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

PRESENT: **Hon. Marcy S. Friedman** PART **57**

Justice

Index Number : 118280/2004
DECLERCQ, SIMONE
vs
SCHINDLER ELEVATOR
Sequence Number : 002
PARTIAL SUMMARY JUDGMENT

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

1 this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Notice of Cross-Motion | 1 |
| Answering Affidavits — Exhibits | 2, 3, 4, 4A |
| Replying Affidavits | 5, 6 |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as per decision/order dated 10-12-07.

FILED
OCT 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10-12-07

_____ J.S.C.
Hon. Marcy S. Friedman

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

SIMONE DECLERCQ, As Administratrix of the Estate of CARL DECLERCQ, deceased, SIMONE DECLERCQ, Individually, and BEBE DECLERCQ,

*Plaintiff(s),*

*against*

SCHINDLER ELEVATOR CORPORATION, BOSTON PROPERTIES, and DTM ELEVATOR CONSULTANTS,

*Defendant(s).*

Index No.: 118280/04

DECISION/ORDER



Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

This wrongful death action arises out of a fatal elevator accident that occurred on August 12, 2004 in an office building located at 5 Times Square ("subject premises") in midtown Manhattan. Plaintiff's decedent, Carl DeClercq, was employed by Pro Quest Security, Inc. as a security guard and elevator operator at the subject premises. At the time of the accident, Carl DeClercq was operating freight elevator #19 at the premises, when a mechanism in the brake system malfunctioned and the elevator rapidly ascended 39 floors and crashed into the cement top of the hoistway, resulting in the death of Mr. DeClercq. Schindler Elevator Corporation ("Schindler") was the manufacturer and installer of the elevators at the subject premises. Defendant Boston Properties ("BP") was an owner and manager of the building. Defendant DTM Elevator Consultants ("DTM") was retained by BP to perform consulting and inspection services for the elevators at the subject premises.

Defendant Schindler moves for partial summary judgment dismissing the fifth and sixth causes of action which plead claims by plaintiffs Bebe DeClercq and Simone DeClercq, as

Administratrix of the Estate of decedent Carl DeClercq, and Simone DeClercq, individually. Schindler also moves for partial summary judgment limiting plaintiffs' third cause of action to a claim for funeral expenses. Defendant DTM cross-moves for partial summary judgment for the same relief sought by Schindler. Defendant BP cross-moves for summary judgment dismissing the complaint and all cross-claims against it. In the alternative, BP joins in Schindler's motion. Plaintiffs cross-move for summary judgment as to liability against Schindler and BP.[1]

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851,853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman v. City of New York, supra, at 562.)

Schindler moves for summary judgment dismissing the fifth and sixth causes of action on the ground that New York law does not recognize claims in wrongful death actions for emotional distress or loss of consortium. The fifth cause of action, asserted on behalf of plaintiff Bebe DeClercq, the widow of decedent Carl DeClercq, seeks damages for "loss of love, affection, pecuniary assistance, financial support, services, maintenance, society, consortium, household chores, duties, social relations outside the home, and companionship." (Verified Complaint, ¶

[1]By stipulation dated March 14, 2004 (sic), plaintiffs withdrew their motion as against defendant DTM.

51.) This cause of action also alleges that plaintiff "was caused to sustain a change in her disposition, temperament and character, including a loss of hope, desire, interest in the home, and general welfare." (Id., ¶ 52.) Defendant construes this allegation as pleading emotional distress. (See Schindler Memo. of Law at 11.) The sixth cause of action, asserted on behalf of Simone DeClercq, decedent's daughter, and decedent's other three surviving adult children, also seeks damages for "loss of his love, affection, financial support, guidance, advice, services, education, society, consortium, maintenance, household chores, duties, social relations outside the home, and companionship." (Verified Complaint, ¶ 57.) Schindler also seeks summary judgment determining that the damages recoverable on the third cause of action should be limited to funeral expenses. This cause of action pleads a claim for wrongful death on behalf of decedent.

It is well settled that wrongful death actions and the measure of damages awarded to surviving spouses and children in such actions are governed by statute. (See Liff v Schildkrout, 49 NY2d 622 [1980]; EPTL 5-4.1 et seq.) EPTL 5-4.3(a) provides that the damages awarded in such cases "may be such sum as the jury * * * deems to be fair and just compensation for the pecuniary injuries resulting from decedent's death to the persons for whose benefit the action is brought." New York courts have consistently construed "pecuniary injuries" as "excluding recovery for grief, and loss of society, affection and conjugal fellowship - - all elements of the generic phrase 'loss of consortium'." (Liff, 49 NY2d at 633.) "Thus, the essence of the cause of action for wrongful death in this State is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death." (Gonzalez v New York City Hous. Authority, 77 NY2d 663, 668 [1991].)

The measure of damages for pecuniary loss is a complex factual determination (Tenczar v

Milligan, 47 AD2d 773, 774-775 [3d Dept 1975], lv denied 36 NY2d 645; Bellows v Smith, 50 AD2d 622 [3d Dept 1979]), which "may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees." (Gonzalez, 77 NY2d at 668.) Even when a decedent is not a wage earner, "'pecuniary injuries' may be calculated, in part, from the increased expenditures required to continue the services she provided, as well as the compensable losses of a personal nature, such as loss of guidance." (Id.) Courts have repeatedly held that "pecuniary loss includes consideration of the chores and duties performed by decedent for his family" as well as the loss of care and guidance that he would have provided for his children. (See Richardson v Lutheran Hosp., 70 AD2d 933 [2d Dept 1979]; Korman v Public Serv. Truck Renting, Inc., 116 AD2d 631 [2d Dept 1986]. See also Ramos v La Montana Moving & Storage, Inc., 247 AD2d 333, 334 [1st Dept 1998][baby sitting services, imparting family and cultural traditions, counseling and guidance, emergency financial assistance established pecuniary loss].) Nor is recovery for such claims precluded based on a plaintiff's status as a financially independent adult child. (Gonzalez, 77 NY2d at 668.)

Here, contrary to Schindler's contention, plaintiffs submit evidence that decedent contributed financially to his household and provided other services to his family. Bebe Declercq testified that, among other contributions, her husband contributed to the rent and gave her his entire paycheck to help pay household expenses. (Dep. of Bebe DeClercq, Ex. D to Denenberg Aff. in Support of Schindler's Motion, at 24-26.) In addition to the testimony of decedent's wife and children, plaintiffs submit an affidavit from an economist showing the value

of the household services that decedent provided, as well as lost earnings. (See Aff. of Alan Leiken, Ex. B to Plaintiffs' Cross-Motion.) Schindler's argument that decedent consumed more than he earned and was financially irresponsible is speculative at best. Nor has Schindler demonstrated that decedent's family did not depend on him for support. At this juncture, plaintiffs need only submit "some evidence of pecuniary loss. The calculation of the precise amount is a question for the jury." (Zelizo v Ullah, 2 AD3d 273, 274 [1st Dept 2003]. See Parilis v Feinstein, 49 NY2d 984, 985 [1980].) Schindler's motion should accordingly be denied to the extent that it seeks to limit the recoverable damages on the third cause of action for wrongful death to funeral expenses.

Under the above authority, the fifth and sixth causes of action seek recoverable damages, except to the extent that they are based on allegations of future loss of consortium or emotional distress. (See Liff, 49 NY2d at 632, 634). Plaintiffs do not contend otherwise. Schindler's motion to dismiss these causes of action should be denied except as to such allegations.

Defendant BP cross-moves for summary judgment dismissing the complaint against it on the grounds that plaintiffs cannot establish that BP created a dangerous condition or had actual or constructive notice of the defective elevator condition that caused decedent's accident. Plaintiffs cross-move for summary judgment as to liability against defendants Schindler and BP.

Schindler submits no opposition to plaintiffs' evidence that Schindler caused or created the defective condition of the elevator that resulted in decedent's accident and death. Plaintiffs are accordingly entitled to summary judgment against Schindler as to liability.

As to BP, it is well-settled that a property owner has a non-delegable duty to maintain a premises in a reasonably safe condition so as to prevent injuries to others on the premises. (See

Basso v. Miller, 40 NY2d 233 [1976]; Longo v Armor Elev. Co., 307 AD2d 848 [1st Dept 2003].) Generally, "for a landowner to be found liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon its property, it must be established that a defective condition existed and that the landowner either affirmatively created the condition, or had actual or constructive notice of its existence." (Castellitto v. Atl. & Pac. Co., 244 AD2d 379, 380 [2d Dept 1997]; Kuchman v. Olympia & York, USA, Inc., 238 AD2d 381 [2d Dept 1997]; O'Connor-Miele v. Bahrite & Holzinger, Inc., 234 AD2d 106 [1st Dept 1996].) The duty to maintain a premises in a reasonably safe condition has been held to include a non-delegable duty to maintain and repair elevators on a premises. (See Oxenfeldt v 22 No. Forest Ave. Corp., 30 AD3d 391, 392 [2d Dept 2006]; Wagner v Grinnell Hous. Dev. Fund Corp., 260 AD2d 265 [1st Dept 1999]. See generally Kleeman v Rheingold, 81 NY2d 270 [1993].)

Significantly, the duty to maintain the elevators in safe condition "remains non-delegable as between the building owner and the injured party, despite any contractual delegation of maintenance obligations by the owner to another party." (Wagner, 260 AD2d at 266.) The rationale for this rule is that "it would be inequitable to permit a property owner to escape liability by merely delegating the obligation to repair or maintain the premises to an independent contractor. Moreover, the underlying policies of public safety and building owner responsibility provide a reasonable basis for imposing liability." (Backiel v Citibank, N.A., 299 AD2d 504, 506 [2d Dept 2002].)

Here, BP wholly delegated maintenance and repair of the elevators to Schindler. However, under the above authority BP's duty to maintain the elevators was non-delegable. As the court has held that Schindler created the defective condition that caused decedent's accident,

BP is vicariously liable for Schindler's negligence.

It is accordingly ORDERED that the motion of defendant Schindler Elevator Corporation and the cross-motion of defendant DTM Elevator Consultants for summary judgment are granted solely to the following extent: Plaintiffs' fifth and sixth causes of action are dismissed to the extent they are based on allegations of future loss of consortium or emotional distress; and it is further

ORDERED that the cross-motion of defendant Boston Properties for summary judgment is denied; and it is further

ORDERED that the cross-motion of plaintiffs for summary judgment is granted to the extent of awarding judgment in plaintiffs' favor as to liability against defendants Schindler and Boston Properties, and directing that damages be determined at the time of trial or after any other disposition of the underlying action herein.

This constitutes the decision and order of the court.

Dated: New York, New York
October 12, 2007

MARCY FRIEDMAN, J.S.C.