Ming Tang v PS Marcato El. Co., Inc.
2023 NY Slip Op 34122(U)
November 28, 2023
Supreme Court, New York County
Docket Number: Index No. 151257-2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MING TANG INDEX NO. 151257-2018

MOT. DATE

- v -

MOT. SEQ. NO. 3&4

PS MARCATO ELEVATOR CO., INC. et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s).
Replying Affidavits ECFS Doc. No(s).

There are two motions for summary judgment presently pending in this personal injury action which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 3, defendants 200 Varick Street DE, LLC and Newmark Family Properties, LLC (hereinafter "200 Varick" or "Varick") moves for summary judgment dismissing plaintiff's complaint and all crossclaims against it as well as judgment in its favor on the contractual indemnity claims against co-defendant PS Marcato Elevator Co., Inc. ("Marcato"). Plaintiff opposes the motion and PS Marcato partially opposes the motion as to the crossclaim for contractual indemnification.

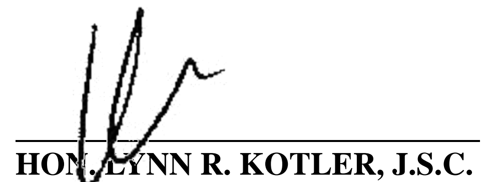
In motion sequence 4, defendant PS Marcato also moves for summary judgment dismissing plaintiff's complaint and all crossclaims against it. Plaintiff opposes the motion and 200 Varick submits a reply only as to plaintiff's opposition. A copy of the surveillance video of the alleged incident was provided to the Court for its review on the relevant motions.

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts are as follows. On August 4, 2016, at approximately 2 pm, plaintiff was entering an elevator, which he believed to be elevator 1, at his place of employment at 200 Varick Street, New York, New York when he claims that the elevator door closed abruptly and struck him on the right shoulder. At the time of his accident, plaintiff testified that he waited "a few seconds" to let people exit the elevator, which took "a few seconds" and that "once everybody exited the door was still wide open, so I proceed to enter the elevator", which [he] "believe it was just two steps".

At his deposition, plaintiff testified as follows:

Dated: November 28, 2023



HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Q. And as you started to enter the elevator, what happened?

A. As I was entering the elevator all of a sudden the door slammed onto my right shoulder.

Q. At what point did the door start to close?

A. As I was entering the elevator I believe my right foot was in the elevator already where the door is, that's when, how should I put it, the door was right on to my right side as I was entering.

Q. Were you already in the doorway when the door first started moving to shut?

A. Yes, I was. I meant to say I was at the door as I was entering.

Q. When you say at the door, were you in front of it or in the opening to the elevator?

A. My body was between -- how should I put it? This is the front of the elevator and I was already entering but not completely inside the elevator.

Q. At what pace were you walking when you were trying to enter the elevator?

A. Normal.

Q. So as the people were exiting the elevator, were you standing directly in front of it or were you standing off to one side or the other?

A. All I could remember is I wasn't in front of it. I was like on the side to make sure they exit before I enter.

…

Q. As the group of people were exiting the elevator, was any of them standing in the doorway holding it open or blocking the doorway?

A. No.

Following the incident, plaintiff reported what occurred to his building superintendent Donald Kuebelbeck. The elevator involved was allegedly taken out of service. Thereafter, PS Marcato came to the building to perform an inspection of the elevator.

200 Varick owned and managed the premises where plaintiff's accident occurred, and PS Marcato was the contractor for 200 Varick that performed maintenance services, preventative maintenance procedures, repairs, adjustments and component replacements for elevators, and related apparatus at 200 Varick.

200 Varick produced Donald Kuebelbeck for deposition. Mr. Kuebelbeck has been employed by Gural Family Property Real Estate (GFPRE) for 29 years in the position of building superintendent. Kuebelbeck testified that if anyone in the building desired to make a complaint about an elevator that person would call the front desk or go down to the front desk in the lobby of the budling. Kuebelbeck described the procedure in response to a complaint about an elevator and that the elevator would be shut down in the lobby, main lobby or brought to the basement and an out of order sign placed in front

of it. Kuebelbeck testified that prior to August 4, 2016, he received a text from Larry Capici about the elevator doors closing too quickly “in their opinion”. Kuebelbeck further testified about the Capici text that “[i]f I remember correctly, something about “can you please call the elevator company and have the doors looked at”, something like that and that he understood from the text that the elevator door hit Larry in the arm. Kuebelbeck testified that PS Marcato always responded to his calls but that he did not know what they did when they came to the building. Mr. Kuebelbeck testified he did not do a report for Capici’s incident because he did not know what day the incident occurred, what elevator or when he hurt his arm. He claimed he was not aware of any issues with the timing or speed of the doors on elevator 1 closing prior to August 4, 2016. He further testified that Marcato came to the building after plaintiff’s incident and checked out elevator 1 but did not find any problems with it.

PS Mercato produced William Tower for a deposition, who testified that he was employed by Marcato as a service mechanic. He testified that he received a time ticket for 200 Varick on August 4, 2016 and that he went to the building. He further testified that he wrote under the heading, work performed, the following: “checked edge. Functions properly. And I checked the edge.” Towers also testified what other services he performed in connection with the elevator when he was at the building.

At his deposition, Tower specifically testified as follows:

Q. So when you were there, would there be anything else that you would have done, with respect to checking the edge, other than what you've just told me?

A. I would check the edge. A lot of times, I would go up to the controller and see if there's any faults in the -- you know, in the memory. Just give it an overall check, basically. Just make sure it's functioning properly.

…

Q. Yes, first, would you have checked the speed with which the door closes?
A. Yes, I would make sure the door is not slamming shut, that it's closing properly. Opening and closing properly and that the edge functions.

…

Q. Yes, first, would you have checked the speed with which the door closes?

A. Yes, I would make sure the door is not slamming shut, that it's closing properly. Opening and closing properly and that the edge functions.

Q. And how would you check the speed of the door closing? Would that visual inspection or something else?

A. I would give it a visual.

…

Q. What you're telling me is how -- is that your custom and practice, as a mechanic, as to what you would do, when you get a call, regarding the edge of the door?

A. Yes.

Q. You don't specifically remember what you did that day.

A. No.

…

Q. It says, "Work performed. "Now, it looks like it says, "Running, check edge." Is that information you would have sent through your tablet?

A. Yes, that means the car was running when I got there. That means even though it says it was shutdown, I put running. That means the car was running when I got there. That means the building put it back into service.

Q. And then when you were done, did you send a notation that the elevator is in service?

A. Yes, done, in service. Yes.

Marcato produced a second witness, vice-president Andrew Trapani, for a deposition on February 27, 2020. He testified that the elevator mechanic is supposed to document work done on an elevator at the conclusion of a service call. He testified that there were no checkmarks indicating that preventative maintenance was done on the form Elevator Maintenance Program Log for 200 Varick.

Non-party witness Lawrence Capici testified as follows:

Q. It's just for the record, but you can tell me what happened.

…

A. Okay. Three days in a row, I got hit with the elevator door. The first day, I went to go in and it was boom, like it hit me really fast. I just looked at the security guards like (indicating) – it was like not normal. You know, it was not like a regular – the next day, the same thing. And I said Mike, what do you – what is going on with this elevator? There is definitely something wrong.

…

The third day, it hit me really bad. And not only did I tell them, I notified the building manager because I thought there was a serious issue that something definitely was wrong with this elevator.

Capici further testified that it was the third time that he had an issue with this elevator, the one next to the security guard, elevator number 1. Capici testified that after the third incident with the elevator he notified the building super Donald on July 28, 2016 via text and that he had a conversation with Donald and told him what happened. Capici described the third incident with the elevator door that "[t]he door fastly jolted on me". Capici claimed that he informed Donald that the incidents occurred with elevator 1 but that Donald said to him that "that wasn't the elevator that I reported".

200 Varick retained Jon Halpern, a licensed professional engineer and electrical engineer with experience in the design, installation, modernization, maintenance, and repair of elevators, as an expert witness. Mr. Halpern evaluated the safety of the elevator and the door protection mechanism. He concluded that the subject elevator was maintained in accordance with industry standards and practices and that failure to maintain the elevator was not the cause of the subject incident.

PS Marcato has submitted an affidavit from its own expert, Michael Sena, who opines that: 'The incident of Tang walking into the closing door of Elevator 1 is human error and therefore can occur on a properly maintained elevator with a properly operating door reversing edge. Marcato was not negligent in performing preventative maintenance on Elevator 1 and did not fail to maintain the FCU door reversing edge of Elevator 1 prior to Tang's incident."

Finally, plaintiff has retained an expert as well named William J. Seymour, who opines that the elevator doors should have taken at least 3.3 seconds to travel the distance that they traveled in only 2.1-2.3 seconds and therefore "the door was closed too fast and consequently had excessive Kinetic ener-

gy when it struck Mr. Tang." Seymour further opines that "Building Management was negligent in having received numerous complaints to both building security and Mr. Keubelbeck regarding the door of elevator #1 striking people, that they failed to carry out a thorough investigation, they failed to enforce the contractual door performance targets and they failed to demand a root cause analysis and path of corrective action from PS MARCATO." As to PS Marcato, Seymour states that it was "not maintaining the elevator to the agreed upon performance and w[as] consequently negligent"

The July 2011 contract between PS Marcato and defendant Newmark Knight Frank contained an Indemnity provision that provides in pertinent part:

> The contract shall, to the fullest extent permitted by law and at its own cost and expense, defend, indemnify and hold Owner, its partners, directors, employees, servants, representatives and agents harmless from and against any and all claims, loss (including attorneys' fees, witnesses' fees and all court costs), damages, expense and liability (including statutory liability), resulting from injury and/or death of any person or damage to or loss of any property arising out of any gross negligent or wrongful act, error or omission or breach of contract, in connection with the operations of the contractor or its subcontractors. The foregoing indemnity shall include injury or death of any employees of the contractor or subcontractor and shall not be limited in any way by an amount or type of damages, compensation, or benefits payable under any applicable Workers Compensation, Disability Benefits or other similar employee benefits acts. Contractor shall not, however, assume responsibility for losses arising from the willful misconduct or gross negligence of any indemnity hereunder.

Subsequently in September 2015, PS Marcato and 200 Varick entered into a Master Provider Agreement that set certain updated terms on PS Marcato' s services.

The Master Provider Agreement provides the following terms regarding indemnity:

> To the fullest extent permitted by law, Provider [PS Marcato], shall defend, indemnify and hold harmless Owner [Newmark Family Properties, LLC], any Fee Owner of the realty and/or improvements upon the realty of the building, Managing Agent and their respective directors, shareholders, partners, officers, members, affiliates, subsidiaries, managers, employees, companies, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, firms, trusts, trustees, successors, assigns, mortgagees and/or designees, including but not limited to those listed on the Exhibit A (collectively, 'Newmark Family Properties, LLC'), from and against any and all claims, demands, suits, actions, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including reasonable attorneys' fees and expenses, on account of bodily or personal injury, sickness, disease, or death sustained by any person or persons, or injury or damage to or destruction of any property, including, without limitation, loss of use thereof, directly or indirectly arising out of or in connection with or relating to acts or omissions in connection with or pursuant to this Agreement[.] Provider shall and does hereby assume and agrees [sic] to pay for the defense of all such claims, demands, suits, and proceedings. If any such suit, action or proceeding is brought against the Newmark Family Properties, LLC (Exhibit A) entities, Provider, upon notice from Newmark Family Properties, LLC (Exhibit A), shall, at Provider's sole expense, resist or defend such suit, action, or proceeding by counsel reasonably acceptable to the Newmark Family Properties, LLC (Exhibit A) entities. If for any reason any part of this indemnification shall be in contravention of any statute, ordinance, regulation or rule, or any decision of any court or adjudicatory body, then this indemnification shall survive to the fullest extent permitted thereby

Parties' arguments

In motion sequence 3, 200 Varick argues it is entitled to summary judgment because the sole proximate cause of plaintiff's alleged injuries was plaintiff's own conduct and not any defect on elevator 1, the fact that the door contacted Plaintiff's shoulder, allegedly resulting in injury, is not evidence that the elevator was defective, and Varick Defendants hired PS Marcato as its sole and comprehensive provider of elevator maintenance services for the Property. 200 Varick contends that Plaintiff's allegations are contradicted by the objective video surveillance evidence of the incident and that the Varick Defendants did not have exclusive control over elevator number 1. Finally, 200 Varick argues that entitled to summary judgment in its favor on their contractual indemnity crossclaim against PS Marcato because of the plain language of the Master Provider Agreement. Defendant Marcato opposes that portion of the motion and argues that 200 Varick's motion seeking summary judgment for contractual indemnification should be denied.

Relatedly, in motion sequence 4, PS Marcato argues it is entitled to summary judgment because there was no defective condition with the elevator, and because they did not have actual or constructive notice of the alleged defect, that plaintiff cannot rely on the theory of res ipsa loquitor and that all crossclaims against it must be dismissed because there is no basis for negligence against Marcato.

Plaintiff argues in opposition to both summary judgment motions that there are triable issues of fact and therefore both motions should be denied. Plaintiff contends that 200 Varick failed to act reasonably in light of their notice of the prior problems with the elevator. There are issues of fact as to whether the subject elevator door closed too quickly after the last passenger exited the elevator; whether the elevator door failed to retract after plaintiff's foot broke the electric eye of the door safety system; whether the door retracted quickly enough and that they failed to comply with the building code. Further, plaintiff argues that its expert William Seymore concluded that the elevator door closed too quickly and that it failed to sense his foot in the doorway and tract accordingly and that if Marcato performed under the maintenance contract it had with 200 Varick the door performance specifications would have been enforced and the door would have closed with an acceptable level of kinetic energy.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

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" (*Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 68 NYS3d 100; *see Napolitano v Jackson "78" Condominium*, 186 AD3d 1383; *Tucci v Starrett City, Inc.*, 97 AD3d 811, 949 NYS2d 419). Similarly, "[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" *(Rogers v Dorchester Assoc.*, 32 NY2d 553, 347 NYS2d 22; *see Roserie v Alexander's Kings Plaza, LLC*, 171 AD3d 822, 97 NYS3d 174; *Nye v Putnam Nursing & Rehabilitation Ctr.,* 62 AD3d 767, 879 NYS2d 505).

200 Varick and PS Marcato's motions for summary judgment are denied. Here, there is an issue of fact as to whether 200 Varick breached its nondelegable duty to passengers to maintain elevator 1 in a safe manner. It is undisputed that that there were multiple prior incidents involving elevator 1 and the alleged fast moving/closing elevator door. Prior to plaintiff's incident, two non-party witnesses both testified that they experienced elevator 1 closing too fast and striking them. Non-party witness Capici claimed he had 3 incidents involving elevator 1 and that on the third time he notified Kuebelbeck. Keubelbeck did not make any report(s) about the Capici incidents and also testified that he did not know what, if anything, the elevator company did when it responded to his call. A second non-party witness, Jean Grillo, also testified about elevator 1 closing very rapidly and that she informed the front desk in the lobby. Furthermore, even though PS Marcato came to the building to service the elevator, 200 Varick has not presented any evidence that that it made any attempts to determine whether or not the subject issue with elevator 1 it was remedied. Finally, the court cannot determine as a matter of law that 200 Varick did not have actual or constructive notice of the alleged malfunction that allegedly caused the elevator door to close too quickly as it is undisputed that there were prior similar incidents involving this particular elevator.

Moreover, on the date of the incident, PS Marcato's witness responded to a call he received from PS Marcato to visit the building because of an issue with an elevator and performed a "visual" of the elevator edge and checked its speed, then left the building. Towers could only testify what he would do in the usual course of business but had no independent recollection of this building, or the elevator in question and also testified that this is not his assigned building. Trapani testified that an elevator maintenance log is maintained for each customer, that he had no personal knowledge what service Towers performed at 200 Varick other than what is indicated in the log that stated "ckd edge". The court finds there are issues of fact whether PS Maracto failed to use reasonable care to discover and/or correct the elevator door issue.

The parties have submitted conflicting expert affidavits as to the elevator door allegedly closing too quickly and its maintenance further creating triable issues of fact. 200 Varick's argument that this court should not consider plaintiff's expert because his conclusions are patently erroneous and speculative is rejected.

While the court reviewed the video depicting plaintiff's incident with elevator 1, the court cannot determine that plaintiff caused his own accident.

Both 200 Varick and PS Marcato cite *Sanchez v. New Scandic Wall L.P.*, which is distinguishable from this case. First, unlike *Sanchez*, plaintiff Tang did in fact submit an expert affidavit of William Seymore, the building super Donald Kuebelbeck received prior notice about elevator 1 from non-party witness Capici and there was no evidence that the elevator was inspected in the maintenance control plan.

Finally, PS Marcato's argument as to plaintiff's reliance on res ipsa loquitur is rejected.

The court now turns to that portion of Varick's motion as to its crossclaim for indemnification. PS Marcato argues, in opposition, that 200 Varick failed to establish that the alleged accident actually arose out of Marcato's performance under the contract and in fact argues that there was nothing wrong with the elevator, that it did not malfunction, was properly maintained and that plaintiff was the cause of the alleged accident. Marcato further argues that the maintenance contract and the master provider agreement contain conflicting language. 200 Varick argues that it is entitled to contractual indemnification against PS Marcato because it was free from any negligence and that if any party was negligent it was PS Marcato.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3

NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]).

The Master Agreement dated September 25, 2015 obligated PS Marcato to defend and indemnify 200 Varick for "any and all claims, demands, suits, actions, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including reasonable attorneys' fees and expenses, on account of bodily or personal injury, sickness, disease, or death sustained by any person or persons, or injury or damage to or destruction of any property, including, without limitation, loss of use thereof, directly or indirectly arising out of or in connection with or relating to acts or omissions in connection with or pursuant to this Agreement". While the parties Agreement to Performance Maintanence of Elevators at 200 Varick Street, commencing August 1, 2011 provides for indemnification "resulting from injury and/or death of any person or damage to or loss of any property arising out of any gross negligent or wrongful act".

Varick's motion for indemnification by Marcato is denied. Plaintiff's claim is for personal injuries as a result of an allegedly fast closing elevator door that presumably Varick was on notice about and which Marcato was obligated to maintain. There is conflicting language in the two contracts between Varick and Marcato that triggers the indemnification. The 2015 agreement provides for indemnification provides in broad terms "arising out of or in connection with" language, while the 2011 Agreement requires a finding of gross negligent or wrongful act by Marcato to trigger the indemnification provision. Here, there are issues of fact as to whether the claim for indemnification is triggered based on Marcato's acts or their failure to perform that the court cannot decide on this record. Therefore, Varick's motion for indemnification is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 3 and 4 are denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: November 28, 2023
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.