Dzidowska v Related Cos., LP
2016 NY Slip Op 32302(U)
November 17, 2016
Supreme Court, New York County
Docket Number: 452293/2014
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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BARBARA DZIDOWSKA,

Plaintiff,

DECISION/ORDER
Index No. 452293/2014

-against-

THE RELATED COMPANIES, LP, 400 E. 84TH STREET ASSOCIATES, LP, 1616 FIRST COMPANY and FUJITEC AMERICA INC. D/B/A FUJITEC SERGE OF NEW YORK,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Barbara Dzidowska commenced the instant action to recover damages for injuries she allegedly sustained when she tripped and fell in an elevator. Defendant 400 E. 84th Street Associates, LP ("Associates") now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it and granting it summary judgment on its cross-claims against co-defendant Fujitec America Inc. d/b/a Fujitec Serge of New York ("Fujitec"). Fujitec cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint against it. The motion and cross-motion are resolved as set forth below.

The relevant facts are as follows. The Strathmore is a condominium residential high-rise building with 180 units spread over approximately 45 floors, which is located at 400 East 84th Street, New York, New York and owned by Associates (the "building"). Prior to July 11, 2011, Serge Elevators, which was purchased by Fujitec in 2001, installed three elevators, numbered "1," "2" and "3," in the building. After 2001, Fujitec maintained the elevators pursuant to a contract with Associates.

On or about July 11, 2011, plaintiff allegedly tripped and fell in elevator #1 due to the mis-leveling of the elevator, thereby sustaining injuries. Specifically, plaintiff asserts that she was in the lobby waiting for an elevator to arrive and that at approximately 1:03 p.m., elevator #1 arrived. After its door opened, the people who were in the elevator exited into the lobby. When plaintiff was entering the elevator, the elevator car suddenly jumped up several inches, causing plaintiff's foot to get caught on the raised floor and plaintiff to fall into the elevator.

There were three mis-leveling incidents involving elevator #1 in the months prior to plaintiff's accident, on April 16, 2011, May 26, 2011 and July 6, 2011. After each of these incidents, building staff notified Fujitec of the problem and Fujitec responded by performing repairs and returning the elevator to service. Plaintiff, who was employed by a tenant in the building, states in her affidavit that she complained about the condition of the elevator multiple times before July 2011.

By a decision and order dated January 8, 2016, the court denied plaintiff's motion for summary judgment against defendants. However, the court granted plaintiff's motion for sanctions based on the building defendants' spoliation or withholding of certain video footage from the camera inside the elevator depicting the hours before the accident, holding that the video footage was "relevant to plaintiff's claim in that it could show actual or constructive notice of the condition on the part of defendants." The court awarded plaintiff an adverse inference charge against the building defendants, including Associates, at trial.

The court first turns to the portion of Associates' motion for summary judgment dismissing plaintiff's complaint against it. It is well-settled that "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. 151 Macombs, LLC*, 84 A.D.3d 457, 458 (1st Dept 2011) (internal citations omitted). Evidence that there had been prior instances of mis-leveling with regard to a particular elevator may give owners constructive notice of the defect that caused the elevator to mis-level. *See Ardolaj v. Two Broadway Land Co.*, 276 A.D.2d 264, 265 (1st Dept 2000) (holding that the

"plaintiff's affidavit stating that the elevator had previously misleveled numerous times during the six months preceding the incident" raised an issue as to whether the owner had constructive notice of the defect); *Oxenfeldt v. 22 N. Forest Ave. Corp.*, 30 A.D.3d 391, 392 (2nd Dept 2006) ("[P]laintiff raised a triable issue of fact [with regard to constructive notice] by submitting the affidavits of three nonparty witnesses who all stated that they frequently observed the elevator mislevel during the two months prior to the plaintiff's accident").

In the present case, there is an issue of fact as to whether Associates breached its nondelegable duty to passengers to maintain elevator #1 in a reasonably safe manner. The court cannot determine as a matter of law that Associates did not have constructive or actual notice of the defect that caused the elevator to mis-level as it is undisputed that there had been multiple prior mis-leveling incidents involving elevator #1, which Associates reported to Fujitec on three occasions but which recurred despite Fujitec's efforts to correct the defect. Moreover, the adverse inference charge based on the building defendants' spoliation or withholding of video footage from the camera inside elevator #1 depicting the hours before the accident also raises an issue of fact as to whether Associates had constructive or actual notice of the defect or whether Associates failed to notify Fujitec about a known defect as the jury may infer at trial that the video footage showed that elevator #1 mis-leveled in the hours before the accident. Therefore, the portion of Associates' motion for summary judgment dismissing plaintiff's complaint against it is denied.

Associates' argument that an adverse inference charge cannot raise an issue of fact is without merit. Although Associates cite case law holding that granting an adverse inference charge at trial is not equivalent to granting summary judgment against the party that spoliated the evidence because the charge merely permits the jury to draw a negative inference, *see Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 554 (2015), this holding is not applicable to the present case as the court is not granting summary judgment based on the adverse inference charge.

The portion of Associates' motion for summary judgment dismissing Fujitec's cross-claim for contractual indemnification against it is granted without opposition on the ground that Associates' contract with Fujitec does not contain an indemnification provision. However, the portions of Associates' motion

for summary judgment dismissing Fujitec's cross-claims for contribution and common law indemnification against it and for summary judgment on its cross-claim for common law indemnification against Fujitec are denied as premature as no determinations have yet been made as to the cause of the alleged elevator malfunction or the negligence of any party with regard to said defect.

Associates' argument that it is entitled to common law indemnification based on the Court of Appeal's decision in *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 562 (1973), is without merit. In *Rogers*, the Court of Appeals awarded the owner indemnification against the elevator company following trial and the jury's determination of the owner's and elevator company's respective liability, unlike the present case wherein no determinations have been made as to the cause of the alleged elevator malfunction or the negligence of any party.

The court next turns to Fujitec's motion for summary judgment dismissing plaintiff's complaint against it. It is well-settled that "[a]n elevator company that agrees to maintain an elevator may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discovery and correct a condition which it ought to have found." *McLaughlin v. Thyssen Dover Elevator Co.*, 117 A.D.3d 511 (1st Dept 2014), citing *Rogers v. Dorchester Assoc.*, 32 N.Y. 2d 553, 557-59 (1973) ("There was evidence that the door had malfunctioned during the six months preceding the accident from which the jury might infer that the elevator company negligently performed its undertaking to repair and maintain the elevator").

In the present case, in accordance with the court's prior decision and order denying plaintiff's motion for summary judgment against Fujitec, the court finds that there are issues of fact as to whether Fujitec failed to correct the condition of elevator #1 of which it had knowledge or failed to use reasonable care to discover and correct said condition which it should have found. Both Fujitec and plaintiff have submitted conflicting expert affidavits about whether Fujitec adequately maintained and/or repaired elevator #1, just as in the prior summary judgment motion. Thus, there remain issues of fact precluding an award of summary judgment dismissing the complaint as against Fujitec.

Accordingly, the portion of Associates' motion for summary judgment dismissing Fujitec's cross-claim for contractual indemnification is granted but Associates' motion is otherwise denied and Fujitec's cross-motion is denied. This constitutes the decision and order of the court.

DATE : 11/17/16

KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.