Walsh v West Gramercy Assoc. LLC
2023 NY Slip Op 32059(U)
June 23, 2023
Supreme Court, New York County
Docket Number: Index No. 151154/2014
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** *Justice* — **PART** **47**

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DESMOND A. WALSH,

Plaintiff,

- v -

WEST GRAMERCY ASSOCIATES LLC,JOSEPHSON, LLC D/B/A THE MOINIAN GROUP, NOUVEAU ELEVATOR INDUSTRIES, INC.,S&S EQUITIES OF NY & NJ INC, ALLSTAR ELEVATOR & ESCALATOR INSPECTION AGENCY, INC.,

Defendants.

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INDEX NO. 151154/2014

MOTION DATE 05/01/2023, 05/01/2023

MOTION SEQ. NO. 009 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 358, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 384, 385, 386, 387, 388, 389

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 359, 383

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

In this action to recover damages for a personal injury due to an alleged elevator malfunction at 10 West 18th Street, New York, New York 10011 (the building) on March 27, 2012, defendant Nouveau Elevator Industries, Inc. (Nouveau), the building's elevator maintenance company, moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiff Desmond Walsh's amended complaint and all cross-claims against it (mot seq no 009). Nouveau argues that: (1) there is no evidence that Nouveau had actual or constructive notice of the alleged specific defect of misleveling; (2) plaintiff cannot establish a necessary element of his cause of action since the testimony of a witness contradicts that plaintiff fell due to the elevator; (3) Nouveau did not owe a duty of care to plaintiff because it did not own, occupy, control or

make special use of the elevator nor did plaintiff plead the necessary exceptions to third-party tort liability to a contract; (4) all common-law and contribution claims against Nouveau must be dismissed since it was not negligent; and (5) all contractual indemnification claims against Nouveau must be dismissed because it did not agree to indemnify any party.

Defendant West Gramercy Associates LLC (West Gramercy), the building's owner, also moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's complaint (mot seq no 010). West Gramercy argues that: (1) plaintiff's version of the incident is not credible as a matter of law due to contradicting testimony of a witness; (2) West Gramercy was not negligent in performing its duties to maintain the elevator nor did it have actual or constructive notice of the specific defect of misleveling; (3) *res ipsa loquitor* does not apply; and (4) plaintiff's allegations of Administrative Code and statutory violations are inapplicable or were not violated.

Plaintiff cross-moves for spoliation sanctions on motion sequence number 009, arguing that defendants should be precluded from contesting the issue of notice because they failed to locate a maintenance logbook. Plaintiff opposes defendants' motions arguing that: (1) defendants failed to meet their burden for summary judgment because they failed to produce sufficient evidence of maintenance records; (2) defendants' failure to properly maintain the elevator caused it to mislevel; (3) plaintiff's testimony is not incredible as a matter of law; (4) Nouveau did in fact owe plaintiff a duty of care as the elevator's maintenance company; and (5) *res ipsa loquitor* applies.

Defendant Nouveau opposes plaintiff's cross-motion arguing that: (1) plaintiff's request for spoliation sanctions is meritless considering all of the maintenance records defendants produced; (2) plaintiff's opposition that defendants did not properly maintain the elevator is entirely speculative; and (3) plaintiff failed to demonstrate third-party tort liability under a

contract since there is no written comprehensive service maintenance contract. Defendant West Gramercy adds that all code violations regarding the elevator were resolved prior to the incident and nevertheless, do not constitute negligence.

The motions are consolidated for disposition.

BACKGROUND

Plaintiff, a U.S. postal worker, alleges he was injured on March 27, 2012 at the building by tripping on a misleveled rear elevator (Peplinski Affirm, 14, NYSCEF Doc No 309). Plaintiff testified that on the date of the incident he was conducting a route inspection in his capacity as a manager for the U.S. Postal Service by following around mail carrier Shelyne White for the day (Walsh EBT, pp 173-74, NYSCEF Doc No 313). At the building, plaintiff followed White to the freight elevator, and as he entered ahead of White, he stubbed the toe of his left foot (*id.* at pp 16-17). This caused plaintiff to fall forward into the elevator wall and use his left hand to break the fall, though his left shoulder hit the wall (*id.* at pp 17-18). Upon turning, his left knee struck the floor (*id.*). As he turned with his back now against the elevator car wall, plaintiff looked down and claims to have seen the elevator car floor above the lobby floor by approximately five to six inches (*id.* at 18-19). White then entered the elevator without incident (*id.* at p 19). After finishing their mail delivery at the building, plaintiff and White went to 30 West 18th Street where plaintiff waited for Tour Superintendent of Operations Allen to arrive so that she could investigate the incident and prepare a report (*id.* at pp 22-25).

White testified that she entered the elevator prior to plaintiff and without observing any misleveling between the lobby floor and elevator car (White EBT, pp 80-84, NYSCEF Doc No 319). White believes that plaintiff fell in the lobby since she saw that only his shoulder and head were inside the elevator while his body from chest down remained in the lobby (*id.* at p 22). She

had not experienced any misleveling nor heard any complaints regarding misleveing of the elevator prior or subsequent to the incident (*id.* at pp 30-31).

Gabriel Dagan, Director of Commercial Operations for Josephson, LLC d/b/a The Moinian Group (The Moinian Group), the building's asset and property management company, and Susan Sahim of S&S Equities of NY & NJ Inc (S&S), the building's property management company, both appeared for depositions testifying that they did not personally experience nor recall receiving any complaints regarding misleveling prior to plaintiff's incident (Dagan EBT, pp 105-08, 126, NYSCEF Doc No 314; Sahim EBT, pp 47-49, 60, 124, 142, 151-58, NYSCEF Doc No 316). Harry Dreizen, General Counsel to The Moinian Group and West Gramercy appeared for deposition on April 15, 2021; however, he was not asked whether he had prior notice of misleveling (Dreizen EBT, NYSCEF Doc No 255).

Joseph Kusnir testified on behalf of Allstar Elevator & Escalator Inspection Agency, Inc. (Allstar), the company hired to witness annual elevator inspections performed by the elevator maintenance company, on April 5, 2021 (Kusnir EBT, NYSCEF Doc No 318). After reviewing a copy of the October 17, 2011 Inspection Report that he signed, Kusnir explained that misleveling issues would be examined at these inspections and if found, denoted with a "100" (*id.* at pp 51-57). No such designation appears in the 2011 inspection report (CAT1 Inspection 10/17/11, NYSCEF Doc No 370). If the misleveling was noticeable, Kusnir would ask for a ruler (NYSCEF Doc No 318, pp 64-65). Kusnir did not request a ruler at the 2011 inspection (*id.*).

Don Cristiano, General Manager of Nouveau's service department, testified on behalf of defendant Nouveau on April 13, 2021 (Cristiano EBT, NYSCEF Doc No 347). He was shown copies of Nouveau's work tickets for the elevator, which do not specifically mention any issues of misleveling (*id.* at p 79; *see also* Work Tickets, NYSCEF Doc No 374). Non-party witness,

Michael Hamilton, a former Nouveau elevator mechanic who inspected the elevator, testified on April 21, 2022 that monthly maintenance included riding the elevator to ensure there was not any misleveling, listening for noises, checking the machine room, and observing the functionality of the elevator (Hamilton EBT, NYSCEF Doc No 320, pp 30, 71). Inspections also involved making sure the fan on the drive was blowing, oil was collected, and the brakes, hoist cables, and ropes were in good condition (*id.* at pp 66-68). Hamilton testified that if there was any misleveling, which he did not witness nor receive complaints about, he would have fixed it and indicated such on the work tickets (*id.* at pp 72-76).

Defendants submitted an affidavit from Shawn Johnson, a certified elevator inspector and mechanic (Johnson Affirm, NYSCEF Doc No 356). Johnson states that a New York City Department of Buildings' (DOB) elevator inspection on December 8, 2010 only showed that the elevator was not level on the second floor and Nouveau's work ticket for December 16, 2010 shows that a floor height adjustment was needed and corrected, and that this correction was verified by DOB on July 5, 2011 (*id.* at ¶ 8). Johnson also reviewed all of the previous DOB violations pertaining to the elevator, which he states were all marked as either resolved or dismissed (*id.* at ¶ 15).

Plaintiff submitted an affidavit from Richard A. Kennedy, a certified elevator inspector and technician (Kennedy Affirm, NYSCEF Doc No 377). Kennedy opines that "excessive dirt on the IP 8300 Plus sensors can cause the elevator to go off level on a particular floor" and "failure to properly clean the elevator car top and elevator pit can cause the oil to get dirty, which would interfere with the IP8300's sensor to detect when the elevator car should stop" (*id.* at ¶¶ 85-86). He supports his theory of causation due to the sensor "[g]iven that there was no evidence that the violations found on December 8, 2010 and October 17, 2011 [by the Department of Buildings

(DOB)], which were that the car top was dirty, the elevator pit was dirty and the hoist machine leaked oil, were ever corrected" (*id.* at ¶ 86).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion 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.'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility." (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Negligence

> 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 out to have found.

(*Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011] [internal citations and quotations omitted]). Though defendant Nouveau addresses the *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]) exceptions for third-party tort liability to a contract, plaintiff did not plead them and in any event, *Espinal* does not factor into the analysis when an elevator maintenance company such as Nouveau agrees to maintain an elevator in a reasonably safe condition. This is because the owner "has the right, under the maintenance contract, to look to [the elevator maintenance company] to perform the owner's entire duty to plaintiff" (*Mas v Two Bridges Assocs. By Natl. Kinney Corp.*, 75 NY2d 680, 688 [1990], quoting *Rogers v Dorchester Assocs.*, 32 NY2d 553, 563 [1973]).

Defendants West Gramercy and Nouveau demonstrated their prima facie entitlement to summary judgment by showing that the elevator was not defective and even if it was defective they did not cause or have actual or constructive notice of the alleged defect. In support, moving defendants submit evidence that the elevator received monthly maintenance inspections—the last occurring seven days prior to the incident on March 20, 2012—which included checking for any misleveling (NYSCEF Doc No 374; NYSCEF Doc No 320, p 71). None of the work tickets mention any misleveling nor does the most recent annual inspection report (NYSCEF Doc No 374; NYSCEF Doc No 370). Defendants additionally detail that they never received any

complaints nor did any of their witnesses personally experience misleveling of the elevator (NYSCEF Doc No 314, pp 105-08, 126; NYSCEF Doc No 316, pp 47-49, 60, 124, 142, 151-58; NYSCEF Doc No 320, 72-73). Indeed, plaintiff himself, and his co-worker, White, did not mention misleveling after the incident occurred (NYSCEF Doc No 313, pp 21, 474-75). Finally, White testified that when the incident occurred the elevator was not mislevel and in fact, plaintiff fell in the lobby because while on the ground, his head and shoulders only entered the elevator whereas the rest of his body remained in the lobby (NYSCEF Doc No 319, pp 22, 80-84). Therefore, defendants have sufficiently demonstrated that the elevator was not defective, and even if it was, they did not have actual or constructive notice of the defect prior to plaintiff's incident (*Sanchez v New Scandic Wall Ltd.*, 145 AD3d 643, 644 [1st Dept 2016] [Defendants "demonstrated their prima facie entitlement to summary judgment by presenting evidence showing that the elevators were regularly inspected, and . . . operating properly before and after [the incident]. Moreover, even if a defect existed, they demonstrated that they did not create or have actual or constructive notice of it."]).

In opposition, plaintiff 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 (*see Meza v 509 Owners LLC*, 82 AD3d 426 [2011]). Even though plaintiff submitted expert testimony from Kennedy stating that the elevator could have misleveled due to excessive dirt on the elevator's sensors such testimony is refuted by Cristiano who testified that Nouveau required its mechanics to perform periodic inspections and maintenance on the elevator's sensor (NYSCEF Doc No 377, pp 26-27; NYSCEF Doc No 347, 18-20). The last preventative maintenance check, occurring only seven days prior to the incident, makes no mention of misleveling, which also refutes Kennedy's speculative testimony (NYSCEF Doc No 374).

Additionally, "plaintiff's reliance on the doctrine of res ipsa loquitor is misplaced under the circumstances. Plaintiff's fall could have occurred in the absence of negligence and could have been caused by a misstep on [his] part (*Meza*, AD3d at 427, *citing Cortes v Central Elev., Inc.*, 45 AD3d 323, 324 [1st Dept 2007] [internal quotations omitted]). Therefore, plaintiff's arguments are conclusory, fail to raise a triable issue, and are not supported by the facts of record.

Accordingly, defendants Nouveau and West Gramercy's motions for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff's complaint as against them will be granted. And after searching the record, plaintiff's claims as against The Moinian Group, S&S, and Allstar will also be dismissed (*see generally Halwani v Boris Kogan & Assocs., P.C.*, 199 AD3d 413 [1st Dept 2021]; *Bd. of Mgrs. of 1984 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542 [1st Dept 2013]).

Since plaintiff's complaint will be dismissed, it renders his cross-motion for spoliation sanctions based on defendant's failure to produce a maintenance log moot. Nevertheless, the First Department already affirmed denial of plaintiff's motion to compel supplemental discovery (*see* Appellate Order 11/17/22, NYSCEF Doc No 282). The Court reasoned that

> Defendants have responded to and complied with numerous discovery demands and orders throughout this seven-year litigation. Defendants have produced multiple deposition witnesses, provided all available items, including the exchange of countless maintenance/work tickets, whose entries duplicate the missing logbook, and provided Jackson affidavits that described their reasonable and diligent search for the rear elevator maintenance contract and the March 2022 logbook pertaining to the rear elevator that is the subject of plaintiff's negligence action.

(*Walsh v W. Gramercy Assocs.* LLC, 210 AD3d 547, 548 [1st Dept 2022]). Therefore, due to the extensive discovery provided by defendants and specifically, the work tickets that duplicate the missing logbook, plaintiff's stated reasons for spoliation sanctions are unavailing.

Additionally, the DOB violations of the elevator were found by DOB to be corrected (DOB Inspections, p 3, NYSCEF Doc No 368).[1]

Accordingly, plaintiff's cross-motion for spoliation sanctions will be denied.

Indemnification

Since plaintiff's claims as against all defendants will be dismissed, all cross-claims by defendants seeking indemnification and contribution from one another will be denied.

Accordingly, it is hereby

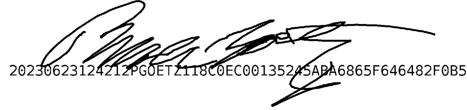
ORDERED that moving defendants Nouveau and West Gramercy's motions for summary judgment (mot seq no's 009, 010) dismissing the complaint are granted and the complaint is dismissed as against defendants West Gramercy and Nouveau; and it is further

ORDERED that, after searching the record, plaintiff's claims against defendants Josephson, LLC d/b/a The Moinian Group, S&S Equities of NY & NJ Inc, and Allstar Elevator & Escalator Inspection Agency, Inc. are dismissed; and it is further

ORDERED that plaintiff's cross-motion for spoliation sanctions is denied; and it is further

[1] Defendants are also not required by law to comply with ANSI standards since it "has not been adopted by or incorporated into New York City's elevator code and ANSI itself is not a statute, ordinance or regulation. Thus, a violation thereof is not evidence of negligence" (*Bradley v HWA 1290 III LLC*, 157 AD3d 627, 633 [1st Dept 2018]).

ORDERED that the Clerk shall enter judgment accordingly, together with costs and disbursements to the appearing defendants to be taxed by the Clerk upon submission of an appropriate bill of costs.



6/23/2023						
DATE				PAUL A. GOETZ, J.S.C.		
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
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APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
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