SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2202-15T3

NADINE AMBRICO,

Plaintiff-Appellant,

v.

THYSSENKRUPP ELEVATOR CORPORATION,

Defendant-Respondent.

Submitted March 9, 2017 – Decided October 13, 2017

Before Judges Hoffman and O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1484-14.

Dennis E. Block, attorney for appellant.

Shimberg & Friel, PC, attorneys for respondent (Kevin B. Golden, of counsel and on the brief).

The opinion of the court was delivered by

O'Connor, J.A.D.

In this personal injury negligence action, plaintiff Nadine Ambrico appeals from a December 18, 2015 order granting defendant Thyssenkrupp Elevator Corporation summary judgment dismissal. After reviewing the record and applicable law in light of the contentions advanced on appeal, we affirm.

The motion record reveals the following. On September 13, 2012, plaintiff was injured when an elevator door at her place of employment, the Camden County Health Services Building in Camden, closed on her hand and arm. At that time, defendant and plaintiff's employer, the County of Camden, were parties to a contract in which defendant agreed to maintain the elevators in the building and service them as needed.[1] Defendant had been inspecting the elevators on a monthly basis since at least January 2011; the last time the subject elevator had been inspected before the subject incident was on August 1, 2012.

Plaintiff did not serve defendant with an expert's report. After the close of discovery, defendant filed a motion for summary judgment dismissal, asserting plaintiff could not successfully prove a claim for negligence against it without expert testimony, because the manner in which elevator doors operate is beyond the ken of the average juror.

[1] A copy of the agreement in effect at the time of the incident was not included in either party's appendix.

Plaintiff maintained she did not require expert testimony to prove her cause of action against defendant because she was proceeding under the doctrine of res ipsa loquitur. She argued she met the three elements of this doctrine, which are: (1) the occurrence itself ordinarily bespeaks negligence; (2) the instrumentality causing the injury was within the defendant's exclusive control; and (3) the injury was not caused by plaintiff's voluntary act or neglect. See Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 269 (1958).

The court determined this doctrine was unavailing to plaintiff because, although she met the first and third elements, she failed to show the elevator was under defendant's exclusive control at the time of or just before the incident. Given plaintiff could not rely upon this doctrine to prove her cause of action, the court granted defendant summary judgment dismissal.

On appeal, plaintiff's principal argument is the court erred when it found defendant did not have exclusive control over the elevator and, thus, improperly rejected plaintiff's claim the doctrine of res ipsa loquitur applied in this matter.

We review the trial court's grant of summary judgment de novo, employing the same standard used by the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of

Pittsburgh, 224 N.J. 189, 199 (2016). When deciding a summary judgment motion, the court "must accept as true all the evidence which supports the position of the party defending against the motion and must accord [her] the benefit of all legitimate inferences which can be deduced therefrom." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that 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." Id. at 528-29.

"Res ipsa loquitur is grounded in probability and the sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances." Buckelew v. Grossbard, 87 N.J. 512, 526 (1981) (citing Bornstein, supra, 26 N.J. at 269). However, "before the doctrine of res ipsa loquitur operates to shift the burden of persuasion to the defendant in a negligence case, the plaintiff first must meet all of the elements of the three-part res ipsa loquitur test." Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 389 (2005). If plaintiff fails to prove any of these elements by a

preponderance of the evidence, this doctrine and its concomitant burden-shifting is no longer available to that plaintiff. Id. at 389-90.

Here, the issue is whether the instrumentality causing the injury was under defendant's exclusive control at the time of the incident. See Jerista v. Murray, 185 N.J. 175, 192 (2005). Defendant does not challenge the trial court's finding plaintiff met the other two elements of the res ipsa loquitur doctrine. In our view, given the time lapse between defendant's inspection of the elevator on August 1, 2012 and the incident over six weeks later on September 13, 2012, compounded by the absence of any evidence linking defendant to the malfunction of the door, the trial court correctly determined defendant did not wield the requisite control over the elevator to justify the application of the res ipsa loquitur doctrine.

To be sure, we have applied this doctrine against an elevator company that had serviced an elevator that subsequently caused personal injuries. In Allendorf v. Kaiserman Enterprises, 266 N.J. Super. 662 (App. Div. 1993), the plaintiff was injured when the doors to an elevator closed against her. At trial, it was established the defendant elevator company had serviced the elevator just hours before the accident. In addition, the plaintiff called an expert witness who testified

the elevator was in a poor state of repair at the time of plaintiff's accident. Given the proofs, a conditional res ipsa loquitur instruction was justified because being struck by an elevator door ordinarily bespeaks negligence, the elevator company's recent service established exclusive control, and there was no evidence the plaintiff herself was negligent. Id. at 667-70.

Here, however, what is lacking is evidence defendant exerted control over this particular instrumentality at the time of the incident. Unlike the elevator company in Allendorf, defendant had not serviced, repaired, or handled any part of the elevator within any temporal proximity of the accident in question. Defendant had last inspected the elevator over six weeks before the incident and, at that time, the elevator was in proper working order. In fact, there was no evidence the elevator was malfunctioning just before plaintiff was injured.

There must be evidence defendant exercised control over the subject instrumentality to meet the second prong of this doctrine. Unlike in Allendorf, where the maintenance company's "connection with the elevator which caused plaintiff's injury was sufficiently immediate and direct to support a finding that it had 'control' of that elevator," id. at 671-72, defendant's connection to the elevator is too attenuated from plaintiff's

accident to conclude it maintained control over the elevator at that time. Accordingly, we affirm the trial court's determination the doctrine of res ipsa loquitur does not apply here.

We have considered plaintiff's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.