Lulgjuraj v Brown Harris Stevens Residential Mgt. LLC
2019 NY Slip Op 31803(U)
June 21, 2019
Supreme Court, New York County
Docket Number: 153643/14
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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GJON LULGJURAJ,

Plaintiff,

-against- Index No.

BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT LLC and CENTENNIAL ELEVATOR INDUSTRIES, INC., 153643/14

Defendants.

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DAVID COHEN, J. :

Defendant Brown Harris Stevens Residential Management LLC (Brown Harris) moves for summary judgment dismissing the complaint and cross claims against it.

This is a personal injury action. Plaintiff was an employee of nonparty 72nd Tenants Corporation (72nd Tenants), a residential cooperative located at 125 East 72nd Street, New York, New York. Brown Harris is the managing agent of 72nd Tenants. Defendant Centennial Elevator Industries, Inc. (Centennial) is the elevator company that contracted with 72nd Tenants.

Plaintiff alleges the following: At about 8:00 p.m. on July 12, 2013, plaintiff, in the course of collecting and discarding garbage on the premises, opened the door to a service elevator shaft and fell down the shaft. The elevator, which was manually operated, was located in the C-D wing of the building. Earlier that evening, plaintiff had brought the elevator down to the lobby, and upon exiting, left the shaft door partially open with the elevator car parked there. When he returned a half hour later, he found the door completely closed. Plaintiff knew that to operate this elevator, one had to insert a key inside the car, which activated the lights in the elevator and enabled it to move. If the shaft door was fully closed, the shaft door had to be

opened with another key, a drop key inserted into a hole in the shaft door. There was a single drop key for the elevators and the drop key was kept in box in an employees-only part of the basement, which box also contained keys to the residents' apartments. Plaintiff used the passenger elevator to go down to the basement, took the drop key from the key box and returned to the lobby. Plaintiff went to the shaft door to the service elevator, and inserted the drop key to open the shaft door. When plaintiff opened the shaft door completely, he looked straight ahead and did not see the car gate. The elevator would not move if the gate was open. Nevertheless, plaintiff took a step into the shaft, fell 15 feet down the shaft and landed in the pit of the elevator, suffering serious injuries.

Plaintiff commenced this action against defendants, alleging negligent maintenance, as well as violations of various statutes, and negligent supervision. Centennial brought cross claims against Brown Harris for common law indemnification, contractual indemnification, common law negligence, breach of contract, strict liability and comparative negligence. Brown Harris also brought cross claims against Centennial.

After plaintiff's service of his bill of particulars, and the completion of a number of depositions, Brown Harris moves for summary judgment for dismissal of all claims brought against it. Brown Harris argues that it cannot be held liable for negligence because it had no duty of due care toward plaintiff. Because it was a managing agent of the owner of the premises, had no express obligations to plaintiff and did not assume the owner's duty to maintain a safe premises, Brown Harris contends that it lacked an actionable duty in this case. Alternatively, Brown Harris argues that by arranging for Centennial to contractually maintain the service elevator, it cannot be liable for any alleged negligence attributable to Centennial.

Brown Harris submits as evidence the following: depositions of John Derlaga (Derlaga), its property manager; Dennis Campbell (Campbell), a superintendent employed by 72nd Tenants; Marc Peper (Peper), Centennial's district manager; Frank Arsis (Arsis), Centennial's supervisor; Gus Catanzaro (Catanzaro), Centennial's shareholder/owner; and plaintiff; a copy of the building management agreement (Management Agreement) between 72nd Tenants and Brown Harris; a copy of the elevator modernization agreement (Modernization Agreement) between Brown Harris, acting on behalf of 72nd Tenants, and Centennial; a copy of the elevator maintenance agreement (Maintenance Agreement) between the same entities; various business records that are the property of Centennial; an affidavit from Derlaga; photographs of the subject elevator; and an affidavit from Michael Sena (Sena), a certified elevator inspector and safety expert retained by Brown Harris to inspect the subject elevator and review the documents and records pertinent to this case.

Derlaga testified that Centennial performed modernization work on the premises' elevators in 2001, including the subject elevator. Following the modernization, Centennial performed monthly maintenance on the elevators and engaged in city-mandated inspections every six months, one year and five years. Derlaga stated that after the modernization, the elevator car for C-D elevators had a light that was activated by a key switch, and that the hallway abutting the elevators had an overhead fluorescent light. Derlaga testified that, prior to the accident, he was not aware of any other employees being injured in a C-D wing service elevator.

Campbell testified on behalf of 72nd Tenants. He testified that the door to the elevator shaft for C-D service elevators could be opened only by using a drop key. He claimed to have kept one of these keys in his apartment at the premises and one stored in the basement key box.

He asserted that he was the only member of the building staff permitted to use the drop key to open the service elevator door in the event that the door was locked. Campbell stated that, on the night of the accident, after investigating an electrical fire on the fifth floor, he heard plaintiff calling out in the elevator pit. Descending to the lobby, Campbell opened the shaft door with the second drop key and saw plaintiff in the pit complaining of injuries. When later visiting plaintiff at the hospital, Campbell inquired as to why plaintiff had used the drop key on his own.

Plaintiff testified that he did use the drop key to open the shaft door to the elevator. He stated that he had been trained how to use the drop key to open the door if it was locked. Regarding the lighting, plaintiff testified that the hallway was lit by a single florescent light. With no light inside the elevator cab, and the dim lighting outside, plaintiff had difficulty seeing below. Plaintiff also acknowledged that the gate was open.

Testifying on behalf of Centennial, Peper stated that Centennial performed elevator maintenance pursuant to the Maintenance Agreement. He discussed a parking lock, which is used as a safety device to prevent the shaft door from opening if the elevator is not on the same level as the door, thereby preventing an inadvertent entry into an open shaft. He was not aware if the subject elevator had a parking lock at the time of the accident, or if such a device was legally mandatory for service elevators at that time.

Another Centennial employee, Arsis testified as to the elevator modernization. Arsis stated that under the Modernization Agreement, Centennial had to perform the work specified in the scope of work section of the contract, and if the owner wanted to change the scope, it would submit a written change order to request an up-change. According to Arsis, Centennial employees, upon complying with the change orders, would complete the modernization, and the

City would inspect the results for compliance with New York City Building Code (Building Code) regulations. Thereafter, Centennial would maintain and inspect the elevators on a regular basis. Centennial would also be responsible for notifying the owner of applicable changes in the Building Code.

Brown Harris submits copies of its contracts. The Management Agreement, dated January 31, 1992, provides that Brown Harris would act as the sole managing agent for 72nd Tenants, would handle various financial matters, and would hire, fire and supervise employees of 72nd Tenants. Brown Harris contends that the agreement provides that it is not responsible for any act or omission of the employees it hired, and that it is not liable to 72nd Tenants for any loss or damage not caused by its negligence. The Modernization Agreement, dated August 2, 2001, provides that Centennial is responsible for modernizing the service elevators at the premises. This agreement refers to the installation of a parking lock for the elevators. The agreement also provides that Centennial would fully comply with all applicable local laws and codes, and that it agreed to be liable to 72nd Tenants for its acts and omissions, and to indemnify 72nd Tenants from any claims of injury arising from its performance of the work.

The Maintenance Agreement, dated April 12, 2001, provides the full extent of Centennial's obligations for the maintenance of the elevators. Brown Harris contends that, pursuant to this agreement, Centennial is required to maintain, repair and replace all component parts of the system, whenever such replacements become necessary due to causes other than malicious damage or fire. The Maintenance Agreement also provides that Centennial agrees to be liable to 72nd Tenants for its acts and omissions and to indemnify 72nd Tenants from any claims of injury arising from its performance of its work.

In his bill of particulars, plaintiff asserts that the cause of his accident was the lack of a parking lock in the subject elevator at the time of the accident, as well as inadequate lighting. Brown Harris submits business records from Centennial, specifically, a maintenance log, work tickets and Department of Buildings (DOB) forms covering the period of August 2011 and November 2013, reflecting the course of maintenance work. Brown Harris states that there is no evidence that Centennial ever installed a parking lock in the subject elevator. Brown Harris submits a record of DOB violations issued to Centennial, which does not include a violation for the absence of a parking lock. A DOB violation, issued on July 2, 2013, refers to a defective light in the elevator in need of repair. Brown Harris claims that plaintiff, in his deposition, testified that this light was working at the time of the accident, as he turned off that light when he parked the elevator at the lobby level prior to the accident.

Brown Harris supplements these records with an affidavit from Derlaga, who affirms that he searched for progress reports, change orders and for a punch list for the service elevators during the modernization work and found nothing that he sought.

The affidavit from the expert Sena states that Centennial contractually agreed to maintain and repair the elevators and keep them in a safe condition. After assessing the evidence, Sena concludes that Centennial never notified Brown Harris of the absence of a parking lock. Sena states that in 2008, the DOB retroactively required all manual elevators be equipped with a parking lock, and that the lay public would not readily observe such a lock from the inside of an elevator. Sen states that the DOB did not require service elevators to have a continuously operating interior light until 2014. However, he concludes that code compliance was Centennial's obligation under its agreements, and that Centennial violated its obligations.

Brown Harris argues that it has provided sufficient proof that it is entitled to summary judgment and dismissal from this action. It argues that as a managing agent, it does not have a duty to plaintiff to maintain a safe elevator on the premises. According to Brown Harris, its duty is related to its contractual obligations to the owner, which is not a party to this action. While there are exceptions to the rule, such as expressly assuming a duty to maintain the premises, Brown Harris denies ever assuming such a duty. Alternatively, Brown Harris contends that if it had such a duty, it had transferred this duty to Centennial, arguing that the agreements that Centennial entered into gave Centennial a duty to maintain safe elevators, including the subject elevator. In addition, Brown Harris contends that it did not create a dangerous condition on the premises or had any actual or constructive notice of said condition. Brown Harris argues that prior to the accident it had no awareness of the absence of a parking lock on the elevator. Thus, Brown Harris argues that it was not negligent, acted reasonably under the circumstances and did not cause the accident.

This motion is opposed by plaintiff and Centennial. Plaintiff argues that a number of issues of fact precludes the granting of summary judgment. First, plaintiff contends that Brown Harris, despite maintaining a contractual obligation to provide services, is also subject to tort liability in the event that it launches a force or instrument of harm, or if plaintiff detrimentally relies on its continuing contractual performances. Plaintiff contends that Brown Harris, through its alleged failure to secure a parking lock for the subject elevator and to maintain adequate lighting in the elevator area, subjected itself to tort liability regarding plaintiff's accident. Plaintiff disputes Brown Harris's claim that it relinquished all of its duties to Centennial under the elevator agreements, because Brown Harris allegedly maintained its duty to oversee

Centennial's modernization and maintenance work, and to ensure that the terms of the agreements were completed or properly performed. Plaintiff also contends that, regardless of contractual duties, Brown Harris had a duty to provide adequate lighting in and outside the subject elevator. Plaintiff disputes the claim about his acknowledgment of a properly functioning elevator light at the time of the accident. He claims that the light, though operative, was inadequate. Plaintiff argues that Brown Harris had notice of defective lighting prior to the accident and did nothing to remedy the situation. Regarding notice, plaintiff contends that Brown Harris was liable for the foreseeable consequences of its own negligence, regardless of whether the conduct of plaintiff or Centennial contributed to plaintiff's injuries.

Centennial argues that Brown Harris was contractually obligated to train and supervise owners's employees such as plaintiff. Centennial asserts that plaintiff acted improperly prior to the accident, and that Brown Harris failed to instruct plaintiff regarding the use of the subject elevator. Centennial contends that Brown Harris knew about the absence of a parking lock prior to the accident, going back to the modernization period. Centennial also contends that Sena, Brown Harris's expert, is incorrect about the 2008 Building Code retroactively requiring all manual elevators to have a parking lock. Centennial refers to Brown Harris hiring Van Deusen & Associates to oversee and monitor Centennial during the modernization period, indicating that Brown Harris maintained some authority over the elevators.

In its reply, Brown Harris argues that plaintiff has failed to prove tort liability on its part, and that it has no duty to protect plaintiff. Brown Harris argues that it had no duty to train or supervise employees of the owner like plaintiff, claiming that this was the owner's responsibility.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted

where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted].'" (*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Surgery,* 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id* at 82).

The court shall first determine plaintiff's claims against Brown Harris. The primary issue here is one of duty. "The threshold question in any negligence action is whether the alleged tortfeasor owes a duty to the injured party, and the existence and scope of that duty is a legal question for the courts to determine [citations omitted]" (*Shelia C. v Povich,* 11 AD3d 120, 125 [1st Dept 2004]).

It is settled that a managing agent is subject to liability towards plaintiff for nonfeasance only if the agent was in complete and exclusive control of the management and operation of the building (*see James v Greenpoint Fin. Corp.*, 34 AD3d 644, 645 [2d Dept 2006]). Plaintiff alleges nonfeasance on Brown Harris's part, a failure to maintain a parking lock and adequate lighting, as opposed to affirmative acts of negligence. Moreover, Brown Harris is party to the Management, Modernization and Maintenance Agreements, which define its duties to the other contracting parties, 72nd Tenants and Centennial. Plaintiff is not a party or third- party

beneficiary to these agreements. Plaintiffs, citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002), argues that Brown Harris is liable in tort to plaintiff for launching a force or instrument of harm against him, and/or allowing plaintiff to detrimentally rely on its continued performance of its contractual duties.

In this case, plaintiff has not shown or raised an issue as to whether Brown Harris's conduct complies with the two *Espinal* requirements. Although plaintiff argues that Brown Harris could have launched a force of harm, there is insufficient proof that this went beyond notice of a defective condition, a standard for nonfeasance. There is no evidence that plaintiff had previously relied on Brown Harris prior to the accident, or that he relied on Brown Harris on the date of the accident. It is not clear that plaintiff had any knowledge of Brown Harris's contractual duties.

As Brown Harris's obligations to maintain the subject elevator are apparently solely contractual, and its conduct here does not fall within the *Espinal* exceptions, the court finds that Brown Harris, even if it had notice of a defective condition, had no duty towards plaintiff in this case. Therefore, the motion for summary judgment is granted against plaintiff, and the complaint is dismissed against Brown Harris.

The court shall now determine the cross claims brought by Centennial. Centennial argues that the Management Agreement between 72nd Tenants and Brown Harris provides Brown Harris with broad authority over the maintenance of the elevators. Pursuant to this agreement, Brown Harris allegedly has the authority to train and supervise 72nd Tenant's employees, including plaintiff. Centennial contends that plaintiff had improperly used the drop key and this resulted in his accident. Centennial contends that Brown Harris had a duty to properly train plaintiff and

breached this duty. Centennial also contends that Brown Harris knowingly failed to have the parking lock installed, in violation of the Modernization Agreement.

Upon examining the Management Agreement, the court finds that the agreement delegates to Brown Harris broad general authority over the premises, including elevator service. However, said agreement does not delegate Brown Harris complete and exclusive control of the operation of the premises so as to impose tort liability on it. Regarding the elevator agreements, the court disagrees with Brown Harris's claim that it had relinquished its authority over elevator maintenance to Centennial. Defendants share an ongoing responsibility with respect to elevator maintenance.

In its answer, Centennial brought a cross claim against Brown Harris for contractual indemnification/contribution. Centennial argues in its opposition papers that Brown Harris was obligated to have a parking lock installed during the modernization period. There is sufficient evidence that Brown Harris hired an elevator expert to monitor and oversee Centennial at that time. There is an obvious failure to provide this device, which constitutes a breach of the Modernization Agreement, as well as an alleged proximate cause of the accident, despite Brown Harris's assertion of lack of knowledge. The court shall not dismiss this particular cross claim brought against Brown Harris. In the event that Centennial is found liable to plaintiff with respect to the lack of a parking lock contributing to the negligence, Centennial's cross claim for contractual indemnification/contribution can be considered.

Accordingly, it is

ORDERED that defendant Brown Harris Stevens Residential Management LLC's motion for summary judgment is granted with respect to the complaint, and the complaint is dismissed

with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion to dismiss the cross claims is granted except for the cross claim for contractual indemnification/contribution; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

Dated: JUNE 21, 2019

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.