Moranska v Affinia Manhattan Hotel
2019 NY Slip Op 32601(U)
September 4, 2019
Supreme Court, New York County
Docket Number: 151527/2014
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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STANISLAWA MORANSKA,

Plaintiff,

- v -

AFFINIA MANHATTAN HOTEL, 371 SEVENTH AVENUE CO., LESSEE LLC,
DHG MANAGEMENT COMPANY, LLC,
P.S. MARCATO ELEVATOR CO., INC.,

Defendants.

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INDEX NO. 151527/2014

MOTION DATE 08/08/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200

were read on this motion for REARGUMENT.

Raphaelson & Levine Law Firm, P.C., (Jason S. Krakower, of counsel) for plaintiff.
Lester Schwab Katz & Dwyer, LLP, (Harold J. Derschowitz of counsel), for Defendants 371 Seventh Avenue Co., Lessee LLC, and DHG Management Company, LLC.
Fullerton Beck, LLP (Joseph A. Sauer of counsel) for defendant, P.S. Marcato Elevator Co., Inc.

Gerald Lebovits, J.:

In this action, plaintiff seeks damages for personal injuries she suffered when she tripped and fell while exiting an allegedly misleveled elevator in a hotel owned by defendants 371 LLC and DHG. Plaintiff sued 371 LLC and DHG; she also sued defendant P.S. Marcato Elevator Co., the entity that maintained and repaired the elevator at issue.

Plaintiff moved for partial summary judgment against 371 LLC, DHG, and P.S. Marcato, relying on a res ipsa loquitur theory of negligence. This court's decision of June 10, 2019, granted the separate cross-motions for summary judgment by 371 LLC and P.S. Marcato, holding that the res ipsa loquitur doctrine did not apply here.[1] (*See* NYSCEF No. 174, at 7-8.)

Plaintiff now moves under CPLR 2221 to reargue that ruling. Plaintiff's motion for leave to reargue is granted. Upon reargument, this court adheres to its grant of summary judgment as to

[1] This court also granted summary judgment to DHG without opposition, on the ground that plaintiff's claims against DHG are barred by the exclusive-remedy provisions of the Workers' Compensation Law. (*See* NYSCEF No. 174, at 5-6.) That ruling is not at issue on this motion.

371 LLC; the court vacates its grant of summary judgment to P.S. Marcato and instead denies P.S. Marcato's summary-judgment motion as to plaintiff's claims.

This court's prior decision held that the res ipsa loquitur doctrine did not apply here because plaintiff's fall and injury could have occurred in the absence of negligence—for example, by a misstep on plaintiff's part—relying on the First Department's decision in *Meza v. 509 Owners LLC* (82 AD3d 426, 427 [1st Dept 2011]). Plaintiff is correct to contend that in so holding, this court misapprehended the law by giving insufficient weight to the First Department's later decision in *Ezzard v One E. Riv. Place Realty Co.* (129 AD3d 159, 162 [1st Dept 2015]).

In *Ezzard*, the First Department held in this context that when plaintiff is proceeding on a res ipsa theory, and has provided evidence that the elevator was misleveled (such as through testimony of her own visual or tactile perceptions of the misleveling), summary judgment should be denied. (*See* 129 AD3d at 163-164.) Here, as plaintiff notes, plaintiff gave deposition testimony that while being treated shortly after her fall, she looked at the elevator and observed a substantial height difference between the floor of the elevator and the hallway. (*See* NYSCEF No. 197, at 3.) Thus, under *Ezzard*, this court erred in holding that res ipsa did not apply here.

To be sure, as P.S. Marcato argues, *Ezzard* did not indicate that it was overruling the Court's prior decision in *Meza*, which remains good law. But *Meza* is distinguishable: in that case, unlike here, it was undisputed that the plaintiff did not actually observe the elevator being misleveled after she fell.[2] As a result, the record in *Meza* left open the possibility that plaintiff's fall was due to a misstep on her part, thereby precluding application of res ipsa. That is not the case here.

Defendants also cite the First Department's decisions in *Jones v Underhill Realty* (160 AD3d 194 [1st Dept 2018]), and *Fasano v Euclid Hall Associates, L.P.* (136 AD3d 478 [1st Dept 2016]). Neither decision, however, criticized—much less purported to overrule—the Court's lengthy and considered ruling on this issue in *Ezzard*. And neither case is directly comparable to the circumstances presented here.

In *Fasano*, the elevator-maintenance company introduced substantial evidence at summary judgment indicating that in the particular circumstances of that case it was impossible for the elevator to have misleveled as plaintiff asserted[3]; and the Court expressly rejected the contrary view of plaintiff's expert (136 AD3d at 479). Defendants do not identify any comparable record evidence in this case. *Jones* was not an elevator-misleveling case at all. Rather, the plaintiff in *Jones* was seeking damages for injuries she sustained when a balcony door slammed shut on her foot in a high wind. The Court there held simply that it was equally

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[2] *See* Br. for Plaintiff-Appellant, *Meza v. 509 Owners LLC*, 2011 WL 11004115, at *25, *29-*30 (1st Dept 2011). Similarly, in *Cortes v. Central Elevator, Inc.*, cited by *Meza*, the Court expressly noted that plaintiff gave "deposition testimony that he did not see the elevator in a misleveled state following his fall." (45 AD 3d 323, 324 [1st Dept 2007].)

[3] *See* Br. for Third-Party Defendant, *Fasano v. Euclid Hall Associates, L.P.*, 2015 WL 13769943, at *9-13, *19-*21, *23-*24, *34-*36 (1st Dept 2015).

plausible that the accident was caused by plaintiff's comparative negligence—i.e., by leaving her foot in the path of the door while she collected items from the balcony.[4]

Ultimately, plaintiff here has introduced evidence that (i) she tripped and fell when leaving the elevator; and (ii) after falling, she observed the elevator being substantially misleveled. A reasonable jury considering this evidence could conclude that plaintiff's fall would not have occurred in the absence of negligence on the part of the entity with control over the elevator, or by plaintiff's own negligence.[5] (*See Ezzard*, 129 AD3d at 163-164.) Plaintiff's res-ipsa negligence claim should not have been dismissed at summary judgment; and this court grants leave to reargue that dismissal.

On reargument, this court adheres to its grant of summary judgment to 371 LLC. The record indicates that 371 LLC entered into a full-service maintenance contract with P.S. Marcato regarding the elevators, under which P.S. Marcato had sole responsibility to maintain, inspect, and repair the elevators in the building. In these circumstances, 371 LLC lacked exclusive control over the elevators, so res ipsa cannot apply to 371 LLC. (*See Ezzard*, 129 AD3d at 165.)

By the same token, however, P.S. Marcato *did* have exclusive control over the elevators. And for the reasons discussed above, this court concludes that plaintiff has satisfied the other elements of the res ipsa loquitur theory of negligence as to P.S. Marcato. This court therefore holds on reargument that P.S. Marcato's motion for summary judgment as to plaintiff's claims should be denied.

Accordingly, it is

ORDERED that plaintiff's motion for leave to reargue the dismissal of her res ipsa loquitur negligence claims against defendants 371 LLC and P.S. Marcato is granted; and it is further

ORDERED that upon reargument, this court adheres to that branch of its Decision and Order, filed June 10, 2019, granting summary judgment in favor of defendant 371 LLC on plaintiff's res ipsa loquitur negligence claims; and it is further

ORDERED that upon reargument this court vacates that branch of its Decision and Order, filed June 10, 2019, granting summary judgment in favor of defendant P.S. Marcato on plaintiff's res ipsa loquitur negligence claims, and denies P.S. Marcato's cross-motion for summary judgment on plaintiff's negligence claims; and it is further

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[4] *See* 160 AD3d at 495. *See also* Mem. Law of Plaintiff at Point I, *Jones v. Underhill Realty, LLC*, 2016 WL 7911829 (1st Dept 2016).

[5] To the extent P.S. Marcato suggests in opposing reargument that plaintiff's account of her fall is implausible (*see* NYSCEF No. 197, at 6-7), that suggestion merely raises credibility questions for the fact-finder—particularly when construing the facts in the light most favorable to the non-moving party.

ORDERED that plaintiff shall serve a copy of this decision with notice of entry on all parties and on the Office of the County Clerk, which shall vacate judgment in favor of P.S. Marcato accordingly.

9/4/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE