Mayo v 1431 Assoc. LLC
2019 NY Slip Op 32967(U)
October 7, 2019
Supreme Court, New York County
Docket Number: 151299/16
Judge: Lynn R. Kotler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

BONNIE MAYO

INDEX NO. 151299/16

MOT. DATE

- v -

MOT. SEQ. NO. 003 and 004

1431 ASSOCIATES LLC a/k/a PALIN ENTERPRISES et al.

The following papers were read on this motion to/for ______________

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).________
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).________
Replying Affidavits NYSCEF DOC No(s).________

This is a personal injury action arising from plaintiff's trip and fall while exiting an interior elevator. There are two motions for summary judgment pending before the court, which are herein consolidated for consideration and disposition in this single decision/order. In motion sequence 003, defendant P.S. Marcato Elevator Co., Inc. ("PS Marcato") moves for summary judgment dismissing plaintiff's complaint and any cross-claims against it. Plaintiff opposes the motion. In motion sequence 004, defendant 1431 Associates, LLC a/k/a Palin Enterprises ("1431 Associates") moves for summary judgment in its favor, dismissing plaintiff's complaint and on its cross-claims against PS Marcato for breach of contract and indemnification. PS Marcato and plaintiff oppose 1431 Associates' motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available.

Plaintiff's accident occurred on November 3, 2014. On that date, plaintiff was working in the building located at 1431 Broadway (the "building"). There are two elevators at the building. The accident occurred in the elevator on the right of the building and as plaintiff exited the elevator onto the second floor. Plaintiff testified at her deposition that she got into the elevator in the lobby of the building and was alone. She then pressed the button for the second floor. Nothing unusual happened during the ride up to the second floor. The elevator door opened on the second floor and as plaintiff attempted to step off the elevator, she tripped. Plaintiff explained at her deposition:

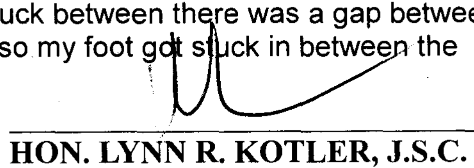
Q. Now did your accident occur as you were attempting to step off the elevator?

A. Yes.

Q. Can you tell me what occurred?

A. I was walking off. I tripped. My foot ultimately got stuck between there was a gap between the doors as well as there was a height difference, so my foot got stuck in between the

Dated: 10/7/19



HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☒SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

elevator I don't know if you call it the shaft. I don't know what you want to call that part and then I had to grab my foot like pull my foot out and I went flying on the floor (indicating).

...

Q. So you're saying that your right foot entered the space between the elevator car and the hallway floor?

A. Yes.

...

Q. Now you indicated that there was some difference in height between the elevator floor and the second floor hallway floor, correct?

A. Yes.

Q. Now when did you first become aware of that?

A. When I tripped.

Plaintiff further testified that the height difference was approximately three to four inches. Plaintiff's elevator ride that day was otherwise unremarkable and plaintiff had never previously observed a problem with the elevators.

Q. Now in getting to your office every morning, did you use both elevators? I don't mean at the same time but on occasion.

A. Yes.

Q. At any time in attempting to get to your office, had you ever had any problem coming off either elevator onto the second floor hallway?

A. No.

Q. Had you ever complained to anyone, whether it be anyone at your job or anyone that was associated with the building, about how that elevator or either of those elevators had operated prior to the date of your accident?

A. No.

Q. Did you ever hear of anyone else who had made any complaints about how the elevators, either one of them, had operated prior to the date of your accident?

A. No.

Plaintiff's errata sheet for her deposition attempted to make two changes to her deposition transcript; plaintiff changed her answers to the last two questions to "yes". As for her reasons for the changes, plaintiff wrote: "people complained about how the elevator did not always land even" and "[m]y co-workers complained." 1431 Associates argues that the court should not consider plaintiff's errata sheet because she has made substantial changes to her testimony. The court rejects this argument, since plaintiff's changes have provided a colorable reason for the change and merely raises issues of credibility (see i.e. *Cillo v. Resjefal Corp.*, 295 AD2d 257 [1st Dept 2002]).

In her opposition to the motion, plaintiff has provided sworn affidavits from two of her coworkers who claim that they had previously observed problems with elevators in the building. Caroline Tobias states:

"The elevator involved is old. I have previously observed that sometimes when it stops at our floor, it is not always level and there is a slight gap."

David Greenberg states:

> The elevator involved was uneven at the time of the Ms. Mayo's incident (sic). Prior to Ms. Mayo's accident, I had observed that sometimes, when the elevator is stopped at our floor (the second floor), the elevator was not level with the floor of the second floor. I am aware that other people in our building had complained about this condition prior to Ms. Mayo's incident. I am aware of the fact that our elevator does not always line up correctly when it opens to our floor.

Plaintiff has also provided an expert's affidavit. Richard Robbins, a registered architect, performed an inspection of the elevator on November 18, 2014. Robbins took measurements and photographs and measured the "landing gap" and "landing accuracy" of the elevator. Robbins claims that during his inspection, the elevator stopped 5/8" below the finished floor surface of the second floor and the space between the elevator car and the second-floor edge was 1 ½". Robbins opines with a reasonable degree of architectural and code compliance certainty that the condition of the subject elevator violated applicable codes, regulations and standards.

1431 Associates produced Scott Ross for a deposition. 1431 Associates owns the building and Ross was employed by 1431 Associates as the building manager at the building since 1995. Ross testified that if his employees observed any problems with the elevators, they were capable of taking them out of service.

1431 Associates had a contract with PS Marcato whereby the latter was responsible for maintaining the elevators on the date of plaintiff's accident. PS Marcato was obligated pursuant to the contract, which has been provided to the court, to "examine monthly all safety devices and governors" and maintain the elevators in accordance with various performance specifications, including maintaining the elevator "Landing Accuracy" at "1/4 plus or minus." The contract was signed on October 1, 2014.

Ross testified that if he received any complaints about the elevator, he would contact PS Marcato. Specifically, Ross stated:

> Q. Do you recall ever having occasion to call the service number for Marcato, to report something, an issue with an elevator?
>
> A. Yes.
>
> Q. And when you would call, when you called, did you make any note of it in a log of some kind of – keep a record of it in your office that you made the phone call?
>
> A. No.
>
> ...
>
> Q. Did you ever have any conversation with Marcato Elevator employees about the leveling of the elevators?
>
> A. I'm not sure.

Ross did not recall when he called PS Marcato, and he admitted that the building did not keep a guest log at the concierge that would show when an elevator maintenance repair person came into the building.

1431 Associates also produced Manuel DiLone for a deposition. DiLone has been employed at the premises for approximately twenty-four years and is presently employed as a Fire and Safety Director.

He testified that he rode the elevators in the building every day and never personally observed any gaps between the elevators and the floors they were stopped on.

PS Marcato produced Andrew Trapani for a deposition. He confirmed Ross' testimony that PS Marcato would usually perform elevator maintenance once per month. Trapani, however, had never been to the building and had no personal knowledge of the servicing and maintenance of the building's elevators. Trapani testified:

> Q. Prior to the November 2014 incident, did P.S. Marcato conduct any inspections of the elevator?
>
> A. No, I don't believe so.
>
> Q. How often does P.S. Marcato conduct maintenance of the elevators in 1431 Broadway?
>
> A. At least once a month.
>
> Q. Is that on a set schedule or how is it determined when the maintenance is done?
>
> A. It's not on a set schedule, but during the course of the month, the primary service technician will perform maintenance.
>
> ...
>
> Q. Do you know whether P.S. Marcato did any maintenance or servicing of the elevators in October of 2014?
>
> A. I would say yes because since we took over the contract that month, you know, it's customary that we would go in and do -- perform maintenance and cleanup the job and, you know, get it up to snuff so to speak.
>
> Q. Does your company maintain records of these initial -- of the initial work done after you enter into these servicing contracts?
>
> A. The only record would be on the maintenance log on the equipment.
>
> Q. Do you know when in October of 2014 P.S. Marcato did any work on the elevators at issue?
>
> A. I do not.

Nonetheless, Trapani testified that the "landing gap" in an elevator cannot increase or decrease over time.

Parties' arguments

Both defendants argue that they are entitled to summary judgment because there is no proof of prior notice of the defective condition with respect to the elevator. 1431 Associates further contends that there is no proof that it created the defective condition, while PS Marcato argues that there is no proof that the defective condition even existed.

1431 Associates also argues that it is entitled to common law and contractual indemnification from PS Marcato pursuant to its contract with same in the absence of any negligence on its part. Finally, 1431 Associates asserts that it is entitled to summary judgment on its breach of contract claim against PS Marcato based upon its failure to procure insurance.

Plaintiff's counsel argues that both defendants had actual and constructive notice of the defective condition which caused her accident. Plaintiff further contends that *res ipsa loquitur* applies to the facts here.

PS Marcato opposes 1431 Associates' motion, arguing that summary judgment is inappropriate because 1431 Associates had a nondelegable duty to keep the premises in a reasonably safe condition and that PS Marcato did not breach its contract with 1431 Associates.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Both defendants' motions must be denied as to plaintiff's claims. Assuming *arguendo* that the defendants have met their burden on these motions, plaintiff has raised sufficient triable issues of fact to defeat them.

In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]).

Here, 1431 Associates claims that it did not have notice of any defective condition concerning elevator mis-leveling or a gap. However, plaintiff claims that the elevators had an ongoing problems with landing even observed by multiple people and has provided affidavits from coworkers which support those claims.

1431 Associates' counsel urges the court to reject plaintiff's coworkers' affidavits, which the court rejects. Plaintiff's witness affidavits do not merely raise a feigned issue of fact. They implicate questions of credibility, as does plaintiff's own deposition testimony, which the court cannot resolve on this motion.

While there is no proof on this record that complaints were made to 1431 Associates about the subject elevator in admissible form, a defendant will be charged with constructive notice where it should have reasonably known about the existence of a defective condition that existed for a substantial period of time (see i.e. *Ficher v. Battery Bldg. Maintenance Co.*, 135 AD2d 378 [1st Dept 1987]). 1431 Associates has not demonstrated as a matter of law that the elevators were not in a defective condition prior to plaintiff's accident. Its first witness admitted to issues with the elevators and calling PS Marcato, but did not know when the calls were made. 1431 Associates did not otherwise have any complaint logs, call logs or even visitor logs which would eliminate all triable issues of fact as to whether there was constructive notice of the mis-leveling or gap condition. PS Marcato's witness was equally unknowledgeable about the building elevators.

Moreover, plaintiff's expert observed mis-leveling and a gap between the elevator and the second floor approximately two weeks after plaintiff's accident. Since 1431 has failed to demonstrate its lack of constructive notice, its motion for summary judgment dismissing plaintiff's claims must be denied.

1431 Associates' reliance upon *Ezzard v. One E. Riv. Place Realty Co., LLC* (129 AD3d 159 [1st Dept 2015]) is misplaced. In that case, while the defendants "established that there had been no complaints of misleveling before plaintiff's accident", they also provided proof that the elevator was level during City and Local Law No. 10 inspections performed two and three weeks before plaintiff's accident.

As for PS Marcato, the court rejects its argument that there is no evidence of a defective condition. Plaintiff's testimony and her expert's opinion are sufficient to survive the motion on this point. PS Marcato's notice argument is also unavailing, since there is no dispute that PS Marcato made routine monthly visits to the building, that its contract to maintain the building's elevators was in effect more than a month prior to plaintiff's accident, and PS Marcato has otherwise failed to come forward with proof that it did not have notice of the defective condition or cause or create it. For at least these reasons, PS Marcato's motion against plaintiff is denied.

As for the balance of 1431 Associates' motion, it must also be denied. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

The contract provides in relevant part:

> Contractor hereby agrees to indemnify and save harmless Owner of the premises, Consultant,, and Owner and any other subsidiaries from and against all liability claims and demands on account of injury to persons including death resulting therefrom and damage to property arising out of the performance of this Contract by Contractor, employees and agents of Contractor and Contractor's property, except and to the extent from and against such claims and demands which may arise out of sole negligence of the Owner, or any of its subsidiaries.

Here, since 1431 Associates' own liability has not been determined, its motion for contractual indemnification against PS Marcato is premature. Indeed, 1431 Associates has not even come forward with proof of whether or not it notified PS Marcato that there was an issue with the elevator.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]). Since PS Marcato's own negligence has not been determined, 1431 Associates is also not entitled to common law indemnification.

Finally, PS Marcato has provided proof that it did procure insurance which named 1431 Associates an additional insured. 1431 Associates readily concedes this point in its reply papers. 1431 Associates' counsel, however, argues that the insurer, Nationwide, "only accepted the defense of 1431 Associates after the erosion of Marcato's $100,000 self-insured retention." The contract requires PS Marcato to carry "Commercial Liability Insurance in the amount of $1,000,000.00" combined single limit including Bodily Injury, Personal Injury... including coverage for the [] noted Indemnity Contract." Since the parties did not agree that the insurance PS Mercato was required to procure could contain a self-insured retention provision, 1431 Associates has therefore established that PS Marcato breached its obligation to obtain the requisite insurance. Accordingly, 1431 Associates' motion is granted only to the extent that

it is entitled to summary judgment cross-claim for breach of contract against PS Marcato and PS Marcato's motion as to the cross-claims is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that PS Marcato's motion for summary judgment is denied in its entirety; and it is further

ORDERED that 1431 Associates' motion for summary judgment is granted only to the extent that 1431 Associates is entitled to summary judgment on its claim for breach of contract; and it is further

ORDERED that 1431 Associates' motion is otherwise denied.

Settle judgment.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/7/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.