTION DATE ________

MOTION SEQ. NO. 002

---X

DIAZ, CARLOS

Plaintiff

- v -

2 BROADWAY GROUND LEASE TRUST, 2 BROADWAY LLC, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY

Defendants

---X

DECISION AND ORDER ON MOTION

2 BROADWAY GROUND LEASE TRUST, 2 BROADWAY LLC, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY

Plaintiffs

-against-

ABM JANITORIAL SERVICES - NORTHEAST, INC., SLADE INDUSTRIES, INC., SLADE ELEVATOR

Defendants

Third-Party
Index No. 595043/2016

---X

ABM JANITORIAL SERVICES - NORTHEAST, INC.

Plaintiff

-against-

GILBERT INTERNATIONAL INC

Defendant

Second Third-Party
Index No. 595049/2017

---X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 131, 132, 134, 135, 137, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 206, 207, 208

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

For the reasons that follow, the motion and cross-motion seeking summary judgment are denied.

Background

In this personal injury matter, Plaintiff, Carlos Diaz alleges that he was injured by a malfunctioning elevator. Plaintiff alleges that on January 3, 2014, while employed as an elevator operator for 12 years, at a 32-story office building at 2 Broadway, New York, New York, the infrared/sensor beams, and the manual mode of the elevator (freight elevator No. 27) malfunctioned and closed on the right side of his body.

Main Action-162756/2014

On December 29, 2014, Plaintiff commenced a negligence action against the lease holders/owners/managers of the premises, Defendants, 2 Broadway Ground Lease Trust, 2 Broadway LLC, Metropolitan Transportation Authority (MTA), New York City Transit Authority, and Triborough Bridge and Tunnel Authority (collectively "2 BROADWAY") (NYSCEF Doc. 155).

On June 13, 2016, and April 13, 2017, Plaintiff amended the complaint to include subcontracting managing companies, Defendant, Slade Industries, Inc. (SLADE), a corporation hired by the MTA to maintain the elevators, and Defendant, ABM Janitorial Services – Northeast (ABM) a corporation hired by the MTA to perform custodial and engineering services (NYSCEF Doc 162, 169).

Third Party Action- 595043/2016

On or about January 14, 2016, Defendants 2 BROADWAY, filed a Third-Party action impleading managing companies, ABM and SLADE. 2 BROADWAY brings causes of action for indemnification and alleges that SLADE and ABM, under their contractual obligation were

responsible for maintaining the elevator in a safe condition, and if Plaintiff's injuries were not caused by his own negligence, then SLADE and ABM are liable (NYSCEF Doc. 157).

Second Third Party Action- 595049/2017

On January 16, 2017, ABM filed a summons and complaint, impleading Plaintiff's employer, Gilbert International Cleaner (GILBERT) (NYSCEF Doc 167). In this second third-party action, ABM alleges hiring GILBERT as further subcontractor to perform certain cleaning and engineering services and sues for contractual indemnification.

Now, post-note of issue, SLADE moves for summary judgment pursuant to CPLR 3212 (NYSCEF Doc 98). SLADE argues entitlement to judgment as a matter of law on the grounds that it did not create, nor have notice of the alleged defective condition and that the doctrine of *res ipsa loquitur* should not apply. SLADE also seeks dismissal of all cross-claims and claims for indemnification (NYSCEF Doc 99). 2 BROADWAY opposes and cross-moves for summary judgment upon similar grounds (NYSCEF Doc 150).

Discussion

The moving party in a summary judgment motion has the high burden of showing that there is no defense to the causes of action or that the cause of action or defense has no merit (CPLR 3212 [b]). The movant establishes entitlement to judgment as a matter of law by submitting admissible evidence that dispels material questions of fact (see CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In a premises liability-related action, where the summary judgment movant alleges that they neither created nor had actual or constructive notice of the defective condition, it is their burden to establish lack of notice as a matter of law (*Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403[1st Dept 2001]; *see* e.g. *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994];

Gordon v American Museum of Natural History, 67 NY2d 836[1986]; *Rogers v Dorchester Assoc.*, 32 NY2d 553 [1973]; *O'Neill v Mildac Props.*, 162 AD2d 441 [2d Dept 1990]; *Liebman v Otis El. Co.*, 127 AD2d 745, 746 [2d Dept 1987]; *Sanchez v City of New York*, 211 AD3d 1065[2nd Dept 2022]; *Dyer-Crewe v Schindler Elevator Corp*, 205 AD3d 474 [1st Dept 2022]).

In actions regarding elevator malfunctioning, elevator companies may be liable if they were contracted to maintain elevators in a safe operating condition and the accident resulted from their failure to correct a condition, they had knowledge of or failed to use reasonable care to discover (*Rogers*, 32 NY2d 553). Moreover, lease holders/property owners continue to owe a nondelegable duty to elevator passengers to maintain their building's elevators in a reasonably safe manner (*see Rogers*, 32 NY2d at 559; see e.g. *O'Neill*, 162 AD2d 441). Furthermore, negligence in elevator-related actions may be inferred from evidence of prior malfunctions (*see Rogers*, 32 NY2d at 557).

Regarding the evidentiary doctrine of *res ipsa loquitur,* a factfinder may infer negligence merely if a plaintiff presents evidence (1) that the occurrence would not ordinarily happen in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendants, and (3) that no act or negligence on the part of plaintiff contributed to the accident (*Barkley v Plaza Realty Invs. Inc.*, 149 AD3d 74 [1st Dept 2017]; *Miller v Schindler El. Corp.*, 308 AD2d 312 [1st Dept 2003]).

As to the second element of the doctrine, it may be applicable to more than one defendant, where the leaseholder/owner/manager and elevator company jointly exercise "exclusive control" over the elevator since the exclusivity requirement is as a relative term, not an absolute one (*Burgess v Otis El. Co.*, 114 AD2d 784 [1st Dept 1985], *affd* 69 NY2d 623 [1986]; *see also Kleinberg v City of New York*, 61 AD3d 436 [1st Dept 2009]). In addition, it is not uncommon for

the *res ipsa loquitur* doctrine to apply in actions involving elevator accidents (*see e.g. Barkley*, 149 AD3d 74; *see also Lilly v City of New York*, 161 AD3d 46 [1st Dept 2018]; *Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297[1st Dept 2007]).

SLADE's Motion

Here, SLADE asserts that there were no prior complaints or similar incidents involving the subject elevator. The evidence they rely on, includes invoices and building dispatch statements, incident report, and deposition testimony of the witnesses for SLADE, ABM and 2 BROADWAY, Caraballo, Saez, Toscani, and Thomson, respectively. Yet the testimonial and documentary evidence reveal prior maintenance issues with elevator No. 27.

SLADE's witness, Caraballo, testified that he did not recall when, prior to Plaintiff's accident, elevator No. 27 had been inspected or any work had been performed on it (Caraballo Tr.). Nor were any maintenance logs or checklists submitted even though Caraballo testified that routine maintenance was conducted and recorded (*id.*).

Also, the submitted dispatch statements, (different from maintenance logs and checklists) show prior malfunctions with elevator No. 27. For example, on or about August 2013, there was a problem with the elevator's door safety sensor. On or about July 15, 2013, there was an undefined shutdown of the elevator due to a fuse replacement, and on or about January 2, 2013, there was an issue with the elevator's door opening button (NYSCEF Doc 106).

Caraballo, SLADE's only disposed witness, testified that he was not familiar with the dispatch statements, had not been informed on how to read them and was not familiar with how dispatchers entered the information (Caraballo Tr.).

There are also questions that arise in reviewing the incident report. On one hand there is a statement that elevator No. 27 was in good working condition, however, a few lines further in the

same report it states that dust had been removed from the sensors before the freight elevator was returned to service (NYSCEF Doc 105). Caraballo's testimony also contradicts the written report, as he testified that he did not recall servicing the freight elevator on January 3, 2014 (Caraballo Tr.). Further, Saez testified that he was surprised to read that dust had been removed from the sensor because he did not recall Caraballo telling him so (Saez Tr.).

In addition, based on Plaintiff's testimony there were recurring problems with the doors of elevator No. 27. He further testified that he had discussed it with a "SLADE mechanic" prior to his accident (Plt. Aff., ¶ 9). Also in Plaintiff's opposition, an expert affidavit was submitted that states that SLADE should have or had notice of prior malfunctions with elevator No. 27.

Thus, upon review, triable questions of fact exist as to whether SLADE had actual or constructive notice (*see Stewart v World El. Co., Inc.*, 84 AD3d 491 [1st Dept 2011]).

As to the doctrine of *res ipsa loquitur,* based on SLADE*'s* evidence and Plaintiff's opposition, a trier of fact could find that it applies. Plaintiff submits an expert affidavit based on more than just deposition testimony[1] (NYSCEF Doc 148 ("Carrajat Aff.") (*see Ebalo v Trustees of Columbia Univ.*, 192 AD3d 626 [1st Dept 2021]; *McLaughlin v Thyssen Dover El. Co.*, 117 AD3d 511 [1st Dept 2014]), stating that the freight elevator doors closed on Plaintiff due to the detector not working and SLADE had notice of similar problems with the same elevator doors (Carrajat Aff. ¶ 12). Carrajat states that there is no evidence that the detector itself or the various cables connected to the detector's control box were checked by SLADE (*id.*). Carrajat further concludes that "the proximate cause of the accident and injuries to Plaintiff were caused by the malfunctioning of the elevator" since the elevator was in manual mode and the doors should not

[1] Carrajat reviewed deposition testimony, Plaintiff's affidavit, the records submitted by SLADE referencing the subject elevator, the records of the New York City Department of Buildings, the accident report, the pleadings, and the parties' discovery exchange (Carrajat Aff., ¶ 3).

have closed without the button being pressed by the operator and nor does this occur without negligence on the part of the entity responsible for its care (*id.*). Thus, based on this affidavit, a jury may reasonably infer that the malfunction of the freight elevator door was an event that would not occur in the absence of negligence.

Additionally, Plaintiff's testimony that the door malfunctioned is uncontroverted[2] and SLADE does not submit any expert evidence that the occurrence as described by Plaintiff is a physical or mechanical impossibility, or one more likely than not to happen (*Barkley*, 149 AD3d 74; *see Miller,* 308 AD2d at 313; *Williams v Swissotel N.Y.*, 152 AD2d 457 [1st Dept 1989]; *Rogers*, 32 NY2d at 557-559).

Also, the evidence submitted raises questions of fact as to whether SLADE exercised exclusive control over the elevator. Caraballo's testimony corroborated Thomson and Toscani's testimonies that SLADE was responsible for making sure all the elevators were operational and repairs were made. Saez corroborated Plaintiff's testimony that ABM's staff was responsible for operation of the freight elevator doors as well as maintenance of its sensor beam. Thus, raising the issue as whether SLADE jointly shared responsibility for the operation, repair, and maintenance of freight elevator No. 27.

SLADE also seeks dismissal of all cross-claims for contractual indemnification. However, the evidence at this time does not establish that SLADE was not part of the actual wrong-doing that contributed or caused Plaintiff's injury (*Beddessee Imports, Inc v Cook Hall & Hyde, Inc.*, 45 AD3d 792 [2nd Dept 2007]; see e.g., *Kleinberg*, 61 AD3d at 439). Accordingly, at this time contractual indemnification is denied without prejudice (*Kleinberg, supra*).

[2] Neither Juan Carlos, the night porter, or Luis Gonzalez, the person who rescued plaintiff, were deposed.

2 BROADWAY'S CROSS-MOTION

2 BROADWAY also moves for summary judgment and dismissal of the contractual indemnification claims from SLADE and ABM.

In support of their summary judgment motion, 2 BROADWAY relies on the same arguments as SLADE.[3] 2 BROADWAY contends that they did not create nor had actual or constructive notice of the alleged defective condition (NYSCEF Doc 153 at ¶ 37). 2 BROADWAY further argues that they are not liable for Plaintiff's injuries as SLADE and ABM were contractually responsible for the maintenance, repairs, and cleaning of the freight elevator sensor beams (*id.* at ¶ 43). Further, 2 BROADWAY relies on the testimonial evidence of Plaintiff, Toscani, and Thomson, to argue that it was ABM's duty, as well as SLADE's to asure the elevator door sensors were clean and free of dirt, dust, or debris (NYSCEF Doc 153 at ¶ 66).

Upon review, questions for a trier of fact exit as to whether 2 BROADWAY had notice of the alleged defect. As per 2 BROADWAY's own witness, Mr. Thomson testified that the freight elevators, (referring to No. 27 and No 28), were often serviced. He testified that perhaps once a month or every six weeks the doors would need repairing as they were knocked off track. He also testified that as a result, the beam sensors in the freight elevators would get dirty often and at times cause the doors not to close properly. According to his testimony, having just two freight elevators to carry trash, demolition, and other heavy loads was not enough for a building the size of 2 Broadway, causing constant damage and need for repairs to the freight elevators. In addition, in his management role on behalf of 2 BROADWAY, he attended monthly meetings and at times these freight elevator conditions were discussed. Further there is testimony that the night before Plaintiff's accident it snowed, and there is also hearsay evidence that the freight elevators doors

[3] The arguments raised in 2 BROADWAY's affirmation in support of its motion for summary judgment overlap with those raised in its opposition to SLADE and ABM's motions (compare NYSCEF Doc 153 with NYSCEF Doc 154).

were failing on the day of Plaintiff's accident (based on Plaintiff's testimony from another employee who was not deposed). Thus, 2 BROADWAY at this time does not establish as a matter of law not having notice of the defective condition (*Giuffrida*, 279 AD2d 403; *see Stewart*, 84 AD3d 491).

As to the applicability of the doctrine of *res ipsa loquitur*, a trier of fact may find that it applies. Plaintiff contends that the detector in the freight elevator door malfunctioned, failing to sense Plaintiff's presence between the doors due to improper maintenance. Plaintiff also submits an expert affidavit that states that his accident would not happen in the absence of negligence. Thus based on Plaintiff's testimony, Plaintiff's expert, and testimonial evidence of 2 BROADWAY's witness, Mr. Thomson, who also testified that 2 BROADWAY "oversaw" and had supervisory control of all cleaning operations, a jury may find that Plaintiff's accident did not happen without negligence, that 2 BROADWAY did not cede all responsibility for the daily operation, repair, and maintenance of freight elevator No 27 to either SLADE or ABM, and thus had "joint control" and that Plaintiff, as an elevator operator for 12 years, did not contribute to his accident while at his place of employment on January 4, 2014 (*see Barkley,* 149 AD3d 74; *Miller*, 308 AD2d 312).

As to dismissal of contractual indemnification, since 2 BROADWAY has not established entitlement to judgment as a matter of law, any determination regarding indemnification must await final disposition as to liability, if any (*Beddessee Imports*, 45 AD3d 792; *Kleinberg*, 61 AD3d at 439). Accordingly, dismissal based on contractual indemnification is denied without prejudice (*Kleinberg, supra*).

It is hereby

ORDERED that SLADE's motion for summary judgment to dismiss the complaint and any cross-claims is denied; and it is further

ORDERED that 2 BROADWAY's cross-motion for summary judgment to dismiss the complaint and all cross-claims is denied.

This constitutes the decision and order of this Court.

HON. DENISE M. DOMINGUEZ
J.S.C.

5/30/2023
DATE

DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART		[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	