Hosein v CDL W.45th St., LLC
2015 NY Slip Op 32470(U)
December 3, 2015
Supreme Court, Bronx County
Docket Number: 306671/2012
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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SEETA HOSEIN, JAMEEL HOSEIN, BELKIS MORALES, CLAIRE BAPTISTE, SHAVONNE TUBBS, KEM WILLIAMS, JACQUELINE THOMAS, FRANCIS THOMAS, CHANDRALAYKA DHANNA, SURENDRANAUTH DHANESAR, LYNETTE BASCOM and MAURICE BASCOM,

Plaintiffs,

- against -

CDL WEST 45TH STREET, LLC, FUJITEC AMERICA, INC. ROBERT FITZGERALD and SEAN KENNEDY,

Defendants.

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DECISION AND ORDER

Index No. 306671/2012

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated April 27, 2015 of defendant CDL West 45th Street, LLC and the affirmation, affidavit and exhibits submitted in support thereof; plaintiffs' notice of cross-motion dated June 24, 2015 and the affirmation, exhibits and memorandum of law submitted in support thereof; the affirmation in opposition dated July 13, 2015 of defendant Fujitec America, Inc. and the affidavit and exhibits submitted therewith; the affirmation in opposition dated July 20, 2015 of defendant Fujitec America, Inc. and the exhibits submitted therewith; plaintiffs' affirmation in reply dated September 23, 2015 and the affidavit and exhibits submitted therewith; the affirmation in opposition dated September 30, 2015 of defendant CDL West 45th Street, LLC; plaintiffs' affirmation in reply dated October 8, 2015 and the exhibits submitted therewith; the affirmation in reply dated October 14, 2015 of defendant CDL West 45th Street, LLC; the affirmation in sur-reply dated October 20, 2015 of defendant Fujitec America, Inc. and the affidavit and exhibits submitted therewith; the affirmation in sur-reply

dated October 29, 2015 of defendant Fujitec America, Inc.; and due deliberation; the court finds:

Plaintiffs are occupants of an elevator that suddenly dropped several floors from the thirty-first floor in a hotel. Given the plaintiffs' differing testimony, the drop was anywhere from six to ten floors. Defendant owner CDL West 45th Street, LLC ("CDL") moves for summary judgment on its cross-claims against the elevator maintenance contractor, defendant Fujitec America, Inc. ("Fujitec"), for common-law and contractual indemnification.

The evening before plaintiffs' accident, the subject elevator was taken out of service and repairs made due to what the responding Fujitec mechanic characterized as "clipping," where contact occurs during travel between the car and the interlock assembly on the hoistway doors (the outer doors found on each individual floor), which causes an abrupt electrical shutdown of the car. The responding mechanic found that clipping occurred on the second and sixteenth floors. He adjusted the clutch on the elevator and the pickup roller assemblies on the second and sixteenth floors and returned the elevator to service. When he responded to the subject occurrence the next day, he determined that clipping had occurred at floor levels somewhere "in the twenties" and adjusted the assemblies on those floors.

The party seeking contractual indemnification must establish that it was not negligent and that the indemnification provision applies. *See Aleman v. RFR/SF State St., LP*, 2011 NY Slip Op 32323(U) (Sup Ct N.Y. County Aug. 19, 2011). "[The party] seeking [common-law] indemnity must prove not only that it was not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law." *Correia v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60, 65, 693 N.Y.S.2d 596, 600 (1st Dep't 1999).

As to CDL's negligence, "[a]n owner of property has a nondelegable duty to maintain its property in a reasonably safe condition, taking into account the foreseeability of injury to others." *Fuller-Mosley v. Union Theol. Seminary*, 10 A.D.3d 529, 530, 782 N.Y.S.2d 16, 18 (1st Dep't 2004); *see also Rogers v. Dorchester Associates*, 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973). "A plaintiff alleging injury caused by a dangerous condition must show that the defendant either created the condition . . . or failed to remedy it, despite actual or constructive notice thereof . . . [and] that the defendant's negligence was a proximate cause of the injuries." *Haseley v. Abels*, 84 A.D.3d 480, 482, 922 N.Y.S.2d 393, 395 (1st Dep't 2011) (citations omitted). The fact that the owner may have contracted responsibility for maintenance to another entity does not relieve a plaintiff of the obligation of demonstrating the owner's actual or constructive notice of the alleged defective condition and failure to remedy. *See Camaj v. East 52nd Partners*, 215 A.D.2d 150, 626 N.Y.S.2d 110 (1st Dep't 1995). Therefore, CDL has the initial burden of demonstrating that it did not create the condition or have actual or constructive notice of it. *See Ceron v. Yeshiva Univ.*, 126 A.D.3d 630, 7 N.Y.S.3d 66 (1st Dep't 2015).

There is no serious argument that CDL created the condition. There is also no evidence of CDL's notice, actual or constructive, of "clipping" in the subject elevator until approximately twelve hours before plaintiffs' accident. The records demonstrate that CDL notified Fujitec of the need for maintenance on the evening before plaintiffs' accident, *see Isaac v. 1515 Macombs, LLC*, 84 A.D.3d 457, 922 N.Y.S.2d 354 (1st Dep't), *lv denied*, 17 N.Y.3d 708, 954 N.E.2d 1178, 930 N.Y.S.2d 552 (2011), and that Fujitec repaired the problem and returned the elevator to service. CDL has demonstrated the lack of active negligence on its part and that Fujitec undertook comprehensive responsibility for repair and maintenance of the elevator. *See Linares v. Fairfield Views, Inc.*, 647 N.Y.S.2d 194, 231 A.D.2d 418 (1st Dep't 1996), *lv denied*, 89

N.Y.2d 978, 678 N.E.2d 1351, 656 N.Y.S.2d 735 (1997).

CDL relies on the mechanic's testimony that the condition was a "recurring" one. It is apparent from the mechanic's testimony that the "recurrence" to which he refers are the two instances of clipping occurring within approximately twelve hours of each other, the second being that claimed to have caused the subject accident. A "recurring condition" subjecting a landowner to liability and relieving the plaintiff of the burden of proving actual notice must be "a dangerous recurring condition that was *routinely* left unaddressed by defendant." *Alamo v. New York City Hous. Auth.*, 118 A.D.3d 484, 484, 987 N.Y.S.2d 139, 139 (1st Dep't 2014) (emphasis added); *Tompa v. 767 Fifth Partners, LLC*, 113 A.D.3d 466, 979 N.Y.S.2d 288 (1st Dep't), *lv denied*, 24 N.Y.3d 903, 995 N.Y.S.2d 711, 20 N.E.3d 657 (2014). The proof here demonstrates that there was no notice of clipping until the evening before the accident, the condition was confined to the second and sixteenth floors, CDL promptly notified Fujitec of the condition, and the condition was promptly addressed and corrected by Fujitec upon discovery.

As to the applicability of the indemnification provision between CDL and Fujitec, the 2006 Elevator Full Preventative Maintenance Agreement[1] contains the following provision:

> [Fujitec] agrees to indemnify and hold [CDL] . . . harmless for losses, liabilities, claims or damages . . . related to any act or failure to act by [Fujitec] or in any way to the provision of the Services or the equipment to [CDL] . . . except to the extent such liabilities are the result of the negligence or willful misconduct of the Owner.

As CDL demonstrated that it was not negligent, and as Fujitec assumed a comprehensive duty to service and maintain the elevators under the Agreement, CDL's liability arises solely as a function of its non-delegable duty to maintain the premises. *See Camaj*, *supra*; *Linares*, *supra*. Thus, CDL is entitled to conditional summary judgment on its cross-claim against Fujitec for

[1] The court disregards, for present purposes, the fact that the agreement is between CDL and "Fujitec, New York" rather than defendant "Fujitec America, Inc."

contractual indemnification, even in advance of any affirmative finding with respect to Fujitec's negligence. *See Ortiz v. Fifth Ave. Bldg. Assocs.*, 251 A.D.2d 200, 674 N.Y.S.2d 360 (1st Dep't 1998), rea*rg denied*, 1998 N.Y. App. Div. LEXIS 11458 (1st Dep't Oct. 20, 1998).

Fujitec argues that the Agreement did not cover the initial installation of the clutch, because such installation was governed by the separate 2011 Proposal. Even if this is true, the 2011 Proposal for the installation of the clutches also contained an indemnification provision:

> [Fujitec] shall indemnify [CDL] from liability attributable to injury to persons or damage to property caused by this work, but only if and to the extent such liability results from the negligence of [Fujitec].

In any event, after the initial installation of the clutch, the clutch became a part of the elevator capable of being "adjusted" or "repaired" pursuant to the Emergency Call-Back Service provisions of the Agreement, like any other component of the elevator. The servicing performed the evening before the accident was categorized as "operational callback" in Fujitec's maintenance records. Therefore, whether the accident may be attributed to a deficiency in the installation of the clutch or the maintenance of the elevator, an indemnification provision applies in favor of CDL. Fujitec failed to raise an issue of fact as to the scope of its maintenance responsibilities or CDL's negligence.

As to Fujitec's negligence, CDL relies in part on deposition testimony of the mechanic, purportedly admitting negligence. The testimony responded to a hypothetical question about failing to perceive an elevator clearance issue, and thus cannot constitute an admission. The mechanic did not "'manifest[] an adoption or belief' in the truth of" plaintiffs' hypothetical, *Bondy & Schloss v. Strategic Dev. Partners LLC*, 82 A.D.3d 615, 615, 918 N.Y.S.2d 722, 723 (1st Dep't 2011), *citing Addo v. Melnick*, 61 A.D.3d 453, 877 N.Y.S.2d 261 (1st Dep't 2009), as elsewhere he testified he believed his repairs the day before the accident to be appropriate and adequate.

Furthermore, the mechanic's purported testimony that the initial installation of the clutch was negligent does not support summary judgment. By its terms the question eliciting such testimony was ambiguous as to whether it referred to initial installation or subsequent adjustment, and the mechanic's answer was confined to the second and sixteenth floors. Thus, under the facts and circumstances of this action, the mechanic's response was neither unambiguous nor unqualified, and cannot constitute an admission. See *Weinroth v. Swid*, 267 A.D.2d 159, 700 N.Y.S.2d 439 (1st Dep't 1999); *CIT Group/Business Credit, Inc. v. Renee Int'l, Inc.*, 265 A.D.2d 251, 697 N.Y.S.2d 16 (1st Dep't 1999).

Even if the testimony constituted an admission, CDL's proof does not establish Fujitec's negligence as a matter of law. Because, as movant explained, each floor has its own independent roller assemblies, the fact that clipping was found on the second and sixteenth floors does not mean that clipping on any other floor could have or should have been assumed or anticipated. The incident at issue here involved neither the second nor the sixteenth floor.

When the mechanic responded the day before the subject incident, he fixed the clipping issue by adjusting both the clutch on the elevator and the roller assemblies at the individual floors. In response to the subject incident, he fixed the clipping issue by adjusting the assemblies. Therefore, it is apparent that clipping may occur because of the elevator clutch, the roller assembly at a particular floor, or a combination of both, and therefore that clipping at one floor does not necessarily place the owner on notice of the condition giving rise to clipping on another floor. The record does not establish that clipping is caused solely by the placement of the clutch. If the initial installation of the clutch was negligent, and placement of the clutch is the primary indicator of whether clipping should occur, then clipping should have occurred immediately or at least at more than only two of over 52 floors serviced by the elevator. In the absence of more

definite proof, it would be speculation to attribute the accident solely to the installation and/or maintenance of the clutch, as urged by plaintiffs.

Furthermore, CDL points to testimony that clipping should cause an abrupt shutdown; however, that is not the only operational problem at issue here, as the claim is that the stop was preceded by an uncontrolled drop of significant height of at least several floors. CDL did not point to any proof highlighting this as a risk or effect associated with clipping or that either CDL or Fujitec had been made aware of a problem involving the sudden drop of the elevator. Furthermore, if, after the accident, clipping was found at floors in the twenties, and all plaintiffs agreed that the drop started at the thirty-first floor, the elevator was already dropping before it encountered any clipping problem. Accordingly, as CDL failed to establish Fujitec's negligence, it failed in its *prima facie* burden with respect to its claim for common-law indemnification.

Plaintiffs cross-move for summary judgment on the issue of the liability of defendants CDL and Fujitec. The cross-motion is untimely without a showing of good cause, *see Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004), and as against Fujitec, a non-moving party, violates CPLR 2215. "A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion." *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281, 824 N.Y.S.2d 244, 246 (1st Dep't 2006), *appeal dism*, 9 N.Y.3d 862, 872 N.E.2d 878, 840 N.Y.S.2d 765 (2007). This is because a court deciding a motion for summary judgment may search the record of the timely-made motion and grant summary judgment to any other party so entitled without a cross-motion. *See* CPLR 3212(b). "The court's search of the record, however, is limited to those causes of action or issues that are the

subject of the timely motion." *Filannino*, 34 A.D.3d at 281, 824 N.Y.S.2d at 246. Furthermore, the favorable treatment accorded by *Filannino* is extended only to true cross-motions as defined in CPLR 2215, and not to purported "cross-motions" against a non-moving party. *See Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 978 N.Y.S.2d 13 (1st Dep't 2013); *Gaines v. Shell-Mar Foods, Inc.*, 21 A.D.3d 986, 801 N.Y.S.2d 376 (2d Dep't 2005).

Because CDL's motion for summary judgment with respect to its cross-claim for common-law indemnification necessarily required a showing as to the negligence of both CDL and Fujitec, plaintiffs' application for relief against them on those grounds may be considered. *See* CPLR 3212(b); *Admiral Indem. Co. v. Chernoff*, 116 A.D.3d 635, 985 N.Y.S.2d 225 (1st Dep't 2014). Plaintiffs' application, insofar as premised upon *res ipsa loquitur*, cannot be considered, as *res ipsa loquitur* was not a subject of CDL's motion. *See Filannino*, *supra*.

To the extent plaintiffs adopted CDL's interpretation of the concept of recurrence in the context of premises liability and similarly relied on the mechanic's purported admissions to establish Fujitec's negligence, such arguments are rejected as per the above discussion.

To the extent plaintiffs' cross-motion against CDL is premised upon CDL's purported attorney admissions in the course of presenting its own motion for summary judgment, plaintiffs are reminded that in the context of summary judgment, an attorney's affirmation is not of evidentiary value, *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980), and no case cited by plaintiffs held otherwise.[2] As movants, plaintiffs are not relieved of their burden of "tendering sufficient evidence to eliminate any material issues of fact from the case," the failure of which mandates denial of the cross-motion. *Winegrad v. City*

[2] In *Burdick v. Horowitz*, 56 A.D.2d 882, 392 N.Y.S.2d 666 (2d Dep't 1977), the one case involving summary judgment, defense counsel affirmatively and unambiguously stipulated on the record at a deposition that defendant controlled the area where plaintiff's accident occurred; however, the court still found that plaintiff was not entitled to summary judgment on the issue of control of the accident site.

of New York, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643-44, 487 N.Y.S.2d 316, 317-18 (1985) (internal citations omitted). Movants cannot succeed merely by pointing to gaps in another party's proof; they must affirmatively demonstrate the absence of triable issues of fact. *See e.g. Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 887 N.Y.S.2d 64 (1st Dep't 2009). Even if counsel's affirmation may be considered a series of admissions by CDL, such admissions do not establish CDL's negligence as a matter of law for the reasons stated above.

Accordingly, it is

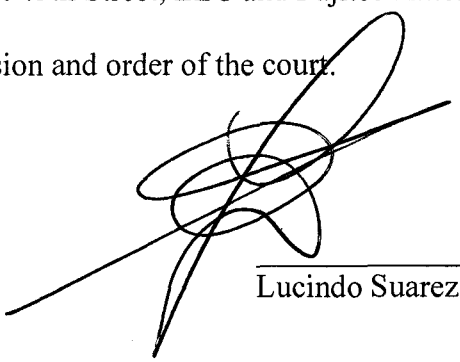
ORDERED, that the motion of defendant CDL West 45th Street, LLC for summary judgment on its cross-claims against defendant Fujitec America, Inc. for common-law and contractual indemnification is granted to the extent of conditionally granting the motion as to the cross-claim for contractual indemnification in the amount of any judgment recovered by plaintiffs in the main action, as well as the amount of attorneys' fees, costs and expenses incurred in the defense of the main action, said amount to be determined at the time of trial or other disposition of the action; and it is further

ORDERED, that the Clerk of the Court is directed to enter conditional judgment in favor of defendant CDL West 45th Street, LLC on its cross-claim against defendant Fujitec America, Inc. for contractual indemnification, as set forth above; and it is further

ORDERED, that the cross-motion of plaintiffs for summary judgment on the issue of the liability of defendants CDL West 45th Street, LLC and Fujitec America, Inc. is denied.

This constitutes the decision and order of the court.

Dated: December 3, 2015



Lucindo Suarez, J.S.C.