NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MYRTLE BRYANT,

Plaintiff,

-against-

BOULEVARD STORY, LLC and UPLIFT ELEVATOR INC.

Defendants.

DECISION/ORDER
Index No. 301724/08

Present:
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 6 read on this motion on the calendar of March 31, 2010

Papers Numbered

Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed.....1-2.....
Answering Affidavits and Exhibits Annexed.....3,4,5.....
Replying Affidavits and Exhibits Annexed.....6.....

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

Dated: 7/9/10

MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MYRTLE BRYANT,

Plaintiff,

-against-

BOULEVARD STORY, LLC and UPLIFT ELEVATOR INC.

Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 301724/08

HON. MARK FRIEDLANDER:

In this "trip and fall" action, defendant Boulevard Story, LLC ("Boulevard") moves for summary judgment dismissing all claims against it, and, in the alternative, seeks indemnification from co-defendant Uplift Elevator, Inc. ("Uplift"). In a separate motion, served six days later, Uplift moves for summary judgment dismissing the claims against it. Both motions were made returnable on the same day, and were ultimately submitted on the same day. Although the motions were placed into separate folders by the clerk's office, they are more accurately considered a motion and cross-motion. Clearly, both motions should be considered together, and they are both decided hereinafter.

Plaintiff alleges that she tripped and fell, on October 6, 2006, while exiting an elevator in the apartment building in which she resides. Boulevard is the owner of the building, and, pursuant to a maintenance contract between Boulevard and Uplift, the ongoing maintenance of the elevator was performed by Uplift. Plaintiff blamed her fall on the purported failure of the elevator to align properly with the floor.

Defendants now move for summary judgment, claiming that plaintiff can prove no actionable defect in the elevator, and that, even if there were such defect, there is no showing of any actual or constructive notice to defendants of a defect, and no proof that defendants caused or created such defect.

Plaintiff opposes the motions, and attaches to her deposition the affidavit of an expert, in which the

expert makes two significant concessions. In paragraph 4a, he states, "I agree if all systems are working properly the elevator should not mis-level more than one-half inch." In paragraph 7, he opines, with a reasonable degree of mechanical certainty, that, "absent negligence an elevator of this type will not mis-level more than +/- one half inch." These statements bolster, to some extent, the deposition testimony of Uplift's CEO that it is acceptable by code and industry standards for an elevator such as the one involved here to stop as much as three quarters of an inch above or below the floor level. Movants also cite precedent arising from tripping accidents which do not involve elevators, which decisions confirm the well accepted rule that changes in ground level of the size described above are de minimus and not actionable.

Movants contend that plaintiff cannot establish that the elevator misaligned by more than the allowable standard, whether that standard is one half inch or three quarters of an inch. It is not contested that plaintiff fell upon leaving the elevator (although no one observed her fall) and that the elevator doors closed, with the elevator presumably continuing its travel, while plaintiff was still on the floor. Plaintiff asserts that the elevator was misaligned by stopping below the level of the hallway floor. It does not require scientific acumen to realize that it would be more difficult for plaintiff, after her fall, to assess the amount of the misalignment of the elevator, at a time when the elevator was below floor grade, than it would have been, had the elevator been above floor grade (with its undercarriage showing clearly above the hall floor level).

In fact, plaintiff, when questioned at deposition, made it quite clear that she could not state the amount of the misalignment. She stated clearly that, in order to state an amount, she would have to guess (EBT, p.43). Plaintiff's counsel tries to rescue plaintiff's claim by asserting that plaintiff indicated the amount with her hands (EBT, p.42), and that the amount she was indicating was between one and two inches. However, movants' counsel disputes this and, in fact, argues that plaintiff was not demonstrating an amount of mis-leveling at all, but merely indicating that the elevator was below the level of the hall, by holding one hand below the other.

The deposition transcript reveals nothing that can be used to discern the amount of mis-leveling and does

not even disclose whether plaintiff was using one hand, two hands, or something else, to indicate. In any event, the context of the "indication" by plaintiff seems to more closely support movants' position that plaintiff was simply demonstrating the general positions of the two surfaces and not the distance between them. If either counsel had wished to use plaintiff's "indication" as a basis for eliciting evidence of the amount of mis-leveling, it would have been the obligation of such counsel to state for the record "indicating a gap of "x" inches," followed by a challenge to the opposing counsel, "do you agree?" This was not done.

In opposition to the motion, plaintiff now submits an affidavit claiming that the amount of the mis-leveling was one and a half to two and a half inches, and that this was the amount she was signaling at her deposition. Such assertion, put forth with seeming certainty, is, of course, directly contradicted by her own statement at deposition that she would need to guess to state an amount, as well as by the continued questioning posed to her at deposition as to the amount (making no reference to her just completed gesture) immediately after she had purportedly demonstrated it.

It is well established that the kind of assertion plaintiff submits in her affidavit constitutes material tailored to defeat a summary judgment motion, and that such material merely raises a feigned issue of fact. Court decisions too numerous to require specific citation here mandate that the statement by plaintiff in her affidavit be discounted.

If plaintiff cannot establish that her fall occurred over a mis-leveling that was larger than the one her own expert considers non-negligent, then she has effectively conceded the lack of a viable cause of action. As a general proposition, everyone is aware that it is possible to trip over very small changes in elevation in a walking surface, such as tripping, or nearly tripping, over a minimal difference in sidewalk blocks. Nearly every human being was experienced it, or watched others experience it, numerous times. But not every minimal change in surface elevation is evidence of negligence or actionable. Here, plaintiff claims that it was her toe which struck the protruding hallway floor, a fact consistent with a smaller, rather than larger, mis-leveling. The

fact of plaintiff's fall does not, in itself, prove negligence.

If plaintiff cannot show that there was a defect in the elevator, her claim must be dismissed. Nevertheless, the Court will briefly address other bases for dismissal, raised by movants, for purposes of completeness. Movants claim that there was no actual or constructive notice given to them as to purported mis-leveling of the elevator. They assert that the elevators were fairly new, having been upgraded the year before, and that Uplift checked them monthly. In addition, the super checked the elevators each day. Further, there were no records of any alleged elevator accidents before plaintiff's. When there were problems noted with an elevator, the super would call Uplift and a technician from Uplift would address the problem. Finally, on the very day of plaintiff's accident, but several hours earlier, there had been a report of a problem with the subject elevator, resulting in a service visit. According to Uplift, that problem had no connection with mis-leveling, but the problem was addressed and the elevator was checked.

At her deposition, plaintiff asserted that two or three other building tenants had mentioned to her that they had noticed elevator mis-leveling, but she could not state that she or any of the other tenants reported such complaints to Boulevard or to Uplift. As of plaintiff's deposition, therefore, it would appear that notice could not be definitively established.

At around the time this motion was made, a non-party witness ("Rawlins") was deposed. He is an admittedly close friend of plaintiff, who occasionally visits plaintiff in her building. He stated at his deposition that he visited plaintiff several months before her accident and noticed her elevator mis-leveling. At the beginning of his deposition, he stated that he could not be sure which of the building elevators he used (there are two). As the questioning progressed, however, he began to assert more forcefully that it was the "right-side" elevator. This was the one on which plaintiff had fallen, although Rawlins claimed not to know that. Rawlins also claimed that he recalled the mis-leveling to have been one and a half to two inches.

Rawlins stated that he reported the mis-leveling to a person wearing a uniform in the lobby, whom he

presumed to be a building employee or guard. Finally, Rawlins stated that he learned of plaintiff's accident when plaintiff called him from the hospital and told him that she had fallen "coming out of the damn elevator."

It is decidedly odd that plaintiff's friend is now produced to claim: 1) Observation of a defect the precise size asserted by plaintiff; 2) a belated certainty as to which elevator he was using years ago; and 3) the giving of notice to an unnamed supposed building employee in the lobby. What is more remarkable, however, is that plaintiff, at deposition, was asked at length about who else complained of elevator mis-leveling. She named various building tenants, but never named Rawlins. Yet, Rawlins claims to have been so concerned about plaintiff's elevator that he made a report of it several months before her fall, and also claims that he learned of plaintiff's fall at the elevator immediately following the occurrence.

It appears that we are being asked to believe that Rawlins did not immediately tell plaintiff during her hospital stay that he, too, had trouble with the elevators in her building. Not only that, but he apparently made no mention of it to plaintiff for the 26 months between her accident (October 2006) and her deposition (December 2008), because, at her deposition, plaintiff could not think to name Rawlins as a person who knew of the alleged elevator problem.

This comes as close as the Court has ever seen to the production of a non-party witness for the purpose of eliciting "testimony tailored to defeat a summary judgment motion." If plaintiff had belatedly come up with the account of Rawlins' elevator trip, after showing no knowledge of it during her deposition, plaintiff's account would have been unavailing. Here, it is her friend rendering the account, and plaintiff's failure to report it at her deposition requires the counter-intuitive leap that, for years after her accident, Rawlins never told plaintiff about something very relevant to her situation.

Nevertheless, the Court would not imply that either plaintiff or Rawlins are improperly presenting questionable sworn evidence. It would not be appropriate to make such determination without a hearing. Therefore, such doubts as are expressed above as to the evidence presented by Rawlins will not be used to

determine this motion. Rather, it suffices that Rawlins cannot state for certain whom it was that he advised of the purported elevator problem. Further, based on the totality of his deposition testimony, it is not clear that he is certain he observed the alleged condition in the relevant elevator.

Finally, Rawlins' experience is several months removed from plaintiff's accident, and, in the intervening period, there were several monthly maintenance visits by Uplift, during which the elevators were checked, (and the elevators were used repeatedly each day, without any specific accounts of problems during that time span) making Rawlins' account less relevant to any alleged issue arising during plaintiff's elevator ride. Based on all of the above, there is no basis in the Rawlins account for finding actual or constructive notice to any defendant. However, as was discussed, supra, the lack of provable notice is not determinative of the result here, insofar as the Court has already found insufficient proof of any defect.

The cases cited by plaintiff, in general, do not support the proposition that the instant situation is one in which a defect was proven, or in which notice of defect was demonstrated. As one example, Dickman v. Stewart Tenants Corp., 221 A.D.2d 158, describes an elevator defect not only much larger than the one half inch standard, but significantly larger than that claimed by plaintiff in her recently tailored affidavit. It also describes indisputable notice through a fair number of reported elevator incidents.

The Court does not accept Uplift's argument that it owed no duty to plaintiff. Because such issue is not determinative here, this point will not be belabored. Suffice it to say that Uplift's responsibilities for installation, maintenance, repair and monthly inspection of the elevator are sufficiently encompassing as to establish that it assumed the duties and control which would render it answerable to a third party under the relevant case law. Uplift's disclaimer language in its contract with Boulevard may affect its rights vis-a-vis Boulevard, but has no impact on the real world facts which impact its responsibilities toward users of the elevator.

Finally, because the summary judgment motions are granted, Boulevard's alternative request for

indemnification from Uplift is rendered moot. However, once again, in the interest of completeness, the Court will note that, had such application remained relevant, it would have been denied on its merits. Uplift's reference to its agreement with Boulevard shows that Boulevard did not preserve any right to indemnity from Uplift under these circumstances. At the very least, Boulevard certainly has no right to indemnification as a matter of law, in advance of a trial that affirmatively establishes negligence on the part of Uplift. In fact, Uplift has preserved certain indemnification rights against Boulevard, to the extent those do not run afoul of the provisions of GOL 15-108. (See Maintenance Agreement, Exhibit H to Boulevard's moving papers, paragraphs 7, 8 and 13).

Boulevard's final submission here, a reply affirmation dated March 30, 2010, shows Boulevard to be unaware of Uplift's "Affirmation in Partial Opposition" in which Uplift raises the defense of the contract provisions. However, the partial opposition was served by Uplift on March 24, 2010, and the motion was not submitted until March 31, 2010, so that Boulevard had an opportunity to seek time to address the arguments of Uplift on indemnification. In any event, the contractual terms seem clear to the Court.

By reason of the foregoing, Boulevard's motion for summary judgment dismissing the claims of plaintiff against it is granted in all respects. Boulevard's alternative application for indemnification from co-defendant Uplift is denied as moot. Uplift's motion for summary judgment dismissing the claims of plaintiff against it is similarly granted in all respects.

This constitutes the Decision and Order of the Court.

Dated: 7/9/10

MARK FRIEDLANDER, J.S.C.