

Rawlins v Shore View Real Estate Holding LLC

2023 NY Slip Op 34076(U)

November 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 514833/16

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of November, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

ANTHONY RAWLINS,

Plaintiff,

-against-

Index No. 514833/16

SHORE VIEW REAL ESTATE HOLDING LLC
and NOUVEAU ELEVATOR INDUSTRIES, INC.,

DECISION AND ORDER

Mot. Seqs. 07 & 08

Defendants.

-----X

And a Third-Party Action.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

128-129, 154-155

Opposing Affidavits (Affirmations) _____

160, 165, 166, 171

Affidavits/ Affirmations in Reply _____

177, 178, 179

Other Papers: Affidavits/Affirmations in Support _____

159

Upon the foregoing papers, defendant Shore View Real Estate Holding LLC (Shore LLC) and third-party defendant Shore View Acquisition I, LLC s/h/a Shoreview Nursing Home d/b/a Shore View Nursing and Rehabilitation Center (Shore View) move (Seq. 07), jointly and on behalf of the other, for an order, pursuant to CPLR 3212, granting summary judgment dismissing: 1) the Complaint of plaintiff Anthony Rawlins (plaintiff); 2) the First, Second and Third crossclaims, for contribution, common law

indemnification and contractual indemnification, respectively, of defendant/third-party plaintiff Nouveau Elevator Industries Inc. (Nouveau) as against Shore LLC and 3) Nouveau's Third-Party Complaint as against Shore View.

Nouveau cross-moves (Seq. 08) for an order, pursuant to CPLR 3212, granting summary judgment dismissing: 1) the Complaint and 2) the crossclaims for common law and/or contractual indemnification and for contribution (as asserted by Shore LLC and Shore View) and the counterclaim alleging breach of contract for failure to procure insurance (as asserted by Shore View only), respectively.

Background

Plaintiff commenced this action to recover damages for personal injuries sustained in an elevator which allegedly came to an abrupt stop after rapidly descending. The incident occurred on July 28, 2014 in a ten-story building owned by Shore LLC and located at 2865 Brighton 3rd Street in Brooklyn, NY. Shore View occupied the building pursuant to a 48-year commercial lease with Shore LLC, dated April 12, 2013, and operated a nursing home at the premises. At the time of the incident, plaintiff was employed by Shore View as a porter.

The building contained four elevators which were serviced and maintained by Nouveau pursuant to a maintenance service agreement with Shore View, dated March 12, 2007. The elevator maintenance agreement (NYSCEF Doc. No. 141) provides at Paragraph 4A, Page 2, in part:

“[Shore View] AGREES TO INDEMNIFY AND HOLD [Nouveau] HARMLESS AGAINST ANY LIABILITY, CLAIM DAMAGE, LOSS AND EXPENSE, INCLUDING

REASONABLE ATTORNEYS FEES AND EXPENSES, THAT [Nouveau] MAY INCUR BY REASON OF ITS OBLIGATIONS UNDER OR THE SERVICES IT PROVIDES PURSUANT TO OR IN CONNECTION WITH THIS AGREEMENT . . . IN DEFENDING ANY SUIT, ACTION OR OTHER PROCEEDING BROUGHT IN CONNECTION WITH THE ABOVE PERSONAL INJURY, INCLUDING DEATH AT ANY TIME RESULTING THERE FROM . . . (I) WHERE [Nouveau's] RESPONSIBILITY IS ESTABLISHED EXCLUSIVELY BY INFERENCE PURSUANT TO THE DOCTRINE[] OF RES IPSA LOQUITOR AND WITHOUT PROOF OF ANY SPECIFIC NEGLIGENT ACT OR OMISSION ON [Nouveau's] PART OR (II) ARISING OUT OF [Shore Views'] NEGLIGENCE OR INTENTIONAL MISCONDUCT. . . ."

Procedural History

On August 24, 2016, plaintiff commenced this action against defendants Shore LLC and Nouveau alleging that Shore LLC was under a duty to keep the building, including the elevators, in a reasonably safe condition, while Nouveau was under a duty to maintain the elevators in a reasonably safe condition; that the accident was caused by the negligence, carelessness and recklessness of defendants in the installation, design, operation, maintenance and/or repair of the subject elevator; and that defendants are liable to plaintiff under the doctrine of res ipsa loquitur. On November 11, 2016, Shore LLC filed an answer setting forth crossclaims against Nouveau for common law and contractual indemnification and/or contribution. On November 16, 2016, Nouveau filed an answer interposing crossclaims against Shore LLC for contractual and common law indemnification and contribution. On July 11, 2018, Nouveau filed a third-party complaint against Shore View, setting forth a single cause of action for contractual

indemnification based upon the aforesaid indemnification provision in the elevator maintenance agreement. In its third-party answer, Shore View interposed a counterclaim against Nouveau for breach of contract (failure to procure insurance), indemnification and contribution.

At his deposition, plaintiff testified that on the day of the incident, he took the “second elevator from the right” from the basement to the tenth floor where he was to “wax and buff the solarium” (a/k/a the tenth floor). When plaintiff arrived at the tenth floor, he unloaded his equipment (along with his father who was teaching him how to wax and buff floors). Plaintiff’s father switched the elevator to “in service” mode, whereupon the elevator remained at the tenth floor for the three hours during which plaintiff (and his father) performed their work. An elevator placed in “in service” mode also would travel directly to a floor called, without stopping. After performing his duties, plaintiff entered the elevator intending to travel to the first floor for lunch in Shore View’s cafeteria. Plaintiff testified that he pressed the first-floor elevator button, but the car did not move. After pressing the button again, however, the car moved slowly, as if it were grinding, then descended rapidly before coming to an abrupt stop, causing plaintiff injury. Plaintiff was later extricated from the elevator by first responders.

Shore LLC and Shore View move, and Nouveau cross-moves, for summary judgment primarily on grounds that these parties did not create or have actual or constructive notice of any defect which could have caused the malfunction in the elevator. Shore LLC also maintains that it is not responsible to inspect or repair the elevator as it is an out-of-possession owner.

Discussion

“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 eliminate any material issues of fact from the case. 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] [citations omitted]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

“A property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect, or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect” (*Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 [2d Dep’t 2017] [internal citations omitted]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641, 643 [2d Dep’t 2017]; *Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2d Dep’t 2010]). However, “[a]n out-of-possession landlord is not liable for injuries that occur on leased premises ‘unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct’ to perform the relevant maintenance or repairs” (*Cali Dev. Corp. v Church Side Realty, LLC*, 208 AD3d 451, 452 [2d Dep’t 2022], quoting *Grant v 132 W. 125 Co., LLC*, 180

AD3d 1005, 1007 [2d Dep't 2020]). "Reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when 'a specific statutory violation exists and there is a significant structural or design defect'" (*Lowe-Barrett v City of New York*, 28 AD3d 721, 722 [2d Dep't 2006], quoting *Stark v Port Auth. of N.Y. & N.J.*, 224 AD2d 681, 682 [2d Dep't 1996]; *Thomas v Fairfield Invs.*, 273 AD2d 118, 118 [1st Dep't 2000]).

Shore LLC and Shore View's Motion for Summary Judgment

The proof submitted establishes as a matter of law that Shore LLC was an out-of-possession landlord with no obligation to inspect, maintain or repair the subject elevators. The lease expressly provides in Section 8(a) that "[Shore View] shall promptly throughout the Term, at [Shore View's] cost and expense, take good care of and maintain the Leased Premises (including the Land, Improvements, and Fixtures)" Further, Section 8(c) of the lease provides:

"[Shore LLC] shall not under any circumstances be required to build any improvements on the Leased Premises, or to make repairs, replacements, alterations or renewals of any nature or description to the Leased Premises or to any of the Improvements or Fixtures, whether interior or exterior, ordinary or extraordinary, structural or non-structural, foreseen or unforeseen, or to make any expenditure whatsoever in connection with this Lease or to inspect or maintain the Leased Premises in any way. . . ."

Shore LLC's witness David Brawerman (Brawerman) testified at his deposition that in 2014, Shore View, not Shore LLC, would be responsible for seeing to any improvement, upgrade, or repairs to the elevators, be responsible for overseeing any

maintenance work, and be responsible for signing off on any work tickets or documentation generated by Nouveau in connection with the maintenance of the elevators at the building.

Shore LLC thus established its prima facie entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord which retained no control over the elevator in which plaintiff's accident occurred, and had assumed no duty to maintain the elevators or make repairs by contract or course of conduct (*Michaele v Steph-Leigh Assoc., LLC*, 178 AD3d 820, 821 [2d Dep't 2019]; *Fuzaylova v 63-28 99th St. Farm Ltd.*, 161 AD3d 946, 946 [2d Dep't 2018]). To the extent Shore LLC reserved any right of entry in the lease, there is no allegation of a specific statutory violation or that the incident occurred due to a significant structural or design defect.

Both Shore LLC and Shore View have further established as a matter of law, through the deposition testimony of Shore View's maintenance director, Marcin Marek (Marek), and the affidavit of Shore View's expert, Michael Sena (Sena), that neither Shore LLC nor Shore View undertook to repair or maintain the mechanical systems of the subject elevator, which was done by Nouveau, and that neither Shore LLC nor Shore View had any actual or constructive notice of any defect in the elevator which would have caused the elevator to overspeed or to "go on safety." Marek testified that Shore View's responsibilities and duties with respect to the elevators were limited to changing light bulbs and testing fire service response using a "fireman's key."

Sena states in his affidavit that he reviewed the inspection, maintenance and repair records exchanged in this matter, together with the bills of particulars and the deposition

testimony of plaintiff, Brawerman and Nouveau witness George Londis (the mechanic who regularly serviced the elevator) and further conducted an inspection of the elevator and associated mechanism. Sena avers that:

“None of the maintenance records and the call back records produced by Nouveau, who was contracted to maintain Elevator 3 prior to July 27, 2014, contain any reference to Elevator 3 ‘going on safety’ or ‘overspeeding,’ and that there is no indication the Elevator 3 had ‘gone on safety’ or ‘oversped’ or of any actual passenger entrapments observed by Nouveau, or, if observed, such issues were not reported to the Owners. Regardless, in either scenario, the record is clear in that no such notice was provided to the Owners . . . Moreover, the Owners had no notice and were not aware of any conditions that existed with Elevator 3 to cause it to ‘go on safety’ or ‘overspeed.’”

Plaintiff and Nouveau have not offered proof in opposition sufficient to raise an issue of fact as to Shore LLC’s lack of responsibility as an out-of-possession landlord or showing that Shore LLC and/or Shore View either created a defect which caused the incident or had actual or constructive notice of such defect. While plaintiff testified that there were prior occasions of “entrapment” or occupants being stuck on stalled elevators, there is no proof offered, and there is no statement in the affidavit of plaintiff’s expert, John F. Mundt (Mundt), indicating that these entrapment events were indicative of a “specific defect” which would have caused the overspeeding and stopping of the elevator as alleged by plaintiff (*Lee v City of New York*, 40 AD3d 1048 [2d Dep’t 2007]). While Mundt opines in his September 13, 2023 affidavit that the condition leading to the accident should have been discovered upon routine inspection, such discovery could only

have been made by Nouveau, and there is no proof or allegation that Shore LLC and/or Shore View were appraised by Nouveau of any such condition.

Further, the doctrine of *res ipsa loquitor* is unavailable to raise an issue of fact as to the liability of Shore LLC, since the responsibilities for inspection, repair and maintenance of the elevator were ceded to Nouveau (*Lonigro v WFP Tower B. Co. L.P.*, 199 AD3d 573, 575 [1st Dep't 2021]; *Chambers v Tilden Towers Hous. Co. Section II, Inc.*, 177 AD3d 413, 413 [1st Dep't 2019]).

As a result, the motion (Seq. 07) of Shore LLC and Shore View for summary judgment is granted to the extent that the Complaint and the First, Second and Third crossclaims of defendant/third-party plaintiff Nouveau, for contribution, common law indemnification and contractual indemnification, respectively, are dismissed as against Shore LLC, as it is not a party to the elevator maintenance agreement. As more extensively addressed in the *res ipsa loquitor* discussion on Nouveau's Cross Motion for Summary Judgment, that part of Seq. 07 seeking dismissal of Nouveau's Third-Party Complaint against Shore View is denied.

Nouveau's Cross Motion for Summary Judgment

“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” (*Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1282 [2d Dep't 2021]; *Dautaj v Alliance El. Co.*, 110 AD3d 839, 840 [2d Dep't 2013]). The Second Department has stated on several occasions that “[a]n 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” (*Carter v Nouveau Indus., Inc.*, 187 AD3d 702, 703 [2d Dep’t 2020]; *Barnes v Astoria Fed. Sav. & Loan Assn.*, --- AD3d ---, 2023 NY Slip Op 05113, *1 [2d Dep’t 2023]). Further, “[i]t is well settled that an elevator maintenance company owes a duty of care to members of the public, and may be liable for failing to correct conditions of which it is aware, or failing to use reasonable care to discover and correct a condition which it ought to have found” (*Alsaydi v GSL Enters.*, 238 AD2d 533, 534 [2d Dep’t 1997]).

Based on the deposition testimony of plaintiff, Brawerman, Marek and Londis, as well as the inspection reports, work tickets and the affidavits submitted by Sena and Nouveau’s expert, Nickolas A. Ribaudo (Ribaudo), Nouveau established its prima facie entitlement to judgment as a matter of law by showing that it did not have actual or constructive notice of an ongoing condition that would have caused the elevator to abruptly stop, and that it did not fail to use reasonable care to correct a condition of which it should have been aware (*Reed v Nouveau El. Indus., Inc.*, 123 AD3d 1102, 1103 [2d Dep’t 2014]; *Tucci v Starrett City, Inc.*, 97 AD3d 811, 812 [2d Dep’t 2012]; *Forde v Vornado Realty Trust*, 89 AD3d 678, 679 [2d Dep’t 2011]).

However, the Court finds that plaintiff’s opposition raises an issue of fact as to whether the doctrine of *res ipsa loquitur* applies to Nouveau. Submission of a case to a jury on the theory of *res ipsa loquitur* is warranted where a plaintiff demonstrates that “the event was of a kind that ordinarily does not occur in the absence of negligence, that it was caused by an agency or instrumentality within the exclusive control of the

defendant, and that it was not due to any voluntary action or contribution on the part of plaintiff” (*Coku v Millar Elevator Industries, Inc.*, 12 AD3d 340, 340 [2d Dep’t 2004]). The application of res ipsa loquitur is not “overcome by [Nouveau’s] evidence that the elevator was regularly inspected and maintained” (*Ardolaj v Two Broadway Land Co.*, 276 AD2d 264, 265 [1st Dep’t 2000]).

It has been held that a fast descent and sudden stop by an elevator is an event which does not ordinarily occur in the absence of negligence (*Syrnik v Board of Mgrs. Of the Leighton House Condominium*, 198 AD3d 835, 837-838 [2d Dep’t 2021]; *Rivera v Slade Indus., Inc.*, 199 AD3d 536 [1st Dep’t 2021]; *Galante v New York City Hous. Auth.*, 146 AD3d 640, 640 [1st Dep’t 2017]). Further, in his September 13, 2023 affidavit, Mundt states:

“In the normal course of operation, an elevator does not go on full safety. This was from a lack in general maintenance and/or various types of equipment failure, which cannot correct themselves, and should have been discovered upon reasonable inspection. The possible cause and failures of elevator mechanisms and equipment include[] a failure of the motor drive system or a component of the elevator car controller.”

The “exclusivity” requirement regarding possession and control over an elevator for purposes of applying the res ipsa loquitur doctrine “is a relative term, not an absolute” (*Burgess v Otis El. Co.*, 114 AD2d 784, 787 [1st Dep’t 1985], *affd* 69 NY2d 623 [1986]). The “exclusivity” requirement is met where a building owner relied upon the elevator maintenance company’s “expertise to inspect and maintain the intricate devices of the elevator in reasonably safe operating condition, pursuant to the service contract”

(*Burgess*, 114 AD2d at 787; *Bigio v Otis El. Co.*, 175 AD2d 823, 824 [2d Dep't 1991] [holding that “the elevator was in the defendant’s exclusive control as a result of a service contract with the building owner”]). Nouveau was the only entity that provided maintenance, service, and repair work for the mechanical components of the elevator. The fact that Shore View may have had access or been in control of other components of the elevator does not preclude the application of the doctrine (*Kleinberg v City of New York*, 61 AD3d 436, 438 [1st Dep't 2009]).

Finally, plaintiff testified at his deposition that the incident occurred while he was standing passively against the wall in the elevator, holding his phone, thus demonstrating that the incident was not due to any voluntary action or contribution on the part of plaintiff. While plaintiff placed the elevator in “in service” mode prior to the incident, neither Sena nor Ribaldo averred in their respective expert affidavits that such action could have caused or contributed to the malfunction. Ribaldo suggests that the incident could have been caused by plaintiff’s “jumping, dancing, and or other similar movements causing an abnormal jerking motion” (NYSCEF Doc. No. 143 at p. 15). However, such speculative statement is contradicted by plaintiff’s deposition testimony, and is sharply disputed in the September 13, 2023 affidavit of Mundt, who characterizes Ribaldo’s foregoing suggestion as baseless and preposterous.

Since issues of fact are raised as to whether the rapid descent and sudden stop of the elevator is an event which does not occur in the absence of negligence, the exclusive control of Nouveau as to the maintenance and service of the elevator’s mechanical components, and the absence of a negligent act on plaintiff’s part which might have

contributed to the happening of the accident, the doctrine of res ipsa loquitur may be applied to defeat Nouveau's motion for summary judgment seeking dismissal of the complaint (*Syrnik v Board of Mgrs. of the Leighton House Condominium*, 198 AD3d 835, 837-838 [2d Dep't 2021]; *Fiermonti v Otis El. Co.*, 94 AD3d 691, 692 [2d Dep't 2012]). While Nouveau claims that Mundt's affidavit is speculative as to the specific defect, where res ipsa loquitur is applicable, plaintiff is not required to identify a specific malfunction or defect in the elevator (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). As a result, Nouveau's motion for summary judgment dismissing plaintiff's complaint is denied.

As there are no contractual provisions in the elevator maintenance agreement for indemnification and contribution in favor of Shore LLC or Shore View, or any requirement that Nouveau procure insurance on their behalf, that part of Nouveau's cross motion for summary judgment dismissing these related crossclaims and counterclaim, is granted. Because there is an issue of fact as to the applicability of res ipsa loquitur, as governed by Paragraph 4A of the elevator maintenance agreement, that part of Shore View's motion for summary judgment dismissing Nouveau's third-party claim for contractual indemnification, is denied.

Conclusion

Accordingly, it is hereby

ORDERED that Shore LLC and Shore View's motion for summary judgment (Seq. 07) is granted in all respects as to Shore LLC and the Complaint and all crossclaims as asserted by Nouveau against Shore LLC are dismissed; and it is further

ORDERED that that part of Shore LLC and Shore View’s motion for summary judgment (Seq. 07) seeking dismissal of Nouveau’s Third-Party contractual indemnification claim, insofar as it is premised upon a finding of Nouveau’s negligence under res ipsa loquitor, is granted as to Shore LLC and denied as to Shore View; and it is further

ORDERED that that part of Shore LLC and Shore View’s motion for summary judgment (Seq. 07) seeking dismissal of Nouveau’s Third-Party contribution and common law indemnification claims, in so far as they are premised upon a finding of Shore View’s negligence or misconduct, is granted; and it is further

ORDERED that that part of Nouveau’s motion for summary judgment (Seq. 08) seeking dismissal of the Complaint is denied; and it is further

ORDERED that that part of Nouveau’s motion for summary judgment (Seq. 08) seeking dismissal of the crossclaims for indemnification and contribution (as asserted by Shore LLC and Shore View) and the counterclaim for breach of contract for failure to procure insurance (as asserted by Shore View) is granted, and all the foregoing claims asserted against Nouveau are dismissed.

The foregoing constitutes the decision and order of the court.

ENTER



J. S. C.

**HON. WAVNY TOUSSAINT
J. S. C.**

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