SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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ANN JANE CULLEN,

Plaintiff

Index No. 450299/16

v

DECISION AND ORDER

PWV ACQUISITION, LLC, et al.,

Defendants.

MOT SEQ 006, 007

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from an elevator accident, the defendants PWV Acquisition, LLC, UES Management Company, LLC, Larry Gluck, and The Chetrit Group, LLC (collectively the PWV defendants), move (SEQ 006) for summary judgment dismissing the complaint against them and on their cross claim for contractual indemnification against the defendant Nouveau Elevator Industries, Inc. (Nouveau). Nouveau moves (SEQ 007) for summary judgment dismissing the complaint and all cross claims against it. The motions are denied.

II. BACKGROUND

It is undisputed that, on January 28, 2015, an elevator door closed on the plaintiff's left arm as she exited the elevator in

her apartment building, and that she fell to the floor of the elevator's cab. It is also undisputed that the elevator door was equipped with electronic sensors that should have caused it to open when a physical presence was detected in the elevator doorway, but that the door nonetheless came into contact with the plaintiff.

The plaintiff alleges that the PWV defendants, as owners and managers of the building, owed her a duty to maintain the elevator in a safe condition, breached that duty by permitting the elevator door to remain in an unsafe condition, and had actual notice of this condition. The plaintiff further asserts that the doctrine of res ipsa loquitur is applicable to her claims against the PWV defendants. The plaintiff also claims that Nouveau negligently inspected and misadjusted the door's settings, so that it remained open for an insufficient period of time, and it closed at too great a speed with excessive force.

In support of their motion, the PWV defendants rely on the pleadings and the deposition transcripts of the parties, including its doorman, Hector Martinez, who also submits an affidavit, its property manager, Kyle Friedland, and Nouveau's elevator inspector, Larry Lewandoski. They also submit a video recording of the accident authenticated by the building's superintendent, the affidavit of its retained engineer, Nicholas A. Ribaudo, elevator inspection records, repair records, and the

elevator maintenance contract with Nouveau. The elevator inspection records include a statement of service calls and inspections made by Nouveau during 2014 and 2015 with respect to the subject elevator, and a work ticket for an inspection dated January 26, 2015, which was two days prior to the accident.

Ribaudo asserts that he viewed the video, calibrated the timing of the accident, and inspected the elevator. He concludes that the elevator door was neither dangerous nor defective, as it generated less than the maximum force permitted by law, and that the time the door took to close after it was completely open was in excess of the minimum closing time required by the New York City Building Code. Although Ribaudo noted that the door did not instantaneously retract when it struck the plaintiff, he opined that the .25 seconds between contact and retraction was almost instantaneous, and there was no defect in the retraction mechanism.

Documents submitted by the PWV defendants show that the elevator passed a City inspection 10 months prior to the accident, and that Nouveau had inspected it two days prior to the accident, and found nothing wrong. Friedland asserts that he never observed anything wrong with the elevator door, and did not remember receiving any oral or written complaints about it. Although Martinez makes similar assertions in his affidavit and generally throughout his deposition, he also testified at his

deposition that he did receive complaints prior to the date of the accident that the elevators were either not steady, "the doors don't move, or they close, you know."

Lewandoski testified at his deposition that, other than the PWV defendants, only Nouveau had access to the elevator controls. He also stated that Nouveau's records reflected that it made a service call to repair an elevator roller on the 14th floor of the building on December 10, 2014, but that this repair was specific to hardware installed in the door frame on that floor. Lewandoski further asserted that, based on his understanding of Nouveau's records, Nouveau made routine inspections of the subject elevator on November 10, 2014, December 11, 2014, and January 26, 2015, but that none of those visits involved repairs, adjustments, alterations, or the replacement of parts.

Nouveau relies on the same submissions, and also submits an unsworn report from an engineer. Nouveau notes that, at his deposition, Lewandoski testified that he inspected the elevator within one hour after the accident, and that the elevator was found to be operating properly, requiring no repairs or adjustments. Lewandoski asserted that the subject elevator door is equipped with a series of 60 infrared light beams spaced at one-inch intervals along its edge and that, when an object passed in front the beam, the door was supposed to open. He further asserts that Nouveau received no prior complaint about the speed

or force with which the door closed. Lewandoski testified that he also viewed the video, and that it showed that the elevator door merely brushed the plaintiff's arm when it began to close. He further testified that it was feasible to adjust both the force generated by the elevator door would when it closed, the time it could remain open before it began to close again, and the speed at which it would close.

In opposition to the motions, the plaintiff relies on her own deposition testimony, the video, the deposition testimony of non-party witness Christian Diekman, and an affidavit from her retained engineer, Patrick A. Carrajat.

Both the plaintiff and Diekman testified at their depositions that, contrary to the assertions made by Martinez and Friedland, numerous complaints had been made to doormen, the building's handyman, and the building superintendent that the elevator door frequently closed too quickly upon unsuspecting elderly passengers, and thus posed a danger. Carrajat, who personally inspected the elevator in 2016, and viewed the video of the accident, opines that, as of the accident date, the doors did not meet the most current standards of the American Society of Mechanical Engineering, which require that closing elevator doors equipped with infrared sensors do not come into contact with passengers. He concluded that, based on his calibrations, the door closed after only two seconds during the course of the

accident, and thus less than the three seconds calculated by Ribaudo and the minimum required by Code. He further states that, contrary to Ribaudo's conclusion, it cannot be known without further testing what force was generated by the door on the date of the accident, or whether it was within Code parameters. Carrajat also asserts that adjustments could have and should have been made to the door prior to the accident to allow it to remain open for longer than the three seconds that Ribaudo claimed was sufficient, and to generate less force than that which struck the plaintiff.

III. DISCUSSION

A. Standard For Summary Judgment Motions

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form. See Zuckerman v City of New York, 49 NY2d 557 [1980]) The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish

the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In deciding a summary judgment motion, the court must be mindful that "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted where there is any doubt about the issue.'" Bronx-Lebanon Hospital Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Obligation of Property Owners and Elevator Repair Contractors

An owner of an apartment building has a "nondelegable duty under Multiple Dwelling Law § 78 to keep its premises in good repair" (Bonifacio v 910-930 S. Blvd., 295 AD2d 86, 91 [1st Dept. 2002]), and that duty "includes elevator maintenance." Id.; see Cole v Homes for the Homeless Inst., Inc., 93 AD3d 593 (1st Dept. 2012). A plaintiff who seeks to hold an owner or its managing agent liable for injuries caused by a defective elevator must prove either that (1) the owner or managing agent created the condition or had actual or constructive notice of the defect, but failed to take appropriate steps to remedy the problem or (2) the doctrine of res ipsa loquitur is applicable. See Ezzard v One E. Riv. Place Realty Co., LLC, 129 AD3d 159, 162-163 (1st Dept. 2015). A property owner can thus be held liable "where it fails to notify the elevator company with which it has a maintenance

and repair contract about a known defect." Tucci v Starrett City, Inc., 97 AD3d 811, 812 (2nd Dept 2012).

With respect to such known defects,

> "the absence of a Building Code violation is not tantamount to the absence of negligence. . . [C]ompliance with statutory or regulatory enactments does not preclude a finding that the defendant violated a common-law duty. Irrespective of the absence of a statutory obligation, the landlord remains subject to the common-law duty to take minimal precautions to protect tenants from foreseeable harm."

Kelly v Metropolitan Ins. & Annuity Co., 82 AD3d 16, 23 (1st Dept. 2011) (citation and internal quotation marks omitted).

> "An elevator company which agrees to maintain an elevator in safe operating condition 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 ought to have found."

Rogers v Dorchester Assoc., 32 NY2d 553, 559 (1973). An inference of negligent inspection and repair may be drawn from the door's prior malfunction. See Scafe v Schindler Elev. Corp., 111 AD3d 556 (1st Dept. 2013); Fanelli v Otis El. Co., 278 AD2d 362 (2nd Dept. 2000).

Although the movants demonstrated, prima facie, that the elevator was neither defective nor dangerous, the plaintiff raised a triable issue of fact with Carrajat's affidavit that the elevator door was indeed defective and posed a danger. With respect to the issue of whether the PWV defendants had prior notice of any problems with the elevator door, their own

submissions reflect that Martinez knew about problems with the closing of the door, and Friedland's statement that he did not remember any complaint is insufficient to establish that there were no such complaints. In any event, the plaintiff raised a triable issue of fact in this regard with her own testimony and that of Diekman that the defendants had prior notice of the condition and defective nature of the elevator door. This proof is further sufficient to raise a triable issue of fact as to whether the PWV defendants also breached their duty to notify Nouveau of a known problem with the elevator door. See Santoni v Bertelsmann Prop., 21 AD3d 712 (1st Dept. 2005).

D. Res Ipsa Loquitur

The movants' submissions reveal the existence of a triable issue of fact as to whether the plaintiff may rely on the doctrine of res ipsa loquitur.

> "Res ipsa loquitur permits a factfinder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part. If a plaintiff establishes these elements, then the issue of negligence should be given to a jury to decide."

Ezzard v One E. Riv. Place Realty Co., LLC, supra, at 162-163 (citations omitted). The First Department has articulated "a

long established jurisprudence . . . recognizing that elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur." Id. at 163; see Gutierrez v Broad Fin. Ctr., LLC, 84 AD3d 648, 649 (1st Dept. 2011); Dubec v New York City Hous. Auth., 39 AD3d 410 (1st Dept. 2007); Ardolaj v Two Broadway Land Co., 276 AD2d 264 (1st Dept. 2000); Dickman v Stewart Tenants Corp., 221 AD2d 158 (1st Dept. 1995); Burgess v Otis El. Co., 114 AD2d 784 (1st Dept. 1985), affd 69 NY2d 623 (1986). Thus, where, as here, there is testimony that an elevator door suddenly and unexpectedly closed, the evidentiary doctrine of res ipsa loquitur may apply. See Lilly v City of New York, 161 AD3d 461 (1st Dept. 2018); Barkley v Plaza Realty Invs., Inc., 149 AD3d 74 (1st Dept. 2017); Ianotta v Tishman Speyer Props., Inc., 46 AD3d 297 (1st Dept. 2007).

Further, exclusive possession and control by the PWV defendants need not be absolute for the doctrine to apply, and the concept is not to be rigidly applied. Rather, as long as their possession and control are of such a character that the probability that the negligent acts complained of were committed by someone else is so remote that it is fair to permit an inference that they were negligent, they are deemed to have exclusive control. See De Witt Properties, Inc. v City of New York, 44 NY2d 417 (1978).

The PWV defendants argue that they did not exercise

exclusive control over the elevator, but instead contractually ceded all responsibility for the daily operation of the elevator to Nouveau, and had no role in inspecting, maintaining, or repairing the elevators. However, a building owner may only avoid applicability of the doctrine of res ipsa loquitur where an elevator maintenance company's control over every aspect of an elevator is "absolute." Hodges v Royal Realty Corp., 42 AD3d 350, 352 (1st Dept. 2007); see Sanchez v. New Scandic Wall L.P., 145 AD3d 643 (1st Dept. 2016); Fasano v Euclid Hall Assoc., L.P., 136 AD3d 478 (1st Dept. 2016); Ezzard v One E. Riv. Place Realty Co., LLC, supra. The contract submitted by the PWV defendants does not establish that Nouveau's control over every aspect of elevator maintenance was absolute. The four-page elevator maintenance contract merely states that it is a "full-service contract," but does not describe what that term entails. Moreover, unlike the maintenance contracts at issue in Sanchez, Fasano, and Hodges, the contract here does not prohibit entities other than Nouveau from making alterations, additions, adjustments, repairs, or replacements, contains no specific language by which the PWV defendants ceded all responsibility for the daily operation of the elevators to Nouveau, and does not require Nouveau to provide a mechanic on site to handle all service, inspection, and repair calls. Hence, the PWV defendants cannot rely on the service contract to absolve it of liability

under the doctrine of res ipsa loquitur.

Morever, Lewandoski's deposition testimony, upon which the PWV defendants rely, reflects that Nouveau's inspections in November 2014, December 2014, and January 2015 did not involve the alteration, adjustment, repair, or replacement of any parts or systems of the elevator, but only observations of the condition of the elevator. As such, the PWV defendants' submissions reveal the existence of a triable issue of fact as to whether Nouveau exercised control over the elevators sufficient to vitiate the PWV defendants' exclusive control. See Barney-Yeboah v Metro-North Commuter R.R., 25 NY3d 2015 (2015), revg 120 AD3d 1023 (1st Dept. 2014); Meade v OTA Hotel Owner LP, 76 AD3d 470 (1st Dept. 2010); cf. Feblot v New York Times Co., 32 NY2d 486 (1973) (res ipsa loquitur is inapplicable since extent of plaintiff's control over elevator was equivalent to defendant's).

The PWV defendants thus failed to make a prima facie showing that the doctrine of res ipsa loquitur is inapplicable, and summary judgment must be denied regardless of the sufficiency of the plaintiff's opposition papers. In any event, as the plaintiff correctly notes in her opposition papers, the doctrine may be applied even where the owner/manager and elevator repair company jointly exercise "exclusive control" over the elevator. As explained by the First Department, res ipsa loquitur may be applicable where, as here, "[t]he mechanism of injury related to

the electronic eye and the door operator and controller . . . which were inaccessible to the general public and in the exclusive control of defendant owner/managers and the elevator repair company." Barkley v Plaza Realty Invs., Inc., supra, at 79 (emphasis added); see Rogers v Dorchester Assocs., supra.

D. Cross Claims

Contractual indemnification is available to a party only where that party is itself free from fault in the happening of the underlying accident. See General Obligations Law § 5-322.1 (1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013). Since it has yet to be determined whether any of the movants was negligent, and the parties have made no definitive showing here that could resolve that issue on papers, those branches of their motions which are addressed to the PWV defendants' third cross claim against Nouveau, which is for contractual indemnification, are premature. See Miranda v Norstar Building Corp., 79 AD3d 42 (3rd Dept. 2010).

Since the parties' submissions reveal that there are triable issues of fact as to whether Nouveau was free from negligence, that branch of its motion which is for summary judgment dismissing the PWV defendants' first cross claim, which is for contribution, must be denied as well.

Finally, although Nouveau also nominally moves for summary judgment dismissing the second cross claim asserted against it by the PWV defendants, which seeks to recover for failure to procure insurance, it does not address this cross claim in its moving papers. It has thus failed to establish its prima facie entitlement to judgment as a matter of law dismissing that cross claim, and that branch of its motion which is addressed to that cross claim must be denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants PWV Acquisition, LLC, UES Management Company, LLC, Larry Gluck, and The Chetrit Group, LLC (SEQ 006), for summary judgment dismissing the complaint against them and on their third cross claim, which is for contractual indemnification, against the defendant Nouveau Elevator Industries, Inc., is denied; and it is further,

ORDERED that the motion of the defendant Nouveau Elevator Industries, Inc. (SEQ 007), for summary judgment dismissing the complaint and all cross claims against it is denied.

This constitutes the Decision and Order of the court.

Dated: July 20, 2018 ENTER:

J.S.C.
HON. NANCY M. BANNON