

**Banner v Rockland Home for the Aged Hous. Dev.
Fund Co., Inc.**

2014 NY Slip Op 32308(U)

August 27, 2014

Sup Ct, New York County

Docket Number: 100694/11

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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9/2/14
E

PRESENT: JUDGE GEOFFREY D. WRIGHT
Justice

PART 47

Index Number : 100694/2011
MONROE, DAVID L.
vs.
ROCKLAND HOME FOR THE AGED
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 6, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 3, 4

Replying Affidavits _____ No(s). 5

memo
Upon the foregoing papers, it is ordered that this motion is decided in accordance with
the attached decision/order.

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

RECEIVED
SEP 02 2014
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NEW YORK SUPREME COURT - CIVIL

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SEP 02 2014

COUNTY CLERK'S OFFICE
NEW YORK

C
GEOFFREY D. WRIGHT
AJSC, J.S.C.

Dated: 8/27/14

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

Part 47

-----x
PAUL L. BANNER, as Trustee of DAVID L. MONROE,

Plaintiff,

Index # 100694/11

-against-

DECISION

ROCKLAND HOME FOR THE AGED HOUSING
DEVELOPMENT FUND COMPANY, INC., and
THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

Present:
Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion/Order for summary judgment.

PAPERS

FILED
NUMBER
____ 1, 2 _____ SEP 02 2014
____ 3, 4 _____
____ 5 _____ COUNTY CLERK'S OFFICE
NEW YORK
____ 6 _____

- Notice of Motion and Affidavits Annexed.....
- Order to Show Cause and Affidavits Annexed
- Answering Affidavits.....
- Replying Affidavits.....
- Exhibits.....
- Memoranda.....

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Co-Defendant Rockland Home For the Aged Housing Development Fund Company, Inc. (hereinafter, "Rockland Home") moves for summary judgment pursuant to CPLR § 3212, dismissing the Complaint against it with prejudice (motion sequence 001). Co-Defendant Thyssenkrupp Elevator Corporation (hereinafter, "TKE") moves for an order for summary judgment pursuant to CPLR § 3212 dismissing the Complaint and all cross claims against it (motion sequence 002). The motions are consolidated for the purposes of this decision.

Plaintiff, an elevator mechanic, alleges that he was injured while performing work on a hydraulic elevator in a building owned by Rockland Home. Specifically, the Complaint alleges that Plaintiff was injured while attempting to boost himself out of an elevator pit in the absence of a pit ladder. Plaintiff banged his right knee on the sill and

fascia of the elevator pit thereby tearing his right medial meniscus and injuring his lower back. In addition Plaintiff alleges that while he was in the elevator pit, his shoes became covered with oil from the pit which caused him to slip and twist his ankle.

Plaintiff asserts claims under Labor Law § 240 (1) and § 200, and a common law negligence claim against Rockland Home, and a products liability and common law negligence claim against TKE, the manufacturer of the elevator on which Plaintiff performed work. Defendants Rockland Home and TKE move for summary judgment dismissing the claims of Plaintiff.¹

TKE has asserted two cross claims against Rockland Home.² TKE's first cross claim alleges that its liability is secondary or derivative only and its second cross claim alleges that it is entitled to indemnity and contribution from Rockland Home for any judgment that may be recovered by Plaintiff against TKE or for that portion shown to be the responsibility of Rockland Home. TKE moves for summary judgment on its cross claims.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law demonstrating the absence of material issues of fact. (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 501 N.E.2d 572 (1986)). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (Zuckerman v. City of New York, 49 NY2d 557 (1980)). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (Winegrad v. City of New York Univ. Med. Ctr., 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985)).

Defendant Rockland Home moves for summary judgment on Plaintiff's Labor Law § 240 (1) claim. Rockland Home argues that Plaintiff was engaged in routine maintenance rather than repair work when Plaintiff came to fix a broken hydraulic elevator that was vibrating, a condition known in the elevator business as "cavitation". Plaintiff sued Rockland Home under Labor Law § 240 (1) on the theory that he was performing *repair* work on the elevator when his injury occurred.

On the date of the accident Plaintiff performed work on an elevator that was cavitating, a condition which occurs when hydraulic elevators become low on oil. His efforts included retrieving a five gallon bucket of hydraulic oil which had drained from the piston head on the elevator, using a wrench to tighten the bolts on the hydraulic piston head of the elevator to prevent the oil from leaking, pouring the oil back into the

¹ Plaintiff waived his claims originally asserted in the Complaint against TKE under Labor Law § 240 (1) and Labor Law § 200.

² TKE withdrew its motion for summary judgment as to its third cross claim against Rockland Home.

hydraulic tank in the motor room, returning the five gallon bucket back underneath the piston head, and riding the elevator up and down to ensure that the elevator no longer vibrated.

“Labor Law § 240 (1) does not apply to routine maintenance that is not done in the context of construction or renovation work.” Jehle v. Adams Hotel Assoc., 264 A.D.2d 354, 355 (1st Dept. 1999). Section 240 (1) does not apply when “replacing or repairing relatively small components that suffered normal wear and tear, not major structural work.” Id. Here, Plaintiff’s work consisted of minor maintenance of an hydraulic elevator system. His efforts to eliminate the problem of cavitation did not consist of major structural work but rather his work constituted routine maintenance of the elevator and not repair work. Therefore, Rockland Home has no liability under Labor Law § 240 (1). Since there are no genuine issues of material fact withstanding, summary judgment is granted in favor of Rockland Home as to Plaintiff’s claim under Labor Law § 240 (1).

Under Labor Law § 200 Plaintiff alleged that Rockland Home was negligent in so far as it had actual or constructive notice of a dangerous condition on its premises. Rockland Home argues that it did not direct or supervise Plaintiff’s work.

“Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work.” Ortega v. Puccia, 57 A.D.3d 54, 60 (2nd Dept. 2008). “Cases involving Labor Law § 200 fall into two broad categories: namely those where workers are injured as a result of a dangerous or defective premises conditions and those involving the manner in which the work is performed.” Id. at 61. “Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.” Id.

In this case Plaintiff alleges that Rockland Home had actual or constructive notice of a dangerous condition on its premises, namely the absence of a pit ladder and the presence of oil on the floor of the elevator pit. Plaintiff’s claim that he was injured is one in which a premises condition is at issue. Rockland Home sets forth no argument in its moving papers that it did not have actual or constructive notice of a dangerous condition on its premises. Rockland Home’s argument is based on a manner of work theory of the case, in which Plaintiff would be required to show that Rockland Home had direct control over his work. At a very minimum there exists a genuine issue of material fact as to whether Rockland Home had actual or constructive notice of a dangerous condition on its premises. Accordingly, Rockland Home’s motion for summary judgment as to Plaintiff’s Labor Law § 200 claim is denied.

Rockland Home moves for summary judgment on Plaintiff’s common law negligence claim. Much like the Labor Law § 200 claim above, Rockland Home must address its failure to provide a pit ladder in the elevator pit. Based on the record, a genuine issue of material fact exists as to whether Rockland Home was negligent when it

failed to install a pit ladder, in violation of ANSI Code A17.106.1d-1981, the applicable code. It is undisputed that Rockland Home did not provide a pit ladder for Plaintiff to use to climb out of the elevator pit. Rockland Home argues that Plaintiff's actions were the sole and proximate cause of Plaintiff's injuries. At best Rockland Home has left a question of contributory negligence which is best left for a jury to decide. Accordingly, Rockland Home's motion for summary judgment is denied as to Plaintiff's common law negligence claim.

Co-Defendant TKE moves for summary judgment on Plaintiff's products liability and common law negligence claims. TKE argues that the manner in which the elevator collected oil was not defective and that TKE was not responsible for the provision of a pit ladder. Plaintiff argues that TKE was responsible for ensuring a ladder be installed in the elevator pit in which the subject elevator was to operate.

Plaintiff relies on the testimony of his expert, William Terry, who testified that the elevator in question should have been equipped with pit ladder and that TKE was negligent in approving or otherwise authorizing the elevator in question to be utilized by the general public without first inspecting the elevator after it was installed and ensuring that a proper pit ladder was installed in the elevator pit. "A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for use of the product." Speller v. Sears, 100 N.Y.2d 252, 254 (2003). Plaintiff has failed to show that the elevator in question was defective because of a flaw in the manufacturing process, inadequate instructions or warnings, or a defect in the design. TKE has established by non-party testimony in this case and by way of an affidavit from its expert, Patrick McPartland that hydraulic elevators are standard in the industry, the oil collection method is standard and code compliant, and the subject elevator was in compliance with all applicable codes when it was designed. Notably Plaintiff does not refute the testimony from TKE's expert or other witnesses in this case as to the manufacture, design, and instructions or warnings of the subject elevator but only argues that TKE should have installed a pit ladder which it had no duty to do as the manufacturer of the elevator.

Plaintiff's expert has testified that TKE "should not have permitted or otherwise authorized the elevator in question to be approved for use by the general public without first insuring that a proper pit ladder was installed." (Affidavit of William Terry, ¶ 8). Plaintiff's expert fails to establish how TKE, the manufacturer of the elevator, was responsible for the manner in which the elevator was installed. Plaintiff has failed to establish how TKE was in violation of code requirements when TKE did not install the subject elevator and had no duty to inspect the premises in which the elevator was installed.³ The affidavit of Plaintiff's expert is insufficient to create a genuine issue as to a

³ Defendant Thyssenkrupp Elevator *Corporation* was the manufacturer of the elevator on which Plaintiff worked. Non-party Thyssenkrupp Elevator *Company* (formerly Dover Elevator

material fact. "Such opinions based on speculation, conjecture and without an evidentiary basis, are patently inadequate to create an issue of fact." Timmins v. Tishman Constr. Corp., 9 A.D.3d 62, 70 (1st Dept. 2004). There exist no genuine issues of material fact that would preclude this Court from granting summary judgment. Accordingly, summary judgment is granted in favor of TKE as to Plaintiff's products liability claim.

As to Plaintiff's common law negligence claim, as stated above, Plaintiff has failed to establish that TKE breached a duty owed to Plaintiff. "In a negligence action, Plaintiff must establish that a manufacturer failed to exercise reasonable care in making his product." Fane v. Zimmer, 927 F.2d 124, 130 (2d Cir. 1991). All the evidence before this Court indicates that Defendant TKE exercised reasonable care in manufacturing the elevator in question. Summary judgment is granted in favor of TKE on Plaintiff's common law negligence claim. Accordingly, the Complaint against TKE and all cross claims are dismissed.


GEOFFREY D. WRIGHT
AJSC

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Dated: August 27, 2014

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JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

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Company), a separate entity, installed the subject elevator.