

Garaventa v Arco Wentworth Mgt. Corp.

2010 NY Slip Op 32637(U)

August 25, 2010

Supreme Court, Richmond County

Docket Number: 103355/05

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

ANNE GARAVENTA and EUGENE GARAVENTA,

**Index No: 103355/05
Motion Nos: 039-002
585-003
649-004**

Plaintiffs,

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

**ARCO WENTWORTH MANAGEMENT CORPORATION,
FOUNTAINS-CLOVE ROAD APARTMENTS, INC., and
KONE INC./STALEY ELEVATORS,**

Defendants.

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The following papers numbered 1 to 12 were fully submitted on the 8th day of July, 2010:
Papers Numbered

Notice of Motion by Defendant Kone Inc.,
with Supporting Papers and Exhibits
(dated December 22, 2009).....1

Notice of Motion for Summary Judgment
by Defendant Kone Inc., with Supporting
Papers and Exhibits
(dated February 2, 2010).....2

Notice of Motion for Summary Judgment
by Defendants Arco Wentworth Management
Corporation and Fountains-Clove Road Apartments,
Inc., with Supporting Papers and Exhibits
(dated February 8, 2010).....3

Affirmation in Opposition by Defendants
Arco Wentworth Management Corporation
and Fountains-Clove Road Apartments, Inc.,
with Exhibits
(dated February 23, 2010).....4

Affirmation in Opposition by Defendants
Arco Wentworth Management Corporation
and Fountains-Clove Road Apartments, Inc.,
(dated March 3, 2010).....5

Affirmation in Opposition by Defendant
Kone Inc.
(dated March 5, 2010).....6

Reply Affirmation by Defendant
Kone Inc., with Exhibit
(dated April 27, 2010).....7

Reply Affirmation by Defendant Kone, Inc. (dated April 27, 2010).....	8
Reply Affirmation by Defendants Arco Wentworth Management Corporation and Fountains-Clove Road Apartments, Inc. (dated April 28, 2010).....	9
Affirmation in Opposition by Plaintiffs Anne and Eugene Garaventa (dated May 26, 2010).....	10
Reply Affirmation by Defendant Kone, Inc., with Exhibit (dated July 2, 2010).....	11
Reply Affirmation by Defendants Arco Wentworth Management Corporation and Fountains-Clove Road Apartments, Inc. (dated July 6, 2010).....	12

Upon the foregoing papers, (1) that part of the motion of defendant Kone Inc./Staley Elevators (Mot. Seq. No. 003) and of the motion of defendants Arco Wentworth Management Corporation and Fountains-Clove Road Apartments, Inc. (Mot. Seq. No. 004) for summary judgment dismissing the complaint is granted; (2) the balance of each motion is denied as academic; and (3) the motion (Mot. Seq. No. 002) by defendant Kone Inc./Staley Elevators for judgment on its cross claims due to alleged spoliation of evidence is denied as academic.

This is an action to recover compensatory damages for personal injuries allegedly sustained by plaintiff Anne Garaventa when she tripped and fell while entering an elevator in a cooperative apartment building owned by defendant Fountains-Clove Road Apartments, Inc. At the time, defendant Arco Wentworth Management Corporation was the managing agent of the building; defendant Kone Inc./Staley Elevators was the elevator-service contractor. Plaintiffs Anne Garaventa and Eugene Garaventa are shareholders in the cooperative corporation, and had resided in the building for approximately twenty-six years at the time of the incident.

In moving for summary judgment dismissing the complaint as against them, the respective defendants argue that plaintiffs cannot establish a prima facie case for negligence because none of the defendants had notice of the allegedly defective condition.

As noted, plaintiffs are long-time residents of the building. According to his deposition testimony, plaintiff Eugene Garaventa and his wife, plaintiff Anne Garaventa, were returning to their apartment on the evening of October 30, 2004, when they entered the right-hand elevator in the building lobby. They took the car to the third-floor where they exited with a neighbor to continue a conversation. After fifteen minutes, the neighbor walked toward her apartment and the Garaventas called for the elevator to continue up to their eighth-floor apartment. As Anne Garaventa stepped into the car, Eugene saw her catch her foot on the “vertical plane” of the car, which, he stated, was approximately two inches above the level of the third-floor hallway. The momentum of the fall apparently carried Mrs. Garaventa into the far wall of the elevator where she sustained facial injuries.

At her deposition, plaintiff Anne Garaventa testified to substantially the same facts. She acknowledged that she had experienced no difficulty exiting the elevator on the third floor prior to the accident, and that she had not noticed any misleveling between the elevator and the third-floor hallway when she exited or when she reentered. Although she did not see what her foot contacted when she reentered the elevator, she “felt the toe of [her] shoe come up against the elevator floor,” which her husband later told her was higher than the third-floor hallway.

Concerning the condition of the elevator in the months and years preceding the accident, Mr. Garaventa testified at his Examination Before Trial that in the nearly thirty years he and his wife had lived in the building, he had observed similar misleveling conditions in the building’s two elevators approximately three to four times. In particular, on one occasion approximately twelve to fifteen months prior to the accident, he saw the right-hand elevator open below the lobby landing and advised the building superintendent, and on another occasion approximately twelve to seventeen months before the accident, he saw a similar condition in the left-hand elevator. A third time, some months after the accident, he saw that the right-hand elevator had been taken out of service while it was being repaired. He also testified that he had heard residents complain about the elevator service among themselves over the years; however, he was unaware of any complaints made to the defendants about the condition of the right-hand elevator.

Robert M. Gallagher, defendant Kone Inc./Staley Elevators’s service superintendent during the relevant period, testified at his deposition concerning his employer’s service contract with defendants Arco Wentworth Management Corporation and Fountains-Clove Road Apartments, Inc. During the seven months preceding the accident, Kone Inc./Staley Elevators service technicians responded to eight service calls at the building, none of which involved misleveling of either elevator. In addition, on August 6, 2004, approximately two-and-one-half months prior to the accident, Kone Inc./Staley

Elevators performed the contractually-required periodic preventative maintenance service on the right-hand elevator, and issued the New York City-mandated Private Elevator Inspection Certificate, which found both the right-hand and left-hand elevators “satisfactory.” Mr. Gallagher further testified that he was unaware of any complaints made to Kone Inc./Staley Elevators prior to the accident concerning the right-hand elevator misleveling, and that Kone Inc./Staley Elevators has no record of having received any violation notices from the New York City Department of Buildings prior to the accident.

Defendants have demonstrated their prima facie entitlement to summary judgment as a matter of law by showing that they had received no relevant prior complaints about the elevator from plaintiffs or others in the months and years preceding the accident. The testimony and documentary evidence presented by defendants establishes that defendant Kone Inc./Staley Elevators had regularly serviced the elevator pursuant to its contract with the co-defendants and had recorded no complaints or service calls with regard to the misleveling of the elevator during the contract period. Similarly, defendants Arco Wentworth Management Corporation and Fountains-Clove Road Apartments, Inc. established that they neither created nor had actual or constructive notice of the allegedly defective condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837-38 [1986]; *Oxenfeldt v. 22 N Forest Ave Corp.*, 30 AD3d 391, 392 [2nd Dept 2006]).

In opposition, plaintiffs have failed to raise an issue of fact as to defendants’ creation or notice of the alleged defective condition. Plaintiffs’ averments that defendants had notice of the elevator’s malfunctioning through prior complaints consisted of both hearsay and alleged oral complaints far too attenuated in time to provide adequate notice of the alleged condition. Moreover, there was no evidence that the alleged prior incidents involved the same or similar defects as that which caused plaintiff’s accident. “On this record, plaintiff[s]’ proof of notice was entirely speculative and insufficient to raise a triable issue of fact” (*Lapin v. Atlantic Realty Apts. Co. LLC*, 48 AD3d 337 [1st Dept 2008]).

Given this disposition, so much of defendant Kone Inc./Staley Elevators’ motion for judgment on its cross claims due to alleged spoliation of evidence is academic. Even were it considered, while defendants Arco Wentworth Management Corporation and Fountains-Clove Road Apartments acknowledge that they are unable to produce the minutes of the Board of Managers meetings for the relevant period, nothing in the deposition testimony of either plaintiff Eugene Garaventa or defendants’ representatives establishes that the minutes would contain any material evidence of notice. Neither Mr. Garaventa, a Board member in the 1980’s, nor Pasquale Cavuoti, the building superintendent who occasionally attended Board meeting in 2003 and 2004, could recall any such agenda item at the meetings they attended. The mere suggestion that, if there had been any complaints in 2004 prior to

the accident, they possibly would have come up at a board meeting .is insufficient to raise a question of fact concerning relevant prior notice, and does not raise the specter of spoliation of evidence on the part of defendants.

Similarly, so much of defendants' respective motions as seek indemnification and contribution are rendered academic.

Accordingly, it is hereby:

ORDERED that so much of the motion of defendant Kone Inc./Staley Elevators (Mot. Seq. No. 003) and of the motion of defendants Arco Wentworth Management Corporation, Fountains-Clove Road Apartments, Inc. (Mot. Seq. No. 004) for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the balance of each motion is denied as academic; and it is further

ORDERED that the motion (Mot. Seq. No. 002) by defendant Kone Inc./Staley Elevators for judgment on its cross claims due to alleged spoliation of evidence is denied as academic; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

All parties shall appear in DCM Part 3 for a pre-trial conference on **Monday, September 27, 2010 at 9:30.am.**

ENTER.

Dated: August 25, 2010

Joseph J. Maltese
Justice of the Supreme Court