SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA **PART** 19

Justice

Index Number : 115308/2009
RAMIREZ, FERNANDO
vs.
ROTAVELE ELEVATOR, INC.
SEQUENCE NUMBER : 005
REARGUMENT/RECONSIDERATION

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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
SEP 12 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/7/12

SALIANN SCARPULLA **, 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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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FERNANDO RAMIREZ,

Plaintiff,

Index No.: 115308/09
Submission Date: 8/8/2012

- against-

ROTAVELE ELEVATOR, INC., and 447-453 West 18 LP,

DECISION AND ORDER

Defendants.

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For Plaintiff:
Douglas & London, P.C.
111 John Street, 14th Floor
New York, NY 10038

For Defendant Rotavele Elevator, Inc.:
Gottlieb Siegel & Schwartz, LLP
180 East 162nd Street, Suite 1D
Bronx, NY 10451

For Defendant 447-453 West 18 LP:
Traub, Lieberman, Strauss & Shrewsberry, LLP
Mid-Westchester Executive Park
Seven Skyline Drive
Hawthorne, N.Y. 10532

Papers considered in review of this motion and cross-motion to reargue:

Notice of Motion 1
Aff in Support 2
Aff in Opp. 3
Notice of Cross-Motion. 4
Aff in Opp 5
Aff in Partial Opp 6
Reply Aff. 7
Reply Aff 8

HON. SALIANN SCARPULLA, J.:

In this negligence action, defendant 447-453 West 18 LP ("447-453") moves pursuant to CPLR §2221(d) for an order granting leave to reargue its motion which sought summary judgment dismissing the complaint of plaintiff Fernando Ramirez's ("Ramirez") and all cross-claims asserted against it, judgment over and against defendant

Rotavele Elevator, Inc. ("Rotavele") for contractual indemnity, and judgment over and against Rotavele for common law indemnification. Rotavele cross-moves for an order pursuant to CPLR 2221(d) granting leave to reargue its motion for summary judgment dismissing all claims and cross-claims against it. By decision and order dated April 16, 2012, 447-453's motion and Rotavele's cross-motion for summary judgement were denied.

447-453 now moves to reargue, asserting that denial of its motion for summary judgment was based on my misapprehension of the operative law. 447-453 argues that my decision to accept as true Ramirez's testimony that he was injured when the elevator went into "free fall" despite concluding that 447-453 had met its burden by submitting evidence that the accident was a mechanical impossibility is a misapprehension of the controlling law, and that I was incorrect to conclude that the case should be submitted to a jury on the basis of Ramirez's invocation of res ipsa loquitur.

Similarly, on its cross-motion, Rotavele argues that I misapprehended the law when I denied Rotavele's motion for summary judgment based on Ramirez's uncorroborated deposition testimony, even though I found that Rotavele made a prima facie showing that the elevator did not have a defective condition on the date of Ramirez's accident and that there was no constructive or actual notice of any defective condition.

In opposition to the motion and cross-motion, Ramirez argues that the Court did not misapprehend the law. Ramirez asserts that neither defendant argues that the Court misapprehended the law of res ipsa loquitur, as neither challenges the Court's finding that an elevator going into free fall is the type of event that does not occur in the absence of negligence, nor do they assert in their respective motions to reargue anything with respect to the exclusive control of the elevator. Further, Ramirez points out that neither defendant argues on these motions that any act or negligence by Ramirez contributed to the accident. Ramirez asserts that both defendants' motions to reargue must be denied, as their argument that their offering of proof that Ramirez's account of the accident is mechanically impossible renders res ipsa loquitur inapplicable does not establish a misapprehension of the law.

Discussion

Pursuant to CPLR 2221(d)(2), a motion to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep't 1992). Absent mistake on the Court's part, the Court must adhere to its original decision. *Pahl Equipment Corp. v Henry Kassis*, 182 A.D.2d 22, 27-28 (1st Dep't 1992). Here, reviewing the submissions of the parties for a second time, the Court once again finds issues of fact which must be resolved at trial.

In the underlying decision, I found that while the defendants met their burdens to show a prima facie entitlement to summary judgment, Ramirez established a triable issue of fact solely under the doctrine of res ipsa loquitur. Defendants properly note that in the underlying decision I found that they submitted evidence sufficient to meet their initial burden that Elevator 2 was not in defective condition and that they did not have actual or constructive notice of an alleged defective condition. I also found that while Ramirez's expert submission failed to create an issue of fact, Ramirez's own deposition testimony and invocation of res ipsa loquitur did create an issue of fact.

As I held in the underlying decision, it is well settled that on a motion for summary judgment "the court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521 (1st Dep't 1989). *See also O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Medical Center*, 217 A.D.2d 98, 101 (1st Dep't 1995); *Armellino v. Thomase*, 72 A.D.3d 849 (2d Dep't 2010); *Hartford Ins. Co. v. General Acci. Group Ins. Co.*, 177 A.D.2d 1046, 1047 (4th Dep't 1991) ("The credibility of the testimony of plaintiff's witnesses and its probative value is not to be resolved on a summary judgment motion, but rather is for the jury's determination").

However, after I decided the underlying motions, the First Department, Appellate Division issued its decision in *Espinal v. Trezechahn 1065 Avenue of the Americas, LLC*,

94 A.D.3d 611 (1st Dep't 2012), which 447-453 relies on in support of its motion to reargue.

The Court in *Espinal* states that "[w]hile generally credibility determinations are left to the trier of the facts, where testimony is 'physically impossible or contrary to experience,' it has no evidentiary value." 94 A.D.3d at 613 (quoting *Loughlin v. City of New York*, 186 A.D.2d 398 (1998)). The Court in *Espinal* found "plaintiff's version of the incident incredible as a matter of law. It is not supported by the other witnesses or evidence submitted on this motion. Plaintiff did not produce an expert to contradict [defendant's expert's] opinion that the incident was mechanically impossible . . . . Plaintiff's contention that the unlikelihood of an occurrence does not mean it is impossible rests on mere speculation, which is insufficient to defeat a motion for summary judgment." 94 A.D.3d 611, 613.[1]

On the motion for summary judgment, Ramirez did submit expert opinion. However I found that it did not create a question of fact, and on this motion to reargue I adhere to my initial determination. Therefore, Ramirez's claim for res ipsa loquitur rests on his testimony alone that the elevator went into free fall. In the face of defendants' submissions that such a fall was a mechanical impossibility, I now find that Ramirez

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[1] *Espinal* also found res ipsa loquitur inapplicable because defendants' expert provided uncontroverted explanations of reasons other than negligence why an accident such as plaintiff's might have occurred. 94 A.D.3d at 614.

failed to rebut defendants' prima facie showing. Accordingly, the motion and cross motion for summary judgment will be granted.

In accordance with the foregoing it is

ORDERED that the motion by defendant 447-453 West 18 LP to reargue the court's decision and order is granted; and it is further

ORDERED that, upon reargument, 447-453 West 18 LP's motion for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross-motion by defendant Rotavele Elevator, Inc. to reargue the court's decision and order is granted; and it is further

ORDERED that, upon reargument, Rotavele Elevator, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 7, 2012

ENTER:

Saliann Scarpulla, J.S.C.