DORIS J. JONES and FREDDIE E. JONES, Plaintiffs-Appellants,
v.
SHERATON ATLANTIC CITY CONVENTION CENTER HOTEL, a corporation AND STARWOOD HOTELS & RESORTS WORLDWIDE, INC., Defendants/Third Party Plaintiffs-Respondents,
v.
SCHINDLER ELEVATOR CORPORATION, Third-Party Defendant-Respondent.

No. A-3827-12T4.

Superior Court of New Jersey, Appellate Division.

Argued January 15, 2014.

Decided July 11, 2014.

Donald G. Targan argued the cause for appellants (Targan & Pender, attorneys; Mr. Targan and Michael J. Pender, on the brief).

David A. Semple argued the cause for respondents **Sheraton Atlantic City Convention Center Hotel** and Starwood Hotels & Resorts Worldwide, Inc. (Cottrell Solensky & Semple, P.A., attorneys; Mr. Semple, on the brief).

Respondent Schindler Elevator has not filed a brief.

Before Judges Maven and Hoffman.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiffs Doris and Freddie **Jones**[1] appeal from Law Division orders granting summary judgment and denying reconsideration in favor of defendants **Sheraton Atlantic City Convention Center Hotel** (**hotel**) and Starwood Hotels and Resorts Worldwide.[2] Plaintiffs allege defendants are liable for the injuries plaintiff sustained when a malfunctioning elevator door struck her as she entered the elevator in the lobby of the **hotel**. For the reasons that follow, we reverse and remand.

I.

On May 8, 2010, an elevator door closed on plaintiff as she entered an elevator at the **hotel**, causing her to fall and fracture her right tibia-fibula requiring surgery; a plate and screws were implanted to repair the fracture. Plaintiff was then admitted to an inpatient rehabilitation **center** where she remained for two months.

Three months before plaintiff's accident, defendant entered into a service contract with Schindler Elevator Corporation (Schindler), titled "Vertical Transportation Maintenance Agreement" (Agreement). The Agreement required Schindler to provide preventative maintenance and adjustment, replacement, and repair services for the elevators at the **hotel**. The agreement also provided that Schindler would "indemnify and hold harmless the [c]lient [p]arties from and against all settlements, claims, damages, losses and expenses" for any and all claims, including bodily injury claims, arising out of the work performed by Schindler under the Agreement.

On September 14, 2010, plaintiffs filed a complaint against defendants, alleging joint and several liability for the injuries, damages, and losses plaintiffs incurred due to defendants' negligence, and creation and maintenance of a nuisance. Nine months after filing an answer to plaintiffs' complaint, defendants filed a third-party complaint against Schindler "for defense, indemnity, and hold harmless protection from the claims of [p]laintiff."[3]

Plaintiff retained James Filippone, P.E.[4] as an expert and he provided a report and deposition testimony setting forth his opinions regarding the cause of the accident. He inspected the subject elevator on three occasions and concluded that the kinetic energy of the closing elevator doors were "significantly higher ... than permitted by New Jersey statutory regulations and good and accepted elevator industry practice." Filippone further noted:

[T]he time that the [elevator] doors remained open before they started to close was approximately [two] seconds. This is extremely short. Good and accepted elevator industry practice would be to have a minimum of [five] seconds of dwell time before the doors close in order to provide sufficient time for people to safely enter the elevator, especially in buildings like a **hotel**.

Filippone further concluded that both "**Sheraton** and Schindler failed to implement a Maintenance Control Program for the incident elevator, in violation of New Jersey statutory regulations and good and accepted industry practice." Finally, Filippone noted questionable maintenance records for the elevators.

During his deposition, however, Filippone conceded there is no code requirement for interference dwell time but reaffirmed his opinion that good and accepted industry practice required more than two seconds of dwell time. Moreover, he stated that a decrease in dwell time would be the result of it "being set at the wrong parameters and not checking them." In conclusion, Filippone opined, to "a reasonable degree of engineering certainty," that the primary causes of the accident and resulting injury were:

• Failure of the building owner to maintain the elevator in a safe operating condition, in good working order, and free of hazards;

• Failure of the building owner to monitor and evaluate the maintenance of the elevator performed by Schindler;

• Improper and insufficient maintenance by Schindler.

Defendant's expert, William J. Meyer, P.E., posited the elevator in question was maintained by defendants in a reasonable and appropriate manner in accordance with their contractual agreement with Schindler. Meyer noted "there is no evidence that the [elevator] door operated improperly at the time, much less that such condition resulted from deficient maintenance." Finally, he stated Schindler "performed their maintenance activities in a reasonable and appropriate manner, which did not require additional oversight or supervision on the part of **Sheraton Hotel**." Meyer concluded to "a reasonable degree of engineering certainty that the ... fall and injury to [plaintiff] did not result from any improper actions or inactions on the part of [defendant]."

Defendants also relied upon the report of Schindler's expert, Jon B. Halpern, P.E., who dismissed Filippone's conclusion that the door struck plaintiff with high kinetic energy as "simply speculation"; he further assessed Filippone's opinion that the door remained open for only two seconds as "simply incorrect." Rather, Halpern opined the doors were open for four to six seconds, meeting all requirements for elevator dwell time. Halpern also disputed Filippone's determination that there was improper maintenance and, instead, found that Schindler was not negligent in the performance of its maintenance duties. Halpern concluded the incident was not caused by a failure to maintain the elevators.

Finally, Al Arcinese, Schindler's mechanic who worked on the **hotel** elevators, was deposed. He stated he performed preventative maintenance at the **hotel** on May 5, 2010, although he could not remember whether he inspected the elevator in question on that date. Moreover, he stated that on May 10, 2010, after the incident, he inspected the subject elevator and did not find any problems. Specifically, regarding the length of time the door remains open following a person exiting, Arcinese stated that Schindler controls the computer that can change door-opening speed; however, there is a default setting for how long the door remains open which is a software issue, also controlled by Schindler. Furthermore, Arcinese noted no one from the **hotel** supervised him while he was working on the elevators as part of Schindler's maintenance.

At the completion of discovery, defendants filed a motion for summary judgment seeking dismissal of plaintiffs' complaint, arguing plaintiffs failed to establish a prima facie case for negligence. The judge granted defendants' motion, finding defendant was not negligent as a matter of law. Relying on Baboghlian v. Swift Elec. Supply Co., 197 N.J. 509 (2009), the judge concluded defendants delegated their duty relating to their elevators to Schindler under the Agreement, and thus were not liable for plaintiff's injuries.

The judge also held there was no credible evidence in the record to support a finding the elevator was not in compliance with applicable code or industry standards. The judge additionally rejected plaintiffs' argument that the doctrine of res ipsa loquitur should apply because "even assuming, arguendo, that an automatic door, which closes onto, and injures a customer is an occurrence bespeaking negligence, ... the instrumentality, the elevator, was clearly not within the defendant's exclusive control."

Plaintiff filed a motion for reconsideration asserting the court overlooked controlling authority imposing a non-delegable duty of care on defendant; specifically, plaintiff argued Baboghlian does not control because those plaintiffs and defendants did not have a landowner and business invitee relationship nor was there a statutorily imposed non-delegable duty. Nevertheless, the court upheld its previous decision again relying on Baboghlian to hold the negligence of Schindler could not be imputed onto defendant. However, the judge acknowledged the "`Elevator-Safety-Sub-Code, including N.J.A.C. 5:23-12.2,' which requires conformance with various ASME standards[,]" is applicable, but again, found no evidence supporting the contentions of plaintiffs' expert that

defendants "in some way violated these `codes,' thereby proximately causing [p]laintiff's injury." Finally, the court reiterated its factual finding that, even if there were a non-delegable duty, plaintiff failed to "cite to any part of the record or produce any exhibits, i.e. code, regulation, statute or publication on industry standards, to support her assertion that the subject elevator was not in compliance with the [C]ode."

On appeal, plaintiffs maintain controlling case law and statutes impose a non-delegable duty upon a **hotel** owner for the safe operation of its elevators; as such, a jury should determine whether defendants satisfied their duty to maintain a safe premises for their guests, including whether the subject elevator was in compliance with applicable codes and industry standards. We agree.

II.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the motion court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). We must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In evaluating summary judgment in this particular case, we also apply well-established principles of negligence law. In order to prove a claim of negligence, a "plaintiff must establish all of the following elements: (1) duty of care, (2) breach of that duty, (3) proximate cause, and (4) damages suffered by the plaintiff." Filipowicz v. Diletto, 350 N.J. Super. 552, 558 (App. Div.) (citing Conklin v. Hannoch Weisman, 145 N.J. 395, 417 (1996)), certif. denied, 174 N.J. 362 (2002). Whether defendants owe a legal duty, and the extent of that duty, are questions of law for the court to decide. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996).

Additionally, a plaintiff bears the burden of proving negligence, see Reichert v. Vegholm, 366 N.J. Super. 209, 213 (App. Div. 2004), and must prove that unreasonable acts or omissions by the defendant proximately caused his or her injuries. Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 309-11 (App. Div.), certif. denied, 156 N.J. 386 (1998). Accordingly, to survive a defendant's motion for summary judgment based upon the allegation that the plaintiff failed to make a prima facie showing of negligence, "proof of certainty is not required, [but] the evidence must be such as to justify the inference of probability as distinguished from the mere possibility of negligence on the part of the defendant." Long v. Landy, 35 N.J. 44, 54 (1961) (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 141 (1951)).

III.

We first address whether defendants have a non-delegable duty for the safe operation of their elevators and, accordingly, whether they must exercise reasonable care for the safety of guests using their elevators. We find defendants do indeed have such a non-delegable duty.

"[A]n owner of a building has a non-delegable duty to exercise reasonable care for the safety of tenants and persons using the premises at his invitation." De Los Santos v. Saddlehill, Inc., 211 N.J. Super. 253, 261 (App. Div. 1986) (citing Mayer v. Fairlawn Jewish **Center**, 38 N.J. 549, 555 (1962)). This principle has its "genesis in our early common law and [is] presently codified in N.J.A.C. 5:10-4.1." Id. at 262. Notably, that regulation, "adopted pursuant to the **Hotel** and Multiple Dwelling Law (N.J.S.A. 55:13A-1 et seq.)," ibid., states:

Owners, including agents of owners, managing agents and superintendents shall have the general duties outlined herein for the maintenance of the premises, and no such person shall be relieved from any such responsibility hereunder by reason of the fact that an occupant or other person shall have similar responsibilities or shall have failed to report any violation, nor shall any such person be relieved of any responsibility by the terms or provisions of any lease, contract or agreement.

[N.J.A.C. 5:10-4.1(a).]

Accordingly, hotels in fact have a non-delegable duty to maintain a safe premises, and our courts have consistently interpreted this regulation as imposing such a duty. Specifically, in De Los Santos, a child was crushed to death by a defective elevator and the court held the negligence of the elevator maintenance company was properly imputed to the building owner. De Los Santos, supra, 211 N.J. Super. at 257, 261. The court found this principle to be reasonably based upon important policy considerations:

The party to whom the lessor owes a non-delegable duty ought not to be required to concern himself with contracts made by the owner for the discharge of his responsibility.... The lessor may secure indemnity by either agreement with the contractor or the pursuit of such remedies as the law may afford, including common

law indemnification.... However, the landlord cannot relieve himself of responsibility for injuries negligently inflicted upon third persons as a result of the act or omission of an independent contractor hired by him to perform his non-delegable duty.

[Id. at 262-63 (internal citations omitted).]

Additionally, Rosenberg v. Otis Elevator, 366 N.J. Super. 292, 303 (App. Div. 2004) reaffirmed De Los Santos, holding "[a]n owner of a building has a non-delegable duty to exercise reasonable care for the safety of tenants and persons using the premises at his invitation." Contracting with a third party for maintenance of the elevator does "not relieve [the owner] of [the] duty, although it may secure indemnification by contract with the maintenance contractor ... or at common law." Ibid. (citing De Los Santos, supra, 211 N.J. Super. at 263).

The motion judge improperly relied on Baboghlian, supra, 197 N.J. 509, in finding defendants could delegate their duty to maintain the safe operation of their elevators. The judge relied on the following proposition, noting none of the exceptions applied:

[A]s a general rule, and absent certain exceptions, one who engages an independent contractor is not liable for the negligence of that contractor in the performance of the contract. Basil v. Wolf, 193 N.J. 38, 62 (2007); Majestic Realty Assocs., Inc. v. Toti Contracting Co., 30 N.J. 425, 430-32, (1959). In Majestic, supra, this Court identified the exceptions to include: (1) where the landowner retains control of the manner and means of doing the work under the contract; (2) where the landowner engages an incompetent contractor; and (3) where the activity constitutes a nuisance per se. 30 N.J. at 431.

[Baboghlian, supra, 197 N.J. at 517.]

However, the facts in Baboghlian are clearly distinguishable from the facts in this case. Specifically, the defendant in Baboghlian was a property owner who hired a contractor to install a fire alarm system in its building. Id. at 512. Thereafter, the defendant's building caught on fire and spread to plaintiff's adjacent building causing damage. Ibid. The fire was allegedly the result of a defective alarm system installed by the third-party contractor. Ibid. Our Supreme Court held the owner of the property did not have a non-delegable duty to the neighbor and it was not responsible for the defective alarm system. Id. at 518. The Court emphasized no law imposes a non-delegable duty of care on the landowner to install a fire alarm system. Ibid.

Here, defendant is a **hotel**, plaintiff is a business invitee, an elevator allegedly malfunctioned and a regulation exists that imposes a non-delegable duty of care on defendant. As noted, a **hotel** has a non-delegable duty to exercise reasonable care for the safety of its invitees, especially with regard to elevators. Although defendant entered into an agreement with Schindler to perform maintenance duties, this fact does not relieve defendant of its non-delegable duty to exercise reasonable care for the safety of its patrons. Further, defendant can still pursue indemnification from Schindler. We conclude the judge incorrectly found defendants delegated their duty to maintain the elevator.

We next address plaintiff's argument that summary judgment was improperly granted because the motion judge should have applied the doctrine of res ipsa loquitur. We agree.

Res ipsa loquitur "`permits an inference of defendant's negligence where (a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality 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.'" Jerista v. Murray, 185 N.J. 175, 192 (2005) (quoting Buckelew v. Grossbard, 87 N.J. 512, 525 (1981)). "Although res ipsa does not shift the burden of proof to the defendant, it ordinarily assures the plaintiff a prima facie case that will survive summary judgment." Id. at 193.

"Whether an occurrence `ordinarily bespeaks negligence' depends on the balance of probabilities being in favor of negligence." Buckelew, supra, 87 N.J. at 526. Thus, res ipsa loquitur is available to a plaintiff "if it is more probable than not that the defendant has been negligent." Myrlak v. Port Auth. of N.Y. & N.J., 157 N.J. 84, 95 (1999) (citing Buckelew, supra, 87 N.J. at 526). Our Supreme Court has noted the malfunctioning of an automatic door is the type of occurrence that bespeaks negligence. Jerista, supra, 185 N.J. at 200 ("[A]n automatic door that closes onto and injures a customer entering a supermarket is an occurrence bespeaking negligence that falls within jurors' common knowledge."). Our Court has further stated that "[m]embers of the public passing through automatic doors, whether in an airport, office building or supermarket do so generally without sustaining injury." Rose v. Port of N.Y. Authority, 61 N.J. 129, 136-37 (1972) (applying res ipsa because plaintiff sustained injuries when an automatic glass door struck him which "is fortunately unusual and not commonplace[;]" as such this "strongly suggests a malfunction which in turn suggests neglect.")

In Jerista, the Court found an automatic door, which closed onto and injured a customer, "is an occurrence bespeaking negligence that falls within the juror's common knowledge." Jerista, supra, 185 N.J. at 200. Further, our Court has acknowledged "it is common knowledge that people ordinarily pass through automatic doors without suffering injury, and that an automatic door smashing into a customer `strongly suggests a malfunction which in turn suggests neglect.'" Id. at 195 (quoting Rose, supra, 61 N.J. at 137). Additionally, pursuant to the state's premises liability law, "a business owner owes a reasonable duty of care `to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe.'" Id. at 191 (quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)).

The present case satisfies the first prong of res ipsa analysis because the occurrence bespeaks negligence. Additionally, the courts in Jerista and Rosenberg determined no expert testimony was necessary to find negligence. The victims in Rosenberg were on the elevator when it began to shake and precipitously drop at least three floors in a freefall before it suddenly stopped. Rosenberg, supra, 366 N.J. Super. at 298. The court held that based on the facts, an expert was not necessary for plaintiff's case because

jurors of common judgment and experience would require no expert testimony to address the issue whether defendants' met their duty to invitees sufficiently to inspect and test such critical components, nor to determine whether a negligent breach of that duty was a substantial contributing cause of the event described by plaintiffs.

[Id. at 305.]

Here, the opinions and conclusions of the parties' experts are disputed and constitute genuine issues of material fact. Viewing the facts in the light most favorable to the plaintiff, summary judgment was improperly granted. Notably, the experts dispute the amount of dwell time that occurred between when the last person on the elevator exited and when plaintiff entered, which is crucial to plaintiffs' claim. Further, the amount of kinetic energy exerted upon plaintiff is disputed. Finally, the experts disagree whether the elevator was properly maintained, a dispute at the heart of the case. Indeed, the "evidence sufficient to infer negligent causation need not always be as complex as the instrumentality." Rosenberg, supra, 366 N.J. Super. at 305.

Next, we find the motion judge erred in concluding the exclusive control prong was not met, stating that the elevator's automatic door "was clearly not within the defendant's exclusive control." "The exclusive control prong does not require that a plaintiff exclude all other possible causes of an accident, only that it is more probable than not that defendant's negligence was a proximate cause of the mishap." Luciano v. Port Auth. Trans-Hudson Corp., 306 N.J. Super. 310, 313 (App. Div. 1997). Additionally, res ipsa loquitur's exclusive control prong "has not been interpreted as limiting application of the doctrine only to those situations involving a single defendant." Apuzzio v. J. Fede Trucking, Inc., 355 N.J. Super. 122, 128 (App. Div. 2002). "`Indeed, the courts of this State have decided that an instrumentality causing injury may be in joint control of two defendants in which event the doctrine of res ipsa loquitur will apply against both of said defendants.'" Id. at 129 (quoting Meny v. Carlson, 6 N.J. 82, 94 (1950)); see Allendorf v. Kaiserman Enters., 266 N.J. Super. 662, 669 (App. Div. 1993) (noting "[t]he word `exclusive' when used to define the nature of the control necessary to invoke the doctrine of res ipsa loquitur does not connote that such control must be several and the defendant singular and never plural." (citation and internal quotation marks omitted)).

However, in cases where the court applied res ipsa loquitur and discussed "exclusive control," the plaintiff filed causes of action against two defendants, the owner of the building and a third party. See Maciag v. Strato Med. Corp., 274 N.J. Super. 447, 460-61 (App. Div. 1994) (citing generally Meny, supra, 6 N.J. at 94 (joint control of scaffolding); Smith v. Claude Neon Lights, Inc., 110 N.J.L. 326, 331 (E. & A. 1932) (owner of building and owner and installer of sign that fell); Allendorf, supra, 266 N.J. Super. at 669 (owner of building and company maintaining elevator)). Here, plaintiff only filed a cause of action against two defendants, related corporate entities. Nevertheless, it is logical to apply res ipsa loquitur when defendants subject to a non-delegable duty have a contractual relationship with a third party, so long as the following requirement is met:

the evidence must afford a rational basis for concluding that the cause of the accident was probably "such that the defendant would be responsible for any negligence connected with it." That does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door.

[Brown v. Racquet Club of Bricktown, 95 N.J. 280, 292 (1984) (quoting 2 F. Harper and F. James, The Law of Torts, § 19.11 at 1086 (1956)).]

Thus, viewing the evidence in the light most favorable to plaintiff, the facts in the record meet this requirement, specifically noting defendants had a non-delegable duty to maintain the elevators in a safe manner.

Finally, there is no evidence suggesting plaintiff was at fault, fulfilling the third res ipsa prong. Because the doctrine of res ipsa applies to plaintiffs' claims, we conclude the court erred in granting defendant's motion for summary judgment.

Reversed and remanded.

[1] In this opinion, we refer to Doris and Freddie **Jones** collectively as "plaintiffs", and Doris **Jones** individually as "plaintiff." Plaintiff's husband sues per quod.

[2] **Sheraton** is a subsidiary of Starwood Hotels and Resorts Worldwide. See http://www.starwoodhotels.com (last visited June 30, 2014).

[3] Plaintiffs did not amend their complaint to include Schindler as a direct defendant.

[4] Mr. Filippone has a degree in Mechanical Engineering and is currently the Senior Mechanical Engineer for the Port Authority of New York and New Jersey where he has worked for the past twenty-six years. There, he is responsible for the evaluation, inspection and testing of mechanical equipment including elevators and escalators. He is also the co-author of Elevator and Escalator Accident Reconstruction and Litigation (2nd ed. 2006).