Maldonado v Vincon Elec. Co., Inc.
2018 NY Slip Op 31562(U)
July 10, 2018
Supreme Court, Suffolk County
Docket Number: 14-11328
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 14-11328
CAL. No. 16-01996OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice Supreme Court

MOTION DATE 4-4-17 (003)
MOTION DATE 4-19-17 (004)
ADJ. DATE 11-16-17
Mot. Seq. # 003 - MG
004 - MG; CASEDISP

---X

DAVID MALDONADO,

Plaintiff,

- against -

VINCON ELECTRIC COMPANY, INC., SCHULMAN CONSTRUCTION, INC., SHULMAN INDUSTRIES, INC., and NOUVEAU ELEVATOR INDUSTRIES, INC.,

Defendants.

---X

NAPOLI SHKOLNIK, PLLC
Attorney for Plaintiff
400 Broad Hollow Road, Suite 305
Melville, New York 11747

BELLO & LARKIN
Attorney for Defendant Vincon Electric Co.
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

REBORE, THORPE & PISARELLO
Attorney for Defendant Nouveau Elevator
500 Bi County Blvd., Suite 214-N
Farmingdale, New York 11735

Upon the following papers numbered 1 to 72 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 42; 43 - 65; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 66 - 68; Replying Affidavits and supporting papers 69 - 70; 71 - 72; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Vincon Electric Company, Inc. and the motion by defendant Nouveau Elevator Industries, Inc. are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Vincon Electric Company, Inc. for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion by defendant Nouveau Elevator Industries, Inc. for summary judgment dismissing the complaint and cross claims against it is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff David Maldonado on September 22, 2010, when he was a passenger on an elevator that dropped, causing him to fall. Plaintiff alleges that defendant Vincon Electric Co. Inc. ("Vincon") was negligent in, among other things, its operation, control, care, custody, charge, supervision, management, inspection, upkeep, upgrading, and maintenance of the premises. Plaintiff alleges that defendant Nouveau Elevator Industries, Inc. ("Nouveau") was negligent in, among other things, its maintenance of the subject elevator.

According to the deposition testimony of plaintiff, he was employed as a physical rehabilitation aide in the Orzac Division of Franklin Hospital. During his usual 8:00 a.m. to 4:00 p.m. shift, he was responsible for transporting patients between their rooms and the physical therapy gym on the ground (basement) floor using the subject elevator. Plaintiff testified that he had experienced the elevator breaking down or "misleveling" approximately 10 times before the accident and complained to his supervisor, who would notify the hospital's engineering department. Alternatively, Plaintiff stated that he never experienced the elevator dropping and never complained to his supervisor about that.

Plaintiff believed Vincon was on the premises on the day of the incident, as he recalled seeing two workers with neon orange and green shirts putting wires in the basement ceiling when he entered the building for his shift. He testified that he also saw a man wearing a black uniform with a "Nouveau" tag, servicing the elevator and working in the room containing the elevator's wires. The elevator door was open and there was a "caution" sign in front of it. Plaintiff stated that on the day of the incident, the lights in the basement flickered more than once and that he had used the subject elevator approximately 10-12 times before the incident occurred.

Plaintiff stated that the incident occurred after he boarded the elevator on the ground floor, intending to go to the second floor to retrieve a patient. Plaintiff testified that the elevator moved past the first floor and was heading to the second floor when the lights went out and the elevator fell back to the first floor. Plaintiff stated that he was thrown two to two and a half feet into the air, and then fell to the elevator floor, sustaining injuries. The lights came on after the elevator stopped at the first floor, and then the doors open. Plaintiff further testified that after he crawled out of the elevator, he learned from his coworkers that the whole facility experienced an electrical blackout.

Michael Perakakis, owner of Vincon, testified that Vincon was hired in July 2010 to add electrical sockets to patient rooms to bring the facility up to U.S. Department of Health standards. Mr. Perakakis stated that Vincon employees worked only on small branch distribution panels in hallways, that they did not have unfettered access to the electrical panels, and that they would have to ask the hospital's engineering department to unlock them. In order to de-energize a circuit breaker on a branch panel, the hospital's engineering department would need to open the panel, and then Vincon would verify what exactly would be shut off using a high-end circuit tracer. Mr. Perakakis further testified that once the engineering department gave their approval, the breaker could be turned off for Vincon to perform work. None of the electrical panels that Vincon had access to were connected to the electric that fed the elevator, as they were

fed by a separate power source. Vincon employees did not have access to the elevator motor room.

Mr. Perakakis further stated that Vincon employees never worked on the building's main electrical service and did not shut down electrical service for the building. The hospital's main electric panels are located in four or five electric rooms, but employees do not access these rooms. Mr. Perakakis also testified that he was not aware of any electrical problems or power outages during work. In addition, no one told Mr. Perakakais that there were lapses in electrical services or flickering of lights prior to beginning work. Further, Mr. Perakakis testified that before plaintiff's incident, Vincon employees were last present on the premises on September 17, 2010 and did not return until October 1, 2010. Vincon employees are issued grey shirts, but they are not required to wear them as uniforms.

Lawrence Lewandoski, a maintenance manager for Nouveau, testified that Nouveau services, maintains, and modernizes elevators, dumbwaiters, and escalators. At the time of the accident, Nouveau had a full-service elevator maintenance contract with North Shore–LIJ Health System, which included Franklin Hospital. Mr. Lewandoski stated that as part of the contract, Nouveau performed monthly maintenance on the elevators in the Orzac Facility, as well as responded to repair calls. As part of the monthly maintenance, a Nouveau mechanic would ask the Franklin Hospital engineering department whether there were any concerns or complaints regarding the elevators, which the Nouveau employee would then address. If no complaints were made, the mechanic would go into the machine room and then "perform lubrication, check the controller, ride the elevator, check the lights, and see if there was anything out of normal on it." The mechanic would then be required to fill out a logbook. Mr. Lewandoski testified that he was not contacted about electrical work taking place at the subject facility in September 2010, and was not aware of any misuse of the subject elevator from September 2009 to September 2010. Mr. Lewandoski further testified that if power to the elevator was lost during operation between floors, the elevator would slow down and come to a stop, which could continue to travel "[p]robably, approximately, five feet."

Mr. Lewandoski testified as to some complaints Nouveau had received in the past regarding the subject elevator. Nouveau addressed a complaint of elevator mis-leveling on February 2-3, 2010 by a technician who "adjusted the down valve to proper level." On March 24, 2010, while responding to a complaint that the elevator timer was not working and the elevator car was not going to the lobby, the mechanic found that the car was "running on arrival," and checked the elevator's operation, but found "nothing apparent" and "left [the] car running." On another occasion, a complaint was received that the elevator lights were misreading floors. This problem was strictly related to the display and did not affect the operation of the elevator, and was solved when Nouveau's mechanic changed the second floor position indicator. Mr. Lewandoski further stated that the power source that runs the elevator up and down and the power source that runs the elevator lights are completely independent of one another.

Defendant Vincon now moves for summary judgment dismissing the complaint against it on the grounds that momentary facility-wide power loss was not a result of any alleged negligence. Vincon submits, in support of the motion, copies of the pleadings; various discovery demands; the bills of particulars; the note of issue; a stipulation discontinuing the action against Shulman Industries Inc.; a contract proposal; payroll records; the transcripts of the deposition testimony of plaintiff, Michael Perakakis, and Lawrence Lewandoski; and the affidavit of Lawrence Marley, Jr.

Defendant Nouveau also moves for summary judgment dismissing the complaint and cross claims against it on the grounds that it provided routine maintenance and inspections, that it was not on notice of any defective conditions, and that its actions did not cause or contribute to this accident in any manner. Nouveau submits, in support of the motion, copies of the pleadings; the bill of particulars; the transcripts of the deposition testimony of plaintiff, Michael Perakakis, and Lawrence Lewandoski; an employee occurrence report; a workers' compensation claim; photographs; the maintenance contract and specifications; various time tickets; the affidavit of Jon Halpern; and the report of Lawrence Marley, Jr. and Mark Nelson.

In opposition to both motions, plaintiff argues that the erratic behavior of the elevator would not have occurred in the absence of negligence. Plaintiff submits, in opposition to the motions, the affidavit of engineer C. Stephen Carr.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To recover against a defendant in a negligence action, plaintiff must prove the defendant owed him or her a duty of care and that the breach of that duty was a proximate cause of the injuries sustained by the plaintiff (*see* ***Pasternack v Lab. Corp. of Am. Holdings***, 27 NY3d 817, 825, 37 NYS3d 750 [2016]; ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]; ***Akins v Glens Falls City School District***, 53 NY2d 325, 441 NYS2d 644 [1981]; ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kimbar v Estis***, 1 NY2d 399, 153 NYS2d 197 [1956]). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]; ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, *supra*, at 140 [internal quotation marks and citations omitted]).

Vincon established a prima facie case of entitlement to summary judgment by demonstrating that as a third-party contractor, it owed no duty to plaintiff (*see* ***Parrinello v Walt Whitman Mall, LLC***, 139 AD3d 685, 30 NYS3d 692 [2d Dept 2016]; ***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 39 NYS3d 190 [2d Dept 2016]). Through its submissions, Vincon demonstrated that it was an independent contractor hired by North Shore–LIJ Health System for the limited purpose of installing electrical sockets in patient rooms,

that it did not launch an instrument of harm, that plaintiff did not detrimentally rely on its contractual duties, and that it did not displace the property owner's duty to safely maintain the premises (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Marasco v C.D.R. Electronics Sec. & Surveillance Sys. Co.***, 1 AD3d 578, 768 NYS2d 18 [2d Dept 2003]). Even assuming, arguendo, that Vincon had a duty to plaintiff, its submissions demonstrated that it did not perform any work on the day of the accident and did not perform any electrical work that interfered with the subject elevator (*see* ***Call v Banner Metals, Inc.***, 45 AD3d 1470, 846 NYS2d 827 [4th Dept 2007]; ***Fenton v Monotype Sys.***, 289 AD2d 194, 733 NYS2d 696 [2d Dept 2001]; ***Siagkris v K & E Mech.***, 248 AD2d 458, 669 NYS2d 375 [2d Dept 1998]; *cf.* ***Campbell v Barbaro Elec. Co., Inc.***, 116 AD3d 728, 984 NYS2d 79 [2d Dept 2014]). In opposition, plaintiff has offered no evidence to demonstrate that Vincon launched an instrument of harm, that plaintiff detrimentally relied on Vincon's duties, or that Vincon entirely displaced Franklin Hospital's duty to maintain the facility in a safe condition (*see* ***Espinal v Melville Snow Constrs.***, *supra*; ***Koslosky v Ross-Malmut***, 149 AD3d 925, 52 NYS3d 400 [2d Dept 2017]; ***Mavis v Rexcorp Realty, LLC***, *supra*).

As to the motion by Nouveau, an elevator maintenance company may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it should have found (***Rogers v Dorechester Assoc.***, 32 NY2d 553, 347 NYS2d 22 [1973]; ***Fiermonti v Otis El. Co.***, 94 AD3d 691, 941 NYS2d 657 [2d Dept 2012]; ***Johnson v Nouveau El. Indus., Inc.***, 38 AD3d 611, 831 NYS2d 527 [2d Dept 2007]; ***Hall v Barist El. Co.***, 25 AD3d 584, 807 NYS2d 639 [2d Dept 2006]). "However, the property owner continues to owe a nondelegable duty to elevator passengers to maintain the elevators in a reasonably safe manner" (*see* ***Dykes v Starrett City, Inc.***, 74 AD3d 1015, 1016, 904 NYS2d 465 [2d Dept 2010]).

Nouveau established a prima facie case of entitlement to summary judgment by demonstrating that it neither created the alleged defective condition nor had actual or constructive notice of the defective condition (*see* ***Reed v Nouveau El. Indus., Inc.***, 123 AD3d 1102, 999 NYS2d 182 [2d Dept 2014]; ***Tucci v Starret City, Inc.***, 97 AD3d 811, 949 NYS2d 419 [2d Dept 2012]; ***Fiermonti v Otis El. Co.***, 94 AD3d 691, 941 NYS2d 657 [2d Dept 2012]; ***Johnson v Nouveau El. Indus., Inc.***, 38 AD3d 611, 831 NYS2d 527 [2d Dept 2007]). The submissions did not reveal any previous sudden power loss or dropping problems (*see* ***Carrasco v Millar El. Indus.***, 305 AD2d 353, 758 NYS2d 679 [2d Dept 2003]; ***Farmer v Central El., Inc.***, 255 AD2d 289, 679 NYS2d 636 [2d Dept 1998]). Plaintiff testified that he rode the subject elevator 10-12 times on the day prior to the accident and did not experience any power losses or drops (*see* ***Farmer v Central El., Inc.***, *supra*).

In opposition, plaintiff failed to raise a triable issue of fact as to whether Nouveau had sufficient notice of the specific defect that allegedly caused the elevator to drop (*see* ***Reed v Nouveau El. Indus., Inc.***, *supra*; ***Tucci v Starrett City, Inc.***, *supra*; ***Carrasco v Millar El. Indus.***, *supra*). In addition, the affidavit of elevator engineer C. Stephen Carr failed to raise a triable issue of fact. Mr. Carr stated that he inspected the subject elevator nearly six years after plaintiff's accident. Mr. Carr re-enacted the sudden power loss to the elevator as it was going up, causing it to drop several feet, and then continue to the floor below. Mr. Carr stated that the elevator "did not perform as required under the circumstances" when it failed to "smoothly and easily come to a safe stop." Mr. Carr concluded that the elevator system's inability to safely stop and hold its position was a departure from accepted elevator safety standards. Mr. Carr also concluded that the re-enactment of the power loss elicited the same response as plaintiff's experience, which shows the

incident was not an isolated one. However, the opinion of the plaintiff's expert was conclusory, lacking in foundation, and speculative (*see* ***Tucci v Starrett City, Inc.***, *supra*; ***Forde v Vornado Realty Trust***, 89 AD3d 678, 931 NYS2d 687 [2d Dept 2011]; ***Cilinger v Arditi Realty Corp.***, 77 AD3d 880, 911 NYS2d 75 [2d Dept 2010]). In addition, Mr. Carr's findings on that date are irrelevant as to the condition of the subject elevator on the date of the accident (*see* ***Roldan v New York University***, 81 AD3d 625, 916 NYS2d 162 [2d Dept 2011]; ***Haynes v Estate of Goldman***, 62 AD3d 519, 880 NYS2d 609 [1st Dept 2009]).

Plaintiffs contends that Nouveau is negligent pursuant to the doctrine of res ipsa loquitur on the ground that it was the exclusive provider of elevator maintenance and repair services for the elevator. For a case to fall within the doctrine of res ipsa loquitur, (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*see* ***Ebanks v New York City Tr. Auth.***, 70 NY2d 621, 518 NYS2d 776 [1987]; ***Espinal v Trezechahn, 1065 Ave. of the Ams., LLC***, 94 AD3d 611, 942 NYS2d 519 [1st Dept 2012]). Here, plaintiff cannot rely on the doctrine of res ipsa loquitur, as he "failed to demonstrate that the accident was one that would not ordinarily occur in the absence of someone's negligence," or that Nouveau had exclusive control of the elevator (*see* ***Reed v Nouveau El. Indus., Inc.***, *supra*; ***Tucci v Starrett City, Inc.***, *supra*; ***Meza v 509 Owners, LLC***, 82 AD3d 426, 918 NYS2d 78 [2d Dept 2011]; ***Cilinger v Arditi Realty Corp.***, *supra*).

Accordingly, the motion by defendant Vincon Electric Co. Inc. for summary judgment dismissing the complaint against it is granted, and the motion by defendant Nouveau Elevator Industries, Inc. for summary judgment dismissing the complaint and cross claims against it is granted.

Dated: JUL 10 2018

Hon. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION