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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

Fernando Ramirez

-v-

Rotanelle Elevator, Inc. and 447-453 West 18th LP

INDEX NO. 115308/09

MOTION DATE 1/18/12

MOTION SEQ. NO. 4

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is and cross-motion are decided in accordance with the accompanying memorandum decision

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/18/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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FERNANDO RAMIREZ,

Plaintiff,

- against-

ROTAVELE ELEVATOR, INC., and 447-453 West 18 LP,

Defendants.

----------X

Index No.: 115308/09
Submission Date: 1/18/2012

DECISION AND ORDER

For Plaintiff:
Douglas & London, P.C.
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New York, NY 10038

For Defendant Rotavele Elevator, Inc.:
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For Defendant 447-453 West 18 LP:
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Papers considered in review of this motion and cross-motion for summary judgment:

Notice of Motion 1
Aff in Support 2
Aff in Opp. 3
Notice of Cross-Motion. 4
Aff in Opp 5
Aff in Partial Opp 6
Reply Aff. 7
Reply Aff 8
Reply Aff 9

HON. SALIANN SCARPULLA, J.:

In this negligence action, defendant 447-453 West 18 LP ("447-453") moves for summary judgment dismissing the complaint of plaintiff Fernando Ramirez's ("Ramirez") and all cross-claims asserted against it judgment over and against defendant Rotavele Elevator, Inc. ("Rotavele") for contractual indemnity, and judgment over and against

Rotavele for common law indemnification. Rotavele cross-moves for summary judgment dismissing all claims and cross-claims against it.

Ramirez sues for personal injuries he allegedly sustained on January 20, 2009, when Ramirez was employed as an elevator operator at the Chelsea Modern, located at 447 West 18th Street, New York, New York (the "premises"). Ramirez alleges that the elevator he was operating went into a "free fall," dropping four stories and then abruptly stopping.

447-453, owner of the premises, hired non-party DCBE to act as construction manager during the construction of a building at the premises. DCBE then contracted with Rotavele to install and maintain the elevators at the premises. Rotavele and 447-453 also entered into a "Basic Elevator Service Agreement," by which Rotavele agreed to "furnish elevator maintenance service on the elevators." Pursuant to the elevator service agreement, Rotavele agreed to, among other things, "inspect, lubricate and adjust" the various parts and components of the elevator and to "periodically examine all safety devices and equalize tension on hoisting cables when necessary." The elevator service agreement also provides that "[Rotavele] does not assume any management or control over any part of the equipment except during periods of work when our employees actually take direct charge of the equipment, and such management and control over the elevator equipment remains exclusively with the owner."

Under the terms of the elevator service agreement, 447-453 "agree[d] to maintain the hatchway, pit and machine room in clean condition and to keep the elevator equipment from being exposed to the elements or to physical damage[,]. . . to shut down the equipment immediately upon the manifestations or appearance of any irregularity in operation of the elevator equipment; to notify [Rotavele] at once, and keep the equipment shut down until completion of the repairs." Pursuant to the elevator service agreement, Rotavele performed routine maintenance on the elevators and addressed elevator service issues.

The building at the premises, which was still undergoing construction at the time of Ramirez's accidents, had two elevators, Elevator 1 and Elevator 2. Ramirez was hired to operate Elevator 2, the elevator designated for tenants only, and to make sure that the construction workers used Elevator 1. Ramirez was responsible for riding Elevator 2 from 8:00 a.m. to 4:00p.m., bringing tenants to and from their desired floors, while preventing construction workers from riding Elevator 2. He held this position for approximately four months prior to the incident.

Ramirez testified at his deposition that on January 20, 2009 he rode Elevator 2 approximately five to six times prior to the accident. According to Ramirez, there was nothing unusual about Elevator 2 and it operated normally, but that on one trip it was not level when he arrived at the lobby, but was a few inches off the ground. Ramirez testified that he then yelled to the doorman about the mis-leveling, and that the doorman told him

to wait and see if it happened again before they contacted Rotavele. Ramirez further testified that after dropping a passenger at the 11th floor, leaving him alone in Elevator 2, he pressed the button to return to the lobby, at which time the lights in Elevator 2 went out and Elevator 2 went into "free fall," abruptly stopping at the 7th floor, and causing him to fall on his right knee and hit his head on the hand rail. Ramirez added that he then rode Elevator 2 to the lobby, and on this ride Elevator 2 operated normally. Upon exiting Elevator 2, Ramirez told the doorman and Marko Mirdita ("Mirdita"), the building superintendent that Elevator 2 had "dropped."

Mirdita testified at his deposition that as soon as Ramirez told him about Elevator 2 dropping, he took Elevator 2 out of service, and called Rotavele requesting that a technician come to service Elevator 2. In response, Jeff Darraugh ("Darraugh"), a Rotavele elevator mechanic, arrived at the premises with his assistant John McArdle ("McArdle") in under an hour to inspect Elevator 2. Darraugh testified at his deposition that he conducted an examination of Elevator 2, and checked the elevator computer system which would show any problems with the Elevator. Darraugh testified that he found no evidence of the car dropping in the error log. He also testified that he physically checked the car and found no evidence that the Elevator car had dropped.

In support of its motion for summary judgment, 447-453 argues that it could not have created a defect in Elevator 2, because it is undisputed that it did not install or perform any work on the elevators. 447-453 further argues that its elevator

responsibilities were limited to cleaning their interiors and entrance ways, which Mirdita carried out twice a day. 447-453 further notes that pursuant to the terms of the elevator service agreement, Rotavele was responsible for all elevator maintenance and repair.

Rotavele cross-moves for summary judgment, adopting 447-453's argument that Ramirez has raised no triable issue of fact that Rotavele had any prior notice of the alleged defective condition, and no evidence exists that the defective condition was caused by any negligent act or omission by Rotavele. Rotavele further argues that Ramirez cannot make a prima facie showing of Rotavele's negligence or that any defective condition existed which could have caused the incident. Rotavele also asserts that any problems which did occur with the elevator were caused by construction dust and debris from 447-453's construction contractors, and it was 447-453's obligation to clean such dust and debris.

In opposition to the motions for summary judgment, Ramirez argues that there exist a number of issues of material fact, including (1) whether the defendants had actual and/or constructive notice of the elevator defect; (2) whether the work previously performed by Rotavele on the 7th floor elevator door release assemblies on July 14, 2008 and September 23, 2008 was negligent; (3) whether 447-453 failed to take appropriate action to protect the elevator equipment from potential damage from dust and debris based on its knowledge of the ongoing construction in the building; (4) whether the elevator was on "Independent Service" or "Automatic" at the time of Ramirez's accident;

and (5) whether Ramirez had made complaints prior to his accident regarding the operational problems with Elevator 2. Ramirez also argues that both 447-453 and Rotavele had notice of a defective condition, that res ipsa loquitur is applicable to both defendants, and that 447-453 is liable for Ramirez's injuries pursuant to provisions of the New York City Building Code and New York State Multiple Dwelling Law.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

"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." *Isaac v. 1515 Macombs*, LLC, 84 A.D.3d 457, 458 (1st Dep't 2011) (internal citations omitted). 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 N.Y.2d 553, 559 (1973).

Here, 447-453 submit Darraugh's deposition testimony to show that Elevator 2 was not in a defective condition on the date of Ramirez's accident. Darraugh testified that he arrived at the premises shortly after the alleged incident, and performed diagnostic tests of Elevator 2 and the error log system. He testified that he used a hand-held unit, which reported that there were no errors. Darraugh testified that after he observed the elevator running up and down without any passengers, he next rode on top of the elevator for fifteen (15) or twenty (20) minutes, "looking for any reason why an elevator would allegedly drop." After riding up and down on top of the elevator many times, Darraugh "couldn't find any evidence of what we were told, and [he] deemed the elevator safe to be in service and [he] put it back in service."

Darraugh further testified that after conducting these diagnostic reviews "[t]here was no evidence of any problem with the elevator at all." Darraugh concluded that the Elevator had not dropped a floor, let alone four as Ramirez claims, because "[t]here was no evidence in the error log, and then I physically checked the car and found no evidence that the car ever dropped or ever will." In addition, Darraugh testified that had there been a free fall from the eleventh to the seventh floor, an error message on the log would have "absolutely" appeared.

Moreover, Darraugh testified that for a "roped elevator," such as Elevator 2 "[t]here are protocols and safeties in place to make [dropping] nearly impossible." Darraugh explained that Elevator 2 has a "governor that governs the speed of the elevator" which limits Elevator 2 to no more than twenty-five percent (25%) past its rate of speed. Darraugh added that there are also brakes on Elevator 2 which prevent it from dropping. Darraugh testified that the protocols and safety features make a free fall of Elevator 2 impossible unless the cables had been cut, or the 2,500 pound capacity was exceed by 1,000 pounds. Ramirez testified he was in Elevator 2 by himself, and has not alleged that either the cables were cut or the weight limit was exceeded.

Rotavele also submitted an affidavit by Darraugh, wherein he affirmed that his "examination of elevator number two on January 20, 2009 found no evidence that the car experienced any type of fall or drop whatsoever. . . . [B]ased on the design of the subject elevator and the conditions found when I observed it, I can attest to a reasonable degree of mechanical certainty that it was physically and mechanically impossible for the subject elevator to drop or free fall as claimed by plaintiff herein."

447-453 also submitted an expert affidavit of William M. Kane, Ph.D. ("Kane"), a Senior Engineer at Exponent Failure Analysis Associates, an engineering firm. Kane examined Elevator 2, and reviewed the deposition testimony in this matter, as well as the elevator maintenance records and the New York City Department of Building elevator records. Kane agreed that the "results of Mr. Darraugh's inspections immediately

following Plaintiff's alleged incident indicate that the motion control mechanisms of the elevator did not fail or malfunction in any way." Kane further stated that based on the elevator's mechanical mechanisms for controlling both "maximum speed and range of stopping distances of the car," even had the elevator experienced a free fall from a full stop, it would fall approximately 11 inches before reaching the maximum allowed speed, at which time the safeties would engage to slow the elevator down. Kane concluded that "even assuming that the motion control mechanisms had failed or malfunctioned, Plaintiff's allegations that the elevator engaged in a "free fall" for four stories before coming to an abrupt halt is inconsistent with the capabilities of" Elevator 2.

Through these submissions, 447-453 and Rotavele have met there initial burden of showing that Elevator 2 was not in a defective condition on the date of the accident. *See Cortes v. Central El., Inc.*, 45 A.D.3d 323 (1st Dep't 2007) ("[d]efendant's submissions, including . . . an affidavit from an elevator consultant who inspected the elevator and concluded that" the accident could not have occurred as plaintiff alleged "demonstrated that there was no evidence of a defective condition"); *Hardy v. Lojan Realty Corp.*, 303 A.D.2d 457 (2d Dep't 2003) (defendants "demonstrated with affidavits of an elevator mechanic and an expert elevator consultant that the allegations [of free fall] were physically and mechanically impossible").

447-453 and Rotavele also make a prima facie showing that they did not have constructive or actual notice of the alleged defective condition of Elevator 2 which would

cause it to "drop" or "free fall" as alleged by Ramirez. Defendants submit the Rotavele service report, which reflects a number of other complaints made about the elevators in the building. There are no reports, however, of free falls or dropping elevators. "There was no evidence that the prior incidents identified in the [report] 'were of a similar nature to the accident giving rise to this lawsuit' or 'were caused by the same or similar contributing factors.'" *Martin v. Kone, Inc.*, 2012 NY Slip Op 2564, 1-2 (1st Dep't April 5, 2012) (quoting *Chunhye Kang-Kim v. City of New York*, 29 A.D.3d 57, 60-61 (1st Dep't 2006)). *See also Gjonaj v. Otis Elevator Co.*, 38 A.D.3d 384, 385 (1st Dep't 2007) ("In order to establish notice based on prior accidents, plaintiff was required to produce evidence that the prior accidents were similar in nature to the accident alleged her and caused by the same or similar contributing factors").

The burden now shifts to Ramirez to "show the existence of a bona fide issue raised by evidentiary facts. Reliance upon mere conclusions, expressions of hope or unsubstantiated allegations is insufficient." *Santoni v. Bertelsmann Property, Inc.*, 21 A.D.3d 712, 714 (1st Dep't 2005) (internal citations and quotations omitted).

In opposition, Ramirez submits the expert affidavit of Patrick A. Carrajat ("Carrajat"), an elevator consultant. Carrajat reviewed the depositions, pleadings, motion papers and attached exhibits, and also performed an online search of records of the New York City Department of Buildings, Elevator Division relative to the building and elevator 2. Carrajat did not inspect Elevator 2.

Carrajat noted that his analysis focused on Rotavele's service report and Mirdita's deposition testimony. Based on this, he concludes that Rotavele failed to conduct sufficient monthly maintenance, that there was a problem with the elevator door release assembly on the 7th floor, and that this problem caused Ramirez to experience free fall. This conclusion lacks any factual support in the record, and Carrajat provides no evidentiary or factual support for his conclusion. Carrajat never inspected Elevator 2, and he fails to demonstrate any confirmation for his theory that there was a problem with the 7th floor door release on the date of the incident, or that it could have caused a free fall.

Accordingly, Carrajat's affidavit does not create an issue of fact. *Santoni*, 21 A.D.3d 7 at 715 ("Indeed, '[i]f the expert's conclusions lack foundation in the record and are speculative, the affidavit will not raise questions of fact sufficient to preclude summary judgment'") (quoting *Samuel v. Aroneau*, 270 A.D.2d 474, 475 (2d Dep't 2000)). *See also Kleinberg v. City of New York*, 27 A.D.3d 317, 318 (1st Dep't 2006) (expert affidavit "does not establish grounds for liability because his opinions are vague, conclusory and factually unsupported. . . . He merely assumed the ultimate fact of causation. . . .") (internal citations omitted).

However, Ramirez establishes a triable issue of fact under the doctrine of res ipsa loquitur. Ramirez alleged that the elevator dropped and stopped abruptly, causing him to fall on his knee and bang his head. "Certainly, this is the type of event that does not ordinarily happen in the absence of negligence, and plaintiff[] is entitled to invoke the

doctrine as against defendants based on plaintiff's testimony concerning elevator malfunction." *Stewart v. World Elevator Co., Inc.*, 84 A.D.3d 491, 495 (1st Dep't 2011). *See also Kleinberg v. City of New York*, 61 A.D.3d 436, 438 (1st Dep't 2009) ("The doctrine of res ipsa loquitur may apply to this case, inasmuch as a free-falling elevator does not ordinarily occur in the absence of negligence").

"The doctrine of res ipsa loquitur, which may be invoked against a defendant that exclusively maintained an allegedly malfunctioning elevator allows the factfinder to infer negligence from the mere happening of an event where the plaintiff presents evidence (1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event." *Miller v. Schindler Elevator Corp.*, 308 A.D.2d 312, 313 (1st Dep't 2003) (internal citation omitted).

Here, the Court need not determine whether 447-453 or Rotovele maintained exclusive control of the elevator. "The Court has applied the doctrine to cases involving elevator malfunction, and . . . the fact that more than one entity may have been in control of the elevator does not preclude application of the doctrine." *Kleinberg*, 61 A.D.3d at 438.

While 447-453 submit evidence showing that Elevator 2 could not have gone into a free fall on the date of Ramirez's accident, Ramirez's testimony regarding the fall "must

be treated as true on defendant[s'] motion for summary judgment. Although defendant[s] presented competent . . . evidence that the elevator was not malfunctioning immediately after the incident, plaintiff's testimony to the effect that a malfunction actually occurred is sufficient to create a triable issue of fact." *Miller*, 308 A.D.2d at 313. In addition, there is no evidence to indicate that Ramirez contributed to the accident.

Lastly, 447-453's motion for judgment against Rotavele for contractual and common law indemnification is premature until there is a determination as to whether Ramirez's injuries were caused by any negligence by 447-453. *Gilbert v. Kingsbrook Jewish Center*, 4 A.D.3d 392, 393 (2d Dep't 2004); *Medina v. New York Elevator Co.*, 250 A.D.2d 656 (2d Dep't 1998).

In accordance with the foregoing, it is hereby

ORDERED that defendant 447-453 West 18 LP's motion for summary judgement dismissing plaintiff Fernando Ramirez's complaint and all cross-claims against it is denied; and it is further

ORDERED that defendant 447-453 West 18 LP's motion for summary judgement for judgment over and against defendant Rotovele Elevator, Inc. for contractual and common law indemnity is denied as premature; and it is further

ORDERED that defendant Rotavele Elevator, Inc.'s cross-motion for summary judgment dismissing plaintiff Fernando Ramirez' complaint and all cross-claims against it is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
April 16, 2012

ENTER:

Saliann Scarpulla, J.S.C.