Short Form Order

Index Number: 25424-2002

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Original Motion Date: 02-21-2007
Motion Submit Date: 05-10-2007
Motion Sequence No's.: 006 MD
007 MOTD

X

SILVIA STOCK as Administratrix of the Estate of Decedent JULIUS STOCK and SYLVIA STOCK, Individually,

Plaintiffs,

-against-

OTIS ELEVATOR COMPANY and THYSSENKRUPP ELEVATOR COMPANY,

Defendants.

X

Silberstein & Awad & Miklos, PC
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Suite 412
Garden City, New York 11530

Babchik & Young, LLP
200 East Point Road, Ste 200
White Plains, New York 10601

ORDERED, that the motion (motion sequence number 006) by Defendant THYSSENKRUPP ELEVATOR COMPANY[1] for summary judgment dismissing the complaint is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 007) by Plaintiff for leave to serve an Amended Bill of Particulars is granted; and it is further

ORDERED, that Plaintiff's cross-motion for summary judgment on the issues of how the subject accident occurred and that THYSSENKRUPP ELEVATOR COMPANY negligently repaired and serviced the subject elevator is denied.

This is an action to recover for personal injuries sustained by Plaintiff's decedent on September 3, 2001, when the elevator doors in his assisted living facility allegedly closed too fast,

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[1]This matter was discontinued against defendant Otis Elevator Company by Stipulation of Discontinuance dated June 7, 2005.

causing him to lose his balance, fall and fracture his hip. Plaintiff, as administrator and surviving spouse, commenced this action against THYSSENKRUPP ELEVATOR COMPANY ("THYSSENKRUPP" or "Defendant") by the filing of a Summons and Verified Complaint, which was subsequently amended on or about December 6, 2002 and issue was joined by the filing of a Verified Answer on or about December 31, 2002. The note of issue has not yet been filed.

The submissions reflect that on September 3, 2001, Plaintiff and her husband, the decedent were residing at an assisted living facility known as the Gurwin Jewish-Fay J. Linder Residence (the "Linder Residence"), located at 50 Hauppauge Road, Commack, Suffolk County, New York. The record further reflects that THYSSENKRUPP installed the elevators in the Linder Residence and at the time of the incident, was still under a one-year warranty.

Defendant moves for summary judgment on the ground that Plaintiff is unable to identify the proximate cause of Decedent's injury; that Plaintiff cannot rely on hearsay to establish proximate cause; and that Plaintiff has not established that Defendant had actual or constructive notice of a defective condition with the subject elevator. Specifically, defendant argues that Plaintiff has not presented any direct evidence to establish that the incident occurred as described in the pleadings. Thus, Defendant argues that Plaintiff is unable to identify the proximate cause of Decedent's injury and cannot establish a *prima facie* case as there were no witnesses to the alleged incident and decedent was not deposed prior to his death.[2] Additionally, Defendant argues that the hospital records which indicate that Mr. Stock was injured when he "got caught in the elevator and was knocked to the ground", are inadmissible because the report was given to the hospital by Plaintiff and are hearsay within hearsay.

Finally, defendant argues that it cannot be liable for

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[2]According to the submissions, Mr. Stock died on February 23, 2003 from cardiopulmonary arrest as a consequence of pneumonia.

decedent's injuries because it had no actual or constructive notice of the alleged defective condition.

In response and opposition, Plaintiff cross-moves pursuant to **CPLR §3042(b)**, for an Order deeming their entitlement as a matter of right to serve an Amended Bill of Particulars; alternatively, pursuant to **CPLR §3025(b)** for leave to serve an Amended Bill of Particulars; and pursuant to **CPLR 3212**, granting Plaintiff summary judgment as a matter of law against Defendant on the issue of how the subject accident occurred and that Defendant negligently repaired and serviced the subject elevator during August of 2001.

Plaintiff appeared for an examination before trial ("EBT") on July 24, 2006. Plaintiff testified that she was not present at the Linder Residence at the time of the incident, she did not witness her husband's accident and that she was unaware of whether there were any witnesses. She testified that upon her return home, she was advised by another resident, Sidney Fox, that there was an incident with her husband and she went to their room where a nurse and aide were trying to make Mr. Stock stand up, which he could not do (**EBT at p. 44-45**). She testified that the decedent stated that "the elevator threw him down and he couldn't walk." **(EBT at p. 45-46)**. Plaintiff testified that her husband "said that he was walking... and the elevator door closed on him." Upon transport to the hospital, the decedent was diagnosed with a fractured left hip, requiring surgery. An "incident report" was completed by an employee of the Linder Residence which stated in part: "Resident coming out of elevator when elevator door bumped him over and caused him to loose [sic] his balance. Elevator door hit resident's ® arm, c/o discomfort from ® arm."

With regard to Mr. Fox, Plaintiff testified at her EBT that Mr. Fox told her that he had a previous incident with the elevator door closing too quickly and that he complained to someone at the Linder Residence about the situation. Mrs. Stock testified that Mr. Fox told her that he had complained to both the head nurse and director of fitness at the Linder Residence regarding the condition

of the elevator. (**EBT at p. 35-36**). Mrs. Stock also testified that she had personally previously experienced a problem with the elevator door closing too quickly but that she had never made a written complaint. (**EBT at p. 39, 40**).

Defendant appeared for an EBT on October 5, 2004, by its representative, Robert Brady ("Brady"), a service adjustor or "troubleshooter". (**EBT at p. 7**). Brady testified that THYSSENKRUPP manufactured the elevators installed at the Linder Residence and that there were maintained free of charge by Defendant for a one year period following the installation. (**EBT at p. 11**). Specifically, the warranty required Defendant to provide maintenance and callback service for the period May 29, 2001 to May 28, 2002. Brady further testified, based upon a review of a document presented at the deposition that on July 7, 2001, the subject elevator was "shut down with broken safety edge pick up bolt, left car shut down until parts are obtained." (**EBT at p. 33**). The elevator was repaired on July 9, 2001. (**EBT at p. 45**). Subsequently, on August 9, 2001, a representative of Defendant went to the Linder Residence on a complaint that the elevator door "was too fast". (**EBT at p. 46**). The service ticket indicated that the mechanic reported as follows: "found cars running on arrival, checked car, did not locate any problem with door closing too fast, left cars in service." (**EBT at p. 46**). Brady testified that in his experience, he has checked door speed by visual inspection. (**EBT at p. 47**).[3] Brady also testified that the elevators at the Linder Residence required monthly maintenance and that as part of such maintenance, the door speed would be checked. (**EBT at p. 51**). He stated that he could determine whether the door speed was appropriate by visualizing it and that "if the door is flying and it slams, it's too fast." (**EBT at p. 51.**).

Defendant has also annexed a document purportedly authored by Sidney Fox in which he states that his knowledge concerning Mr. Stock's incident was based upon what he was told by Plaintiff and

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[3]Brady was not the mechanic who performed the August 9, 2001 service call.

that he never made any complaints to the management of the Linder Residence regarding the operation of the elevator. Additionally, he states that he had never been personally involved in any incident on the elevator and that "he had never observed the door of the elevator or the elevator in general, break down, malfunction or operate improperly." Although the signature of Mr. Fox was seemingly notarized on this document, the document was not properly sworn as an affidavit.

In response and opposition, Plaintiff has cross-moved for leave to file an Amended Bill of Particulars and for summary judgment on the issue of how the accident occurred and a determination of Defendant's negligent repair and service of the subject elevator during August 2001.

Regarding the Bill of Particulars, Plaintiff served an original Bill of Particulars on or about June 23, 2005 in which she detailed the decedent's injuries to include a broken right hip. Thereafter, on or about January 4, 2007 Plaintiff served a Supplemental Verified Bill of Particulars in which she amended the injuries to state broken "left" hip. Now, Plaintiff seeks to amend the Bill of Particulars to additionally allege Defendant was negligent, careless and reckless by causing, permitting and allowing:

> The multi-beam array on the subject elevator door to be in a malfunctioning state; The multi-beam array on the subject elevator door to be in a state of disrepair; improper maintenance and/or repair and/or servicing to be done on the subject elevator door; the wrong sensor edge to remain on the subject elevator door and it was permitted to remain in a malfunctioning state and/or state of disrepair; the correct sensor edge (i.e., as per the specifications and/or contract) were on the subject elevator door was allowed to remain in a malfunctioning state and/or state of disrepair.

This proposed amendment essentially sets forth more specific details regarding Defendant's alleged negligent maintenance and repair of the elevator than contained in the original Verified Bill of Particulars.

On the cross-motions for summary judgment, Plaintiff argues that evidence exists demonstrating how the subject accident occurred

by the submission of a copy of the accident/incident report, decedent's hospital records and an affidavit from an elevator expert. Specifically, Plaintiff submits the accident/incident report discussed above which stated that decedent was "bumped" by elevator causing him to lose his balance. Plaintiff argues that she should be able to rely on this accident report to establish proximate cause because defendant maintained a copy of such report and that it is direct evidence of how the accident occurred. Additionally, Plaintiff seeks to rely on hospital records of Huntington Hospital where decedent was treated. Specifically, Plaintiff refers to an emergency room record in which plaintiff reports that decedent got caught in the elevator. Plaintiff argues that since decedent was "slurring his speech" due to a past stroke, the medical staff should be able to rely on her report as to how the accident occurred. Additionally, Plaintiff points to other hospital records, including the patient history taken by the attending physician which indicates that decedent "fell today when elevator closed on him"; the transfer form to the critical care unit which indicates that decedent was hit by elevator door; and physical therapy department initial evaluation form which stated that "Patient was caught in elevator and knocked to the ground." Plaintiff argues that these records and notations are relevant to the diagnosis and treatment of decedent and thus, should be considered as direct evidence as to how the accident occurred. Thus, Plaintiff argues that the Defendant's motion for summary judgment should be denied and laintiff's cross-motion for summary judgment on the issue of proximate cause should be granted.

Plaintiff has also annexed an affidavit from an expert elevator consultant, James Hearty (Hearty) who personally observed the elevator approximately eleven (11) months after decedent's accident and who reviewed the contract and specifications for the installation of the elevator. Hearty also reviewed the deposition transcript of Defendant's employee, Brady (discussed above). Hearty states in his affidavit that pursuant to his inspection of the elevator in question, the average door closing speed was 3.5 feet per second, which was in violation of accepted industry standards of 4.0 feet per second based upon the length of closure of the

particular elevator door. **(Hearty Affidavit at ¶18.).** Hearty described the elevator door as single speed with a "detector type safety edge which emitted electronic beams across the opening" and which should be "very effective in causing the door to stop and reverse when the electronic beams are interrupted by a person or object" but only when the elevator is "properly maintained." **(Hearty Affidavit at ¶19)**. Additionally, based upon his inspection, Hearty stated that there was a "by-pass" built in, meaning that if the door was blocked for an extended period of time a buzzer would sound and the door would only gently "nudge" to the close position in a slow fashion; but if the door speed was not properly adjusted, the door could strike a person at a greater speed and pressure. **(Hearty Affidavit at ¶20-21)**. Hearty concludes based upon his inspection and review of the records and transcripts that the elevator door was not functioning properly on the date of decedent's accident and that given the "multi-beam array across the opening", the elevator door should have stopped and rolled back prior to striking any persons. **(Hearty Affidavit at ¶27)**. Finally, Hearty states that checking door speed by visual inspection alone (as testified to by Brady), was inadequate and violated accepted industry standards applicable in 2001 and 2002.

On the issue of notice, Plaintiff's argument is two-fold. First, Plaintiff argues that Defendant had actual and constructive notice of the purported defective condition of the subject elevator, based upon the August 9, 2001 service record which indicated that it was reported that the elevator door was closing too fast. Regarding constructive notice, Plaintiff argues that Defendant had constructive notice of the elevator door closing too fast because its mechanics had been servicing the elevator on multiple occasions prior to the accident and should have seen the defective condition.

Alternatively, Plaintiff argues that notice of the allegedly defective condition was not required because Defendant installed and negligently maintained the elevator and thus created the defective condition.

In reply and opposition to the cross-motion, Defendant does not

specifically address Plaintiff's request to serve an Amended Verified Bill of Particulars. Turning to the merits of the motion for summary judgment, however, Defendant argues that Plaintiff cannot rely on inadmissible hearsay evidence, to wit, the accident report and hospital records, to establish proximate cause. Additionally, Defendant argues that the affidavit of Plaintiff's elevator expert was based merely on speculation and fails to create a question of fact necessary to defeat the motion for summary judgment.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Winegrad v. New York University Medical Center,*** 64 N.Y2d 85, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is arguable. ***St. Andrews Homeowners Association, Inc., v. Saint Andrews Golf Club,*** 289 A.D.2d 388, 734 N.Y.S.2d 898 (2d Dept. 2001); ***Akseizr v. Kramer,*** 265 A.D.2d 356, 696 N.Y.S.2d 849 (2d Dept. 1999). However, once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. ***State Bank of Albany v. McAullife,*** 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983).

Here, Defendant has established its *prima facie* entitlement to summary judgment by the submission of the excerpts of Plaintiff's deposition indicating that did not witness decedent's accident, that there were no other witnesses and decedent was not deposed prior to his death. Thus, Defendant has established *prima facie* that Plaintiff is unable to demonstrate the proximate cause of decedent's injury. ***See, Lissauer v. Shaarei Halacha, Inc.,*** 37 A.D.3d 427, 829 N.Y.S.2d 229 (2d Dept. 2007); ***Teplitskaya v. 3096 Owners Corp.,*** 289 A.D.2d 477, 735 N.Y.S.2d 585 (2d Dept. 2001). However, Plaintiff has met her burden of demonstrating the existence of issues of material fact warranting a trial and thus the Defendant's motion for summary judgment must

be denied.

Specifically, Plaintiff has submitted her deposition transcript in which she testified that decedent told her that "the elevator door closed on him," an affidavit by an expert[4] who testified that it was his opinion that the elevator door was not working properly on the date of the accident, an accident report and hospital records indicating that decedent was hit by the elevator doors, the testimony by Defendant's representative that a complaint had been received regarding the elevator doors closing too fast and Plaintiff's testimony that she had personally experienced problems with the elevator doors closing too fast. Although any one of these standing alone would probably be insufficient to defeat the motion for summary judgment, taken as a whole, they demonstrate an issue of fact regarding the causation of the accident necessitating a trial.

With regard to notice, the Court agrees with Plaintiff that the expert's affidavit establishes a material issue of fact as to whether the Defendant, by virtue of its installation and maintenance of the elevator, created or contributed to the alleged defect in the elevator doors, thus obviating the requirement of actual or constructive notice. ***Simpson v. Tenore and Gugliemo,*** 287 A.D.2d 613, 731 N.Y.S.2d 859 (2d Dept. 2001). Additionally, even if the Court were to find that actual or constructive notice of the alleged defect was required, plaintiff has, at a minimum, demonstrated an issue of fact regarding notice. Specifically, Plaintiff has submitted the deposition testimony of Defendant's representative who reviewed work tickets from August 9, 2001 indicating that a complaint was made regarding the elevator doors closing too fast. This complaint was made less than one month prior to decedent's accident. Thus, Plaintiff has demonstrated a question of fact on the issue of notice. Moreover, as Defendant was responsible for the maintenance and repair of the elevator pursuant to a warranty in effect on the

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[4]As the note of issue has yet to be filed, consideration of the affidavit of plaintiff's expert is proper. ***Simpson v. Tenore and Gugliemo,*** 287 A.D.2d 613, 731 N.Y.S.2d 859 (2d Dept. 2001); ***Blade v. Town of North Hempstead,*** 277 A.D.2d 268, 715 N.Y.S.2d 735 (2d Dept. 2000).

date of the accident, a question of fact also exists as to constructive notice by virtue of said maintenance and repairs during that period.

Based upon the foregoing, Defendant's motion for summary judgment dismissing the complaint is denied. Likewise, as genuine issues of fact exist regarding the circumstances surrounding the decedent's accident and notice, the Plaintiff's cross-motion for summary judgment is also denied.

Plaintiff's application to serve an Amended Verified Bill of Particulars is granted without opposition from Defendant. The law is well settled that "amendment of a bill of particulars is freely given absent prejudice or surprise unless the amendment is sought on the eve of trial." ***Singh v. Rosenberg,*** 32 A.D.2d 840, 821 N.Y.S.2d 121 (2d Dept. 2006). As Defendant has not opposed the motion, and the Amended Verified Bill of Particulars conforms essentially to the claims propounded in Plaintiff's cross-motion, it cannot be said that such amendment would cause prejudice or surprise. Plaintiff shall serve the Amended Verified Bill of Particulars within twenty (20) days from the date herein.

The foregoing constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: June 25, 2007
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.