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

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FABIAN ORRIOLS,

Plaintiff,

-against-

25 BROADWAY OFFICE PROPERTIES, LLC. and PBM/CMSI, INC.,

Defendants.

Index No.: 158590/15

Motion Seq. Nos. 001; 002; 003

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PBM, LLC i/s/h/a PBM/CMSI, INC.,

Defendant/Third-Party Plaintiff,

-against-

CEMD ELEVATOR CORP. d/b/a THE CITY ELEVATOR COMPANY,

Third-Party Defendant.

DECISION AND ORDER

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HON. NANCY BANNON, J.:

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In this elevator improper landing/drop case, defendants 25 Broadway Office Properties, LLC (Building Owner) and PBM, LLC, sued herein as PBM/CMSI, Inc., (PBM), and third-party defendant CEMD Elevator Corp. d/b/a The City Elevator Company (Elevator), each move for an order granting summary judgment in their favor (CPLR 3212).

Specifically, Elevator, the elevator maintenance company for a manually operated freight

elevator located in the Building Owner's building, seeks an order granting summary judgment dismissing the third-party complaint and cross claims asserted against it (motion sequence no. 001). Although plaintiff did not sue Elevator, Elevator also seeks dismissal of the complaint. Defendant and third-party plaintiff PBM seeks an order granting summary judgment dismissing the complaint and all cross claims asserted against it (motion sequence no. 002). PBM employed the manual freight elevator operator that operated the elevator on the night of the incident. Building Owner, which owns the building in which the incident occurred, cross-moves for an order granting: (1) summary judgment dismissing the complaint and any cross claims against it; and (2) conditional summary judgment on its claims for contractual indemnification and common law indemnification against PBM (motion sequence no. 003)

In the complaint, plaintiff alleges that, on May 22, 2014, he sustained injuries in the Building Owner's freight elevator due to either an elevator malfunction or the elevator operator's negligent operation of the elevator. In his verified bill of particulars, plaintiff alleges that the elevator was ascending from the basement when, upon reaching the fifth floor, it suddenly dropped to below the building's basement level. Plaintiff alleges that PBM and Building Owner were negligent in failing to properly and adequately maintain or operate the elevator and provide a properly trained freight elevator operator.

Plaintiff testified that he was in the freight elevator, which began ascending in order to take him, his coworkers, and some furniture they were delivering to the fifteenth floor. Plaintiff further testified that he was paying attention to his cell phone and realized that something was amiss when the elevator landed, his knees collapsed from the impact, and the elevator cabin filled with dust. Plaintiff stated that, thereafter, he was stuck in the elevator for at least five

minutes before the doors opened and he climbed out and was taken by ambulance to the hospital.

Plaintiff also stated that an elevator operator ran the elevator using a control handle. Based upon the fact that the operator did not raise the elevator up from the elevator pit after the impact, plaintiff believed that the elevator operator was unable to operate the elevator then. Plaintiff testified that his knowledge that the elevator had ascended to the fifth floor of the building before heading down is based upon a statement made by the PBM elevator operator. An accident report from PBM, submitted by Elevator (NYSCEF Doc No. 69 [mislabeled as a deposition transcript]), records that the elevator operator reported that the elevator dropped, and that he requested to be taken to the hospital.

Elevator's Motion for Summary Judgment

In moving for summary judgment, Elevator argues that there was no evidence of an elevator defect or malfunction when the Elevator was inspected in a scheduled annual inspection, held approximately a month after the accident, or the day after the incident, when it was tested by an elevator consultant hired by the Building. PBM opposes the motion arguing that: (1) there is no direct evidence of its employee's negligent conduct in operating the elevator; (2) Elevator has not demonstrated precisely how the incident occurred; (3) plaintiff testified that the elevator fell, raising a fact issue as to whether the elevator dropped; and (4) Elevator was required to maintain the elevator in a reasonably safe condition.

In support of its motion, Elevator relies heavily upon the expert affidavit of elevator consultant Nickolas A. Ribaudo, who avers that he inspected the elevator in June of 2018. PBM argues that Ribaudo's opinion should be discounted because he did not inspect the elevator until over four years after the incident. Elevator responds with the testimony of Building Owner's

engineer, Eric Sturhann, that, when he testified in 2017, the Elevator was in same condition as in 2014, except for minor maintenance and repair work performed by the Elevator's mechanics.

Ribaudo's affidavit does not indicate that the elevator was in the same condition when he inspected it as when the incident occurred. An inference in favor of Elevator, that the elevator would have been in the same condition four years after the incident simply because it did not have major maintenance during that time period, or any inference concerning maintenance that the mechanics may have performed in the four-year period, may not be drawn against the nonmoving parties (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]; [court must draw all reasonable inferences in favor of the nonmoving party]; *see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). Elevator's witness, its president, Mitchell Hellman, testified that the resident elevator mechanics in the building would not necessarily have kept job tickets, were not required to give a description of work performed at the site, and that maintenance records were unlikely to be made or kept. Consequently, Ribaudo's assertion, that he sees nothing deficient in Elevator's maintenance of the elevator is conclusory, and Elevator has not demonstrated, as a matter of law, that the elevator was the same in 2018 as it was in 2014 or was properly maintained.[1]

In addition, the gravamen of Ribaudo's opinion is that the elevator did not free fall or over-speed, because, had it done so, several safety mechanisms would have been triggered, stopping the elevator, when it reached speeds of 15%, and then 30%, above the typical maximum

[1] Elevator cites to *Gjonaj v Otis El. Co.* (38 AD3d 384, 385 [1st Dept 2007]) in support, but Elevator did not submit maintenance records, or evidence from a resident mechanic that worked on the elevators, to meet its summary judgment burden. In addition, Wray Crooks, who worked for PBM, testified that he believed that there was a period of time where the elevator was taken out of service for an extended period of time "since 2014" (NYSCEF Doc No. 74 at 75).

normal running speed for the elevator. However, the only testimony contemporaneous with the elevator incident is plaintiff's that he did not notice the elevator dropping, but only realized that it had fallen due to the impact. Even though plaintiff was looking at his cell phone when the elevator was moving, an inference that, unbeknownst to plaintiff, the elevator was plummeting to the basement may not be drawn against the nonmoving parties, and the issue of the speed at which the elevator may have been traveling, and whether it would necessarily have reached the 15% threshold, is not addressed by Ribaudo, who does not account for slight over-speeding, below the 15% threshold (*see* Ribaudo affidavit, ¶ 16).

Furthermore, Ribaudo states that, if the electrical safety device was triggered, at the 15% threshold, it would have taken several minutes for the mechanic to arrive, move the elevator off of the buffer, and reset the electrical switch (*id.*). In fact, Ribaudo's opinion that no safety device was triggered, thereby demonstrating that there was no fast drop of the elevator, is based upon PBM employee Wray Crooks' testimony that Elevator's mechanic restored the elevator to service in minutes. Ribaudo opines that this demonstrates that a mechanical safety device, which would have taken a longer time to reset, was not reset. However, Elevator points to no record evidence as to *how* the Elevator was restored or put back into operation, and plaintiff testified that he was in the elevator for at least five minutes. Whether, as Ribaudo contends, Crooks' testimony demonstrates that there was not sufficient time for the *electrical* safety devise to be reset, is for the trier of fact to resolve.

In reply, Elevator argues that the only conclusion that may be drawn from the evidence is that the elevator operated properly on the night of the claimed incident because, thereafter, nothing was repaired, changed or fixed, yet the elevator continued to operate properly the rest of

the night and over the following days. This ignores that Elevator has made not made an adequate showing that the circumstances on the night of the incident were replicated during that time. [2]

Elevator argues that there has been no actual or constructive notice of any defective elevator-related condition demonstrated, but has not established when the elevator was inspected, prior to the incident, and the outcome of that inspection.[3] While Hellman testified that he would have expected the Elevator's resident elevator mechanics to perform inspections on a weekly basis, no showing has been made that Hellman had personal knowledge as to whether, in fact, this actually occurred.

Hellman also testified about a March 31, 2014 service call, indicating that the elevator was broken, and which involved the activation of the elevator's mechanical safety mechanism. Hellman stated that this device stops the elevator from dropping, suggesting that mechanism had been triggered and then had to be or reset (NYSCEF Doc No. 75 at 104-109). He further testified that the mechanical safety device related to elevator over-speeding (*id.* at 107). Ribaudo does not address this repair or service call.

Furthermore, Sturhann testified that if a certain device, relating to the elevator doors on

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[2] The letter and memo reporting on inspections after the incident are unsworn, and, when used to support the truth of the matters that they assert, and absent a further showing of admissibility, constitute hearsay (*Acosta v Fuentes*, 183 AD2d 483, 484 [1st Dept 1992] [movant must proffer admissible evidence to meet summary judgment burden]).

[3] Hellman testified that freight elevators were required to be inspected quarterly, but whether this was actually done was not addressed. When the last annual inspection was held, prior to the incident, is also not discussed. In addition, Elevator's contention that certain witnesses were unaware of elevator problems does not establish lack of notice as Elevator does not sufficiently establish that problems with the freight elevator would necessarily have been reported to those witnesses (*Sheifla v Benchmark Mgt. Corp.*, 270 AD2d 815, 815 [4th Dept 2000]), as opposed to the resident mechanics working in the building, from whom no evidence has been provided.

the building floors, was not correctly inserted, then the elevator "might start and move a couple of floors, then all of a sudden it might lose the contact and stop," which then had to be corrected by the resident elevator mechanic (NYSCEF Doc No. 68 at 59). Hellman testified that the interlock safety switch is a safety device relating to those doors, which prevents the elevator from going faster than it is intended to move, and that such a device was addressed in Elevator's March 2014 repair documentation. Hellman also stated that elevator records indicated that there was a problem with the elevator floor, or platform, that may have been related to the triggering of the interlock safety device, and that, on April 3, 2014, there was a follow-up service call to determine whether the freight car platform was secured. He stated that this was followed by an April 5, 2014 entry, indicating that he elevator became stuck and that Elevator's mechanic performed work on the interlock. Granting the benefit of all favorable inferences to PBM, the nonmoving party, as required here, evidence of work Elevator performed in March and April 2014 involving safety stopping devices and the elevator platform, raises a fact issue as to notice of either a faulty elevator safety device or freight car platform that triggered an elevator safety device (*see Ruiz-Hernandez v TPE NWI Gen.,* 106 AD3d 627, 627-628 [1st Dept 2013]).

In addition, Hellman testified that Elevator's records showed that, on August 7, 2013, Elevator performed work repairing a latching arm for the "governor contact" on the freight elevator, which he also testified is the part of the elevator safety mechanisms that break the electrical contacts if the elevator over-speeds. The record also contains a December 2012 incident report stating that someone became trapped in the freight elevator, between the first floor and the basement, and was freed by Elevator's mechanic, who said that the governor switch opened and needed to be reset in order to free the trapped individual, and to repair the elevator.

This evidence, submitted into the record by Elevator, but essentially unaddressed by Ribaudo, cannot be said, as a matter of law, to have no relationship to the incident of which plaintiff complains (*see Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013] [evidence "produced by defendant, which contain numerous references to recurring problems, some from which it can be reasonably inferred that the doors may have been involved, did not necessarily explain the cause of the defects previously found"]), and raises a fact issue as to notice. In light of the foregoing, Elevator's motion is denied.

PBM 's Motion for Summary Judgment

PBM moves for summary judgment dismissing the complaint and any cross claims against it on the grounds that it was not responsible for maintenance or repair of the elevator and that there is no evidence of its negligence in operating the freight elevator, or of what caused the elevator to drop. PBM contends that plaintiff, and those witnesses who viewed a video of the incident,[4] testified that they could not or did not see PBM employee Utic Usein's hand on the elevator's control handle, and that there is no evidence that he was negligent in operating the handle, or as to what caused the incident. Plaintiff argues that PBM has not met its prima facie burden to demonstrate its lack of negligence.

PBM's motion is denied. Plaintiff claimed that the elevator fell due to operator error, and his testimony is that the elevator landed improperly. PBM has not met its summary judgment burden as it merely points to potential gaps plaintiff's evidence (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018], *lv dismissed*, 31 NY3d 1036 [2018]

[4] Although witnesses, and Ribaudo, rely on the video (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010] ["expert testimony must be based on facts in the record or personally known to the witness"], no copy of the video has been provided to the court.

["Merely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden" on summary judgment]). As there is record evidence that the newly trained PBM elevator operator controlled the direction handle of the elevator, based upon circumstantial evidence, and granting plaintiff the benefit of all reasonable inferences derived from that evidence (*Garcia*, 180 AD2d at 580), there is a fact issue as to whether the elevator operator improperly operated the elevator.

PBM's argument, that plaintiff has not presented any evidence that PBM's operation of the freight elevator at the time of the claimed incident departed from the generally accepted custom in the freight elevator industry also impermissibly, points to potential gaps in plaintiff's evidence (*id.*). PBM's proffer of its own employee's unsworn statement (NYSCEF Doc No. 100), that the elevator dropped, to prove the truth of that assertion, rests upon inadmissible hearsay, which PBM may not use to meet its moving burden on summary judgment (*Acosta,* 183 AD2d at 484).

Building Owner's Cross Motion for Summary Judgment

Building Owner seeks summary judgment on the grounds that it: (1) exercised reasonable care in maintaining its premises; (2) lacked actual or constructive notice of any defective elevator condition; and (3) did not cause or create the incident. Building Owner argues that there is no evidence in the record that it improperly maintained the elevator, or as to what, specifically, caused the alleged incident. Building Owner contends that the evidence shows that the incident was the result of Elevator's improper elevator maintenance or PBM's operator's error, neither of which are the responsibility of Building Owner, as PBM employed the elevator operators and Building Owner contracted out the elevator maintenance work to Elevator.

In opposition, plaintiff argues that Building Owner is vicariously liable for the negligence of PBM, which it hired to perform services on its behalf, and that the record raises fact issues as to whether PBM's employee, Utic Usein, the elevator operator, caused or created the incident. PBM also opposes Building Owner's motion, challenging it as untimely.

Whether or not Building Owner's motion was timely is a threshold issue. Building Owner does not dispute that the note of issue was filed on July 3, 2018 and that it filed its motion on October 15, 2018, which did not meet this court's 60-day summary judgment deadline. In reply, Building Owner argues that its cross motion should be considered because it addresses the same issues addressed by the other moving parties.

Building Owner did not provide good cause for its delay (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Muqattash v Choice One Pharm. Corp.*, 162 AD3d 499, 500 [1st Dept 2018]; *see also Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 77, 83-89 [1st Dept 2013] [a motion should not be entertained where it is not timely, no excuse for delay is rendered, and the issues raised are not nearly identical to those raised in timely decided motions]). Building Owner's motion for summary judgment dismissing the complaint is also "not [a] true 'cross motion[']" as to plaintiff, because Building Owner seeks relief of dismissal of the complaint against the nonmoving plaintiff (*Muqattash*, 162 AD3d at 500; CPLR 2215). As plaintiff did not move, Building Owner's motion does not "not raise issues that were "'nearly identical' to those raised in the [plaintiff's] timely initial motion" (*Muqattash*, 162 AD3d at 500).

In Building Owner's motion seeking conditional contractual indemnification and conditional common law indemnification from PBM, Building Owner moves on the grounds that there is no evidence of Building Owner's own negligence and that its contract with PBM entitles

it to contractual indemnification. However, PBM moved for summary judgment based upon its argument that there was no evidence of PBM's negligence (NYSCEF doc no. 83, ¶¶ 96-103). Consequently, Building Owner's arguments and issues are not nearly identical to those of PBM, and the determination made on PBM's motion, that PBM did not meet its prima facie burden to demonstrate the absence of material facts as to its own negligence, does not require an affirmative determination concerning the Building Owner's entitlement to judgment (*see Kershaw*, 114 AD3d at 89).

Accordingly, and upon the foregoing papers and after oral argument, it is

ORDERED that the respective motions of CEMD Elevator Corp. d/b/a The City Elevator Company (motion sequence no. 001), PBM, LLC, sued herein as PBM/CMSI, Inc. (motion sequence no. 002) and 25 Broadway Office Properties, LLC (motion sequence no. 003) for summary judgment are denied.

This constitutes the Decision and Order of the court.

Dated: July 5, 2019

ENTER:

J.S.C.

HON. NANCY M. BANNON