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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 101000/2004
DAYANIM, FARANGIS
VS
OTIS ELEVATOR
Sequence Number : 004
SUMMARY JUDGMENT

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

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided as attached

FILED
APR 05 2007
COUNTY CLERK'S OFFICE

Dated: 3/26/07

EJG
_____ J.S.C.
EMILY JANE GOODMAN

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

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: PART 17

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FARANGIS DAYANIM,

Plaintiff,

–against- Index No.: 101000/04

OTIS ELEVATOR COMPANY, THE TRUMP CORPORATION and 845 UN LIMITED PARTNERSHIP,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

This is a personal injury negligence action against the owner and manager of an apartment building and an elevator maintenance company for injuries allegedly sustained by a tenant when an elevator she was riding in allegedly malfunctioned. Defendants move for summary judgment pursuant to CPLR 3212 alleging that, as a matter of law, there is no evidence of any defect or improper operation of the elevator in question, and because defendants had no actual or constructive notice of any defects or problems with the elevator. For the reasons stated below, defendants' motion is denied.

Plaintiff claims that on July 24, 2003 at 4:00 p.m. she was involved in an accident involving passenger elevator #4 at Trump World Towers located at 845 UN Plaza, New York, New York. Plaintiff testified at her deposition that she called an elevator from the 6th floor and elevator #4 responded to the call. Plaintiff boarded the elevator, which was empty of other passengers, the doors closed normally, and she pressed the lobby button. She then claims that the elevator "fell," which she described as like hitting an air pocket on a plane, dropping a lot faster

than normal speed to the lobby (Dayanim Tr., at 168-69).[1] At or below the lobby, the elevator came to a jolting stop without the doors opening, and then returned "rapidly" to the 6th floor where it came to a stop, again without the doors opening (id., at 170-71). The elevator then traveled normally from the 6th floor down to the lobby, where the doors opened, and she walked out of the elevator with the assistance of the hallman on duty, John Pullara. She further testified at her deposition that while the elevator was initially dropping, she pressed the "red button" on the control panel and that an alarm sounded and she heard a recorded female voice saying "[w]e're experiencing operating difficulties." (id., at 173-74, 176, 248-49, 254-56). The parties to do not dispute that the red button is a pull-push button, and known as the "emergency stop switch button."

Although plaintiff did not fall to the ground in the elevator, she claims that "the elevator went from under my feet" (Dayanim Tr. at 237-38). As a result, plaintiff claims to have suffered various injuries to her neck, back and knees as well as severe anxiety and fear of using elevators alone as a result of this incident. In 2004, she commenced this action against the defendants for negligent inspection and maintenance of the elevator.

John Pullara, the hallman on duty at the time of the incident, testified that he was in the lobby of the building, standing at the concierge desk. He testified that he did not hear an alarm prior to his being informed by the concierge, Michelle Espado, who was facing the elevator banks, that the plaintiff was in elevator #4 and might need assistance. Mr. Pullara then turned around, and saw the plaintiff leaning to one side of the elevator bank on the wall, and grasping

[1]There are only two floors between the 6th floor and the lobby, the 5th floor and the "HC" floor, which stands for health club. The building is a luxury high-rise condominium, and elevator #4 services 70 floors.

her neck area, wincing and moaning as if in some form of discomfort and pain. Mr. Pullara testified that he then rode the elevator approximately 30 minutes after the alleged incident, but found nothing wrong with the elevator's operation. He eventually shut down the elevator at the instruction of the building's property manager.

The building placed a service call to defendant Otis Elevator Company (Otis), who was responsible for service and maintenance of the building's elevators pursuant to a written agreement dated September 1, 2002. Otis mechanic John O'Connell responded to the call at 5:30 p.m. Mr. O'Connell took the elevator out of service in order to check its operation. He rode the elevator from the lobby to the top floor of the building in each direction a number of times and found nothing wrong with the elevator's operation. He thereafter traveled to the machine room located on the building's roof to check the elevator equipment, including the main machine and the controller and again found nothing wrong. There were no broken parts or components of the elevator that required any adjustments, repair or replacements. The elevator was operating and functioning properly, and thus he returned the elevator to service.

Defendants contend that Otis' records from January 24, 2003 through July 24, 2003 demonstrate that the elevator was properly maintained and show no prior notice of any defect with the elevator. Defendants offer an affidavit from John Goutzounis, the assigned route mechanic at the time of the alleged incident. Mr. Goutzounis avers that he performed weekly routine maintenance of the elevators at the building which included lubricating and cleaning, checking all parts of the elevator for proper operation, replacement of worn parts, minor adjustments, as well as performing safety checks to the elevator and the machine room equipment. He avers that he was unaware of any prior calls or complaints regarding elevator #4

dropping or operating inappropriately as claimed by the plaintiff.

Defendants also proffer an affidavit from John D. McHugh, an alleged expert in the elevator industry.[2] Mr. McHugh opines that the elevator travels at a rate of 1600 fpm (meaning feet per minute), but that to attain its full speed, the elevator must travel at least seven floors to accelerate to that speed, and that, similarly, the elevator begins to decelerate at least seven floors prior to reaching the desired floor. Mr. McHugh contends that since there are only two floors between the 6th floor and the lobby, the elevator could not possibly have traveled "faster than normal" as claimed by the plaintiff as it never reached its full speed. In addition, Mr. McHugh contends that the elevator did not over-speed, because it was equipped with a governor, which is both an electrical and a mechanical device which acts to stop the elevator if it exceeds its normal running speed only slightly. When the governor engages, it opens a safety circuit, which must be a closed loop in order for the elevator to run, thus depriving the elevator of electricity and causing the brake to apply. Mr. McHugh contends that plaintiff's own testimony establishes that the governor did not activate, because she testified that the elevator moved after it stopped momentarily at the lobby level. If the elevator had traveled faster than normal, as plaintiff claims, the governor would have been activated and the elevator would not have been able to move afterwards until a mechanic arrived to reset the governor.

Plaintiff's complaint asserts a single cause of action for common law negligence. "An elevator company which agrees to maintain an elevator in safe operating condition may be liable

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[2]The court does not consider the affidavit of Joseph J. Barna, another purported expert retained by defendants and submitted as part of defendants' reply papers, to the extent that Mr. Barna raises a new theory as to why elevator #4 could not have dropped as plaintiff claims in this case. Azzopardi v American Blower Corp., 192 AD2d 453, 454 (1st Dept 1993).

to a 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 (citations omitted)." Rogers v Dorchester Assoc., 32 NY2d 553, 559 (1973); see also Carrasco v Millar Elevator Indus., Inc., 305 AD2d 353, 354 (2d Dept 2003).

Defendants have submitted evidentiary proof in admissible form that the elevator was working properly after Otis had last serviced it and that none of the defendants had any actual or constructive notice of the alleged defect. The testimony of Otis mechanics, John O'Connell and John Goutzoumis, and Trump hallman, John Pullara, as well as the defendants' expert, show that the elevator was operating and functioning properly prior to and for at least 30 minutes after the alleged incident. Defendants have demonstrated, through competent evidence, that no other complaints, calls, shutdowns or problems regarding the subject elevator dropping, speeding, or stopping abruptly in the six-month period prior to the alleged incident or immediately after it, and that routine maintenance of the elevators at the building was performed on a weekly basis.

Accordingly, in order to defeat defendants' motion, plaintiff must show "the existence of a bona fide issue raised by evidentiary facts." Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); see also Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Santoni v Bertelsmann Prop., Inc., 21 AD3d 712, 714 (1st Dept 2005). In opposition to summary judgment, plaintiff relies on the deposition testimony and Otis' maintenance and repair records, and submits an affirmation from her counsel, Lawrence B. Lame, as well as an affidavit from Patrick A. Carrajat, a purported expert in elevator accidents. For the reasons expressed below, plaintiff has failed to raise a triable issue of fact as to whether defendants had actual or constructive notice of the alleged defect in the elevator, however, summary judgment is denied

based on the theory of res ipsa loquitur.

Mr. Lame has no personal knowledge of the incident or the configuration of the building and his affirmation is of no probative value. Zuckerman, 49 NY2d at 563; Lewis v Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324, 325 (1st Dept 2004); Lampel v Sergel, 297 AD2d 709, 710 (2d Dept 2002). For example, Mr. Lame makes certain pronouncements about the distance between the fifth and lobby floors and questions whether the governor was working properly at the time of the incident, both without any evidentiary support.

On the question of proper maintenance, plaintiff's expert, Patrick Carrajat,[3] avers that the level of maintenance performed was inadequate, because Otis' maintenance records show that only four and one-half hours of maintenance work was performed on elevator #4 in the six months prior to July 24, 2003. However, Mr. Carrajat fails to explain how this alleged inadequate amount of maintenance work fits in with either of his two theories for why elevator #4 malfunctioned in the manner described by the plaintiff, which are: (1) an internal failure in the elevator controller such as a component of a printed circuit board or software program; or (2) outside interference caused by transient radio signals affecting the control system. As described below, these theories are not based on any evidence in the record, and amount to nothing more than pure conjecture and speculation. An expert may not reach a conclusion by assuming material facts not supported by the evidence and may not guess or speculate in drawing a conclusion. Hambsch v New York City Transit Auth., 63 NY2d 723, 725-26 (1984); Santoni v Bertelsmann Prop., Inc., 21 AD3d at 714-15; Timmins v Tishman Constr. Corp., 9 AD3d 62, 69-

[3]Although both sides attempt to impugn each other's expert, for purposes of this motion, the court assumes that both experts would qualify as such at trial.

70 (1st Dept), lv dismissed 4 NY3d 739 (2004), rearg denied 4 NY3d 795 (2005).

Mr. Carrajat himself discounts his first theory. He avers that an internal failure of a printed circuit board or software would cause on-going problems, and there is no evidence of any ongoing problems with the subject elevator after the July 24th incident. He further relies on the fact that a system reset was performed by John O'Connell, the Otis mechanic who responded to the service call, as indicative that there was no permanent failure of any component. With respect to his second theory, he merely contends that "[a]ll solid state control systems require and should be properly shielded against radio frequency interference," but fails to explain how and why the subject elevator was not properly shielded on the date of the incident. In addition to his failure to provide any justification or explanation for his opinion, he further fails to explain how Otis' alleged inadequate maintenance of the elevator has anything to do with radio frequency interference -- which appears to be a design defect. As explained by defendants' elevator consultant, Joseph Barna, the elevator, an Elevonic 411 model, is designed to be immune from radio frequency interference.

Mr. Carrajat further contends that the records of service calls produced by Otis prove that defendants were aware of operational problems with elevator #4. He contends that in the nine-day period prior to July 24th, there were three callbacks[4] involving elevator #4 being out of service. However, he fails to explain how any of these callbacks would have put defendants on notice that the elevator was experiencing outside interference caused by transient radio signals affecting the control system. In addition, as defendants point out, none of these callbacks

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[4]The term "callback" refers to a call between the customer, in this instance 845 UN Plaza, reporting an elevator shutdown, complaint or problem to Otis.

involved the elevator speeding, dropping, or stopping abruptly. On July 15th, 2003, the elevator was reported as stuck on the 23rd floor with the doors closed and empty of passengers. A second callback on that date appears to refer to the same incident. In the third callback, occurring on July 16th, the building reported that the "PE-3" elevator was shutdown on the 48th floor with the doors closed and empty of passengers, and this was found to be due to a blown fuse in the main electrical supply. Although this evidence is notice of an operation problem with the elevator, it is not notice of the problem at hand as the condition which allegedly caused the elevator to drop and rise as plaintiff alleges is unknown.

"Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it." Kambat v St. Francis Hosp., 89 NY2d 489, 494 (1997). The res ipsa inference, in effect, substitutes for evidence of actual or constructive notice where notice is a necessary element of plaintiff's claim for negligence. Dittiger v Isal Realty Corp., 290 NY 492, 495-496 (1943); Mejia v New York City Transit Auth., 291 AD2d 225, 226 (1st Dept 2002); Parsons v State of New York, 31 AD2d 596, 596 (3d Dept 1968).

Summary judgment must be denied as plaintiff has raised a triable issue of fact as to the applicability of the doctrine of res ipsa loquitor, which generally applies to cases involving the extraordinary movement of an elevator, including dropping, stopping abruptly and mis-leveling. See Burgess v Otis Elevator Co., 114 AD2d 784, 785 (1st Dept 1985), affd 69 NY2d 623 (1986) (mis-leveled elevator); DiPilato v H. Park Central Hotel, L.L.C., 17 AD3d 191 (1st Dept 2005) (elevator plunged 18 floors to elevator pit); Gurevich v Queens Park Realty Corp., 12 AD3d 566 (2d Dept 2004) (mis-leveled elevator); Carrasco v Millar Elevator Indus., Inc., supra, 305 AD2d

353 (elevator passed designated floor, stopped suddenly, and began to shake and vibrate); Ardolaj v Two Broadway Land Co., 276 AD2d 264 (1st Dept 2000) (mis-leveled elevator); Dickman v Stewart Tenants Corp., 221 AD2d 158 (1st Dept 1995); Duke v Duane Broad Co., 181 AD2d 589 (1st Dept 1992) (elevator fell six stories until governor stopped it abruptly); Walden v Otis Elevator Co., 178 AD2d 878 (3d Dept 1991), appeal denied 79 NY2d 758 (1992) (elevator fell from sixth floor, came to sudden stop, rose a distance, and then fell and came to a second sudden stop); Bigio v Otis Elevator Co., 175 AD2d 823 (2d Dept 1991) (elevator mis-leveled); Williams v Swissotel New York, Inc., 152 AD2d 457 (1st Dept 1989) (elevator fell nine stories and abruptly stopped just below the lobby).[5]

The submission of a case to a jury on the theory of res ipsa loquitor is warranted when the plaintiff can establish the following elements: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant[s and]; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Dermatossian v. New York City Transit Auth., 67 NY2d 219, 226 (1986) (citations omitted); see also Banca Di Roma v Mutual of Am. Life Ins. Co., Inc., 17 AD3d 119, 120 (1st Dept 2005).

In Williams v Swissotel New York, Inc., supra, the First Department ruled that the plaintiff's testimony alone as to how the elevator fell nine stories and abruptly stopped just below the lobby, throwing him to the floor and against the wall, was "sufficient evidence, if found

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[5]Santoni v Bertelsmann Prop., Inc. (21 AD3d 712), which defendants argue supports their entitlement to summary judgment, involved an allegedly defective elevator door closing on the plaintiff's arm. As Otis, also a defendant in that case, recognized, elevator-door cases have not generally been found to meet the three-part test of res ipsa loquitor. See Santoni Record on Appeal, at p. 681.

credible by the trier of fact, to support the application of the [res ipsa] doctrine." 152 AD2d at 459. Thus, the court ruled that even though defendants' expert testified that it was physically impossible for the accident to have occurred as related by the plaintiff, and plaintiff failed to offer any expert testimony, it was error for the trial court to have dismissed the complaint at trial for failure to prove a prima facie case.

In Carrasco v Millar Elevator Indus., Inc., supra, the Second Department ruled that summary judgment was improperly granted to an elevator maintenance company in a case where the plaintiff alleged that he was trapped for an hour in an elevator that passed the floor he designated, stopped suddenly at another floor, and then began to shake and vibrate. Even though the plaintiff had failed to raise a triable issue of fact as to whether the defendant has actual or constructive notice of any defective condition in the elevator, the court ruled that the plaintiff had raised a triable issue of fact as to the applicability of the res ipsa loquitor doctrine where the elevator was in the defendant's possession and control, the plaintiff did not contribute to the malfunction complained of, and there was an issue of fact as whether the malfunction as described by the plaintiff was an event that would not ordinarily occur were due care exercised in the elevator's maintenance.

In the case at bar, the court must, on summary judgment, accept the plaintiff's sworn testimony as to what happened to her in elevator #4 as true since courts do not make credibility determinations on summary judgment. S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974); Lehrer McGovern Bovis, Inc. v New York Yankees, 207 AD2d 256, 258 (1st Dept 1994). Thus, plaintiff's testimony alone is sufficient evidence, if found credible by the trier of fact, to infer negligence since a jury could conclude that, even if the actual cause of the

accident remains unknown, it was more likely than not that the erratic movement of the elevator was caused by defendants' negligence. Bonura v KWK Assoc., Inc., 2 AD3d 207, 208 (1st Dept 2003). Moreover, plaintiff's expert's opines that the elevator cannot, under normal circumstances, perform in the manner plaintiff describes, supporting the conclusion that the event is of the kind which ordinarily does not occur absent negligence.

Defendants argue that they did not control the elevator, because plaintiff testified that she pressed the red stop switch button. Whether plaintiff in fact pressed or pulled the red emergency stop switch button (see Dayanim Tr. at 173-74, 176, 248-49, 254-56), a fact that defendants themselves dispute, and whether she herself thus caused the abrupt stopping of the elevator as described as plaintiff, is a question of fact for trial.

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied.

Dated: March 26, 2007

ENTER:

J.S.C.
EMILY JANE GOODMAN