

Levine v City of New York

2008 NY Slip Op 31445(U)

May 21, 2008

Supreme Court, New York County

Docket Number: 0110643/2004

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
~~Justice~~ **J.S.C.** Justice

PART 1

Index Number : 110643/2004

INDEX NO. 110643/04

LEVINE, JERRY

MOTION DATE _____

vs

CITY OF NEW YORK

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

SUMMARY JUDGMENT

motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-F

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Answering Affidavits — ~~Exhibits~~ _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAY 27 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 21, 2008

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X

JERRY LEVINE AND PAULINE LEVINE,

Plaintiffs,

Index No. 110643/04

Decision & Order

-against-

THE CITY OF NEW YORK,

Defendant.

-----X

SHULMAN, J.:

In this action, plaintiff Jerry Levine ("Levine") claims that, on the morning of October 16, 2003, he suffered personal injuries while exiting elevator No. 8 on the first floor of the Criminal Courts Building at 100 Centre Street in Manhattan. Levine and his wife, suing derivatively, commenced this action against the City of New York (the "City"), alleging that the City controlled, managed and operated the Criminal Courts Building, and negligently permitted elevator No. 8 to be in a defective and dangerous condition.

The City now moves for summary judgment dismissing the complaint. For the reasons set forth below, the City's motion for summary judgment is granted and the complaint is dismissed.

BACKGROUND

On October 16, 2003, Levine, a case management coordinator employed by the state of New York, left his 10th floor office in the Criminal Courts Building at approximately 10:30 in the morning to go down to a coffee shop on the building's first floor (Levine Dep., at 10, 14, 22 [Aff. of Ava R. Maynard, Esq., Exh. C]; Complaint, ¶¶ 8, 10). He entered elevator No. 8 (*id.* at 22). Approximately 15 other people were in the

elevator car (id. at 39). When the elevator arrived at the first floor, the doors opened – retracting from the middle – and Levine started to step out (id. at 38-39, 45-46).

According to Levine, “[a]s soon as the doors opened, they started closing” (id. at 48).

The door to his left struck his left shoulder (id. at 51-52).

Levine went to the coffee shop then returned to his office on the 10th floor (id. at 56-57). He later filled out an accident report, stating:

While exiting from elevator #8 of the north bank of elevators in 100 Centre St, the elevator door closed very fast (prematurely) and hard striking my left shoulder.

Unusual Occurrence Report (Maynard Aff., Exh. D).

Levine testified that the elevators in the building were being renovated, and that elevator No. 8 had been taken out of service for a prolonged period of time (Levine Dep., at 32-33, 115-116). Elevator No. 8 was restored to service “a matter of a few days before [his] accident” (id. at 117). Levine was not aware of any complaints that were made about elevator No. 8:

Q. Prior to Oct '03, did you ever make any complaints with regard to elevator 8?

A. No.

Q. Do you know of anyone who ever did make any complaints with regard to elevator 8?

A. I don't know. I don't recall.

Q. Did anyone ever tell you that they had any incidents with elevator No. 8 prior to October 16, 2003?

A. No.

Id. at 114-115.

Dean Smith ("Smith"), an elevator mechanic employed by the City, testified at his deposition that Schindler Elevator Corporation ("Schindler") commenced renovating the elevators in the Criminal Courts Building in May of 2003 (Smith Dep., at 6-7, 20-21 [Maynard Aff., Exh. E]). Smith did not supervise Schindler's mechanics and did not inspect the elevators (id. at 8, 20, 22-23). Schindler performed all maintenance and repairs on the elevators, including elevator No. 8:

Q. Did you ever, yourself, service elevator number eight during that period of time?

A. No.

Q. Who did service it?

A. Schindler.

Q. Was Schindler called in by the City to work on the elevators?

A. Schindler was here providing the maintenance and repair on the elevators.

Q. And did you supervise them?

A. No.

Q. What did you have to do with Schindler?

A. If they had any questions about something, I would try and help them and guide them through it.

Smith Dep., at 15-16.

Pursuant to the contract between the City and Schindler for the "modernization work" (the "Contract" [Maynard Aff., Exh. F]), Schindler was to provide full maintenance services for the duration of the project. The following maintenance coverage applies:

Provide full protective maintenance services and equipment coverage for twenty-six (26) elevators prior to the commencement of work, and during the work implementation procedure, until final acceptance of the finished project.

Contract, ¶ 2.02.1 (B).

The Contract required Schindler to provide a “dedicated resident maintenance team consisting of a mechanic and helper who are familiar with the project” (id., ¶ 3.11 [B]). The team was obligated to “perform scheduled systematic examinations, adjustments, cleaning and lubrication of all machinery, machinery spaces, hoistway and pit” (id.). Schindler’s maintenance obligation under the Contract extended to all aspects of the elevators:

The Contractor shall maintain all parts of the elevator consisting of, but not limited to hoisting machine, power drive, controller, brake, drive motor, master power door system, electrical and mechanical safety apparatus, operating and signal fixtures, fixed and moving mechanical equipment, and all other elevator signal scheduling, wire ropes and accessory equipment complete.

Id., ¶ 3.11 (C).

Schindler was at the site at least through October 16, 2003 (Smith Dep., at 7-8). The resident Schindler mechanic would advise Smith at the end of the day what work had been done on the elevators (id. at 17-18), but Smith played no role in the actual maintenance work on the elevators, including elevator No. 8:

Q. [D]id you ever inspect elevator number eight during that period of time for one year prior to the date of the incident, which is October 16, 2003?

A. No.

Q. You never personally inspected it. Is it fair to say you

never personally had anything to do with the repair, maintenance or any of the problems that arose from that elevator?

A. For the year prior?

Q. Yes, sir.

A. No.

Id. at 20.

DISCUSSION

In order to hold a landowner liable for a dangerous condition on its premises, a plaintiff must demonstrate that the landowner had actual or constructive notice of the hazardous condition which precipitated the injury (Aquino v Kuczinski, Vila & Assocs., P.C., 39 AD3d 216 [1st Dept 2007]; Zuk v Great Atl. & Pac. Tea Co., Inc., 21 AD3d 275 [1st Dept 2005]). Thus, to succeed here, plaintiffs must demonstrate that the City “received actual or constructive notice of the elevator door malfunction that led to [Levine’s] injury” (Clark v New York City Hous. Auth., 7 AD3d 440 [1st Dept 2004]; see e.g. Lapin v Atlantic Realty Apts. Co., LLC, 48 AD3d 337 [1st Dept 2008] [summary judgment granted to property owner as plaintiff failed to raise issue of fact as to whether property owner had actual or constructive notice of elevator door malfunction]; Tashjian v Strong & Assocs., 225 AD2d 907, 908 [3d Dept 1996] [“the owners ... submitted competent evidence establishing prima facie that, prior to plaintiff’s accident, they received no actual or constructive notice of any defective condition in the elevator”]).

Here, plaintiffs are unable to demonstrate that the City had either actual or constructive notice of the malfunction of elevator No. 8. Smith testified that since Schindler came on the site and commenced the elevator modernization project in May

of 2003, he never once inspected elevator No. 8 and played no role in its maintenance (Smith Dep., at 708, 15-16, 20). While Schindler personnel did advise Smith as to what work they were doing, and while Smith recalled being told of some “problems” with the operation of the elevator, Smith was not aware that the elevator doors were closing too fast (Smith Dep., at 13-18). Under these circumstances, the City is entitled to summary judgment (see Browning v Meadowlands Professional Park, Inc., 254 AD2d 725, 725 [4th Dept 1998] [“As the owner of the building, Meadowlands may not be held liable for injuries resulting from an elevator malfunction where, as here, it had an exclusive maintenance contract with Niagara, an elevator company, to inspect, maintain and repair the elevator and had neither actual nor constructive notice of a defective condition”]; see also Lee v City of New York, 40 AD3d 1048 [2d Dept 2007] [defendants established entitlement to summary judgment as a matter of law by producing evidence that they did not have actual or constructive notice of any defect in elevator doors and gate]; Pares v Taino Towers, 17 Misc 3d 1125 [A], 851 N.Y.S.2d 72 [Sup Ct, NY County 2007] [same]).

In response to the summary judgment motion, plaintiffs fail to raise a triable issue of fact. Plaintiffs assert that “after the accident, the doors on car #8 continued to malfunction in the same way ‘until the elevator was shut down,’” earning this elevator a reputation among courthouse personnel as “the runaway elevator” (Aff. of David Segal, ¶¶ 22-23). Notoriety acquired after the accident, however, does not qualify as notice, actual or constructive, to the City prior to the accident.

While Smith did testify in response to a deposition question that he had been aware of some door problems – not that the doors closed too fast, but that “they

wouldn't open or wouldn't close" (Smith Dep., at 12-14), such vague complaints of door problems that did not even involve the same or similar defects as those that caused Levine's injuries are wholly insufficient to demonstrate notice (Clark v New York City Hous. Auth., supra ["While plaintiff and his father allege that prior complaints were made to NYCHA personnel concerning the malfunctioning [elevator] doors, such allegations are too conclusory to raise a triable issue of fact"]; see also Lapin v Atlantic Realty Apts. Co., LLC, supra ["there was no evidence from plaintiff that the alleged prior incidents involved the same or similar defects as those that caused her accident" and thus, "[on] this record, plaintiff's proof of notice was entirely speculative and insufficient to raise an issue of fact"]).

Similarly, plaintiffs cannot invoke the doctrine of *res ipsa loquitur*. While the doctrine of *res ipsa loquitur* may be invoked against the defendant in an action involving a malfunctioning elevator (see Miller v Schindler Elevator Corp., 308 AD2d 312 [1st Dept 2003]), it may only be applied if it can be established that: (1) the occurrence would not ordinarily occur in the absence of negligence; (2) the occurrence was caused by an instrumentality within the exclusive control of the defendant; and (3) the plaintiff did not affect the happening of the event by any voluntary action (Ebanks v New York City Transit Auth., 70 NY2d 621 [1987]). Here, the City did not exercise any control over elevator No. 8, as it ceded all responsibility for the safe maintenance and repair of the elevator to Schindler. This fact alone defeats any contention that the City can be held liable on a *res ipsa loquitur* theory:

By contract, all responsibility for the daily operation of the building's elevators was ceded to Schindler. Royal [the owner] had no role in inspecting, maintaining or repairing the

elevators; those duties and their faithful execution were the total and complete responsibility of Schindler by virtue of its contract. . . Schindler not only provided a mechanic on site to handle and service calls and perform all routine and preventative maintenance as well as periodic inspections, it also informed Royal when any additional work on the elevators was needed. . . In sum, Royal did not exercise such a degree of control over the building's elevators to allow for the application of *res ipsa loquitur* to establish its liability for this accident.

Hodges v Royal Realty Corp., 42 AD3d 350, 352 (1st Dept 2007). Likewise, here, the City did not exercise any control over elevator No. 8 and the doctrine of *res ipsa loquitur* does not apply (see Pares v Taino Towers, 17 Misc 3d 1125(A) at *5 ["There is no factual dispute that the elevator was not in the exclusive control of the owner and property manager since they had a service contract with the elevator company" and thus, "application of the doctrine [of *res ipsa loquitur*] is not warranted").

Plaintiffs contend that "Elevator # 8 had not been renovated (as part of the work being done by Schindler) prior to October 16, 2003" and thus, "this fact indicates that defendant City, and not Schindler, was in control of this elevator at the time of the accident" (Aff. of David Segal Esq., ¶¶ 17-18). The court rejects this argument. Smith testified that Schindler was retained as of May 2003 not only to renovate the elevators, but also to perform "the maintenance and repair in the building at that time" (Smith Dep., at 6-8). His testimony is corroborated by the full-service maintenance agreement between the City and Schindler, which provided for "full protective maintenance services and equipment coverage for twenty-six (26) elevators prior to the commencement of work, and during the work implementation procedures, until final acceptance of the finished project" (Contract, ¶ 2.02.1 [B]). This agreement also

required Schindler to provide a "dedicated resident maintenance team consisting of a mechanic and helper," whose duties were to "maintain all parts of the elevator" (*id.*, ¶¶ 3.11 [B] and [C]).

Moreover, Smith testified that, in the one-year period preceding this accident, he never inspected elevator No. 8, performed repairs or maintenance on elevator No. 8, or supervised Schindler's work on elevator No. 8 (Smith Dep., at 15-16, 20). Thus, Schindler alone exercised control over the elevators and plaintiffs have failed to offer any evidence to the contrary. Accordingly, the City's motion for summary judgment must be granted.

The court has considered the remaining claims, and finds them to be without merit. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
May 21, 2008



Hon. Martin Shulman, J.S.C.

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