Ileiwat v PS Marcato El. Co. Inc.
2017 NY Slip Op 32560(U)
December 6, 2017
Supreme Court, New York County
Docket Number: 150343/2010
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32
--X
ABDULLAH ILEIWAT

Plaintiff,

-against-

PS MARCATO ELEVATOR CO. INC., GOTHAM ELEVATOR INSPECTION, COOPER SQUARE REALTY, INC.,

Defendants.
--X
PS MARCATO ELEVATOR CO., INC.,

Third Party Plaintiff,

-against-

G.R. HOUSING CORPORATION,

Third Party Defendant.
--X
GOTHAM ELEVATOR INSPECTION INC., s/h/a GOTHAM ELEVATOR INSPECTION,

Second Third-Party Plaintiff

-against-

G.R. HOUSING CORPORATION,

Second Third-Party Defendant.
--X

Index No. 150343/2010
Motion Seq. 012

DECISION & ORDER
ARLENE P. BLUTH, JSC

The motion for summary judgment by defendant First Service Residential New York, Inc. f/k/a Cooper Square Realty, Inc. ("Cooper Square") for summary judgment dismissing all claims, cross-claims, and counterclaims against it is granted. The cross-motions, by defendant PS

Marcato Elevator Co., Inc. and G.R. Housing Corporation, for summary judgment dismissing plaintiff's complaint are granted.

Background

This case arises out of an unfortunate accident involving plaintiff while he was working at a building located at 711 Amsterdam Avenue. Plaintiff was injured when he attempted to remove debris that was lodged underneath a service elevator. When plaintiff, a temporary employee of the building's owner, third-party defendant G.R. Housing Corporation (GR), removed the item (a wooden ramp), the elevator fell on top of him causing severe injuries to his back and rendering him a paraplegic.

This service elevator was primarily used to transport garbage and other items from the basement to the sidewalk outside the building. The elevator was not designed to hold passengers. Workers at the building often used a wooden ramp to wheel carts of garbage off the elevator because there was a slight height differential between the elevator and the sidewalk. On the day of the accident, this wooden ramp fell out of the elevator and down into the elevator shaft. Plaintiff claims that his supervisor directed him to enter the pit underneath the elevator to try to manually dislodge the ramp. Plaintiff kicked out at the ramp and the elevator fell on his back.

Cooper Square claims that it was hired by GR to perform administrative functions one or two days a week and that it had no role whatsoever with the service elevator. Cooper Square further contends that it did not supervise or direct plaintiff's job responsibilities.

Defendant PS Marcato Elevator Co. Inc. ("PS") cross- moves for summary judgment to

dismiss plaintiff's complaint on the ground that there was no defect with the elevator associated with any work done by PS. PS was hired in 2005 to maintain the elevators at the premises, including the subject service elevator. PS contends that the elevator got stuck in the elevator shaft because of the wooden ramp, a result that indicates that the elevator was functioning properly. PS concludes that instead of waiting for PS to fix the problem, the employees at the building deliberately turned off the safety features on the elevator and sent an untrained plaintiff to remove the wooden ramp– the only item holding up the elevator.

GR cross-moves for summary judgment on the ground that plaintiff's sole exclusive remedy is to seek workers' compensation because his injuries arose from the purported negligence of his co-worker.

Claims against defendant Gotham Elevator Inspection, Inc. were previously dismissed under Motion Sequence 013 (*see* NYSCEF Doc. No. 351).

In opposition, plaintiff insists that there is an issue of fact regarding whether PS was a proximate cause of plaintiff's injuries because PS allegedly allowed the elevator to remain operational despite the fact that PS knew that the building's employees were circumventing safety features. Plaintiff contends that PS knew, for instance, that the building's employees would put tape on the gate switch to allow the elevator to operate when the gate is open. This permitted the employees to send garbage up to sidewalk without having to wait for the gate to open and close. Plaintiff further claims that under *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]), PS had a duty to act in a non-negligent fashion. Plaintiff argues that Cooper Square's motion should be denied because Cooper Square displaced GR's duty to maintain the premises and that it is responsible for the maintenance workers at the building.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Here the Court finds that plaintiff failed to raise a material issue of fact in opposition to defendants' motion and cross-motions. It is undisputed that the elevator became inoperable on the day of the accident because of the existence of a wooden ramp jammed underneath the elevator. Plaintiff testified that on the day of the accident, he saw that the elevator was stuck in between the basement and the sidewalk; it was about two to three feet above the basement level

(plaintiff's tr. at 162 [NYSCEF Doc. No. 203]). Plaintiff stated that he looked down into the shaft and saw that the ramp was down there (*id.* at 163). Plaintiff then told a supervisor (Olvis Brito) about the problem and Brito told him to go get the ramp (*id.* at 164-65). Once plaintiff kicked the ramp, the elevator came crashing down (*id.* at 166-71).

Plaintiff's testimony indicates that he simply followed the direction of his employer to repair an elevator that was stuck by a wooden ramp. There is no evidence that the accident was caused by any defect with the elevator that should have been fixed by PS. The wooden ramp that caused the elevator to get stuck was used by the building's workers– the elevator did not get stuck because of PS's faulty elevator inspection. For some reason, plaintiff's employer did not call PS (the company hired to maintain this elevator) or, at the very least, refrain from trying to fix the elevator without expert assistance. Instead, plaintiff was allegedly asked to remove the wooden ramp that was holding up the elevator.

Plaintiff's claim that PS had duty to act in a non-negligent way under *Espinal* does not compel a different outcome. This is not a case where an elevator jamming caused injuries to plaintiff. The plaintiff here was not injured when the elevator jammed; there is not evidence that the ramp falling down the shaft caused any injuries. If PS had been called to remove the obstruction, then plaintiff would not have been injured. It was the decision to go under the jammed elevator to remove the ramp which caused the injury. Plaintiff cannot try to fix an elevator at the behest of his own employer without asking the elevator maintenance company for help and then blame that company when he is injured. Once plaintiff tried to remedy the situation, whether at the behest of Brito or on his own accord, PS was absolved of liability.

For the same reasons, plaintiff's reliance on the existence of the tape placed on the gate

switch by GR's employees as evidence of PS's negligence is without merit. This tape kept the gate open so the workers would not have to take the time to open and close the gate when bringing garbage from the basement to the sidewalk– this presumably made taking out the garbage more convenient; plaintiff claims that the open gate allowed the ramp to fall down the shaft. Although PS's inspectors purportedly knew about the use of the tape by GR's employees, the presence of the tape on the gate switch was not a proximate cause of the accident. The proximate cause was the decision, either by Brito or by plaintiff himself, to remove the wooden ramp.

Plaintiff also failed to raise an issue of fact relating to Cooper Square. Plaintiff did not demonstrate that Cooper Square displaced GR's duty to maintain the premises. Cooper Square established that plaintiff and the other maintenance employees at the building were employed by GR (the building owner). It was a GR employee (Brito) who allegedly told plaintiff (another GR employee) to remove the wooden ramp under the elevator. Although Brito maintains that he did not instruct plaintiff to remove the wooden ramp, that is not a material issue of fact in this case because whether Brito instructed him or plaintiff undertook removing the ramp himself, none of the defendants here was involved in that decision.

Summary

As GR correctly points out in its cross-motion, this is a workers' compensation case. Despite plaintiff's efforts to assert liability against Cooper Square, PS and Gotham, the fact is that "[w]hen an employee is injured or killed by the negligence or wrong of another in the same employ, the exclusive remedy available to the injured employee . . . is Work[ers]' Compensation" (*Albarran v City of New York*, 56 AD2d 822, 822, 393 NYS2d 37 [1st Dept

1977]; *see also* Workers' Compensation Law § 29[6]). The jammed elevator caused no injuries. The proximate cause of this accident was the decision, made during the course of plaintiff's employment, to duck under a jammed elevator to remove the cause of the jam.

Accordingly, it is hereby

ORDERED that the motion by Cooper Square Realty, Inc. for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the cross-motion by defendant PS Marcato Elevator Co. Inc. for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the cross-motion by G.R. Housing Corporation is granted to the extent that it sought summary judgment dismissing plaintiff's complaint and denied as moot to the extent that it sought to exclude plaintiff's experts; and it is further

ORDERED that the clerk is directed to enter judgment accordingly. Case dismissed.

This is the Decision and Order of the Court.

Dated: December 6, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH