SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0168-15T3

MAUREEN MCDAID,

Plaintiff-Appellant,

v.

AZTEC WEST CONDOMINIUM ASSOCIATION, BERGEN HYDRAULIC ELEVATOR, and PREFERRED MANAGEMENT, INC.,

Defendants-Respondents.

Argued March 22, 2017 - Decided April 5, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7527-12.

Lisa A. Lehrer argued the cause for appellant (Davis, Saperstein & Salomon, P.C., attorneys; Ms. Lehrer, on the briefs).

Robert J. Mormile argued the cause for respondents Aztec West Condominium Association and Preferred Management, Inc. (Farkas & Donohue, L.L.C., attorneys; Mr. Mormile, of counsel; Christine M. Jones, on the brief).

Brian L. Calistri argued the cause for respondent Bergen Hydraulic Elevator (Weber

Gallagher Simpson Stapleton Fires & Newby, LLP, attorneys; Mr. Calistri and Anthony T. Ling, on the brief).

PER CURIAM

Plaintiff Maureen McDaid appeals from companion orders entered by the Law Division on August 7, 2015, which dismissed her personal injury action on summary judgment. We affirm.

We incorporate the factual findings in Judge Mary F. Thurber's comprehensive fifteen-page written opinion granting defendants' motions for summary judgment. Briefly summarizing, on October 14, 2010, plaintiff was seriously injured when she fell after being struck by a closing elevator door in the condominium complex where she resided. The elevator doors were equipped with two safety features: (1) a rubber safety edge running along the side of the doors, which was designed to retract upon contact; and (2) an electric eye that emitted narrow light beams across the elevator entrance at two different heights, which would reopen the doors if the beam was broken by an object in its path.

On September 26, 2012, plaintiff filed her complaint, naming as defendants the property owner, Aztec West Condominium Association (Aztec), the property manager, Preferred Management, Inc. (Preferred), and Bergen Hydraulic Elevator (Bergen), the company Aztec contracted with to perform monthly service on the

elevator.[1] Plaintiff's expert, Gregory DeCola, submitted a report in which he concluded that the electric eye system on the elevator was not working properly at the time of the accident. He further opined that Bergen "also should have recommended that the older door protection system be replaced with a new upgraded safer door reopening device."

After discovery ended, defendants moved for summary judgment. They asserted, among other things, that they never received any notice that the electric eye was malfunctioning before the accident occurred and that, absent such notice, they could not be held liable in negligence for its failure.

After carefully analyzing the parties' arguments, Judge Thurber granted defendants' motions for summary judgment and dismissed plaintiff's complaint. In her August 7, 2015 written opinion that accompanied the memorializing orders, Judge Thurber first found that plaintiff failed to establish defendants had actual or constructive notice of the electric eye malfunction. The judge noted it was undisputed that on September 22, 2010, plaintiff expressed concern to the building manager, Howard Gartenberg, about the closing speed of the elevator door. The

[1] Plaintiff also pleaded a claim in strict products liability. However, plaintiff did not pursue that claim, which was dismissed on summary judgment and is not at issue in this appeal.

speed was then adjusted, and there were no complaints about the door's closing speed thereafter. Judge Thurber rejected plaintiff's contention that this constituted notice that the electric eye was not functioning properly. She elaborated:

> Plaintiff's expert did not suggest that the concern about door speed could be in any way linked to an electric eye malfunction or that it should have put defendants on notice that the electric eye might malfunction in the near future. Despite repeated inquiry during oral argument, plaintiff's counsel was not able to identify any support in the record for a link between these two, nor any other fact to serve as possible evidence of notice to defendants prior to the accident sufficient to impose on them an obligation to have prevented the failure of the electric eye or injury caused by that.
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> It is undisputed that the City of Hackensack conducted semi-annual elevator inspections, and that it issued satisfactory certificates of inspection for the Aztec elevator both before and after plaintiff's injury, on May 10, 2010, and November 16, 2010. Mr. DeLoof, Bergen's principal, testified in deposition about the nature of the electric eye failure, describing it as a contact failure inside the relay, stating not only had he never seen that type of failure before in this elevator, he had never seen that problem before on any elevator he had worked on in his entire career.
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> No complaint was made about the door closing prematurely or otherwise malfunctioning due to a failure of the electric eye. Nor was there a complaint about any other malfunction or problem with the door, after September 22, 2010, and prior to the accident on October 14, 2010. Plaintiff

> and Mr. Gartenberg testified to frequent use of the elevator without incident between September 22, 2010, and the date of the accident.
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> Although it is not disputed that the electric eye was found to be malfunctioning after the accident, . . . there is no evidence that the electric eye was malfunctioning before plaintiff's accident, and therefore no basis to send the case to a jury on that issue, even assuming the injury to have been caused by a failure of the electric eye.

Plaintiff sought to establish an inference of negligence by reliance upon the doctrine of res ipsa loquitur. Res ipsa loquitur, a Latin phrase meaning "the thing speaks for itself," permits an inference of negligence, establishing, in turn, a prima facie case of negligence. Jerista v. Murray, 185 N.J. 175, 191-92 (2005). In order to invoke the doctrine, a plaintiff must establish that "'(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect.'" Mayer v. Once Upon a Rose, Inc., 429 N.J. Super. 365, 373 (App. Div. 2013) (quoting Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 398 (2005)); Buckelew v. Grossbard, 87 N.J. 512, 525 (1981) (quoting Bornstein v. Metro. Bottling Co., 26 N.J. 263, 269 (1958)). The doctrine is inapplicable if it is equally likely that the

negligence causing the injury "'was that of someone other than the defendant[.]'" Bornstein, supra, 26 N.J. at 273 (citation omitted).

Judge Thurber rejected plaintiff's reliance on res ipsa loquitur. She reasoned:

> The [c]ourt finds plaintiff has not established the first prong of the res ipsa loquitur analysis. To establish that the occurrence "ordinarily bespeaks negligence," plaintiff must show that the occurrence would ordinarily not occur absent negligence and that it is more probable (not merely possible) than not that negligence of the named defendants was the cause of the accident or injury. Gore v. Otis Elevator Co., 335 N.J. Super. 296, 301 (App. Div. 2000) (citing Myrlak [v. Port Auth. Of N.Y. and N.J.], 157 N.J. 84, [95 (1999)]; Hillas [v. Westinghouse Elec. Corp.], 120 N.J. Super. 105, [113 (App. Div. 1972)]). In this case plaintiff did not refute the contention that the electric eye, being a mechanical device, is subject to failure from time to time totally unrelated to negligence.
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> Although plaintiff is not required to exclude absolutely any other possible causes of the injury, plaintiff is required to bring forth affirmative evidence that tends to exclude other causes. Gore, [supra,] 335 N.J. Super. at 302-03, citing Hillas, [supra,] 120 N.J. Super. [at 114]; Jimenez v. GNOC Corp., 286 N.J. Super. 533[, 544] (App. Div.), certif. denied, 145 N.J. 374 (1996). She did not do so. Of course the mere occurrence of an accident cannot be evidence of negligence. See Mockler v. Russman, 102 N.J. Super. [582,] 588 [(App. Div. 1968), certif. denied, 53 N.J. 270 (1969)].

> Plaintiff has not put forth proofs to create a prima facie case that a malfunction in the elevator door electric eye device would ordinarily not occur absent negligence. Plaintiff herself pleaded a defective device (products liability) as an alternative explanation for the failure, for which she abandoned any claim that the named defendants could be held liable. In Gore, [supra,] the court rejected an argument by the plaintiff that the doctrine of res ipsa loquitur should have applied in a comparable factual situation. 335 N.J. Super. 296 [at 302].

Finally, Judge Thurber rejected plaintiff's remaining claim that Bergen was negligent in failing to recommend that Aztec upgrade its elevator safety system to include a state-of-the-art electric light curtain feature, which would detect an obstruction in the doorway over a broader spectrum than the two-level electric eye. The judge found that plaintiff's expert, DeCola, "cites no authority for his opinion that Bergen should have recommended an upgrade. As Bergen notes, the mechanisms in place conformed to all applicable industry regulations and standards. New Jersey Code required only the retracting safety edge. Even the electric eye was not required by code." Judge Thurber concluded:

> Defendants established that their actions with respect to the elevator complied with local and national standards. Plaintiff offered no authority outside its expert's personal opinion that Bergen should have recommended an upgrade that exceeded applicable regulations. The [c]ourt finds that opinion to be a net opinion not sufficient to withstand the motions for summary judgment.

We review a grant of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted).

On appeal, plaintiff argues that defendants had notice of problems with the elevator prior to the accident; that the doctrine of res ipsa loquitur applies; that her expert report is not an inadmissible net opinion; and that material factual disputes exist that preclude summary judgment. We have carefully reviewed plaintiff's contentions and the controlling legal principles and

affirm substantially for the reasons expressed by Judge Thurber in her thoughtful written opinion. We add only the following brief comments.

The summary judgment record convincingly establishes that defendants lacked actual or constructive notice of the electric eye malfunction. The absence of such notice is fatal to plaintiff's claims of premises liability. Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003); Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984). The mere "[e]xistence of an alleged dangerous condition is not constructive notice of it." Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990).

Nor does the evidence here support application of the res ipsa loquitur doctrine. As Judge Thurber aptly noted, we have declined to apply the doctrine against an elevator company in an action for negligent maintenance of elevator doors in substantially similar circumstances. See Gore, supra, 335 N.J. Super. at 296.

Finally, "a trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011). DeCola's expert report fails to identify any local, state, or national code to support his claim that defendants were negligent

in failing to equip the elevator with an upgraded safety system. To the contrary, there is no dispute that the system at the time of the accident complied with all applicable safety regulations, and was inspected and approved by the City of Hackensack both before and after the accident. Accordingly, this aspect of DeCola's report was properly discounted as an inadmissible net opinion.

Affirmed.