Guzman v Kone, Inc.
2023 NY Slip Op 35081(U)
November 8, 2023
Supreme Court, Bronx County
Docket Number: Index No. 27081/2018E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

----------X Index No.: 27081/2018E

Lourdes Guzman

Plaintiff,

DECISION/ORDER

-against-

Kone, Inc., Broadwall Management Corp., d/b/a
570 Lexington Ave., 570 Lexington Ave., LLC.,
Jeffery Management Corp., The Feil Organization, Inc.,
And Tower 570 Company, L.P.

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of the order to show cause as indicated below:

Papers	**Numbered**
Notice of Motion & Affirmation in Support & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Affirmation in Reply	**3**

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this personal injury action alleging that she became injured when the elevator she was traveling in dropped twenty floors. The defendants, Kone, Inc., (Kone), Broadwall Management Corp., d/b/a 570 Lexington Ave, (Broadwall), Jeffrey Management Corp., (Jeffery), The Feil Organization, Inc., (Feil) and Tower 570 Company, LP (Tower), collectively, "Defendants") move for summary judgment dismissing the complaint. The plaintiff opposes the motion.

The plaintiff was a cleaner for the defendant's building located at 570 Lexington Avenue, New York, New York. On June 27, 2016 at approximately 10:15 p.m the plaintiff was transporting a cleaning cart and pressed the call button for the elevator on the 48th floor. Elevator

No. 8 responded, she entered the elevator and pressed the button for the 26th floor. She claims the elevator fell quickly and suddenly stopped on the 28th floor, paused for 10 to 15 seconds before it proceeded to the 27th floor. Without pushing any buttons the elevator door opened on the 27th floor and she exited. She completed an incident report with Karen Wang, the security officer on duty at the time.

The proponent of a motion for summary judgment must tender sufficient evidence to show absence of any material, triable issues of fact and the right to entitlement to judgment as a matter of law (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Summary Judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (see *Assaf v. Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). It is well settled that issue finding, not issue determination, is the key to summary judgment (see *Rose v. Da Ecib USA*, 259 Ad 258 [1st Dept 1999]). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

A defendant is entitled to judgment as a matter of law where plaintiff's allegations as to how the incident occurred are physically or mechanically impossible (see *Williams v. Port Auth. of New York & New Jersey*, 247 AD2d 296 [1st Dept. 1998]; *Forde v. Vornado Realty Trust*, 89 AD3d 678 [2nd Dept. 2011]; *Hardy v. Lojan Realty Corp.*, 303 AD2d 457 [2nd Dept. 2003]). In *Cinequemani v. Otis Elevator Co.*, 179 AD3d 588 [1st Dept. 2020], the First Department granted the defendants' summary judgment motion and held that the "defendants submitted evidence,

including an expert affidavit and deposition testimony of Otis's elevator mechanic, demonstrating that plaintiff's account of how the elevator incident occurred was electrically and mechanically impossible. Defendants also demonstrated lack of notice of any defect that could have caused the incident, and that what had occurred was an appropriate system activated by shutdown." (*Cinequemani* at 588). Here, the defendants contend that the plaintiff's version of how the elevator dropped is a physical and mechanical impossibility.

The plaintiff testified that when she got into the elevator on the 48th floor she pushed the button for floor 26. She stated that the elevator started going down quickly and heard screeching sounds as it was going down. She claimed that prior to June 27, 2016 she did not have any incidents with elevator 8. It stopped on the 28th floor and then she heard banging noises (see exhibit "E" pg. 127 lines 19-25). The elevator halted for approximately 30 seconds. The elevator kept going down and stopped at the 27th floor. When the elevator came to a stop she felt a sharp pain in her lower back and her knee. She sustained herniations to her L5-S1 disc that required fusion surgery and a torn medial meniscus in her left knee that required surgery. She stated the elevator fell very quickly and came to an abrupt stop (see Exhibit "E" pg. 130 lines 20-23).

In support of their motion, the defendants submit an affidavit from Jon B. Halpern, P.E. a licensed professional engineer in the State of New York and consulting engineer in the field of vertical transportation, which includes matters of design, construction, installation, maintenance and repair of escalators, elevators and other devices. In preparation for the affidavit regarding elevator 8, he reviewed, among other records, the plaintiff's complaint, deposition transcript, Mr. Mayer's deposition transcript, Ms. Wang's deposition transcript, the building logbook, the

Kone's time ticket detail reports (maintenance), NYC Department of Buildings inspection reports and the NYC on-line records. On September 3, 2019 he also performed a site examination of the elevator, took photographs, witnessed the unit's testing and operation (see document # 48 pg. 2).

He states that it is impossible for the elevator to "drop" in an uncontrolled manner and then operate normally after an overspeed. He claims that the elevator "has redundant features that measure the unit's speed including its overspeed governor. The overspeed governor would have tripped if the elevator dropped as alleged by the plaintiff. Once the overspeed governor is tripped, it must be reset manually before the unit will move again or the doors will open". He explains that there is no record of the overspeed governor tripping or being reset. Ms. Wang testified that moments after the incident she pushed the call button in the lobby, the elevator responded and operated without any issue to the lobby. Mr. Halpern claims it is impossible for the elevator to operate normally after a purported overspeed event with a tripped governor.

Mr. Halpern avers that there are no reports of any adjustment, repair or work performed on the elevator after the incident. The elevator's operation and E-Stop force were tested and inspected within a month after the incident with the NYC Department of Buildings Elevator Division and it was certified for continued service.

In a prior incident, on June 14, 2016, another cleaning lady, Ms. Garrido, was entrapped in the elevator due to a failed brake coil. She was extracted from elevator 8 by a Kone mechanic. The time ticket indicates that the brake coil was replaced during a repair on June 16 and June 17, 2016. Pursuant to the time ticket the brake coil did not fail at the time of the plaintiff's incident. Mr. Halpern believes that Ms. Garrido's entrapment is not related to the plaintiff's purported

event on June 27, 2016.

Mr. Halpern also states that the elevator's overspeed governor is designed to stop the elevator if it operates outside of its predetermined speed. He also explained that the ASME A17.1 Safety Code for Elevators and Escalators provides the table for tripping of the overspeed governor to cause an E-Stop of the unit by the removal of power from the driving motor and brake. Mr. Halpern tested the elevator's E-Stop force on September 3, 2019 and the accelerometer showed that the E-Stop force met code requirements. Mr. Halpern concluded that even if the plaintiff experienced an E-Stop, the stop was well within the code compliance and was insufficient to cause injury to anyone.

The defendants argue that they are entitled to summary judgment because they did not have notice of a similar recurring problem with the elevator (see *Forde*, 89 AD3d at 679; *Hardy*, 303 AD2d at 457; *Farmer, v. Central Elevator, Inc.*, 255 AD2d 289 [2nd Dept. 1998]). The court in *Farmer* held that "the defendant's repair records for the subject elevator did not reveal any previous misleveling problem" (*Farmer* at 290). The plaintiff testified at her deposition that she rode the elevator at the facility several times every workday prior to the accident and never noticed that it misleveled" (*Farmer* at 290). In *Gjonaj v. Otis Elevator Co.*, 38 AD3d 384 (1st Dept. 2007), the Appellate Division affirmed the granting of summary judgment to the defendants who demonstrated that "there were no prior complaints about the elevator, including from the plaintiff in the six months he had been working as an elevator operator and that no dropping problems with the elevator were indicated in the contractor's records, which serviced the elevator on a monthly basis" (Id. at 385). The court held that "in order to establish notice based on prior accidents, plaintiff was required to produce evidence that the prior accidents were

similar in nature to the accident alleged here and caused by the same or similar contributing factors" (*Id.* at 385).

The defendants argue that similar to *Gjonaj*, the evidence shows that they did not have notice based on prior accidents of any issue with elevator 8 allegedly dropping. The plaintiff testified at deposition that prior to the incident, she had hundreds of elevator trips at Tower and she never experienced any incident out of the ordinary with elevator 8. The maintenance history also demonstrates that there is no report of the elevator dropping as of one year prior to the date of the incident. They argue that the prior incident of Mary Garrido becoming entrapped in the elevator on June 14, 2016 is not related to the plaintiff's incident. The elevator entrapment she experienced was caused by a failed brake coil.

The defendants also move to dismiss the claims against Jeffrey and Tower contending they are barred by the Worker's Compensation Law. The plaintiff testified that she was employed as an office cleaner by Jeffery and paid by Tower. Worker's compensation benefits are "the sole and exclusive remedy of an employee against his employer for injuries in the course of employment" *Weiner v. City of New York*, 19 NY3d 852 [2012] quoting *Gonzales v. Armac Indus. Ltd.*, 81 NY2d 1 [1993]; see also Worker's Compensation Law § 11 and 29(6). This "precludes suits against an employer for injuries in the course of employment" (*Weiner* at 405).

The plaintiff opposes the defendants' motion and submits the affidavit of Dennis W. Olson who is a Certified Elevator Inspector. He has 37 years of experience in the elevator and escalator industry. He inspected the elevator on December 12, 2019 and concluded in his report that the elevator was experiencing an intermittent failure of the elevator landing system. This failure caused a loss of position while in flight in the hoist way or elevator shaft. He states that

the "elevator landing system requires maintenance which would include cleaning and verifying the operation of the tape and reader device on top of the elevator cab, opening the box to observe the condition of the circuit boards and associated wiring and connections" (see Exhibit 5 pg 3). The elevator room, hoisteway car top and pit of the elevator was inspected and photographed by Mr. Olson. Excessive amounts of dirt, dust and debris were found on all components of the elevator, the machine room and pit areas. Mr. Olson concluded that the defendants failed to perform any maintenance consistent with recognized industry practices or procedures on the elevator.

He also states that the time ticket reports provide descriptions that are vague and fail to identify any known component or circuitry associated to the erratic operation experienced by the plaintiff and Garrido. The tickets indicate that unidentified "circuits" or "system module" were "checked" or "reset". "There was no specific component within the elevator noted in need of repair or having been repaired" (Exhibit 5 pg. 4). Mr. Olson states that Mr. Mayer's testimony that technicians would check numerous conditions before restarting does not address the fact that they failed to take in-depth troubleshooting or testing of the elevator. They made simplistic resets or observations. He states that within a reasonable degree of professional and technical certainty the erratic operation of the elevator on June 14, 2016 and June 27, 2016 were the result of Kone's repeated failure to accurately test and diagnose or repair the elevator landing system. Mr. Olson also claims there is no recognized term "E-Stop" in the elevator industry.

Mr. Olson claims that the plaintiff did not report that she experienced an overspeed condition but her description of the elevator dropping is her describing the erratic operation of the elevator. This erratic operation and abrupt stop caused her to become injured. In the time

ticket dated March 11, 2016 the customer reported the elevator jumping and dropping. The defendants only checked operation of the control system in response to this event. On April 6, 2016 the equipment shut down which caused the elevator to stop at the lobby with the doors shut. The ticket shows that the only work performed was a resetting of the control system. The tickets also show that the elevator was between floors on May 11, 2016 and Kone repaired the drive system module. However the elevator was stopped with the doors closed in the basement on May 12, 2016 and the ticket indicates Kone "checked the operation of the control system." Mr. Olson concludes that within a reasonable degree of professional and technical certainty that the erratic operation of the elevator on June 14, 2016 and June 27, 2016 was the result of Kone's repeated failure to diagnose and repair the elevator landing system.

The expert affidavits submitted by the parties create an issue of credibility between the experts. "It is not the court's function on a motion for summary judgment to assess credibility" (*In Ferrante v. American Lung Ass'n*, 90 NY2d 623 [1997]). Mr. Halpern and Mr. Olson's expert affidavits provide different conclusions as to the condition of the elevator and whether the incident occurred as described. The plaintiff has raised a triable issue of fact with respect to the probability of the elevator malfunction and the motion is therefore denied.

The plaintiff argues there is notice to the defendants of the elevator's erratic movements. Karen Wang, who was employed by Jeffrey as a security officer testified that the defendant's log book recorded numerous incidents with the elevator prior to the plaintiff's incident. On May 6, 2016 the elevator was stuck on the 27th floor, on May 10, 2016, the elevator was getting stuck on the 37th floor, on May 11, 2016 the elevator suddenly jolted and shook violently when it came down from the 26th floor. The Kone time ticket dated March 11, 2016 indicates the "elevator

jumping and dropping". This is evidence that the defendants had prior notice of the elevator's erratic motions but failed to perform effective diagnosis or repair of the elevator landing system. The plaintiff has raised a triable issue of fact that the defendants had notice based on prior complaints or incidents involving the elevator. The defendants' motion for summary judgment dismissing the claim based on having no notice of prior complaints or incidents is denied.

"Under appropriate circumstances, the evidentiary doctrine of res ipsa loquitur may be invoked to allow the factfinder to infer negligence from the mere happening of an event (*Marinaro v. Reynolds*, 152 AD3d 659 [2nd Dept. 2017] citing *States v. Lourdes Hosp.*, 100 NY2d 208 [Ct App 2003]). "Res Ipsa Loquitur does not create a presumption of negligence; rather, it is a rule of circumstantial evidence that permits, but does not require, the jury to infer negligence" (*Id.* at 661). In order for Res Ipsa Loquitur to apply, the plaintiff must establish three elements: (1) 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 (*Valdez v. Upper Creston, LLC*, 201 AD3d 560 [1st Dept. 2022]).

Here, the defendant contends that Res Ipsa Loquitur is inapplicable because the elevator's alleged stop was designed by a safety code and not improper maintenance. She failed to identify the instrumentality that allegedly caused her injuries because her account of the incident is a physical and engineering impossibility. The plaintiff has established that the doctrine is applicable through Mr. Olson's testimony. Mr. Olson concluded that the elevator's landing system was defective because it was not maintained properly and Kone failed to diagnose and repair the system. The defendants do not deny that the elevator is in their exclusive control.

There are no actions by the plaintiff that contributed to the elevator dropping and abruptly stopping. The defendants' motion for summary judgment dismissing the Res Ipsa Loquitur claim as inapplicable is denied.

Worker's compensation benefits are "the sole and exclusive remedy of an employee against his employer for injuries in the course of employment" (*Weiner v. City of New York*, 19 NY3d 852 [Ct App. 2012]). The plaintiff testified that her employment ended at Tower (see exhibit E pg. 32 lines 16-19). The plaintiff's opposition states that Jeffery was the management company and she does not oppose this branch of the defendant's motion. The defendants' motion is granted to dismiss the complaint against Tower. The motion is denied against Jeffery since the plaintiff testified that she was employed by Tower and not Jeffery.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendant's motion for summary judgment and dismissing the complaint is granted to the extent of dismissing the action against Tower, and it is further,

ORDERED AND ADJUDGED, that the defendants shall serve a copy of this decision and order upon the plaintiff within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: November 8, 2023

Hon. Paul L. Alpert, J.S.C.