STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Antoinette G. Miliani,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 7534-03
RJI NO. 01-04-0797707

Otis Elevator Company,

Defendants,

Supreme Court, Albany County, All Purpose Term, December 7, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

PAUL PELAGALLI, ESQ.
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TERESI, J.:

Plaintiff brings a motion for summary judgment pursuant to CPLR §3212. Defendant opposes the motion with a cross motion for summary judgment.

On December 7, 2000, Plaintiff Antoinette G. Miliani ("Plaintiff") got in elevator number one at the twenty-ninth floor of the Alfred E. Smith Office Building. Plaintiff alleges that around

the twenty-fourth floor the elevator suddenly dropped and did not stop until it reached almost to the seventeenth floor. Plaintiff used the elevator's emergency button to call for help and spoke with Leon Dooris, a maintenance mechanic employed by Defendant Otis Elevator Company ("Defendant"). Mr. Dooris took an adjoining elevator up to elevator number one and opened both elevators' side emergency doors for Plaintiff to jump into the adjoining elevator. Plaintiff alleges that injuries to her lower and upper back, right leg, and neck resulted from this incident.

Upon inspection of the elevator immediately after the incident, Mr. Dooris discovered that a jammed governor was the cause of the elevator stopping suddenly. In his deposition, Mr. Dooris explained that if something major went wrong with the elevator, such as a total break failure, the elevator may free fall about six to ten feet before the calibrated governor would detect the excess speed causing the safeties to engage and stopping the elevator. Mr. Dooris, however, found no indications that the elevator went into a free fall. Mr. Dooris did, however, find pieces of terra cotta tile on top of the elevator car and broken up around the governor, as well as a torn governor rope. Mr. Dooris concluded that the reason the elevator car suddenly stopped was because the falling terra cotta ceiling block tore one of the governor ropes and jammed the governor.

Gil Baker, Ph.D., an engineer and expert witness for the Plaintiff, explained that the reason for the elevator stopping suddenly was a control system failure, which should have been detected prior to this incident through maintenance logs showing that the elevator car did not always level off properly when stopped at a floor. Plaintiff argues that if the elevator was maintained properly by Defendant, the control system would not have failed and the incident would not have occurred.

Plaintiff's motion for summary judgment rests on a claim for res ipsa loquitur. A successful claim for res ipsa loquitur can be made by proving that the event would not ordinarily happen in the absence of someone's negligence, must be caused by an agency or instrumentality within the exclusive control of the defendant, and must not have been the result of any voluntary action or contribution on the part of the plaintiff. Walden v. Otis Elevator Co., 178 A.D.2d 878, 879, 577 N.Y.S.2d 732, 734 (3rd Dep't 1991). If all of these elements are satisfied, a plaintiff can rest his or her case on circumstantial evidence where the actual cause of the accident is unknown. Pavon v. Rudin, 254 A.D.2d 143, 145, 679 N.Y.S.2d 27, 29 (1st Dep't 1998).

Here, whether the Defendant was in exclusive control of the agency or instrumentality that caused the event is unclear. Defendant argues that the falling piece of terra cotta block causing the governor to jam was the cause of the event. Defendant further argues that they are not responsible to maintain the structural integrity of the elevator shaft and are, therefore, not responsible for the incident. Defendant's contract with the Office of General Services to maintain the elevators at the Alfred E. Smith Office Building does not require Defendant to maintain the structural integrity of the ceiling of the elevator shaft, but rather requires Defendant to maintain the elevator and its parts needed to make the elevator function properly. Plaintiff, on the other hand, argues that the cause of the event here is Defendant's failure to maintain a properly functioning control system, which was in the exclusive control of the Defendant.

The second element of res ipsa requiring the Defendant to be in exclusive control of the agency or instrumentality of the cause of the event is not established where it is at least equally possible that negligence was involved by someone other than the defendant. DeSimone v. Inserra Supermarkets Inc., 207 A.D.2d 615, 616, 615 N.Y.S.2d 528, 528 (3rd Dep't 1994). Two

possible theories of what caused the elevator to stop suddenly and varying views as to who was responsible for the cause makes it impossible at this stage to assert that the Defendant was in exclusive control of the agency or instrumentality that caused this event. The res ipsa loquitur doctrine, therefore, does not apply here. The drastic remedy of summary judgment is not proper if there is any doubt as to the existence of a triable issue, or even where doubt as to the existence of a possible triable issue is arguable. See Fleming v. Graham, 34 A.D.3d 525, 824 A.D.2d 376 (2nd Dep't 2006). Here, all of the elements of res ipsa loquitur are not satisfied, and therefore, the Plaintiff's motion for summary judgment is denied.

Defendant's cross motion for summary judgment alleges that Plaintiff's other claims of negligence and strict products liability against the Defendant are not sufficient to go to trial. To succeed on a negligence claim, it must be proven that the Defendant owed a duty of care, the Defendant breached that duty, and that the breach proximately caused the Plaintiff's injuries. Van Nostrand v. Froehlich, 44 A.D.3d 54, 68, 844 N.Y.S.2d 293, 304 (2nd Dep't 2007). It cannot be determined here whether the Defendant breached a duty of care to the Plaintiff, because the cause of the incident is not clear. It is plausible, however, that the cause of the incident was due to negligent maintenance by the Defendant. Because there is a possibility that Defendant breached a duty to Plaintiff, summary judgment for the Defendant on the issue of negligence is denied.

The original complaint included a claim for strict products liability. Defendant moves to dismiss that claim and Plaintiff does not oppose. A strict products liability claim requires a defective product to be caused by a manufacturing mistake, improper design, or an inadequate or absent warning regarding the use of the product. Village of Groton v. Tokheim Corp., 202

A.D.2d 728, 729, 608 N.Y.S.2d 565, 567 (3rd Dep't 1994). Plaintiff here argues that Defendant's negligent maintenance of the elevator caused this incident. Plaintiff cannot at the same time argue that the cause of the incident was a defective product caused by the manufacturer. This claim has no merit and summary judgment for the Defendant on the issue of strict products liability is granted.

In sum, the Plaintiff's motion for summary judgment is denied, and the Defendant's cross motion for summary judgment is denied except with respect to the claim for strict products liability.

All papers, including this Decision and Order are being returned to the attorneys for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: January 31, 2008
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Plaintiff's Notice of Motion for Summary Judgment, dated September 27, 2007, with Attached Exhibits A - E.
2. Affidavit of Antoinette G. Miliani in Support of Motion for Summary Judgment, dated August 27, 2007.
3. Affidavit of Gil Baker, Ph.D. in Support of Summary Judgment Motion, dated September 26, 2007.
4. Defendant's Notice of Cross Motion, dated October 31, 2007, with Attached Exhibits A - J.

5. Affidavit of William Woolford, dated October 29, 2007.
6. Affidavit in Reply of Support of Summary Judgment Motion, dated November 28, 2007.
7. Reply Affidavit of Gil Baker, Ph.D., dated November 29, 2007.
8. Reply Affidavit of William Woolford, dated December 4, 2007.