SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

----------x

THOMAS CINQUEMANI and LYDIA CINQUEMANI,

Index No. 150507/13

Plaintiffs,

-against-

OTIS ELEVATOR COMPANY, BOCA GROUP EAST, LLC* and HLT NY WALDORF, LLC,

Defendants.

----------x

JENNIFER G. SCHECTER, J.:

Defendants Otis Elevator Company (Otis) and HLT NY Waldorf, LLC (Waldorf) move for summary judgment. Their motion is granted.

Background

This is a personal-injury action arising from an elevator malfunction on May 23, 2010. On the date of the incident, Thomas Cinquemani (Cinquemani) was employed by Inter-Con Security (Affirmation in Support [Supp], Ex I [Cinquemani Tr] at 22). Prior to his employment with Inter-Con Security, Cinquemani was a corrections officer with the New York City Department of Corrections (DOC) (Cinquemani Tr at 42). In 1986, while working for DOC, he injured his head, neck and back during a prison riot (Sup, Ex J [Cinquemani Tr 2] at 185). In 2004, a few months before retiring from DOC, Cinquemani was in a car accident (*id.* at 191-93).

*Plaintiffs discontinued this action against Boca Group East, LLC (Affirmation in Support, Ex C).

On the day of the incident, Cinquemani worked as a meal relief officer at the Waldorf, relieving security officers on duty so that they could take meal breaks. At approximately 3:45 p.m., he took elevator nine or 10 to the 42nd floor of the Waldorf and did not experience any problems (Cinquemani Tr at 56, 107-08, 114-15). After fulfilling his duties, he used elevator 10 to return to the lobby (*id.* at 107). Cinquemani testified that immediately after the elevator left the 42nd floor it "started jumping," "jumping up and down violently" and continuously (*id.* at 120-21, 126-27). He did not push an alarm but tried to grab the handrail with his left hand (*id.* at 123). At some point on the way down he recalled being on the elevator's floor and the last floor he remembered seeing was the 18th floor (*id.* at 126). After the elevator hit the 18th floor, Cinquemani stated that he believes he was unconscious, there was an "explosion" and that the elevator "free fell" to the third floor at which point he regained consciousness (*id.* at 128-30). Cinquemani reported that elevator number 10 was "jumping up and down until the 18th floor at which time it shot down to 3rd with a big bang knocking [him] to the floor" (*id.* at 139).

Cinquemani did not have a problem getting up and when he exited the elevator he saw "Ms. Smith," asked her if she heard

the explosion and she replied that she had (*id.* at 132-33). Cinquemani testified that Ms. Smith gave him her driver's license but he did not record her information (*id.* at 134-35). He then took an elevator to the first floor or lobby.

On reaching the lobby, he reported the incident to George Nurse, a Waldorf security supervisor, and then to Wesley Drake at Cinquemani's employer's main office. He then drove himself home (*id.* at 137-38).

The following day, Cinquemani sought medical treatment but does not recall his complaints (Cinquemani Tr 2 at 180). He commenced this action in 2013 and seeks recovery for injuries to his shoulder, disc herniations and bulges, elbow pain, bilateral carpal tunnel, left-knee pain and aggravation of his pre-existing spine and neck conditions as well as for fear, anxiety and depression (Supp, Ex E at ¶ 2). He alleges that he "has been totally disabled from employment from the date of the incident to date and continuing" (*id.* at ¶ 4). After the incident Cinquemani continued working for Inter-Con Security for a little more than two years until September 2012 when Dr. Shiau performed spinal surgery on him (Cinquemani Tr 2 at 198-99).

At his deposition, Cinquemani testified that he did not have any shoulder pain (*id.* at 270).

Eileen Kenney

Eileen Kenney is an Otis elevator mechanic (Supp, Ex L [Kenney Tr] at 13). Otis has a full-service agreement with the Waldorf for the 30 or so elevators in the building (*id.* at 28-31). Kenney mostly dealt with preventative maintenance (*id.* at 60). Each time an elevator at the Waldorf was worked on a record would be generated though the employees' work phone (*id.* at 40-41). Additionally, there was a handwritten monthly checklist in the employees' motor room (*id.* at 41-47).

Kenney explained that the elevator system has a motherboard, which holds the individual board of each elevator (*id.* at 53-54). This enables communication with the elevator's components and ensures that the elevator can function properly (*id.*). On the top of the elevator there is a tape switch, tape reader and vane (which gives the leveling of every floor), boards for the car operating panel and a reader indicating available floors (*id.* at 53-54, 56). There is also a governor safety feature preventing the elevator from speeding. If the elevator goes over a certain speed it trips electronically and if it goes even further it trips manually. If the elevator is going over 20% of its contract speed the governor trips stopping the elevator more abruptly than usual (*id.* at 53-54, 56, 78, 81). Maintenance was performed

monthly, including the month of the plaintiff's incident (*id.* at 65, 110-112, 156-58). Yearly inspections would be performed by a different company-- Boca Group East, LLC (Boca) (*id.* at 69).

Kenney testified that she first became aware of Cinquemani's accident the day after it happened when she reported to work (*id.* at 77, 168, 182). She noted that the incident report indicated a "System Activated Shutdown," which could happen for a number of reasons including activation of the governor (*id.* at 180).

George Nurse

George Nurse was the Security Supervisor at the Waldorf on the date of the incident (Supp, Ex M [Nurse Tr] at 12). Nurse was aware of and saw video feed of Cinquemani getting off the elevator on the third floor and at the lobby but the videos were no longer in existence at the time of his deposition (*id.* at 40-44). Nurse testified that he saw video of Cinquemani getting off the elevator on the third floor and that he was "just looking into the mirror and just walking around. . . . He got on the next elevator" (*id.* at 48). He then saw him "walking around in the lobby area" (*id.* at 49). After the incident, Nurse spoke to Cinquemani and took a report (*id.* at 52). He does not recall seeing Cinquemani in

an injured or incapacitated state nor did he remember seeing a woman on the third floor (*id.* at 64). Nurse recalled that Cinquemani complained about pain in his body. Nurse prepared a statement on May 27, 2010 and noted that on the day of the incident, Cinquemani wanted to file a report and inquired about insurance compensation (*id.* at 84-88). Nurse did not inspect the elevator because it was locked (*id.* at 89-90, 95). Nurse was not aware of any other accidents or SAS (system activated shutdown) mode involving elevator number 10 or any complaints (*id.* at 115-16).

Steven Brillo

Steven Brillo was the General Manager of Otis. Based on the information he received, he made a report to the Waldorf regarding Otis' findings (Supp, Ex N [Brillo Aff]). He was informed that the elevator had shut down on the third floor and was left out of service in order to be inspected (*id.* at ¶ 5). Based on the inspection, two electro-mechanical switches located on top of the elevator were tripped. "The tripped switches would cause the brake to apply and the motor to shut off, which would cause the elevator to come to a controlled, code compliant stop. The elevator stopped level with the third floor preventing the passenger(s) in the elevator from being trapped" (*id.* at ¶ 6). "The switches were re-set and the elevator was monitored in 'test mode.' After

multiple tests, the switches were found to be working correctly . . . Out of an abundance of caution, the switches were replaced" (*id.* at ¶ 8).

Stephen Spampinato

Stephen Spampinato is the Vice President and Director of Field Operations for Boca. He became aware of Cinquemani's incident the day after it happened and prepared a letter to the Waldorf outlining Boca and Otis' findings (Supp, Ex O [Spampinato Aff] at ¶ 3). He was notified that the elevator allegedly came to an abrupt stop on the third floor while traveling from the 42nd floor (*id.* at ¶ 5). Otis had reported that it found the tape switch and safety operated switch in the open position (*id.* at ¶ 6). "There were no other apparent causes for the shut down" (*id.*).

Elevator Experts

Patrick J. McPartland, P.E.

Patrick McPartland was retained as an expert for Otis (Supp, Ex P [McPartland Aff] at ¶ 1). He reviewed multiple documents in this action, inspected the elevator in 2015 and conducted tests on the elevator in 2017 (*id.* at ¶¶ 4-5). The test he performed (Vertical Vibration Analysis using a PTM accelerometer) analyzed the force on passengers riding in the elevator (*id.* at ¶ 6). He concludes to a reasonable degree of engineering certainty that there was no "objectionably harsh

stopping when the replicated emergency stops took place" (*id.* at ¶¶ 8, 25, 28). "It is [his] opinion, with a reasonable degree of engineering certainty in the field of elevator safety, operation, service, and engineering that Cinquemani was not subject to any harsh stop while riding the subject elevator on the date of May 23, 2010" (McPartland Aff at ¶ 28). He also concluded that the tape switch safety device activated properly and as designed resulting in the elevator coming to a safe and proper stop (*id.* at ¶ 30). Additionally, "[a] drop or fall of the elevator [as Cinquemani described at his deposition] did not occur because it is electrically and mechanically impossible . . ." (*id.* at ¶¶ 32, 35). Based on his examination and testing, "there is nothing defendants did, or failed to do, that could have caused the incident or injuries claimed by Cinquemani" (*id.* at ¶ 38). In fact, the tape switch can be activated even with proper maintenance (*id.* at ¶ 21). He believes that the elevator "functioned properly under the circumstances by coming to a safe and proper stop upon the activation of the tape switch and that defendants acted reasonably and proper[ly] under the circumstances" (*id.* at ¶ 39).

Patrick A Carrajat

Patrick Carrajat claims that McPartland's testing seven years after the incident is unavailing as variables cannot be

accounted for (Opposition [Opp]], Ex G [Carrajat Aff] at ¶¶ 10-11). He urges that any condition that could have caused the opening of the tape switch indicates that Otis "failed to properly perform maintenance on the tape switch" (*id.* at ¶ 14). He states that McPartland's not feeling an objectionably harsh stop is likely because he anticipated the stop during a controlled situation and that despite his conclusion he is not qualified to render opinions on Cinquemani's injuries (*id.* at ¶ 16). Carrajat notes that work was performed on the governor on May 2, 2010 (*id.* at ¶ 8). Carrajat concludes that defendants failed to maintain a safe premises, acted improperly by not reporting the incident to the New York City Department of Buildings and that Otis failed to properly perform or record maintenance to the top of the elevator in the six months before the incident (*id.* at ¶¶ 22-25). Notably missing from Carrajat's analysis is whether the violent condition of the elevator could have occurred as Cinquemani states it did.

Medical Experts

Gregory Jay, M.D., PhD

Doctor Gregory Jay is a professor of Emergency Medicine and Engineering (Supp, Ex AC [Jay Aff] at ¶ 1). He examined the elevator in 2017 and found the maximum deceleration in descent from the 42nd floor to the ground floor without a brake

stop generated a maximal deceleration of 0.123 G (Jay Aff at ¶ 12). When he tested the brake stop condition there was a force of .450 G and none of the occupants of the elevator fell down (*id.* at ¶ 12). He noted that a repetitive heel strike from walking normally generates 1.5-2.0 Gs when measured at the hip which is also transmitted up the spine (*id.* at ¶ 13).

With a reasonable degree of medical and biomechanical engineering certainty, Dr. Jay concludes that the "decelerative forces associated with 0.450 G are still too low to exacerbate [Cinquemani's] pre-existing disc herniations" and notes that Cinquemani's MRI of 2004 documented degenerative disc disease (*id.* at ¶ 14). Although he does not believe that Cinquemani's injuries can simply be attributed to the normal activities of daily living, it is his opinion that Cinquemani's prior motor-vehicle accident "is the type of traumatic event that could precipitate symptomology from advanced degenerative changes in the spine. The brake stop decelerative forces [however] are in fact no greater than what is experienced in day to day activities and is not the cause of the patient's complaints. Accordingly, it is [his] opinion, with a reasonable degree of medical and biomechanical engineering certainty, that the neck and back pain spine pathology and the need for cervical spine fusion surgery is not compatible with the plaintiff's assertion of how the

injury occurred" (*id.* at ¶ 15). Dr. Jay concludes, moreover, that the "emergency stop decelerative forces were insufficient to cause bilateral carpal tunnel syndrome, or the alleged knee, shoulder and elbow injuries alleged by Mr. Cinquemani" (*id.* at ¶ 16).

Dr. John Shiau

At a workers-compensation deposition, Dr. John Shiau testified that he first saw Cinquemani in September 2011 (Opp, Ex I [Shaiu Tr] at 5). Cinquemani relayed to him that he had been in an elevator that fell 15 stories (*id.* at 6). "He said the elevator had cut loose, [he is] not exactly sure what that means. In any case, he said he had a brief loss of consciousness and then when the elevator finally stopped he was able to walk out on his own" (*id.* at 6).

When asked whether he had an opinion as to the causal relationship of the injuries, Dr. Shiau stated that Cinquemani "told [him] that he had regular aches and pains . . . but prior to this injury he didn't have any chronic daily pain. So [he] can say with reasonable medical certainty that the injury aggravated a pre-existing condition" (*id.* at 7). He further stated, as related to carpal tunnel syndrome, that "[he does not] know the mechanism of [Cinquemani's] fall, [he does not know] whether [Cinquemani] injured his wrists. But again, [Cinquemani told him] that prior to this injury he

didn't have any numbness in his fingertips and [Shiau] would have to make the same conclusion regarding the carpal tunnel" (*id.* at 7-8). Dr. Shiau also stated that he did not have any of Cinquemani's medical records predating his injury (*id.* at 15-17).

Analysis

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendants met their heavy burden. They established that the elevator was regularly maintained and that any malfunction or activation of safety devices could not have caused the

elevator to react in the manner plaintiff describes nor could it cause or exacerbate injuries as plaintiff alleges.

Defendants' expert opined that the drop or fall of the elevator as Cinquemani described it was "electrically and mechanically impossible . . ." (McPartland Aff at ¶¶ 32, 35). The elevator "functioned properly . . . by coming to a safe and proper stop upon the activation of the tape switch and . . . defendants acted reasonably and proper[ly] under the circumstances" (*id.* at ¶ 39). He stated that "there is nothing defendants did, or failed to do, that could have caused the incident" (*id.* at ¶¶ 21, 38).

Defendants established that the brake-stop decelerative forces are "no greater than what is experienced in day to day activities" and is not the cause of Cinquemani's complaints. Dr. Jay concluded, with a reasonable degree of medical and biomechanical engineering certainty, that the neck and back pain spine pathology and the need for cervical spine fusion surgery were not compatible with Cinquemani's assertion of how the injury occurred and that the emergency stop decelerative forces were insufficient to cause bilateral carpal tunnel syndrome or the alleged knee, shoulder and elbow injuries alleged (Jay Aff at ¶¶ 15-16).

In response, plaintiffs' experts failed to raise a triable question of fact. Significantly, there is no evidence

that the incident could have occurred as Cinquemani describes. Specifically, there is no evidence that:

- the elevator could have free fallen or "jumped up and down violently" or
- the opening of the tape switch was due to lack of maintenance or
- the governor, which would prevent any type of free fall, was not working.

Carrajat does not identify what defendants did wrong that caused the elevator to allegedly malfunction in a manner consistent with Cinquemani's account or opine that a specific problem with a component part could have triggered the events described by him. Carrajat's statements that defendants were negligent are conclusory. Dr. Shiau's testimony, moreover, which is based solely on Cinquemani's reports, is insufficient to rebut defendants' medical evidence.

Because defendants met their burden and plaintiffs did not demonstrate that there is a triable issue--including that the elevator could have acted in the manner described by plaintiff--summary judgment is granted in defendants' favor (see *Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611, 613 [1st Dept 2012][awarding summary judgment to defendants who established that the elevator could not have acted in the manner described by plaintiff and could have shut down for a myriad of reasons unrelated to negligence and

finding plaintiff's account "incredible as a matter of law" as nothing refuted that the incident was "mechanically impossible"]; *Forde v Vornado Realty Trust*, 89 AD3d 678 [2d Dept 2011][plaintiff's allegations were physically and mechanically impossible; res ipsa loquitur inapplicable as plaintiff failed to establish that the accident was not one that would not occur in the absence of negligence]; *contrast Miller v Schindler Elevator Corp.*, 308 AD2d 312 [1st Dept 2003][summary judgment denied as defendant did not offer expert evidence that the incident was physically or mechanically impossible]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the action is dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision, order and judgment of the court.

Dated: February 23, 2018

HON. JENNIFER G. SCHECTER