

Scott v 55 Knolls Crescent, LLC

2014 NY Slip Op 32537(U)

January 6, 2014

Supreme Court, Bronx County

Docket Number: 305124-09

Judge: Julia I. Rodriguez

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX IA- PART 27**

Present: JULIA I. RODRIGUEZ, JSC

Index No.: 305124-09

EILEEN SCOTT, Individually and as Administrator
of the Estate of SHELDON M. SCOTT, deceased,

DECISION & ORDER

Plaintiff,

-against-

55 KNOLLS CRESCENT, LLC, THE KNOLLS
COOPERATIVE SECTION NO. 2, INC. and
MCGLYNN, HAYES & CO., INC.

Defendants,

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Plaintiff's motion and Defendant's cross-motion noticed on Feb 1, 2013 and March 11, 2013 respectively, and submitted on Aug 2, 2013:

<u>Papers Submitted</u>	<u>Numbered</u>
Motion & Exhibits	1
Cross-motion & Exhibits	2
Opposition & Exhibits	3-5
Reply	6-7

Upon the foregoing papers, Plaintiff moves for an Order striking the Answer of Defendant McGlynn, Hayes & Co., Inc. (McGlynn) based upon spoliation and/or in the alternative granting summary judgment as against all Defendants on the issue of liability.

McGlynn cross-moves for an Order dismissing all claims and cross-claims for punitive damages as against McGlynn.

The instant action was commenced as a result of an accident involving an alleged malfunctioning elevator at the building where deceased Plaintiff resided. McGlynn was called to the premises to fix a problem of the elevator being stuck on the fourth floor. It is alleged that McGlynn fixed the problem and the elevator was operating properly. The interlock mechanism of the elevator door malfunctioned causing the door to the elevator to open when the cab was not present. A properly working interlock mechanism would not allow the door of the elevator to open unless a cab was present. Plaintiff stepped into the elevator on the first floor and fell down the shaft to his death. Defendants 55 Knolls Crescent, LLC and the Knolls Cooperative Section No. 2, Inc. (Knolls) owned the subject premises. McGlynn had performed maintenance on the

elevator just prior to the accident. The parties concede that McGlynn discarded the interlock mechanism.

Plaintiff moves to strike McGlynn's Answer based on the discarded interlock mechanism. On a motion for spoliation, the movant must establish that the loss will fatally compromise the case or leave movant without the means to prove the action at trial. *Cameron v Nissan 112 Sales Corp.*, 10 A.D.3d 591, 781 N.Y.S.2d 661 (2nd Dept. 2004). The court does not find that the loss of the interlock mechanism compromises Plaintiff's case, in light of the fact that the parties concede that it was replaced because it was not working properly. As such, that portion of Plaintiff's motion seeking to strike McGlynn's Answer is **denied**.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). The movant's failure to establish their prima facie entitlement requires denial of the motion without consideration of the opposing papers. *Id.* When a movant's burden is sufficient to establish its entitlement to summary judgment, the burden shifts and it is then incumbent upon the opposing party to raise a triable issue of fact. *Mallick v. Farfan*, 33 A.D.3d 762, 823 N.Y.S.2d 200 (2nd Dept. 2006). The court's function in determining a motion for summary judgment is issue finding rather than issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 49 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978) and *Stone v. Goodson*, 8 N.Y.2d 8, 200 N.Y.S.2d 627 (1960).

Plaintiff argues that summary judgment should be granted based upon the theories of *res ipsa loquitor* and negligence *per se* for the violation of certain statutes thus imposing strict liability upon Defendants. In as much as Plaintiff relies on a general statute and ordinance imposing general duties, the court finds this insufficient for imposing a negligence *per se* standard or strict liability.

In order to succeed on a claim of *res ipsa loquitor* claim, the movant must prove that the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. *Nikollbibaj v City*, 106 AD3d 789, 964 NYS2d 619 (2nd Dept. 2013). The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may, but is not required to, draw the permissible inference of negligence. *Id.* The use of *res ipsa loquitur* does not relieve the plaintiff of the burden of proof. *Id.* In a *res ipsa loquitur* case, the jury has great latitude; even when the plaintiff has established a prima facie case and the defendant has offered no proof, the jury nonetheless is entitled to find for the defendant. *Id.*

Here, Plaintiff did not make the claim of *res ipsa loquitur* in her complaint. So it would not be appropriate to grant summary judgment based on that doctrine. In addition, the court finds that there are issues of fact such as whether the deceased Plaintiff was comparatively negligence in not taking the necessary precautions to make sure there was a cab before he stepped in the elevator, the failure to look before he leaped, whether Defendants had notice of the alleged defective condition, whether the interlock system was negligently maintained or malfunctioned due to wear and tear, whether the interlock system was within the exclusive control of the defendant, or whether Plaintiff and/or other tenants can cause damage to it or cause it to malfunction by banging on the door as alleged. Thus, the court finds it inappropriate to grant summary judgment to Plaintiff.

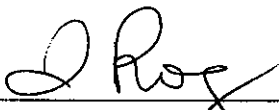
Punitive damages may be imposed when a Defendant engages in wanton and reckless conduct regardless of intent. It is determined on a case by case basis. The nature of the conduct which will justify an award of punitive damages must display a high degree of moral culpability which manifests a conscious disregard of the rights of others. *Home Insurance Company v. American Home Products Corp.*, 75 NY2d 196, 551 N.Y.S.2d 481 (1990).

In her complaint, Plaintiff alleges “the aforesaid occurrence and resulting injuries were due to the intentional, willful and wanton conduct of the defendants, which exhibited a careless and reckless disregard for human life and in particular, the life of decedent plaintiff.” Here the court does not agree that the alleged negligence of Defendants, rises to the egregious level of willful, wanton, criminal or grievous nature. As such, Plaintiffs’ claim for punitive damages is dismissed.

Accordingly, Plaintiff's motion for an Order striking the Answer of Defendant McGlynn, Hayes & Co., Inc. based upon spoliation and/or in the alternative granting summary judgment as against all Defendants on the issue of liability is hereby **denied**.

Defendant McGlynn, Hayes & Co., Inc.'s cross-motion for an Order dismissing all claims and cross-claims for punitive damages as against them is hereby **granted**.

Dated: January 6, 2014



Hon. Julia I. Rodriguez, J.S.C.