Chino v 615 Ocean Ave. Realty Corp.
2021 NY Slip Op 31610(U)
April 27, 2021
Supreme Court, Kings County
Docket Number: 524714/2018
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

x

JOSEPHINA CANTOR CHINO,

Plaintiff,

-against-

615 OCEAN AVE. REALTY CORP. and P&W ELEVATOR INC.,

Defendants.

x

DECISION / ORDER

Index No. 524714/2018

Motion Seq. No. 4, 5, 6

Date Submitted: 4/26/21

Cal No. 9, 10, 11

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendants' motions for summary judgment and plaintiff's motion for sanctions for spoliation of evidence

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	43-56, 57-87
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	88 -103
Affirmation in Opposition and Exhibits Annexed.....	104, 105
Reply Affirmation.....	106

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is an action arising from an elevator accident which took place on November 28, 2018 in defendant's apartment building located at 615 Ocean Avenue, Brooklyn, NY. According to plaintiff's testimony, she was a tenant residing on the sixth floor at the building. On the day of her accident, she entered the lobby and walked up to the elevator, opened the door, and stepped in, just as she had earlier in the day. However, there was no elevator inside the door, and she fell into the elevator shaft, sustaining serious injuries. It is undisputed that if there was no elevator at that floor, the door should not have been

able to open.[1]

In Mot. Seq. 4, defendant 615 Ocean Avenue Realty Corp. (hereafter 615 Ocean) moves for summary judgment dismissing the complaint and all crossclaims. In Mot. Seq. 5, defendant P&W Elevator Inc. (hereafter P&W) moves for summary judgment dismissing the complaint and all cross claims. In Mot. Seq. 6, plaintiff cross-moves for an order striking the defendants' answers or for alternative sanctions for spoliation of the evidence. Oral argument was held virtually on April 26, 2021.

615 Ocean claims it is entitled to summary judgment dismissing the complaint because it lacked actual or constructive notice that the elevator's door interlock mechanism would fail. Counsel avers that the elevator had been used without any problems since it was last serviced by defendant P&W on October 2, 2018, almost two months earlier. Defendant also points out that the elevator passed its annual inspection some five months earlier. Mr. Muller, President of 615 Ocean, testified at an EBT that he makes weekly inspections of the building himself, counsel points out. He checks that the hallways are clean and free of graffiti. If he finds anything, he reports it to the super. He testified that there are thirty apartments and one elevator. There is a live-in superintendent named Enrique Hernando Flores. Counsel concludes, at ¶ 17 of his affirmation in support (Doc 43), that "Simply stated, the system failed this one time, without any known reason and without any warning, albeit with tragic results for the plaintiff." The superintendent was also deposed. Mr. Flores said he works Monday to Friday and is on call during weekends. He testified that he checked the elevator every day [Doc 55 at 17] "floor by floor, checking

[1] Mark Jacques from P&W ELEVATOR, INC. testified at his EBT [Doc 76] that he reviewed the records for the repairs subsequent to the incident. He advised that the interlock latch, which prevents the door from opening, without the elevator cab being present, was replaced on November 30, 2018. He did not know whether the work was done by P&W or a company they had hired [Page 38].

the everything is fine . . . that the elevator floor is level with the hallway floor . . . everything is clean . . . and if there's a light that needs to be changed." He said the mechanics did the rest. After plaintiff's accident, he called the management office and they called P&W. Three mechanics came and stayed for four or five hours. They came back the next day, too [Page 31]. He was unaware that the NYC Department of Buildings came on November 30, 2018.

Co-defendant P&W opposes the motion, claiming that it is entitled to indemnification from 615 Ocean. Plaintiff opposes the motion and argues that this elevator was often out of service, had numerous violations from the NYC Department of Buildings before the plaintiff's accident, and numerous complaints from the tenants. Counsel provides copies of the violations in Doc 100 and of the complaints in Doc 102. There were several violations issued in the months prior to the date of the plaintiff's accident and many complaints about the elevator in the two years prior to the date of the plaintiff's accident.

Defendant P&W moves for summary judgment and for an order dismissing the crossclaims, or, in the alternative, for summary judgment on its crossclaim for contractual indemnification against 615 Ocean. Counsel argues that "Pursuant to the terms of the Limited Service Agreement, 615 Ocean "agree[d] that the control over the management, inspection and operation of the equipment is and remains the full and sole responsibility of [615 Ocean]" (Doc 80 at 4). Further, P&W "[did] not assume possession, management or control of any part of the [elevator] equipment," and would "not in any event be responsible or liable for any loss or damage resulting from non-operation of said equipment" (*id.* at 3). Additionally, pursuant to the terms of the Limited Service Agreement, P&W would "not be responsible for mis-leveling of cars at landings, eccentricities in operation of car doors, defects in shaft doors, or their locking devices and for any situation that may occur." The

gist of this argument is that the contract was a limited maintenance agreement which did not displace the owner, and the company did not "assume exclusive control of the elevator." In addition, counsel argues that "there were no violations or defects found with the outer door elevator locks during the elevator's annual Category 1 DOB inspection, and . . . no evidence that P&W failed to correct a condition with the first floor elevator door lock of which it had knowledge or failed to use reasonable care to discover and correct." In conclusion, counsel avers that, as a matter of law, P&W is entitled to summary judgment.

Plaintiff opposes both motions and cross-moves for sanctions for spoliation of the evidence, providing a list of possible sanctions, starting with striking the defendants' answers. Counsel alleges that the workers who came to repair the elevator the night of plaintiffs' accident and on the subsequent days did not retain the parts they removed in the course of their work, entitling plaintiff to sanctions. P&W opposes plaintiff's motion and argues that the apparent discard of the parts was not done intentionally or negligently and did not "fatally compromise the movant's ability to prove a claim or defense."

Discussion

The court determines that P&W has made a prima facie case for dismissal of the complaint and all crossclaims. The business is an independent contractor, with no duty to the tenants at the building, as the contract with the owner did not "entirely displace" the responsibility of the owner to maintain the safety of the elevator (*see Espinal v Melville Snow Contrs.,* 98 NY2d 136, 140 [2002]; *Sanchez v 1067 Fifth Ave. Corp.*, 2021 NY Slip Op 01522 [1st Dept 2021]). The contract provides that for $175 per month, the company will "12 times a year . . . examine, adjust and lubricate the elevator." It goes on to say that the company will respond to emergency calls as well, but anything more than two hours of

service per month shall be billed at an hourly rate. The contract provides that the building owner shall indemnify the company, and that "The Company shall not be responsible for mis-leveling of cars at landings, eccentricities in operation of car doors, defects in shaft doors, or their locking devices and for any situation that may occur. In addition, the Company shall not be responsible for malfunctions and for any situation that may occur that cannot be revealed by the ordinary visits offered with this service [emphasis added]."

"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" *(see Dykes v Starrett City, Inc.,* 74 AD3d 1015, 1016 [2d Dept 2010] citing *Rogers v Dorchester Assoc.,* 32 NY2d 553, 559, 300 NE2d 403, 347 NYS2d 22 [1973]). Here, the contract makes no such representation, and instead provides, on Page 4, that "The Owner agrees that the control over the management, inspection and operation of the equipment is and remains the full and sole responsibility of the Owner, that the Owner will immediately shut down and remove any equipment from service when it appears to be unsafe or operating in a manner which might cause injury to anyone using said equipment."

The court also notes in *dicta* that the defendant sued is not the company the owner contracted with. Doc 80, the contract, indicates that 615 Ocean contracted with "P & W Elevator Mod & Construction Corp.," a New Jersey corporation authorized to do business in New York, and not with defendant "P & W Elevator Inc.," a New York corporation with its principal place of business in Kings County at a different address. They must have overlapping owners, as defendant answered the complaint and makes no mention of this error in the instant motion.

Turning to the motion by 615 Ocean, the court determines that the motion must be denied. The owner retained P&W to provide minimal servicing of the elevator but did not assume the responsibility for the remainder of the work needed to properly maintain the elevator. Now, the owner claims it had no notice that there was a problem. However, the part at issue is not visible to the eye, as it has a cover,[2] and the property owner did not engage anyone to inspect it. Mr. Jacques, who participated in the July 13, 2018 annual inspection of this elevator, states in his EBT that he "made sure everything is in working order [Page 35]." He does not provide any specifics. A property owner only performing repairs when something breaks is not an unusual circumstance. However, with regard to elevators, preventative maintenance is required. Because when "something breaks" in an elevator, people can be seriously injured. There have been too many elevator accidents in New York. This has resulted in the recent enactment of the Elevator Safety Act by the New York State Legislature (S. 4080-C/A. 4509), signed by the Governor but not effective until 2022.

To be clear, the building owner claims they are entitled to summary judgment because they stuck their proverbial head in the sand and did not know about the problem. To defendant, this equates to no actual or constructive notice. This is insufficient, and fails to make a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint (*see Urman v S & S, LLC*, 85 AD3d 897, 898-899 [2d Dept 2011]); *Nye v Putnam Nursing & Rehab. Ctr.*, 62 AD3d 767, 768, 879 NYS2d 505 [2009]; *compare Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882, 911 NYS2d 75 [2010]). Although the owner retained P&W to perform monthly maintenance of the building's

[2] *See* EBT of M. Jacques for P&W, Doc 76 at 39 ("from the photograph I see that they replaced the entire interlock." Q. How can you tell that? A. "Because the cover's new.").

elevator, it "continue[d] to owe a nondelegable duty to elevator passengers to maintain its building['s] [elevator[ ] in a reasonably safe manner" (*Dykes v Starrett City, Inc.*., 74 AD3d 1015, 1016, 904 NYS2d 465 [2010]). The owners failed to eliminate all triable issues of fact as to whether they had actual or constructive notice of the allegedly defective condition prior to the happening of the plaintiff's accident, as the deposition testimony they submitted in support of their motion included testimony from the owner's principal and the super that they looked for cleanliness, graffiti, and mis-leveling of the elevator, but left the mechanical operation inspections to the mechanics. However, the "mechanics" only inspected the part that failed, if at all, during the annual inspection.

As the Second Department clarifies in *Dykes v Starrett City, Inc.*, 74 AD3d 1015, 1016 [2d Dept 2010]:

> "the property owner continues to owe a nondelegable duty to elevator passengers to maintain its buildings' elevators in a reasonably safe manner (*see Rogers v Dorchester Assoc.,* 32 NY2d at 559; *Ortiz v Fifth Ave. Bldg. Assoc.,* 251 AD2d 200, 674 NYS2d 360 [1998]; *O'Neill v Mildac Props.,* 162 AD2d 441, 556 NYS2d 387 [1990]). Moreover, negligence in the maintenance of an elevator may be inferred from evidence of prior malfunctions (*see Rogers v Dorchester Assoc.,* 32 NY2d at 557, 559; *Liebman v Otis El. Co.,* 127 AD2d 745, 512 NYS2d 136 [1987]). Here, based on the deposition testimony and documentary evidence of numerous complaints and malfunctions of the subject elevator prior to the plaintiff's accident, there were triable issues of fact as to both Starrett's and Schindler's notice of a defective condition involving the subject elevator sufficient to defeat their respective cross motions for summary judgment."

In conclusion, defendant does not make a prima facie case for summary judgment, but even if the court found that it does, plaintiff overcomes the motion and raises issues of fact. Not only does plaintiff provide evidence that the elevator was often out of service and had numerous violations, but plaintiff provides an expert's affidavit, from Mr. Patrick Carrajat, (Doc 89), which is 111 pages long, and concludes in part that, to a reasonable

degree of professional certainty, that (Page 73) that "A defect that causes a passenger to fall into an open shaftway does not occur on a property [properly?] operating elevator absent negligence in its maintenance." Mr. Carrajat states that "At the time of the accident the elevator was equipped with electro-mechanical interlocks that are designed to keep the outside, swing type elevator doors securely locked when the elevator is not at that floor. Interlocks are considered a primary safety device to protect the public from entering a shaftway and being killed or injured. . . . A review of the New York City Department of Buildings records further revealed that the subject elevator was inspected by the Elevator Division and found to have violating conditions in 2001, 2002, 2003, 2004, 2007, 2008, 2009, 2012, 2013, 2015, 2016 and 2017. No inspections are recorded for 2005, 2006 and 2014. The inability of the elevator to pass these routine safety inspections is indicative of the degree of the lack of proper maintenance by the Defendants. Copies of the Elevator Division of the Department of Buildings records are attached as Expert Exhibit 'C.' The violations that were issued include CEASE USE violations which are the most serious the Elevator Division can issue."

Finally, addressing the plaintiff's motion for a remedy for P&W's alleged spoliation of the evidence (it is not really claimed that 615 Ocean is responsible) – here, the interlock that was broken and replaced – the court finds that plaintiff does not make a prima facie case for this relief as against either defendant. There are several elements of a valid claim for spoliation. "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact

could find that the evidence would support that claim or defense" (*see Oppenheimer v City of NY*, ___AD3d___, 2021 NY Slip Op 02401, *2 [2d Dept 2021], citing *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547, 26 N.Y.S.3d 218, 46 N.E.3d 601 [2015] [internal quotation marks omitted]).

Here, plaintiff has failed to establish that the elevator repair workers had an obligation to preserve the elevator parts they discarded at the time of their destruction, or that the unavailability of these parts is prejudicial to the plaintiff's case (*Garda v Paramount Theatre*, ___AD3d___, 2021 NY Slip Op 02278 [2d Dept 2021]; *Walker v Shaevitz & Shaevitz*, ___AD3d___, 2021 NY Slip Op 01799 [2d Dept 2021]). Plaintiff is not prevented from using the appropriate, but new, elevator parts as demonstrative evidence at trial. There is no dispute as to the identity of the part that needed to be replaced or the fact that it was broken when it was replaced.

This shall constitute the decision and order of the court.

Dated: April 27, 2021

ENTER:

Hon. Debra Silber, J.S.C.