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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice PART 19

Index Number : 111591/2006
ALBANESE, LAURA L.
vs.
MAINCO ELEVATOR
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

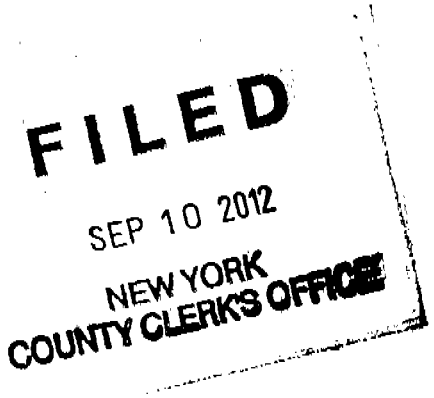
The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.



MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/6/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

LAURA L. ALBANESE and CHRISTOPHER ALBANESE,

Plaintiffs,

- against-

MAINCO ELEVATOR & ELECTRICAL CORP. and THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

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Index No.: 111591/2006

DECISION AND ORDER

For Plaintiffs:
Tomkiel & Tomkiel PC
670 White Plains Road, Suite 322
Scarsdale, NY 10583

For Defendants:
Babchik & Young, LLP
200 E. Post Rd., 2nd Floor
White Plains, NY 10601

Papers considered in review of this motion for partial summary judgment:

Notice of Motion. 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiffs Laura L. Albanese and Christopher Albanese (collectively referred to as "Albanese") move for partial summary judgment on the issue of liability.

This personal injury action arises out of an accident that occurred on November 8, 2004, when an elevator malfunctioned causing plaintiff Laura L. Albanese to sustain injuries. Albanese filed a complaint against defendants Mainco Elevator & Electrical

Corp. and Thyssenkrupp Elevator Corporation ("Elevator Defendants") alleging seven causes of action grounded in negligence and products liability.

Laura L. Albanese was an animal technician employed by New York University ("NYU") at the time of her accident. The animals were kept in the NYU basement and the research was done on the tenth and eleventh floors. Albanese and the other employees would have to take one of two elevators to transport the animals or other items from the basement to the labs. On the date of her accident, at around 3:00 P.M., Albanese and her manager, nonparty Michael Gorman ("Gorman"), needed to transport an animal chair from the basement to the eleventh floor. One of the two elevators, the "southwest" elevator, was out of service, so they had to take the "northwest" elevator. This elevator was the only one which had doors that opened in the front and the back. Albanese and Gorman had just previously taken the northwest elevator down from the eleventh floor without incident.

Gorman testified that he and Albanese entered the northwest elevator and that it started to ascend. He continued, "[t]hen after I don't know how long, five seconds to ten seconds, I don't recall, it felt like it dropped and we fell, I would guess, a few floors, I don't know and then it stopped abruptly." Gorman stated that the elevator definitely fell a couple of floors. The doors then opened and he could see that the elevator was between floors two and three. Gorman testified that while it was falling, he "lost his balance. When I stopped, I slammed into the chair that I had my right arm resting on."

With the doors still open, the elevator then started to ascend and came to a stop between floors three and four. The lights did not turn off nor were there any vibrations. At that point, Gorman testified that he looked at Albanese who was "crouched down leaning against the back of the elevator." The elevator then went up and stopped at the tenth instead of the eleventh floor. Gorman and Albanese exited the elevator.

According to Albanese, she and Gorman had entered the elevator and it started to travel upward normally. Then, "all of a sudden it just started free falling, it just dropped and then it slammed to a stop." Albanese stated that when the elevator came to the sudden stop, she felt a "searing" pain in her back. Although Albanese previously had back problems, she testified that this back pain was different and more intense. After the elevator finally stopped and opened on the tenth floor, Albanese laid down on the floor behind her desk. She also started to have pain in her legs. When Albanese visited the doctor shortly after her accident, she was diagnosed with a new back injury, unrelated to her previous injuries.

Mainco Elevator & Electrical Corp. ("Mainco") is the elevator service maintenance and repair company employed by New York University. Mainco merged with Thyssenkrupp Elevator Corporation in 2009. Mainco was the exclusive provider of services for the elevators at Albanese's place of employment. It was responsible for routine inspections and preventive maintenance. Frank Zuccaro ("Zuccaro"), the chief maintenance and repair mechanic, testified that the subject elevator and the southwest

elevator each had their own separate elevator control room. He explained that the elevators had different components from each other. When asked during testimony about the work tickets for the elevators in the building, Zaccaro conceded that it was not possible to ascertain which elevators had been worked on from some of the work tickets. For example, when shown the work ticket for July 21, 2004, Zaccaro could not tell which elevator had been serviced.

The service repair ticket from the date of Albanese's accident indicated that a mechanic had been working on the southwest elevator, which was the other elevator. Although the elevator was not labeled as such on the work ticket, Zaccaro testified that the work ticket referenced a component which was not present on the subject northwest elevator. Zaccaro continued that the mechanic would have been working on the southwest elevator around the time of Albanese's accident and that the mechanic would have been in the southwest elevator's private control room.

Zaccaro testified that the work log for the date after Albanese's accident indicated that, "[f]reight car on 11/8/04 dropped and building staff had hurt their back, accident form was filled out needs car checked out." The northwest elevator was then inspected on November 9, 2004 and no problems were found. Zaccaro testified that the controller is the device which controls the movement of the elevator. This device could be tested in the elevator's motor room by the mechanic. There were other switches in the motor room that could be opened by a mechanic which would also control the movement of the

[* 6]

elevator. He maintained that passengers in the elevator could not make the doors open mid-trip unless they used excessive force.

Albanese now moves for partial summary judgment on the issue of liability. In support of the motion, she submits an affidavit from expert Patrick A. Carrajat ("Carrajat"), who claims that what happened to the subject elevator was not normal, and was due to the negligence of the elevator mechanic. He explains that the "mechanisms involved in causing the elevator to malfunction as described are within the exclusive control of the elevator maintenance company, specifically in the motor room where a mechanic would have to jump out a circuit on the elevator control board for the subject elevator to malfunction as described by the witnesses." Carrajat hypothesized that the elevator mechanic who was there working on the other elevator, mistakenly worked on the control panel for the subject elevator. That is why on the date after the accident, the subject elevator did not have any problems. He maintains, "[t]he mechanics frequently confused the two elevators." Carrajat concluded that nothing Albanese could have done would have made the elevator act the way that it did and that the only possible cause of the accident was due to an error by the elevator mechanic.

Albanese claims that it is an "inescapable conclusion that a defendant mechanic caused the subject elevator to drop precipitously without warning while Albanese and her supervisor were in it, thereby causing her bodily injury." Albanese alleges that the doctrine of res ipsa loquitur should apply as well.

In opposition, the Elevator Defendants claim that on the date of Albanese's accident, the work ticket demonstrates that the mechanic was servicing the other elevator. As such, the mechanic would have been in the other control room and it would not have been possible for him to have caused the accident. For instance, the work ticket generated that day states that the mechanic started at 3:00 P.M. and ended at 4:30 P.M. and that he "found car stuck on 3rd floor. [Motor Limit Timer]. Cleaned edge checked tape guides. Ran car returned to service." The Elevator Defendants' expert, Jon B. Halpern ("Halpern") states that the elevator Albanese was riding did not have a motor limit timer, so evidently the mechanic was working on the other elevator. The mechanic who was on site on the date of Albanese's accident was not deposed.

Halpern further avers, contrary to Gorman and Albanese's testimony, that the elevator did not "overspeed, drop or fall in any way." He bases this opinion on the elevator's mechanical system. Halpern then states that there are other possible scenarios, besides the negligence of Elevator Defendants, which could have caused the elevator to malfunction. He continues, "[a]mong these possible scenarios are that the elevator controller can simply lose direction and or its position from a spontaneous failure of a controller component, selector component or a simple blip of the incoming power without any human intervention and without any negligence on behalf of the maintenance company." Halpern does not provide any further explanation of what exactly defines a "simple blip."

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

To rely on the doctrine of res ipsa loquitur, a plaintiff must demonstrate that the event:

> (1) was of a kind that ordinarily does not occur in the absence of someone's negligence; (2) [was] caused by an agency or instrumentality within the exclusive control of the defendant; and (3) [was not] due to any voluntary action or contribution on the part of the plaintiff [internal quotation marks and citation omitted]."

Singh v. United Cerebral Palsy of N.Y. City, Inc., 72 A.D.3d 272, 277 (1st Dept. 2010).

Albanese contends that the only explanation for the elevator's malfunction is the Elevator Defendants' mechanic's presence in the control room manually overriding the subject elevator's controls. Albanese explains that Elevator Defendants were present at the time of Albanese's accident and were allegedly working on the other elevator. They were the only ones who provided the repair and maintenance services for the elevators. The work tickets in the past for the elevators demonstrated that there was confusion as to the identity of the elevators being worked on. Neither Albanese nor any other passengers

could cause the elevator to function the way that it did. An inspection the day afterwards did not indicate that the elevator had problems. Albanese also claims that the possible non-negligent causes of the accident, as provided by Halpern, "are based on the erroneous assumption that the elevator did not drop or reverse direction." Albanese contends that Halpern did not address her allegation of the controls being manually overridden and that his theories of alternative causes of the accident are without foundation. As such, Albanese claims that there is no issue of fact with respect to the Elevator Defendants' exclusive control of the elevator and of Elevator Defendants' negligence.

It is undisputed that Albanese did not contribute to the elevator's behavior. The Elevator Defendants do not appear to dispute that they were the ones that had exclusive control over the elevators. The court finds that the Elevator Defendants had exclusive control over the elevator in that they had the exclusive contracts for the maintenance and service of the elevator. *See Fiermonti v Otis Elevator Company*, 94 A.D.3d 691, 692 (2d Dept. 2012 ("Proof that the sudden misleveling of the elevator was an occurrence that would not ordinarily occur in the absence of negligence, that the maintenance and service of the elevator was within the exclusive control of Otis, and that no act or negligence on the injured plaintiff's part contributed to the happening of the accident, is a basis for liability under the doctrine of res ipsa loquitur").

Elevator Defendants do argue, however, that the evidence raises issues of fact particularly as to the negligence element of the res ipsa loquitur doctrine. As previously

mentioned, the Elevator Defendants' expert provides alternative theories for why the accident occurred, and also alleges that the elevator could never have descended after it started to ascend.

In support of its argument regarding negligence, the Elevator Defendants cite to *Martinez v. Mullarkey* (41 A.D.3d 666 [2d Dept. 2007]), in which the court found that the trial court erred when it granted judgment as a matter of law against the elevator maintenance company based on the doctrine of res ipsa loquitur. Similar as in the present case, in *Martinez v. Mullarkey*, the plaintiff suffered injuries when the elevator suddenly dropped and came to a sudden stop. There had been no previous complaints about the subject elevator. Both plaintiff and defendant's experts gave different explanations for what could have caused the accident. The Court found that,

> There was inconclusive and sharply disputed evidence concerning the precise cause of the accident and it was therefore error for the trial court to rely on res ipsa loquitur to direct a verdict against Centennial on the issue of liability as a matter of law rather than submitting to the jury the issues of fact surrounding the applicability of the doctrine. *Id.* at 669.

Albanese claims that *Martinez v. Mullarkey*, *supra*, is not comparable because in the present situation, Halpern's "musings about possible 'spontaneous' component failures are flatly contradicted by defendants' own admission ... nor are they based on his personal knowledge or inspection of the subject elevator."

Although the doctrine of res ipsa loquitur may apply in this case, inasmuch as the court finds that the erratic behavior of the elevator which led to Albanese's injuries was

"neither an ordinary nor a natural experience" (*Weeden v. Armor El. Co.*, 97 A.D.2d 197, 205 [2d Dept. 1983]), the court finds that the case of *Martinez v. Mullarkey, supra,* is instructive and comparable. *Compare Dickman v. Stewart Tenants Corp.* 221 A.D.2d 158, 158 (1st Dept. 1995) (in which defendant elevator repair company had been informed of complaints regarding the elevator's misleveling and the court held that negligence could have been inferred due to its "failure to take any corrective action" and also that "[d]efendant's negligence was also established through the application of the doctrine of res ipsa loquitur").

Although Halpern's contends, in an affidavit, that it may have been a possibility that the elevator did not free fall, he then sets forth additional causes of the incident that would not be the result of the Elevator Defendants' negligence. There is no apparent contradiction. Moreover, there is no indication that Albanese's expert inspected the subject elevator either.

With respect to negligence, the Appellate Division, First Department has held that "[t]he only instance when res ipsa loquitur can be established as a matter of law is when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of [the] defendant's negligence is inescapable [internal quotation marks and citation omitted]." *Naughton v. City of New York*, 94 A.D.3d 1, 11 (1st Dept. 2012).

While the court agrees that Halpern's affidavit is minimally informative, due to other evidence in the record, the Elevator Defendants' negligence or lack thereof, cannot

be determined as a matter of law at this time. For example, the work ticket generated on the date of Albanese's accident indicates that the mechanic was working on the other elevator. Zaccaro, as well as Halpern, contended that one of the parts referred to by the mechanic on his ticket, was not a part on the elevator involved in Albanese's accident. Because the mechanics' work tickets were frequently unidentifiable and the mechanics themselves confused the elevators, the court cannot conclude at this time that the "inference of [the] defendants's negligence is inescapable."

Moreover, res ipsa loquitur is an evidentiary doctrine where plaintiff bears the burden of proof. *States v. Lourdes Hospital*, 100 N.Y.2d 208, 213 (2003). Albanese has not met her burden of proof in light of the additional alleged non-negligent possible causes of the accident, coupled with the work tickets allegedly indicating that Elevator Defendants were not working on the subject elevator at the time of the incident.

Accordingly, because questions of fact remain with respect to the Elevator Defendants' negligence, Albanese's motion for partial summary judgment on the issue of

liability is denied.

In accordance with the foregoing, it is hereby

ORDERED that Laura L. Albanese and Christopher Albanese's motion for partial summary judgment on the issue of liability is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
~~August~~ September 6, 2012

ENTER:

J.S.C.
SALIANN SCARPULLA

FILED
SEP 10 2012
NEW YORK
COUNTY CLERK'S OFFICE