

Lapin v Atlantic Realty Apts. Co. LLC

2007 NY Slip Op 30324(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0113163

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sherry Klein Heitler
Justice

PART 30

Toni Lapin

INDEX NO. 113163/04

MOTION DATE _____

MOTION SEQ. NO. (duy)

MOTION CAL. NO. _____

- v -
ATLANTIC Realty Apts

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 3.23.07

FILED
MAR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3.23.07

Sherry Klein Heitler
SHERRY KLEIN HEITLER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

-----X
TONI LAPIN,

Plaintiff,

Index No. 113163/04

DECISION & ORDER

-against-

ATLANTIC REALTY APTS. CO. LLC
and CENTURY ELEVATOR,

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

Plaintiff, Toni Lapin, brought this action against defendant Century Elevator and defendant Atlantic Realty Apts. Co. LLC (hereinafter "Atlantic Realty") for personal injuries allegedly resulting from defendants' negligence. Century Elevator now moves for summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint and all cross-claims against it. Atlantic Realty does not oppose Century Elevator's motion and further moves for summary judgement dismissing plaintiff's complaint or granting summary judgement in its favor on Atlantic Realty's cross-claim against Century Elevator for common law indemnification. Plaintiff opposes both motions. For the reasons discussed below, defendant Century Elevator's motion for summary judgement is granted.

On or about November 9, 2004, plaintiff commenced an action for personal injuries against defendants Century Elevator and Atlantic Realty. Plaintiff claims personal injuries arising out of an incident in an elevator that occurred on August 18, 2002 at approximately 5:30 p.m. at 900 West End Avenue, New York, New York. Atlantic Realty is the owner and landlord of said premises. Century Elevator provides maintenance services for the subject elevator under a written service agreement with Atlantic Realty. Plaintiff resides in the building where the incident at issue

occurred. Just prior to the incident, plaintiff was outside the subject premises walking her two dogs. Each dog was attached to its own leash. After walking the dogs, plaintiff reentered the premises, retrieved her mail, and walked into one of the elevator cabs in order to go up to her apartment. According to the plaintiff, after she and her two dogs entered the elevator cab, plaintiff began to feel tension on the leash held in her right hand. A portion of said leash entered the gap between the lobby floor and the elevator cab. The plaintiff maintains, but failed to see, that the leash was “sucked” into the gap. Plaintiff asserts that the tension in the leash pulled her towards the doors as the elevator’s doors were closing. Plaintiff further asserts that plaintiff’s right fist was wedged between the closing doors, and the elevator began to go up and then quickly returned to the lobby when the doors opened. The building’s handyman, Gustavo Gutierrez allegedly watched the incident unfold from a security monitor. He claims that the plaintiff was not facing the doors when she entered the elevator cab. Mr. Gutierrez further alleges that the plaintiff kneeled down as if she was picking up dropped mail. The video in question cannot be located by Mr. Gutierrez. When the elevator doors re-opened, Mr. Gutierrez ran to plaintiff’s assistance to tend to the plaintiff’s bloody hand. Mr. Gutierrez further observed that a piece of the dog leash had broken off and was lodged between the lobby floor and the elevator cab saddle.

Approximately three months prior to the date of the accident, Century Elevator was involved in a modernization project with respect to the elevator in said premises by converting the elevators from manual operation to electric. As part of this project, the edges of the elevator doors were equipped with electronic sensors. Following completion of the modernization project and before it was put into service, the elevator was inspected by a representative from the City of New York. Following the accident, Century Elevator inspected the elevator. No problems were detected during the inspections.

Plaintiff's complaint asserts that the incident was caused by the negligence of both Century Elevator and Atlantic Realty in that the elevator was defective and negligently maintained by the defendants. Century Elevator contends that there is no evidence of a defective condition. Specifically, Century Elevator maintains that no one, including the plaintiff, actually witnessed the incident; further, the elevator was inspected immediately after the incident and found to be in "proper working order". Century Elevator also argues that it also had no notice of the alleged defective condition.

Atlantic Realty, in turn, contends that there is no evidence of a defective condition in the elevator, nor was it on notice of the alleged malfunctioning of the elevator at issue. Atlantic Realty argues that the elevator was inspected both prior to and after the accident and no defect was detected. Atlantic Realty further asserts that it received no complaints about the elevator after the modernization project. Finally, Atlantic Realty asserts that even if a defective condition was found to exist, it is Century Elevator's responsibility to service the elevator under contract and notify Atlantic Realty of the condition of the elevator. Therefore, Atlantic Realty argues that it should not be responsible for any incidents arising out of the functioning or malfunctioning of the elevator.

In opposition to defendants' motions, plaintiff claims that notice of the malfunctioning of the elevator is not required as the doctrine of *res ipsa loquitur* applies. Plaintiff also asserts that there were previous incidents involving the subject elevator and that similar incidents were documented in a log book kept in the lobby of the building. Plaintiff further provides an affidavit from Richard Twomey, a safety engineer, who states that had the safety devices been working properly and according to code, the elevator doors would not have closed and the accident to plaintiff would not have happened.

The defendants object to the admissibility of Mr. Twomey's affidavit, arguing that the plaintiff violated CPLR §3120 by failing to provide notice of an inspection of the elevator and that his conclusions are merely based on speculation. They also argue that the doctrine of res ipsa loquitur does not apply to these facts.

The court agrees with the defendants. With respect to the affidavit, same is not probative to the issue of negligence. Further, although plaintiff's failure to notify the defendants could potentially be an issue at trial, in that they would argue that there has been prejudice, as the court is granting the defendants' motion, the question of prejudice becomes moot.

Generally, the doctrine of res ipsa loquitur applies when the plaintiff establishes three elements: first, the event must be of the kind which does not ordinarily occur in the absence of someone's negligence; second, the event must be caused by an agency or instrumentality within the exclusive control of the defendant; third, the accident must not have been due to any voluntary action or contribution by the plaintiff (see, 16 N.Y. Pac., NY Law of Torts §20:21). If the accident can be accounted for on any other reasonable theory other than the negligence of the defendant, the doctrine will not be applied (see, Gallagher's Successors, Inc. v. Consolidated Edison Co. Of N.Y., Inc., 52 A.D.2d 547.X [1st Dept., 1976]). This is especially true in the case where there is evidence that plaintiff's own conduct contributed to the accident (see, Pedro v. N.Y. Life Ins. Co., 277 A.D.2d 213, 214 [2nd Dept., 2000]).

In this case, the plaintiff has failed to satisfy the three elements at issue. First, the defendants did not have exclusive control of the elevator (see, Allen v. Woods Management Co., 86 A.D.2d 530, 532 [1st Dept. 1982] [Justice Murphy dissenting] [internal citations omitted]). In Allen, the plaintiff, an elderly woman, sustained injuries when her arm was caught by the door closing in a service elevator. The dissent maintained that in such circumstances the doctrine of res ipsa loquitur

is inapplicable because the plaintiff was in a position to exercise some control over the elevator, even by pushing the “stop” button, and removing herself from the path of the elevator door. *Id.* This position on the doctrine of res ipsa loquitur in the context of elevator cases was memorialized in subsequent case law. In Graham v. Wohl (283 A.D.2d 261 [1st Dept. 2001]), the court stated:

A plaintiff’s allegations that she sustained an injury when an elevator door abruptly and unexpectedly closed as she was entering the elevator, striking and pinning her against the side of the elevator without retracting, were insufficient to permit an inference of negligent maintenance of some mechanical device controlling the operation of the door, and therefore, the plaintiff could not state negligence claims based on the doctrine of res ipsa loquitur against the building owner, managing agent and elevator service company.

The instant action took place under similar circumstances, thus the elevator is deemed *not* to be in the exclusive control of the defendants (emphasis added).

Furthermore, plaintiff cannot establish that she could not have contributed to the accident. In Chcka v. Citibank, N.A., and Otis Elevator Company (2001 WL 1803322 [App. Term]), the court denied the application of the doctrine of res ipsa loquitur because the court maintained that it was possible that the plaintiff’s own actions contributed to the accident. Therefore, “plaintiff has failed to establish a triable issue of fact since her claim of negligence is based solely on the doctrine of res ipsa loquitur.” *Id.* (internal citations omitted). In that case, the plaintiff was struck by the elevator door when exiting the elevator. *Id.* Similarly, in the instant action, plaintiff has failed to establish that her own actions, after she entered the elevator, did not contribute to the incident. Thus, the doctrine of res ipsa loquitur is, once again, inapplicable.

Further, although plaintiff attempts to raise issues of fact by referring to other incidents, she fails to provide proof of same. It is well settled that once a party has made a prima facie entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact (see, Zuckerman v. City of New York, 49

N.Y.2d 557 [1980]). Plaintiff's allegations, without more (i.e. affidavits, log book), are insufficient to establish a genuine material issue of fact for trial.

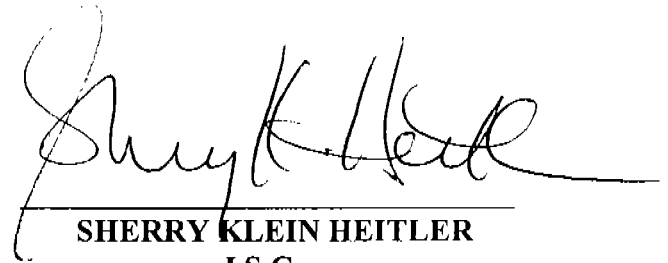
Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment against the plaintiff is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment dismissing this matter against defendants Atlantic Realty Apt. Co. LLC and Century Elevator.

This shall constitute the decision and order of the court.

DATED: MARCH 23, 2007



SHERRY KLEIN HEITLER
J.S.C.

FILED
MAR 26 2007
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