SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 512162/2017
Motion Seq.: 06, 07

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JACQUELINE SKOLNICK,

Plaintiff,

– against –

DECISION AND ORDER

ROSEBROOK BUILDING CORP., MILLENNIUM ELEVATOR GROUP, INC., and MILLENNIUM ELEVATOR, INC.,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 06) 131-140 and 159-164, and (Motion 07) 141-156 were read on these motions for summary judgment.

In this action to recover damages for personal injuries, defendants Millennium Elevator Group, Inc. and Millennium Elevator, Inc. (hereinafter Millennium) move for an order (Motion 06) granting summary judgment pursuant to CPLR § 3212 and dismissing plaintiff's complaint and all cross-claims of co-defendant and owner Rosebrook Building Corp. (hereinafter Rosebrook). Rosebrook also moves for an order (Motion 07) granting summary judgment dismissing the complaint and cross claims. Only the plaintiff opposed the motions. For the reasons set forth below, Motion 06 and Motion 07 are denied.

This action arises out of a trip and fall accident that allegedly occurred on February 16, 2017, when she tripped stepping out of a mis-leveled elevator located within the premises at 2718 Ocean Avenue, Brooklyn, NY 11229. In support of its motion, Millennium submits, inter alia, the pleadings, the deposition transcripts of the plaintiff and two deponents for the defendants, Nevzat Tuncel for Rosebrook and Mitchell Evelkin for Millennium, and the expert affidavit of Jon B. Halpern, a licensed professional engineer. The plaintiff testified that on the date of the accident, she took the elevator from the basement up to the fourth floor, where her apartment was located. *See* NYSCEF Doc. No. 36. Once the elevator arrived at the fourth floor, the inner door opened automatically, and the plaintiff manually pushed open the outside door and tried to walk out of the elevator, but did not realize the elevator was mis-leveled in that it was over a foot below the fourth floor, causing her to trip.

Millennium relies upon the deposition testimony of Nevzat Tuncel, the superintendent of the subject premises, who stated that he conducted daily inspections of the elevator to ensure that it was working. *See* NYSCEF Doc. No. 137. Mr. Tuncel further testified that nobody had ever complained about mis-leveling of elevators at the premises before, and that he therefore never made such a complaint to Millennium. *Id.* Millennium also refers to the deposition testimony of

Mitchell Evelkin, the general manager of Millennium and an elevator mechanic. Mr. Evelkin testified that Millennium would make monthly visits to perform tasks such as oil and grease maintenance, cleaning the cars, and checking that the buttons were operating properly. *See* NYSCEF Doc. No. 138. Millennium would also make service calls to remedy any other issues that arose. *Id.* Mr. Evelkin testified that he had never received notice of any issues with elevator mis-leveling, nor were there any warning signs that the issue would come about. *Id.* Mr. Evelkin also testified that he had recommended several times that Rosebrook upgrade to a newer model elevator to prevent issues such a mis-leveling, and that mis-leveling could occur with this model for reasons outside of their control, such as a change in temperature. *Id.* Millennium also relies upon the Service Agreement, which only requires Millennium to perform monthly examinations and make minor adjustments when necessary. *See* NYSCEF Doc. No. 139.

Millennium also submits the affidavit of professional engineer Jon B. Halpern. *See* NYSCEF Doc. No. 140. Mr. Halpern states that he has been working in the vertical transportation industry since 1971, and that he has been qualified as an expert witness in both federal and state courts and on numerous occasions as an expert in the field of elevator design, safety, operation, maintenance, field engineering, and repairs. Mr. Halpern states that the elevator model that allegedly caused the accident was old and obsolete. *Id.* at pg. 3. Mr. Halpern further states that although the subject elevator was fitted with a door restrictor that was designed to prevent the car door from opening if the elevator was outside of the landing zone (more or less than 18 inches from the landing), the device would not have prevented the elevator from mis-leveling as occurred in this matter. *Id.* Mr. Halpern further states that Millennium had neither actual nor constructive notice of the elevator mis-leveling. *Id.* at pg. 5. As such, Millennium argues that it cannot be held liable for plaintiff's alleged injuries because plaintiff failed to show that defendants had either actual or constructive notice of the alleged defect.

Rosebrook also moves for summary judgment and argues that the plaintiff, who had lived at her apartment for approximately 25 years, had never experienced any problems with the elevator prior to the subject accident. The plaintiff also testified that she had not experienced problems with that elevator after the day of the accident. Rosebrook also relies upon the testimony of Mr. Tuncel, who stated that he was unaware of any complaints by tenants or violation concerning the elevator made by the City of New York, and that even though he rides the elevator at least twice per day, he has never noticed an issue with mis-leveling or skipping floors. Rosebrook further argues that the allegation by Millennium that Rosebrook was pushed to modernize its elevators is insufficient to demonstrate notice with regard to mis-leveling of the elevator. Rosebrook also attaches the affidavit of its own expert, professional engineer William J. Meyer, who is a licensed Mechanical Inspector, Building Inspector, and Elevator Inspector. *See* NYSCEF Doc. No. 156. Mr. Meyer states in his affidavit that there is "no code requirement for elevator systems to be modernized," and that the alleged tripping hazard would have been readily visible to anyone using reasonable observation. *Id.* at pg. 5.

The plaintiff opposes both motions and submits photographs of the elevator mis-leveling and the affidavit of elevator consultant Patrick A. Carrajat. The plaintiff testified that although she has never made complaints about the elevator, she has heard other tenants make complaints. Mr. Carrajat stated in his affidavit that the elevator was installed in "1938 and had not received any improvements to its stopping or leveling abilities prior to the day of the accident," and "was

overdue by more than twenty years for modernization on the date of the accident." *See* NYSCEF Doc. No. 162. Mr. Carrajat states that there have been feasible and economical devices available to ensure proper leveling within the last 20 years since the elevator required modernization. Mr. Carrajat further opines that the accident occurred as a result of Millennium's failure to perform proper maintenance and repair to the leveling system, which was a proximate cause of the mis-leveling that caused plaintiff to trip. Also attached to Mr. Carrajat's affidavit are copies of NYC Department of Buildings records, spanning from February 13, 2003 to September 20, 2019, that show 27 complaints about the elevator, including mis-leveling. NYSCEF Doc. No. 162, pgs. 18-19.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

Premises liability begins with duty, the existence and extent of which is a question of law. *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10 (2d Dept 2011); *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 (1994). In order to impose liability upon the defendant for a trip and fall, "there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time." *See Kudrina v 82-04 Lefferts Tenants Corp.*, 110 AD3d 963, 964 (2d Dept 2013); *see also Davis v Sutton*, 136 AD3d 731, 732-733 (2d Dept 2016). The owner has a nondelegable duty to maintain and repair the elevator on its premises, even though the owner has contracted with an elevator company to maintain it. *See Oxenfeldt v 22 North Forest Ave. Corp*., 30 AD3d 391 (2d Dept 2006). "'A property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect.'" *Napolitano v Jackson "78" Condominium*, 186 AD3d 1383, 1383-1384 (2d Dept 2020), quoting *Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 (2d Dept 2017). "An elevator company which agrees to maintain an elevator in safe operating condition can also be held liable to an injured 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." *Goodwin* at 766 (internal quotation marks removed); *see also Tucci v Starrett City, Inc.*, 97 AD3d 811, 812 (2d Dept 2012); *Rogers v Dorchester Associates*, 32 NY2d 553 (1973).

In the instant matter, although the defendants established prima facie entitlement to judgment as a matter of law, the plaintiff raised triable issues of fact in opposition through the affidavit of its expert. Mr. Carrajat opined that the issues with the elevator could not have occurred without Millennium's negligence in failing to repair and care for the leveling system. He also opined that there were feasible and economical devices available to ensure proper leveling within the last 20 years, during which time the elevator was overdue for modernization. Further, Rosebrook's argument that it did not have notice of issues with the elevator is unavailing, given the elevator's extensive history of defects and complaints, which include complaints in 2011 that "the elevator does not stop on some floors" and in 2010 that the elevator "stops in between floors, gets stuck and doesn't stop level with the floor." In tandem with Millennium's contention that it advised Rosebrook several times that the elevator required modernization, there are questions of fact as to whether the premises owner had actual or constructive notice of potential issues of mis-leveling with the subject elevator. *See Oxenfeldt*, 30 AD3d at 392.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by Millennium Elevator Group, Inc. and Millennium Elevator, Inc. (Motion 06) is DENIED; and it is further

ORDERED, that the motion for summary judgment by Rosebrook Building Corp. (Motion 07) is DENIED.

This constitutes the decision and order of the Court.

DATED: December 22, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.