CITATION: Green v. York Region Condominium Corporation No. 834, 2013 ONSC 5004
COURT FILE NO.: 07-CV-338348
DATE: 2013/07/29

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Sallie Green	)	*Gerald Sternberg*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
	)	
	)	
York Region Condominium Corporation No. 834 and ThyssenKrupp Elevator (Canada) Ltd.	)	*Leanne Rapley*, for the Defendant
	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** June 20, 21, 26-28, July 2, 3, 2013

A.J. O'MARRA J.:

[1] The plaintiff, Sallie Green has brought an action claiming damages for injuries suffered in an attempt to extricate herself from a stuck elevator in her condominium apartment building on August 20, 2005.

[2] Ms. Green brought proceedings against the building owner, York Region Condominium Corporation No. 834 (YRCC No. 834) and ThyssenKrupp Elevator (Canada) Ltd., the maintenance and service provider for the building elevators.

[3] The issue of damages has been settled, as has the plaintiff's claim against YRCC No. 834 by way of a Pierringer Agreement. The issue for this trial is whether ThyssenKrupp bears liability for the plaintiff's injuries.

Facts

[4] On Friday, August 19, 2005 there had been a massive downpour of rain during a line of severe thunderstorms that descended on the Greater Toronto area. In the area of Finch Avenue and Dufferin Road, Environment Canada recorded the rainfall to be 140.6 millimeters (5.5 inches) an area proximate to where the incident that gives rise to this action occurred, 110 Promenade Circle, also known as Royal Promenade in Markham. The extent of the downpour caused a number of power failures and extensive flooding throughout the Toronto area. Power failures and flooding of the elevator pits at the bottom of the elevator shafts occurred at the condominium building at 110 Promenade Circle, as was the case with a number of apartment buildings throughout the area.

[5] The building at 110 Promenade Circle is a 19 storey apartment building owned and operated by YRCC No. 834. It owns and was licensed to operate the three elevators within the building.

[6] ThyssenKrupp was under contract to provide monthly maintenance and repair service as requested by the building owners or management in accordance with standards as set by the Canadian Standards Association (CSA) B44 Code for elevators and other lifting devices. (Exhibit No. 3) ThyssenKrupp provided monthly maintenance in compliance with Code B44 as indicated by its work order reports filed in evidence (Exhibit Nos. 4 & 4A). Its most recent maintenance service of the elevators at 110 Promenade Circle was August 10, 2005, ten days before the incident.

[1] In addition to the regular maintenance routine provided under contract, ThyssenKrupp would respond to requests of the building and elevator owners or management to attend to provide service when problems arose. Service attendances resulted in additional invoicing to the customer, separate from the monthly fee for maintenance.

[2] On August 19 and 20, 2005 ThyssenKrupp sent mechanics to 110 Promenade Circle, as well as other buildings under contract, because of elevator shutdowns due to power failures, and elevator pit flooding.

The Incident

[3] On Saturday, August 20, 2005 Sallie Green, then 72, left her apartment on the 16th floor to take the elevator to the lobby where she was to meet her brother and sister-in-law to go to dinner at 7:00 p.m. Ms Green testified that she pressed the call button for the elevator at approximately 6:50 p.m. It seemed to her to take longer than usual for the elevator to arrive at her floor and open its door. On entering the elevator she pressed the lobby button and the elevator descended and stopped at the lobby as indicated by the "L" on the floor indicator. However, the door did not open. She waited for a period of time and then she began to bang on the door in the hope that someone in the lobby area would hear her and they would summon help to assist her. When there was no response, she used the emergency telephone in the elevator to speak with security personnel at the condominium gatehouse. Someone answered, she did not know who, and told her he would take care of it and someone would come to help her.

[4] Again she waited for a long period of time without anyone coming to her aid. Suddenly, the door started to open in a shaking fashion but stopped leaving only a small gap. Initially she testified at trial that the opening was approximately one to one and a half feet wide, however, earlier at an examination-for-discovery on April 27, 2011 she believed it was five to six inches. Ms. Green, who is of diminutive stature, said she turned sideways to push through the opening with her arm and shoulder out, when suddenly the car door, as she described it, "jumped again", pushing her out onto the lobby floor. She slid across the floor and hit a pillar, approximately six feet from the elevator, with her head and shoulder. She testified she was unsure as to whether she passed out. She recalls being dazed by the blow. She next recalled looking back at the elevator and seeing that the floor of the elevator car was off-level to the lobby floor by approximately one to one and a half feet. No one was in the lobby. Suffering considerable pain, she pulled herself to the front door of the lobby where she let her brother in. Realizing she was injured her brother and sister-in-law took her to the hospital. She was found to have a fractured shoulder. Since these proceedings commenced her brother has passed away.

[5] The elevator Ms. Green fell out of was designated as elevator number 1 of 3.

[6] Later that evening she returned to the building with her arm in a sling. She found a number of people waiting in the lobby area for the elevators, including the president of the condominium board, Dater Morley. She did not recall whether she told Mr. Morley what had happened to her. She sat in the lobby until there was an elevator available to take her to her apartment on the 16th floor.

[7] No report about the incident or her injury was made to the condominium corporation until about one week later when her solicitor sent a letter to the condominium corporation notifying it of her pending claim. ThyssenKrupp was notified sometime thereafter.

[8] Several ThyssenKrupp elevator mechanics testified who attended 110 Promenade Circle on August 20 as a result of the multiple service requests due to elevator shutdowns caused by the effects of the storm, Phenias Phiri, Kevin Short and Robert Jones, all with Class A Elevating Devices Mechanic Licenses (EDMA). In addition, the area service manager for ThyssenKrupp, Paul Mount, testified as to the high number of service calls ThyssenKrupp mechanics responded to throughout the city as a result of the heavy rains causing power failures, elevator shutdowns and the many priority calls involving persons being stuck in elevator cars. Any time a call was received by a customer of someone being stuck in an elevator it was treated as a priority call requiring immediate attendance, often accompanied by emergency or at least building security personnel.

[9] There was no recorded call to ThyssenKrupp Call Centre from 110 Promenade Circle having been received proximate to when Ms. Green testified to having become stuck in the elevator and her use of the emergency phone to speak with security personnel in the condominium gatehouse. Nor was evidence tendered of any call having been received and recorded by the building security personnel.

[10] However, ThyssenKrupp did receive three calls on August 20, 2005 because of elevator problems at 110 Promenade Circle (Exhibit No. 10). The first was at approximately 3:30 a.m. in which the call centre recorded "elevator number 3, occupied, stuck 9th floor". Elevator mechanic Robert Jones received the dispatch call to attend to 110 Promenade Circle. He testified that because the call involved a person stuck in an elevator car it was a priority call which required him to attend immediately. He arrived and found elevator number 3 stuck on the 9th floor, however, no one was inside. He checked the elevator pit and found three feet of water which needed to be pumped out.

[11] The building owner is responsible for the drains and sump pumps as part of the building infra-structure and if flooding problems arise, the owner has to have plumbers attend to remove the water from elevator pits and unplug the building drains, if necessary. At the time of his attendance there was no one on site to pump the water out of the elevator pit or from building management who could give him access to the roof and top of the elevators for him to troubleshoot and reset circuits if necessary. He recorded on his call-back ticket number 929857 (Exhibit No. 6) with respect to car number 3, "car stuck 9th, three feet water in pit, left shut down, no one to let me in upstairs".

[12] The next call recorded at 8:51a.m. in the Call Centre reported the information received as "elevator #2, #3, door problem won't open". The call was dispatched to Mr. Kevin Short at 10:57 a.m. Mr. Short testified that he was at 110 Promenade Circle on August 20, 2005, but not in response to that particular call. He was there later that evening after another mechanic, Phenias Phiri called him to come and assist him when he was there trying to resolve difficulties with all of the elevators. He recalled being there only once to assist Mr. Phiri and no recollection with respect to the earlier call. He has surmised he did not take the earlier call because he was already on another call and it was not a priority call involving someone being stuck in an elevator.

[13] The third call received at the Call Centre, August 20 from the building, was at 4:58 p.m. in which it was reported "all cars, occupied, stuck". Mr. Phenias Phiri was dispatched at 5:05 p.m. He arrived at the building at 5:29, as reflected by the security log maintained at the gatehouse. (Exhibit No. 9)

[14] Mr. Phiri was qualified as an EDMA mechanic in February, 2005 however; he also had 17 years experience as an elevator mechanic in Zimbabwe prior to being licensed in Ontario by the Technical Standards and Safety Association (TSSA).

[15] On arrival he received the keys from security at the gatehouse in order to access the necessary locations in the building to deal with the elevator problems. The first thing he did was check all the elevator cars to determine if anyone was stuck as indicated by the call. He found no one in any of the three elevators. He found that the elevator pits still contained water and assisted plumbers who had arrived to pump water out of the pits. He did not participate in the actual pumping, but rather provided assistance by providing them access to the pit area. Then he tried to get the elevators running. He testified he would put the elevator he was trying to get

working on maintenance so the door would only open at the floor he wanted access to it. He could not recall the order of service because of the passage of time, but he did recall this specific service call because of the number of times he had to go up and down flights of stairs in order to check the cars that kept stopping when he tried to run them. Further, after several hours of trying to get the cars to run without shutting down, he called another mechanic, Mr. Kevin Short on his cell phone to have him come to assist him. He recalled that the elevator cars would continually stop because of the safeties (a breaking mechanism) coming on and that car number 1 was particularly sensitive.

[16] Mr. Phiri, as well as the other mechanics indicated that the safeties could come on for a variety of reasons, one of which involved debris or garbage in the pit that would be caught up in the elevator governor ropes from the surface of the water in the pits. He did not know the reason in this instance for the safeties coming on, but eventually with the assistance of Mr. Short they were able to get cars 2 and 3 running without the safeties activating. However, with two cars running, after about 7 hours working on the elevators, because car number 1 kept shutting down it was left shut down to be looked at later.

[17] Mr. Short recalled arriving at the building to assist Mr. Phiri sometime in the evening. He did not know the specific time, however, on his callback ticket number 923815 (Exhibit No. 6) he recorded the time as 10:43, which he said referred to the call he received directly from Mr. Phiri. He was not dispatched from the Call Centre. He did not agree with the suggestion of plaintiff's counsel that the "10:43" written on the ticket referred to the dispatch call that morning at 10:57 a.m. because the only time he was at that building that day was to assist Mr. Phiri. It was in the evening after dinner, not the morning.

[18] He noted on his ticket that he was there for approximately two hours and he recalled leaving before Mr. Phiri. Although he had very little recall of the specifics of that evening beyond the information contained in his ticket, he clearly recalled arriving to find, as he stated, "a very sweaty Phineas", because he had to go up and down the building stairs so many times in his efforts to start the elevator cars.

[19] When he arrived all the cars were still shut down. At the end of his attendance he filled out his callback ticket with the following information: "All cars not running, assist Phenias with shutdown elevator due to water in pit. All idlers and governors got wet. Car 1 shut down. Car 2 and 3 running."

[20] Mr. Phiri filled his ticket at the conclusion of his attendance: "Car 1 occupied due to safeties coming on in flight, idler needs repair. Car 2 and 3 running. Checked pit equipment. Pumped water". He noted being there five hours, although he testified that it was more likely seven hours because it was after midnight before he left the building.

[21] Mr. Phiri was at 110 Promenade Circle from 5:29 p.m. onward. When he arrived he received information that elevator number 1 was occupied, but on checking all of the cars found

no one stuck in any of them. While he was in attendance working on the elevators he received no notification of anyone being stuck in an elevator and calling for assistance.

[22] In his callback ticket Mr. Phiri indicated with respect to car number 1, "Idler needs repair". He had no specific recollection as to what repair, if any, was required. However, he, as well as the other mechanics who testified, stated that when the elevator pits become flooded the idler and governor rope would get wet. The idler is a tension weight on the bottom of the governor rope which is attached to the safeties and applies the safeties if the elevator exceeds contract speed of 300 feet per minute by approximately 15 per cent. If exposed to water, the idler and the governor ropes, which are metal, may start to rust. The idler may need re-greasing and at some point may require replacement.

The position of the parties

[23] The plaintiff's case consisted of her testimony as to events that occurred Saturday, August 20th, 2005. She pleads that the defendant is liable for failing to exercise a duty of care as an "occupier" under the *Occupiers Liability Act*, RSO 1990, O.1; its negligence and relies on the principle of *res ipsa loquitur*.

[24] An "occupier" under the *Occupiers Liability Act* defined in s.1 as including:

> a) A person who is in physical possession of premises; or
>
> b) A person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to the premises, despite the fact that there is more than one occupier of the same premises…

[25] An occupier's duty of care is cited in s. 3 as follows:

> (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

[26] In support of its position that ThyssenKrupp was an occupier, the plaintiff relies on the case of *Hanna v. M.D. Realty Canada Inc.* (1996), 24 BCLR (3d) 185 in which a building owner and elevator maintenance provider were both referred to as occupiers. In that case the court concluded that Dover Elevators Ltd. was negligent in failing its duty as an occupier under the Act, however, there is no analysis as to why the maintenance provider was considered an occupier. I find its application in this instance not to be persuasive. No other authorities were

offered to support the position. Here, ThyssenKrupp was an independent contractor in the employ of the occupier, YRCC No. 834.

[27] In the alternative, the plaintiff argued *res ipsa loquitor* in terms of the defendant bearing the onus. The fact that the elevator door only partially opened and as she tried to get out the door jumped causing her to fall out, raises an inference of negligence and as such, the defendant has the onus of providing a reasonable explanation that it happened without negligence on its part.

[28] It is the position of the defendant that it was called on to act and provided service in the course of an exceptional unforeseeable event, an act of God; a massive downpour of rain which caused elevator shutdowns throughout the city and amongst its customers. The power failures and the flooding of the elevator pits caused the elevators to malfunction. It was not negligent on its part. Indeed, it sent mechanics to the site to perform the requisite services. There is no evidence to suggest that the regularized maintenance schedule performed in compliance with CSA B44 Code had any causal link to the operational difficulties of the elevator and the injuries of Ms. Green. On August 20, 2005 its employees responded in a diligent fashion and provided service in compliance with the standards as required of them under the CSA B44 Code. There is no evidence to the contrary.

[29] Further, even if s.3 of the *Occupiers Liability Act* applied, it establishes a duty of care only and not a presumption of negligence. Contrary to the submission made by plaintiff's counsel that ThyssenKrupp would bear the onus under the *Occupiers Liability Act*, it was noted by E.M. Macdonald J. in *Whitlow* v. *572008 Ontario Limited* (1995), OJ No. 77 (GenDiv) at para. 33 that s.3 does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. The plaintiff must still be able to point to some act, or some failure to act, on the part of the occupier which caused the injury complained of, before liability can be established. Accordingly, the plaintiff must establish on a balance of probabilities, a causal link between the alleged breach of the standard of care and the alleged injuries. (See *Suzanne St. Lewis-Lalonde et al* v. *Carleton Condominium Corporation No. 12 and CNIM Canada Inc.* [2005] Carswell Ont 2731 (SCJ)).

[30] In *Lavalee* v. *Bristol Management*, [2005] BCSC 1666, a case in which the plaintiff claimed the building management was liable for its elevator door closing on her hand, the court cites *Thuveson* v. *Robert Ash and Associates*, [1997] BCJ No. 1173 (SC) in which Sinclair-Prowse J. set out the principles applicable in occupier liability cases: 1) the onus is on the plaintiff to prove on a balance of probabilities that the defendant breached the duty of care; 2) the fact of injury does not create a presumption of negligence; 3) the plaintiff must point to some act or failure to act on the part of the defendant which resulted in the injury, this act or failure to act being a breach of the defendant's positive duty to take reasonable care to ensure the plaintiff was reasonably safe while using the premises.

[31] Plaintiff's counsel submitted that the negligence committed by ThyssenKrupp's employee, Phineas Phiri, occurred while he was trying to repair and render the elevators functional. After he had put the elevator on maintenance and the safeties kept coming on,

knowing the idler and governor rope were wet and the idler needed repair, he should have shut it down immediately, thereby preventing Ms. Green access to the elevator.

[32] Plaintiff's counsel suggested that Mr. Phiri's reference to "idler needs repair" must have meant that an immediate repair was required. On realizing a repair was required, rather than trying to get it running, he should have shut the elevator down. Not to have done so exposed Ms. Green to an unsafe elevator.

[33] Mr. Paul Mount, the ThyssenKrupp area supervisor, an EDMA technician with more than 30 years' experience testified that the idler is "not part of the safety circuit". All the mechanics observed that wet idlers and/or governor ropes would not need immediate replacement, but at some point would be replaced as precautionary maintenance procedure. Noting it, as Mr. Phiri did, would give the customer notice that a repair entailing additional billing would be necessary at some point.

[34] Plaintiff's counsel further argued that Mr. Phiri's evidence should be considered suspect because the time recorded on his callback sheet, which was a different form than the ones used by the other mechanics who attended 110 Promenade Circle, reflected five hours attendance, whereas the call record for invoicing purposes provided by the company cited only three hours. Counsel appeared to be suggesting that Mr. Phiri was not being truthful because of these differences, but to what end was unclear.

[35] I found Mr. Phiri to have testified in a straightforward and candid manner and detected absolutely no guile or even partisan interest. Mr. Phiri had left ThyssenKrupp and had taken up employment elsewhere by the time of trial. I accept Mr. Phiri`s evidence that he was there in attendance trying to service the elevators for a period of time in excess of five hours, leaving sometime after 12 a.m., as corroborated by Mr. Short. His explanation for citing fewer hours than he was actually in attendance was that it was often done in order to maintain customer relations. Moreover, Mr. Phiri had no involvement with the recording of the hours of his attendance for the purpose of invoicing. Also, I accept Mr. Phiri's evidence, corroborated by Mr. Short that he was using the old chargeable ticket form, whereas Mr. Short and the other mechanics were using the new form introduced around that time of the incident. I find nothing turns on the differences or discrepancies in the documentation.

[36] Much of Mr. Sternberg's submissions were based on speculation - speculation as to the timing of Mr. Phiri's activities in his efforts to render the elevators operational, and about the effect of wet idlers, governor ropes and elevator safeties, none of which was connected to the operation of the elevator door as described by Ms. Green.

[37] The only evidence as to when Ms. Green accessed the elevator was her testimony that it was sometime after 7:00 p.m. If such was the case, Mr. Phiri was in the building trying to effect repairs. When the elevators were being run by Mr. Phiri, they were put on maintenance, which prevented the doors of the car stopping and opening on any floor other than the one Mr. Phiri set it to. Mr. Short's evidence was that sometime after dinner he had received a call from Mr. Phiri

that the elevators at 110 Promenade Circle were not running and he needed assistance. When he arrived sometime late in the evening to provide the assistance the elevators were still not running. Consequently, the elevators were not running and accessible by apartment dwellers or others at 7:00 pm.

[38] I found Ms. Green's evidence to be understandably vague and uncertain in a number of respects, such as the length of time she spent waiting for the elevator, the length of time waiting for the door to open, the length of time waiting for someone to come and provide assistance, the varying widths the car door opened, and the level of the car floor, one to one and half feet, from the lobby floor. In that regard, Mr. Mount testified that the elevator car door operated electronically and would not open unless it was within three inches of the landing floor. Further, the landing or hall door would only open when mechanically engaged by the car door. The hall door had no electrical means of opening itself. It only opened and closed in conjunction with the car door. While such vagueness and discrepancies are understandable because of the passage of time and having to recall a traumatic event, they nonetheless give rise to uncertainty as to the accuracy of the evidence.

[39] The plaintiff did not call any evidence by way of records or documentation from the condominium corporation of which she is a member, or witnesses as to when the call was made by her to the security gatehouse or her attendance at the hospital, which could have helped to confirm the time of the incident. On Mr. Phiri's attendance at 5:29 p.m. he had information that someone was stuck in Car #1. On checking all of the cars he found none of them "occupied". There was no notice to him thereafter that anyone was stuck in an elevator. I am left in a state of uncertainty as to when the incident occurred.

[40] I am satisfied that the malfunction of the elevators at 110 Promenade Circle on August 20, 2005 happened because of the flooding that occurred. In addition, no expert was tendered to identify any breach of a duty of care or negligent act on the part of ThyssenKrupp or its employees in the response to the malfunctioning elevators in general, or elevator number 1 specifically.

[41] I consider as well that the failure to report the incident involving injuries in a timely fashion prevented ThyssenKrupp from notifying the TSSA as it would be required to do, and a timely investigation of the incident.

[42] I am satisfied that ThyssenKrupp took all reasonable steps to respond to the service call made at approximately 5:00 p.m., August 20, 2005 and attempted through its qualified employees to render the elevators operational at 110 Promenade Circle over many hours.

[43] Whenever Ms. Green became stuck in the elevator that day she was in a place of safety until she attempted to push herself through the small opening in the elevator doorway. Unfortunately, had she not done so she would not have fallen through the door and injured her shoulder. She was in a place of safety with access to the emergency call phone she had used

earlier to make contact with security personnel. In the circumstances, Ms. Green was the author of her own misfortune and the defendant, ThyssenKrupp cannot be held liable for her injuries.

[44] The action is dismissed and costs will follow the result. If the parties are unable to agree as between themselves on the matter of costs, they may make written submissions no more than four pages in length within 15 days of the release of this judgment.

A.J. O'Marra J.

Released: July 29, 2013

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Plaintiff

– and –

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Defendants

REASONS FOR JUDGMENT

A.J. O'Marra J.

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