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| Polanco v Bronx 360 Realty LLC |
| 2015 NY Slip Op 32382(U) |
| November 20, 2015 |
| Supreme Court, Bronx County |
| Docket Number: 303568/11 |
| Judge: Norma Ruiz |
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**NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-22**

HECTOR POLANCO,

Plaintiff,

-against

BRONX 360 REALTY LLC, UPLIFT ELEVATOR CORP.
T.U.C. MANAGEMENT COMPANY, INC. and
PRC MANAGEMENT LLC,

Defendants.

**MEMORANDUM
DECISION/ORDER**
Index No.: 303568/11

HON. NORMA RUIZ

Defendants, Bronx 360 Realty LLC ("Bronx 360") and T.U.C. Management Company, Inc. ("TUC."), move for an order, pursuant to CPLR§3212, granting summary judgment in their favor, dismissing the complaint and all cross-claims against them, or, in the alternative, conditional summary judgment over and against co-defendant Uplift Elevator Corp. ("Uplift") on their cross-claim for common law indemnity. Plaintiff cross-moves, pursuant to CPLR§3212, for partial summary judgment against Bronx 360 and TUC. on the issue of liability. The motion and cross-motion are decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained by him on June 22, 2010, as a result of defendants' failure to maintain an elevator located at 940 Fox Street, Bronx, New York, in a safe condition.

The facts, as culled from the pleading, transcripts of deposition testimony, and exhibits, are as follows: Bronx 360 was the owner/lessor and TUC the managing agent of the premises 940 Fox Street, Bronx, New York ("the building"). The building has five floors and one

elevator, which services all floors. Jimmy Vargas (“Vargas”) was the building superintendent for thirty-seven years. Vargas was also the superintendent of four other buildings in the Bronx. If Vargas was busy, he would go to the building three times a week. Vargas’ duties for the building were to check the boilers in the morning, check the elevators, make sure the building was clean and do repairs in the apartments.

Vargas would notify the office at the end of his morning rounds whether the boiler and elevator were working. Vargas’ inspection of the elevator consisted of pushing the call button in the lobby and confirming that the elevator arrives at the lobby and the elevator door opens. Vargas did not maintain any written records regarding his daily inspections of the elevator or the building. If there was a problem with the elevator, Vargas’ custom and practice was to notify the office, of which defendant would in turn call the elevator company, as Vargas had no direct communication with the elevator company. If a tenant had a problem with the elevator, the tenant would call the office. The office would then contact Vargas and have him check to confirm that the elevator was indeed malfunctioning. If the elevator was malfunctioning, Vargas would notify the office and post signs to that effect. These signs, which directed the use of stairwells because the elevator was out of order, would be placed on the outer door of the elevator (the shaftway door) in the lobby and in the window at the entrance to the building. Vargas did not put any signs on the upper floors. Sometimes these signs were torn down, removed or vandalized and Vargas would have to put them back up.

Vargas testified that he:

- did not recall any problems with the elevator in the one or two months preceding plaintiff’s accident;
- did not recall whether the elevator had been taken out of service during the two years

prior to plaintiff's accident;
did not recall whether any work had been performed on the elevator during the same two year period;
did not recall receiving any complaints about the elevator for the same two year period;
did not recall if he ever posted a sign regarding the elevator being out of order within two years prior to plaintiff's accident; and
did not recall if the "out of order elevator sign" was posted on the weekend, or week,

plaintiff was hurt.

Vargas's deposition testimony was equivocal and it is unclear whether his testimony referred to his memory or a lack of thereof.

According to plaintiff's deposition testimony, he was a courier for Federal Express ("Fedex"). On June 22, 2010, he was scheduled to make a delivery to a tenant in the building located on the fifth floor. This tenant "buzzed" him into the building. When he entered the building he saw no workmen (*i.e.*, porters, supers, or any body in any capacity). Plaintiff did not notice any posted signs indicating that there was any issue with the elevator, or work being done. He proceeded to the building elevator, which had a single door which slides across, and when viewed from the lobby floor, opens from left to right. Plaintiff pushed the lobby elevator button and entered the elevator. The elevator door closed properly behind him and opened when he reached the fifth floor. He made his delivery, returned to the elevator, pressed the call button to summon the elevator. The elevator arrived at the fifth floor, at which point he entered, pushed the button to go down to the lobby, the elevator door closed and the elevator started to descend towards the lobby. After about six or seven seconds the elevator stopped, after descending an indeterminate number of floors. The elevator remained stopped for about two seconds, reversed course and started to climb back up. While it was stopped, the elevator car was shaking. The car then traveled a couple of seconds before stopping again. When the car stopped, there was a

small gap in the door. Plaintiff tried to open it about two or four inches, which allowed him to see that he was between floors. The door remained open in that manner for about ten seconds, after which it closed on its own. Plaintiff tried to call his service manager from inside the elevator but could not get service. He was eventually able to reach someone by using his handheld "power pack" device that Fedex uses. Plaintiff was instructed to wait for the doors to open. He pressed the emergency call button (alarm) inside the elevator for approximately five seconds, but did not hear any sound. He yelled for help, but no one heard him. The elevator was stuck between floors for about a minute. It then began to descend, finally coming to rest at the first floor/lobby. Once the elevator reached the lobby, the door opened "almost completely." Plaintiff attempted to step out of the elevator cab which was level with the lobby floor. Plaintiff then took two steps toward the door (the first with his right foot, the second with his left foot), when he heard a loud "bang," after which the door started to close on him very rapidly. As the door began to close, plaintiff had one foot out of the elevator. The door then hit his left foot causing him to lose his balance. Plaintiff tried to reach for the rail, but fell back inside the cab. The elevator door continued to close, but plaintiff's foot was now stuck outside the cab. Plaintiff could not determine whether the door that hit his left foot was the door to the elevator, or the door to the shaftway. Before plaintiff could clear his foot from the path of the door, which is about the width of his foot, the elevator started to ascend. Plaintiff believes that his foot came into contact with the bottom of the next floor. As the elevator began its ascent, his body was being propelled toward the floor of the cab, however plaintiff was able to regain his balance and pull his foot out from the path of the door and inside the cab. The door then closed completely and the elevator again started to ascend within the shaft. Plaintiff could not tell where the cab

was when it stopped, but after one to two seconds, the cab began to descend. When the cab came to a stop on the second floor, a person wearing an Uplift Elevator shirt whom he believed to be an elevator technician, helped him out of the elevator. Plaintiff estimated that it took about two or three minutes from the time he got on the elevator until he was helped off by a technician.

Bronx 360 issued a purchase order, dated June 14, 2010, to Uplift, which stated, **“Elevator down at 940 Fox Street.”** In response to the order Uplift sent Thomas O’Brien (“O’Brien”) to the building. According to O’Brien’s testimony, he was an “Uplift Field Supervisor” who had twenty six years of experience as an elevator repair man. As of the date of the accident, O’Brien testified that he had been to the building approximately twelve times to make repairs. Although he did not specify the exact dates of those visits, he explained that the work fell into two categories. The first was replacing old equipment. The second was repairing tenant vandalism which consisted of: (1) “things being smashed”; (2) “doors being wrenched out of their tracks”; (3) “trash being jammed in the door equipment”; and (4) “human waste of both varieties.”

O’Brien further testified that the elevator at the building was a “Single Speed AC, automatic operation,” with a single panel slide door. As part of this elevator design, there are certain safety mechanisms which prevent the elevator from moving when the door is open. These devices are a “gate switch” and a “door close/door open limit.” According to O’Brien, these devices basically communicate with the elevator controller regarding the status of the door to prevent the cab’s running with the door open. However, the cab might still move if the door is open less than half an inch. O’Brien was asked whether the elevator could operate in a situation where the outer door was closed, but the inner door was blocked by something

preventing it from closing. O'Brien responded, "No. Not in any form of normal operation."

O'Brien was at the building responding to a call that the elevator car was "not holding the position," meaning: the elevator would not necessarily respond to a call for it on one floor but would instead arrive at a different floor. As part of the service call, no work was to be done on the elevator cab itself, nor was there a conversation with anyone from the building regarding work that needed to be done. On the day of plaintiff's accident, it was O'Brien's third day working at the building. When he arrived at the building, he saw at least one elevator "out of order" sign posted on the wall alongside the elevator in the lobby. O'Brien did not check whether signs had been placed anywhere else. He made no effort to notify people that the elevator was out of order (*i.e.*, placement of signs, accordion gates or cones), as this was not a high traffic building with multiple elevators and it was the co-defendants responsibility to place signs. Moreover, the elevator doors were not to be open to warrant the use of such safety devices.

On the day of the accident, O'Brian had been working alone in the control room, located on the roof, which houses the control panel. At the time he had been there to replace relay coils. One of the functions of these coils is to facilitate the movement of the elevator. In adjusting and testing them the elevator would have to be running. However, in this case Mr. O'Brien testified that he switched off the call buttons and disabled the doors in order to prevent access to the cab during his work on the coils. In other words, when the coils were changed the elevator would be taken out of service. During the testing, O'Brien would need to run the elevator up and down but residents would not have access because the call buttons were switched off.

O'Brien was at the building for about three hours when plaintiff's accident occurred. During these three hours he had been adjusting the stepping control system. While working on the stepping control system, the door was "locked down," which means the doors do not open or close. When the door is "locked down" power needs to be applied to the door in order to open it. In order to prevent the door from opening and closing while he was testing the "stepping control system"(i.e this "stepper" is a mechanical unit which "tells the elevator what floor it's at, it tells us when it's approaching its destination"), O'Brien disabled the relay that opens and closes the door. This relay had been disabled for days. He did this by placing a folded piece of paper in the relay to "physically block" it, to prevent it from making the electrical contact close. Once the circuit is blocked the elevator can be freely moved up and down and the door will not open. Likewise, the call buttons would not work, as the switch was off. O'Brien was controlling the movement of the elevator from the motor room, as the elevator itself was out of service for a few days.

O'Brien first became aware that something had occurred when he was in the control room and heard what sounded like someone yelling from the elevator shaft. About five or ten minutes prior to the incident, the elevator was running with the cab moving up and down from floor to floor. Once he heard the yelling, O'Brien then took the paper out of the circuitry, opened the doors and killed the power so the door could not re-close. From the control room O'Brien could look down and see the cab in the shaftway, on one of the lower floors. O'Brien started to run down the stairs, looking at each floor to see where it landed. Ultimately, he found that the car had landed "off level" on the second floor. He discovered a man in a "FedEx" or "UPS" delivery uniform, lying on the floor of the elevator, with the door to the elevator only partially open.

O'Brien could not explain how plaintiff managed to get into the elevator. When asked "If someone's ankle was in the door of an elevator, should that elevator go up or down?" O'Brien answered "No." Following plaintiff's accident O'Brien conducted an inspection of the elevator, including the door lock and found them to be working properly. However, when O'Brien removed the piece of paper from the relay to open the door, he did not notice whether the door was open or closed. O'Brien was further asked whether it was possible for the door of the elevator to be pried open when the piece of paper was still in the circuit relay. While acknowledging it was possible, he testified that this was not what happened, because if the elevator door had been pried open, the elevator would have stopped immediately.

Defendant Bronx 360 and TUC demonstrated their *prima facie* entitlement to summary judgment as a matter of law, that they did not have actual or constructive notice of the condition that caused plaintiff's accident. O'Brien testified that Uplift was called to service the elevator car because it was "not holding the position." No complaints were made that the elevator door would open while the elevator cab was moving. *Gjonaj v. Otis El. Co.*, 38 A.D.3d 384 (1st Dept. 2007); *Gutierrez v. Broad Financial Center, LLC*, 84 A.D.3d 648 (1st Dept. 2011). Further, any claim of notice of a defective condition must call attention to a specific defect alleged. *Gjonaj v. Otis El. Co., supra*; *Gutierrez v. Broad Financial Center, supra*.

In opposition to the motion, plaintiff proffered no expert testimony that Bronx 360 or TUC had notice of the specific defect that caused plaintiff's accident. *Isaac v. 1515 Macombs, LLC*, 84 A.D.3d 457 (1st Dept. 2011); *Metz v. 509 Owners LLC*, 82 A.D.3d 426 (1st Dept. 2011).

Accordingly, the motion by defendants Bronx 360 and TUC for summary judgment is granted, and the complaint is **dismissed against Bronx 360 and TUC, only**. Plaintiff's cross-

motion for summary judgment is denied.

In paragraph "4" of the moving affirmation of his cross-motion, plaintiff asks for summary judgment against Uplift if the Court awards summary judgment to Bronx 360 and TUC. The Court notes that plaintiff's notice of cross-motion did not seek summary judgment against Uplift. While the doctrine of *res ipsa loquitur* may have application against Uplift, (*see, Stewart v. World El. Co. Inc.*, 84 A.D.3d 491 [1st Dept. 2011]), a plaintiff is rarely awarded summary judgment based upon the doctrine. *Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203 (2006), and the Court declines to address plaintiff's request for such relief.

The foregoing constitutes the Decision and Order of the Court.

Dated: 11/20/15



NORMA RUIZ, J.S.C.