

Kilpatrick v Dormitory Auth. of the State of N.Y.

2024 NY Slip Op 32559(U)

June 26, 2024

Supreme Court, Bronx County

Docket Number: Index No. 28911/2018E

Judge: Kim Adair Wilson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X

YVONNE F. KILPATRICK,
Plaintiff,

Index No. 28911/2018E

-against-

Hon. KIM ADAIR WILSON
Justice Supreme Court

DORMITORY AUTHORITY OF THE STATE
OF NEW YORK and SLADE INDUSTRIES,
INC.,

Defendants.

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The following papers NYSCEF Doc No. (128 - 151), read on this SUMMARY JUDGMENT MOTION, (Seq. No. 5). Noticed on 8/12/2022 and duly submitted as NYSCEF Doc. No. 128.

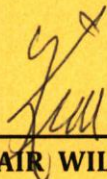
	NYSCEF Doc. No.
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Other: Stipulation	

Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Motion is Respectfully Referred to Justice:
Dated: _____

Dated: June 26, 2024

Hon. 
KIM ADAIR WILSON, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

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YVONNE F. KILPATRICK,
Plaintiff,

-against-

DORMITORY AUTHORITY OF THE STATE
OF NEW YORK and SLADE INDUSTRIES,
INC.,
Defendants.

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Kim Adair Wilson, J.:

DECISION AND ORDER
Index No. 28911/2018E
Motion Seq. #: 005

HON. KIM ADAIR WILSON
J.S.C.

“NOTICE OF MOTION” (NYSCEF Doc 128) dated and filed August 12, 2022, respectively, and signed by one James L. Sonageri, Esq. (Sonageri & Fallon, LLC), counsel for defendant, Slade Industries, Inc. (“Slade”), seeking an Order, “pursuant to CPLR §3212, granting Defendant, Slade Industries, Inc.’s, summary judgment, dismissing Plaintiff’s Complaint with prejudice,” is decided as set forth below.

The instant matter was commenced on August 1, 2018, by the filing of plaintiff’s Verified Complaint seeking monetary damages for injuries allegedly sustained by plaintiff on or about May 9, 2017, when she fell while attempting to exit a misleveled elevator, while on the premises located at 160 Convent Avenue, New York, New York, also known as City College, owned and/or maintained by defendants Dormitory Authority of The State of New York (“DASNY”), and Slade. The Complaint alleges one cause of action sounding in negligence. Defendant Slade filed its Answer (NYSCEF Doc 6) on August 20, 2018, asserting a general denial, five affirmative defenses, as well as a cross-claim against defendant Dormitory Authority for indemnity and/or contribution. On August 31, 2018, defendant DASNY also interposed its Answer (NYSCEF Doc 14), denying all allegations and asserting twenty-six affirmative defenses. On January 30, 2019, DASNY also filed its “AMENDED REPLY TO CROSS-CLAIM” (NYSCEF Doc 22), refuting Slade’s cross-claim. Plaintiff filed her Note of Issue (NYSCEF Doc 127) on June 21, 2022.

Defendant Slade now moves for summary judgment against plaintiff. In support, movant submits its annexed Affirmation in Support (NYSCEF Doc 129); its Reply Affirmation (NYSCEF Doc 150), dated and filed December 15, 2022; the deposition transcripts of plaintiff Yvonne Kilpatrick (NYSCEF Doc 132) and Antonio Santiago (NYSCEF Doc 133); the Affidavits Jon B. Halpern, P.E. (NYSCEF Doc 138), and Arda Safak (NYSCEF Doc 139); and elevator maintenance records for the period between June 14, 2016, to May 9, 2017 (NYSCEF Doc 137).

In opposition, plaintiff submits her Affirmation in Opposition (NYSCEF Doc 145), dated and filed December 2, 2022, by one Mariel Crippen, Esq., counsel to the plaintiff; the Affidavit of Patrick A. Carrajat (NYSCEF Doc 146); and the deposition transcript of nonparty Christopher Roberts (NYSCEF Doc 147).

Movant contends that the submitted evidence establishes that Slade had no prior notice that the subject elevator was prone to misleveling, and that Slade did not cause the allegedly dangerous condition. Movant points to the deposition testimony of Antonio Santiago (NYSCEF Doc 133), the supervising elevator mechanic employed by defendant Slade, who stated that Slade had regularly conducted routine maintenance of the elevator on a monthly basis, including just prior to the incident, on May 1, 2017, when the on-site mechanic reportedly replaced a broken wire on the controller, which regulates the leveling of the elevator on each floor. Movant also highlights the Affidavit of Jon B. Halpern, P.E. (NYSCEF Doc 138), who is submitted as an expert with over forty years of experience with elevator design, installation, modernization, maintenance and repair. Halpern did not conduct an inspection of the elevator, but instead observed from submitted evidence, including photographs of the subject elevator and the New York City Department of Building Records, that the elevator was declared to be properly maintained and fully code compliant pursuant to a private inspection conducted in October of 2016. The Affiant further stated that the elevator had no reported history of misleveling, and opined that the May 9, 2017, incident did not result from improper elevator maintenance.

In contrast, plaintiff asserts that summary judgment in favor of the movant is precluded by the doctrine of *res ipsa loquitur*, because the agency or instrumentality of control over the leveling of the elevator remained in Slade's exclusive control. Plaintiff states that Slade's disclosed records (NYSCEF Doc 137) show that the elevator had been taken out of service for maintenance prior to the accident on May 9, 2017, and then subsequently was returned to service, with Slade personnel directed to remain on stand-by. Additionally, the deposition of Christopher Roberts (NYSCEF Doc 147), a custodian employed by City College, recounts that the elevator frequently experienced operational issues and would occasionally be misleveled, of which Slade was immediately notified at its on-campus office. Finally, plaintiff offers the Affidavit of Patrick A. Carrajat (NYSCEF Doc 146), presented as an "Elevator Consultant" with sixty years' experience in elevator maintenance, repair and modernization, and who rebuts the opinion of movant's expert, Halpern, contending that the maintenance records, as well as the magnitude of the misleveling during the incident, alleged to be approximately one and a half feet, show that Slade failed to use reasonable care to discover and correct the recurring misleveling of the elevator.

In its Reply (NYSCEF Doc 150), movant contends that plaintiff's expert, Carrajat, is unqualified to contest engineer Halpern's Affidavit and thereby establish a material issue of triable fact. Movant also argues that plaintiff fails to establish the third prong of *res ipsa*

loquitur, that the injured plaintiff contributed no voluntary action that proximately caused her injury, because plaintiff failed to look down when she exited the elevator.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Winegrad v New York University Medical Center*, 64 N.Y.2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

A defendant contractor seeking to dismiss the claims of an injured third party must demonstrate prima facie that the defendant did not exhibit negligence in the performance of its duties, and thereby “launch a force or instrument of harm” by creating or exacerbating a dangerous condition. *Medinas v. MILT Holdings LLC*, 131 A.D.3d 121, 126 – 127 (1st Dept. 2015); *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 142 (2002); also see *Baillargeon v. Tuttle Roofing Co.*, 92 A.D.3d 908, 909 (2d Dept. 2012); *Haracz v. Cee Jay, Inc.*, 74 A.D.3d 1145, 1146 (2d Dept. 2010). Such a showing requires a sufficient demonstration that the hazardous condition alleged to have proximately caused the plaintiff’s injuries did not originate from the repair work conducted by the defendant. *Baillargeon, supra* at 908. Actual notice will be imputed where a defendant is determined to have created a dangerous or defective condition. See *Lewis v. Metro. Transp. Auth.*, 99 A.D.2d 246, 249 (1st Dept. 1984) aff’d, 64 N.Y.2d 670 (1984).

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that movant Slade has not met its burden to demonstrate entitlement to summary judgment against the plaintiff. The elevator maintenance records (NYSCEF Doc 137) submitted by the movant, alongside the deposition testimony of Antonio Santiago (NYSCEF Doc 133) establish (i) that the elevator leveling was regulated by a controller located in the elevator control room; (ii) that, subsequent to a malfunction, a controller wire was replaced on May 1, 2017, eight days prior to the incident; and (ii) that on May 9, 2017, immediately prior to the incident, the elevator was taken offline to repair a voltage problem in the controller. Therefore, the movant’s own evidence tends to show that Slade had either actual notice of ongoing mechanical issues plaguing the elevator component responsible for regulating the leveling immediately prior to the misleveling incident that proximately caused the plaintiff’s injuries. Furthermore, movant has not established that Slade’s maintenance work on May 1 and 9, 2017, did not create or exacerbate the alleged dangerous or defective condition. Since movants have failed to carry

their initial summary judgment burden, defendant Slade's motion is **DENIED** without considering the sufficiency of the opposing papers (*Winegrad, supra* at 853).

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

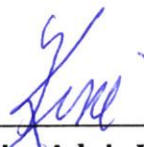
Accordingly, it is hereby

ORDERED that defendant Slade Industries, Inc.'s motion, pursuant to CPLR 3212, granting defendant, Slade Industries, Inc., summary judgment, dismissing plaintiff's Complaint with prejudice, is DENIED; and it is further

ORDERED that the movant is directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: June 26, 2024
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.