Mendez v Access El., Ltd.
2009 NY Slip Op 30913(U)
April 20, 2009
Supreme Court, Nassau County
Docket Number: 02001/07
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 23

X

EDISON MENDEZ ,

Plaintiff,

Index No. 02001/07
Motion Sequence...01
Motion Date... 2/24/09

-against-

ACCESS ELEVATOR, LTD.,

Defendant.

X

Papers Submitted:
Notice of Motion......................................x
Affirmation in Opposition..........................x
Reply Affirmation.....................................x

The motion by the Defendant, Access Elevator, Ltd., seeking an Order, pursuant to CPLR § 3212, granting summary judgment in favor of the Defendant, is **DENIED** for the reasons set forth herein.

The Plaintiff commenced this action seeking money damages due to injuries he allegedly sustained in an elevator accident. The alleged incident occurred on January 16, 2005 at a Dunkin Donuts store located at 389 Atlantic Ave., Freeport, New York. The Plaintiff alleges that he was moving backwards and pulling a baker's rack cart into the

elevator located at the above mentioned premises. The Plaintiff alleges that he opened the elevator door on the first floor (the unit was between the first floor and the basement). The elevator was still situated in the basement and the Plaintiff alleges that he fell into the elevator shaft and fell on top of the elevator. The Plaintiff alleges that he sustained injuries resulting from the fall and as a result of the baker's rack cart falling on top of him. The Defendant installed the elevator or "elevette" manufactured by Access Industries, which is not affiliated with the Defendant. The elevette operated between the basement and the first floor. The elevator was installed with a safety device, whereby the door to the elevator could not be opened on the first floor if the elevator was still in the basement (see Exhibit E, pgs. 28-29, 34-35 annexed to the Defendant's motion). David Russo, the co-president of the Defendant, stated that someone "altered the interlock" (see Exhibit F, pg. 27 annexed to the Defendant's motion). The Defendant has offered the expert affidavit of Ronald Schloss (his affidavit follows the Defendant's Notice of Motion) who states the elevator was installed by the Defendant as per code and there was no negligence on the part of the Defendant in the installation that would have caused the injury to the Plaintiff. The elevator was installed in August or September, 2004.

The interlock mechanism stops the door from opening if the elevator is not at the floor (see Exhibit G, pg. 26-27 deposition of Frederick Russo, the other co-president of the Defendant, annexed to the Defendant's motion). Frederick Russo added that an inspection shortly after the incident indicated that the interlock was bent out of shape

(Exhibit G, pg. 26-28), i.e., it would not lock and prevent the door from opening when the elevator was not at floor level.

David Russo testified that after the elevator was installed there was no maintenance contract between the Defendant and Dunkin Donuts (see Exhibit F, pgs. 17-18) but the unit was covered by a one-year parts and 90-day labor guarantee after completion of the installation (see Exhibit D, Sales Agreement, ¶ 13).

The Plaintiff has offered the sworn statement of Jose Calle, an employee of the Dunkin Donuts store at the location of the incident (the statement is dated October 30, 2008 and is annexed to the Plaintiff's affirmation in opposition as Exhibit B). Mr. Calle stated that he never saw anyone or heard of anyone bypassing or "rigging" the elevator door lock.

The Plaintiff also offered the sworn affidavit of Anthony D'Alessandro, a licensed elevator mechanic (the affidavit is dated December 4, 2008 and is annexed to the Plaintiff's affirmation in opposition as Exhibit C). Mr. D'Alessandro states that he reviewed work tickets/invoices of the Defendant (for service calls) and the service agreement between the Defendant and Dunkin Donuts, various Examinations Before Trial, the report of Dr. Schoss and the affidavit of Jose Calle. It is Mr. D'Alessandro's opinion that the Defendant could have taken steps to prevent the incident of January 16, 2005 (see ¶ 5 of Exhibit C). He states that the repairs done by the Defendant, prior to the incident, were negligent.

The Plaintiff also offered the deposition of Mario Castro. Mr. Castro, an employee of the Defendant, testified that he had been sent to the premises prior to the

incident of January 16, 2005, on the complaint that the unit was not working (see Exhibit A, pgs. 23-24 annexed to the Plaintiff's affirmation in opposition; the following pages refer to that exhibit). Mr. Castro stated he had to go to the premises after the unit was installed because the unit was not working. Mr. Castro stated "we have invoices in the van that we put the information down" (pg. 24, lines 17-18). Mr. Castro wrote the information received from the secretary at Dunkin Donuts as to the malfunction (pg. 24, line 22; page 26, lines 17-25). This invoice, with the date, has not been offered in the court record (p. 27). Mr. Castro went to the Dunkin Donuts location 15 times in a six (6) month period (p. 31) with four (4) visits for the repair or maintenance of the locking mechanism (p. 31); Mr. Castro stated he had been to Dunkin Donuts on calls for the unit before the incident of January 16, 2005 (p. 35) and those visits involved maintenance and repair of the locking system (pgs. 35-36). Invoices were prepared for those pre-incident visits (p. 36). The invoices for these pre-incident visits were not produced at the deposition (p. 37). Mr. Castro stated the lock became maladjusted due to the employees banging on the "keeper" and "cam" (pgs. 39-40). Mr. Castro stated the co-presidents, David and Fred Russo, were aware of the problem (p. 41).

A manufacturer is not responsible for injuries resulting from substantial alterations to or modifications of a product by a third-party that render the product defective or otherwise unsafe (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471; *Pichardo v C.S. Brown Co., Inc.*, 35 AD3d 303).

A defectively designed product is one which, at the time it leaves the seller's

hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use (*Donovan v All-Weld Products Corp.*, 38 AD3d 227).

A defendant manufacturer is liable if the plaintiff can establish that the duty to warn was breached and that the failure to warn was a substantial or proximate cause of the injury (*Howard v Poseiden Pools, Inc.*, 133 Misc2d 874). Whether warnings were (needed or) adequate to deter potential misuse and whether the failure to warn was a substantial cause of the injury is ordinarily a question for the jury (*Howard v Poseiden Pools, Inc., supra; see Schiller v National Presto Industries, Inc.*, 225 AD2d 1053).

Of course, a manufacturer may not be cast in damages, either on a strict products liability or negligence cause of action where, after the product leaves the possession and control of the manufacturer there is a substantial modification which substantially alters the product and is the proximate cause of the plaintiff's injuries (*Robinson v Reed-Prentice Div. of Package Machinery, Co., supra*). Here, the Defendant was the installer of the unit, not the manufacturer of the elevette. The Defendant did offer maintenance contracts.

It is well settled that an elevator maintenance company owes a duty of care to members of the public for failing to correct conditions of which it is aware or failing to use reasonable care to discover and correct a condition which it ought to have found (*see Rogers v Dorchester Assoc.*, 32 NY2d 553).

A general issue of material fact can exist as to whether the elevator accident

was caused by equipment for which the elevator servicer was responsible under its agreement with the building owner (*Thomas v Euclid Avenue Associates*, 269 AD2d 440).

An inference of negligent inspection and repair in the maintenance of an elevator such as would subject a contractor to liability for the elevator user's injuries could be drawn from evidence that the elevator door had previously malfunctioned (*Fanelli v Otis Elevator Co.*, 278 AD2d 362).

A job invoice, dated January 12, 2005, indicated for N/C or "No Charge" that a "bottom limit switch" and "cam" were adjusted by the Defendant's employees just days before the incident (see Exhibit D, last page annexed to the Defendant's motion).

A finder of fact could infer negligent inspection and repair in the maintenance of an elevator from evidence that hoisting doors automatically opened in the absence of the elevator cab itself and that the interlock system, which was designed to prevent such an occurrence, contained a worn and bent latch which required replacement (*Alsaydi v GSL Enterprises, Inc.*, 238 AD2d 533).

Were the problems to the elevator herein such that they could have been discovered by the Defendant's employees upon reasonable inspection? (*see Burgess v Otis Elevator Co.*, 114 AD2d 784).

Could the Defendant, with its expertise in the field of installing elevators, offered preventive maintenance to stop and/or prevent the problems with the elevator door?

Should the Defendant have offered ways to modify the locking system (put a

shell or shield on it; move or alter it; etc.) to avoid the recurring damage to the unit?

The Defendant's contract of sale does include a one-year warranty (Exhibit D annexed to the Defendant's motion, ¶ 13). There is an invoice for January 12, 2005, just four days before the incident (see Exhibit D annexed to the Defendant's motion, wherein the "cam" was adjusted as was the "bottom limit switch.")

The Defendant also offered a service contract with different plans (see Exhibit D annexed to the Defendant's motion). All plans offered "preventive maintenance inspections." There is some indication that Dunkin Donuts had a service contract with the Defendant. While David Russo stated there was no maintenance contract between the Defendant and Dunkin Donuts (Exhibit F, pgs. 17-18 annexed to the Defendant's motion), Mr. D'Alessandro, the Plaintiff's expert, stated he examined the service agreement between the Defendant and Dunkin Donuts (see Exhibit C, ¶ 3(b) annexed to the Plaintiff's affirmation in opposition).

A negligent failure to discover a condition that should have been discovered can be no less of a breach of care than a failure to respond to the actual notice of such a condition (*Blake v City of Albany*, 48 NY2d 875). One who undertakes to perform inspections becomes subject to a duty to perform such inspections in a non-negligent manner (*West Side Corp. v PPG Industries,* 225 AD2d 459).

Here, there is an issue of fact as to whether the Defendant's employees properly performed a "preventive maintenance" inspection of the elevette.

An elevator company which agrees to maintain an elevator in a safe operating condition may be liable to a passenger for its failure to correct conditions of which it has knowledge or for its failure to use reasonable care to discover and correct a condition which it ought to have found (*Rodgers v Dorchester Associates*, 32 NY2d 553; *Fyall v Centennial Elevator Industries, Inc.*, 43 AD3d 113; *Johnson v Nouveau Elevator Industries, Inc.*, 38 AD3d 611).

While a maintenance agreement between an owner and an elevator maintenance company may not be a comprehensive maintenance obligation which displaces a property owner's duty to safely maintain the premises (*see Poka v Servicemaster Management Service Corp.*, 83 NY2d 579), the elevator maintenance company must still demonstrate that it did not fail to perform or negligently perform under the terms of the contract (*Lithgow v London Park Realty Corp.*, 6 AD3d 668).

Was the Defendant required to inspect the unit? Did the Defendant's employees perform the inspection in a non-negligent fashion? Should the Defendant's employees/inspectors have sought ways to prevent the lock from opening the elevette door? Clearly, the Defendant's request for summary relief must be denied due to the many issues of fact present herein.

Mr. Castro indicated nothing could be done to keep the "keeper" and the "cam" from coming loose (see Exhibit a, pgs. 40-41 annexed to the Plaintiff's affirmation in opposition). The Plaintiff's expert, Mr. D'Alessandro, indicated the "cam" could have been

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"adjusted" so that the locking mechanism would not get loose, a manual "outside" latch could have been used and a sign could have been posted to remind workers to be more careful with their carts (see Exhibit B, ¶ 5 annexed to the Plaintiff's affirmation in opposition).

Was the alleged problem which caused the incident one which could have been discovered upon a reasonable inspection by the Defendant's employees? (*see Burgess v Otis Elevator Co., supra*).

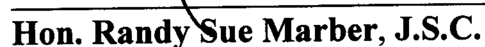
The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which should be rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662; *Pedone v B&B Equipment Co., Inc.*, 239 AD2d 397).

Summary judgment is not appropriate when the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution (*Roca v Perel*, 51 AD3d 757; *Barbuto v Winthrop University Hospital*, 305 AD2d 623).

All matters not decided herein are hereby **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
April 20, 2009



Hon. Randy Sue Marber, J.S.C.

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