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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 19

Justice

Index Number : 116522/2008
CASEY, BARBARA
vs
NY ELEVATOR & ELECTRICAL
Sequence Number : 007
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

decided per the memorandum decision dated May 8, 2013
which disposes of motion sequence(s) no. 007 and 008.

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

Dated: 5/8/2013

Saliann Scarpulla, J.S.C.

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: PART 19

----------X

BARBARA CASEY, as Administratrix of the Goods, Chattels and Credits which were of KIERNAN CASEY, deceased,

Plaintiffs,

-against-

NEW YORK ELEVATOR & ELECTRICAL CORPORATION and WINOKER REALTY CO., INC.,

Defendants.

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NEW YORK ELEVATOR & ELECTRICAL CORPORATION,

Third-Party Plaintiff,

-against-

BROADWAY 36TH REALTY, LLC,

Third-Party Defendant.

---------- X

Index No.:116522/2008
Submission Date: 2/5/2013

DECISION AND ORDER

For Plaintiff:
Gair, Gair, Conason, Steigman,
Mackauf, Bloom & Rubinowitz
80 Pine Street, 34th Floor
New York, NY 10005

For Defendant New York Elevator:
Babchik & Young, LLP
200 East Post Road, Suite 200
White Plains, NY 10601

For Third-Party Defendant:
Dillon Horowitz & Goldstein LLP
11 Hanover Square - 20th Floor
New York, NY 10005

For Defendant Winoker Realty Co., Inc.:
Law Office of Patrick J. Crowe
445 Broad Hollow Road - Suite 25
Melville, NY 11747

HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 007 and 008 are consolidated for disposition.

Plaintiff Barbara Casey ("Plaintiff") commenced this wrongful death action to recover damages for the death of Kiernan Casey ("Mr. Casey"). Defendant New York Elevator & Electrical Corporation ("NY Elevator") now moves (motion seq. no. 007) for leave to reargue this Court's July 19, 2012 decision and order. Defendant Winoker Realty Co., Inc. ("Winoker") also moves (motion seq. no. 008) for leave to reargue or renew the same decision and order.[1]

On September 12, 2008, Mr. Casey fell to his death in an empty freight elevator shaft at 29 West 36th Street, New York, NY ("the building"). Plaintiff alleges in her complaint that NY Elevator and Winoker were negligent in the inspection, maintenance, and repair of the freight elevator. NY Elevator performed two annual inspections of the freight elevator in 2006 and 2007. Winoker served as managing agent of the building, which was owned by third-party defendant Broadway 36th Realty, LLC ("Broadway").

After Mr. Casey's death, the NYC Department of Buildings ("DOB") inspected the freight elevator and issued an accident report that identified three defects which contributed to Mr. Casey's accident: (1) a broken spring in the cab's manual lever ("broken spring"); (2) a by-passed gate switch ("gate switch"), and (3) a by-passed fifth floor hoistway door interlock ("fifth floor interlock").

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[1] NY Elevator and Winoker have also filed notices of appeal on July 31, 2012 and August 15, 2012, respectively.

1. NY Elevator's Motion to Reargue

In my July 19, 2012 decision and order, I granted NY Elevator's motion for summary judgment to the extent that I dismissed Plaintiff's negligence claims based on the broken spring and the gate switch. However, I found that NY Elevator failed to make a *prima facie* showing that it did not owe a duty to Mr. Casey with respect to the fifth floor interlock. I also found that although "NY Elevator did not receive actual notice of this issue, NY Elevator has failed to establish that it did not negligently perform prior annual inspections, which would have revealed the fifth floor interlock issue."

In its motion to reargue, NY Elevator claims that I misapprehended the law and facts when I denied its motion for summary judgment dismissing Plaintiff's claim based on the fifth floor interlock. NY Elevator argues that the fifth floor interlock issue did not exist at the time that it conducted the 2006 and 2007 inspections, and that this issue only arose several days before Mr. Casey's accident. NY Elevator claims therefore that it: (1) had no duty with respect to the fifth floor interlock; and (2) lacked constructive notice because the fifth floor interlock issue did not exist when it inspected the freight elevator.

2. Winoker's Motion to Reargue or Renew

In my prior decision and order, I denied Winoker's motion for summary judgment dismissing any cross-claims for contribution and Broadway's cross-claim for contractual indemnification. I denied that portion of Winoker's motion on the basis that triable issues of fact exist as to whether Winoker acted negligently in causing Mr. Casey's accident.

In its motion to reargue or renew, Winoker claims that I misapprehended the law because Winoker does not have a legal duty to maintain the freight elevator as a managing agent of the building. Winoker also claims that it is not liable for any nonfeasance because it does not exercise exclusive control over the building. Finally, Winoker claims that I overlooked the facts when I denied its summary judgment motion dismissing Broadway's contractual indemnification claim.

Discussion

Pursuant to CPLR § 2221(d)(2), a motion to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep't 1992). Absent mistake on the Court's part, the Court must adhere to its original decision. *William P. Pahl Equipment Corp. v Henry Kassis*, 182 A.D.2d 22, 27-28 (1st Dep't 1992).

A motion to renew must present either new facts not offered on the prior motion or a change in the law that would alter the prior determination. CPLR § 2221(e). A motion to renew must also contain reasonable justification for the failure to present such facts on the prior motion. *Henry v. Peguero*, 72 A.D.3d 600, 602 (1st Dep't 2010).

1. NY Elevator's Motion to Reargue

In its motion to reargue, NY Elevator claims that the fifth floor interlock issue did not exist at the time it inspected the freight elevator in 2006 and 2007, and therefore NY Elevator has no duty with respect to the interlock and lacked constructive notice. For the

reasons set forth below, I deny NY Elevator's motion to reargue based on its failure to demonstrate that I misapprehended the facts or law on its summary judgment motion.

First, NY Elevator fails to show that I overlooked or misapprehended the facts in determining its motion for summary judgment. In the underlying motion, NY Elevator failed to submit sufficient evidence to establish when the fifth floor interlock issue arose. At his deposition, Koch testified that he never reported any problem with the fifth floor interlock to Winoker, and that he was not aware of any work performed on that interlock during his tenure as superintendent. This testimony is insufficient to prove that the fifth floor interlock issue arose only several days before the accident. Koch never indicated in his testimony that he went up to the fifth floor several days before the accident and observed the fifth floor interlock functioning properly.

In addition, NY Elevator's submission of the DOB notice of violation dated February 20, 2008 does not demonstrate that the fifth floor interlock was functioning properly at that time. Although the DOB must inspect interlocks under NYC Administrative Code § 27-999, the notice itself does not indicate whether the interlocks were inspected.

Second, NY Elevator fails to show that I overlooked or misapprehended the law in my prior decision on its summary judgment motion. Contrary to its claims, NY Elevator owed a duty of care with respect to the 2006 and 2007 annual inspections that it performed on the freight elevator. As the First Department found in its recent decision regarding this

action, "even in the absence of a contract, an elevator company can be liable in tort, where it negligently services and/or inspects an elevator." *Casey v. New York Elevator & Electrical Corp.*, 82 A.D.3d 639, 640 (1st Dep't 2011).

In my prior decision, I found that NY Elevator failed to demonstrate that it conducted the 2006 and 2007 annual inspections without negligence. Although NY Elevator submitted its annual inspection reports from 2006 and 2007 which list a general "satisfactory" result, those reports do not indicate whether NY Elevator conducted any inspection of the fifth floor interlock. In addition, NY Elevator did not submit any testimony from its inspectors to demonstrate that a proper inspection of the freight elevator was performed.

For the foregoing reasons, defendant NY Elevator's motion for leave to reargue the Court's July 19, 2012 decision and order is denied.

2. Winoker's Motion to Reargue or Renew

In my prior decision, I found that triable issues of fact exist as to whether Winoker acted negligently in causing Mr. Casey's accident. In its motion to reargue, Winoker contends that I overlooked the law by failing to find that it does not owe a duty to maintain

the freight elevator as the managing agent of the building.[2] However, a managing agent, such as Winoker, is liable for any affirmative acts of negligence regardless of whether it exercises exclusive control over the premises. *Trombetta v. 775 Park Ave., Inc.*, 262 A.D.2d 147, 147 (1st Dep't 1999); *German v. Bronx United in Leveraging Dollars, Inc.*, 258 A.D.2d 251, 253 (1st Dep't 1999).

The deposition testimony submitted with Winoker's underlying motion raised issues of fact as to whether Winoker acted negligently with regards to the inspection, maintenance, or repair of the freight elevator. Francine Razzo-West, Winoker's property manager, testified that she made the decision to delay the freight elevator inspection, and that Winoker was responsible for maintaining the freight elevator in code compliance. I therefore adhere to my original decision denying Winoker's summary judgment motion dismissing any cross-claims for contribution.

In regards to Broadway's contractual indemnification against Winoker, I also adhere to my original decision that denied Winoker's motion for summary judgment dismissing that claim. Winoker failed to address Broadway's contractual indemnification claim in its original motion papers, and offers no excuse for raising new arguments now.

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[2] I construe Winoker's current motion as a motion to reargue only. Winoker does not present any new facts or a change in law as required on a motion to renew. I also exercise my discretion to consider Winoker's motion to reargue even though it is technically untimely by four days under CPLR § 2221(d)(3). *Garcia v. Jesuits of Fordham, Inc.*, 6 A.D.3d 163, 165 (1st Dep't 2004); *Itkowitz v. King Kullen Grocery Co.*, Inc., 22 A.D.3d 636, 638 (1st Dep't 2005).

A motion to reargue is not designed to allow parties "to present arguments different from those originally asserted." *William P. Pahl Equipment Corp.*, 182 A.D.2d at 27.

Accordingly, defendant Winoker Realty Co.'s motion for leave to reargue or renew the Court's July 19, 2012 decision and order is denied.

In accordance with the foregoing, it is hereby

ORDERED that defendant New York Elevator & Electrical Corporation's motion for leave to reargue the Court's July 19, 2012 decision and order is denied; and it is further

ORDERED that defendant Winoker Realty Co.'s motion for leave to reargue or renew the Court's July 19, 2012 decision and order is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York

May 9, 2013

ENTER:

Saliann Scarpulla, J.S.C.