

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2716-09T2

THOMAS DIBARTOLOMEO,

Plaintiff-Appellant,

v.

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY and
SCHINDLER ELEVATOR COMPANY,

Defendants-Respondents.

Submitted November 9, 2010 - Decided February 16, 2011

Before Judges Carchman and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9351-07.

Bramnick, Rodriguez, Mitterhoff, Grabas & Woodruff, LLC, attorneys for appellant (Stephanie Ann Mitterhoff, on the brief).

Zucker, Facher and Zucker, P.A., attorneys for respondent New Jersey Sports and Exposition Authority (Paul J. Soderman, on the brief).

Sonageri & Fallon, L.L.C., attorneys for respondent Schindler Elevator Company (James C. DeNorscia, on the brief).

PER CURIAM

Plaintiff Thomas DiBartolomeo appeals from the Law Division's grant of summary judgment to defendants New Jersey Sports and Exposition Authority (NJSEA) and Schindler Elevator Company (Schindler). We have considered the arguments raised in light of the record and applicable legal standards. We affirm in part, reverse in part and remand the matter for further proceedings.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts. Id. at 230.

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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).]

We then decide whether the "motion judge's application of the law was correct." Atl. Mut., supra, 387 N.J. Super. at 231.

We owe no deference to the motion judge's legal conclusions.

Ibid.

Plaintiff's amended complaint alleged that he was injured on October 1, 2006, while exiting Meadowlands Stadium after a New York Jets football game when an escalator malfunctioned causing him and other patrons to "trip and fall." Plaintiff claimed that NJSEA as owner of the facility, and Schindler, as the company "responsible for the maintenance of the escalators," were negligent.

The motion record revealed the following salient facts. Plaintiff attended the game with his friend, Bob Krauss. Together they sat in the mezzanine level. The stadium was full, and the game was very close. Most of the patrons waited until the end of the game to exit. Krauss proceeded to the escalator with plaintiff several steps behind him. There were no security guards at the top of the escalator, and Krauss, in his deposition, likened the scene to a "cattle run." Approximately one quarter of the way down, the escalator "bucked" twice and the treads "flattened." Krauss leapt the handrail onto the neighboring escalator and watched plaintiff and the other patrons slide down to the bottom of the escalator where "there were bodies piling up." Krauss described the escalator as being in a "free fall, like a sled."

Plaintiff testified in his deposition that the incident happened within "seconds" after he stepped onto the escalator step that he shared with another person he did not know. After traveling "fifteen [or] twenty feet down," plaintiff heard a "rumbling," the escalator shook, and he was catapulted to the bottom amidst a pile of bodies. Frederick Cristi, a nearby security guard, testified that the escalator was filled with patrons on every step. He heard screams and saw the escalator "free falling."

Sometime after the accident, Thomas Scairpon, a mechanic employed by Schindler, came to the stadium to repair the escalator. NJSEA and Schindler were parties to a "Preventive Maintenance Agreement" whereby Schindler would "conduct evaluations of equipment performance." The evaluations would "be conducted when conditions warrant[ed], and w[ould] take place during a regularly scheduled maintenance visit." However, under the agreement, NJSEA would "retain . . . responsibility and liability as owner This responsibility include[d] . . . advising, warning, or instructing passengers in the proper use of the equipment."

Scairpon had been called to the site previously on September 14, 2006, because the same escalator had a "step wreck at the top," which often occurred when the steps "turn around"

and "pile up." Scairpon removed the escalator from service while he made repairs on that occasion.

Scairpon returned to investigate the malfunction that led to plaintiff's accident. He determined the escalator had "skipped a tooth" causing it "[to] shift[] to the bottom." He believed that the escalator's "free fall" was "probably [caused] [by] overloading of patrons." Scairpon claimed he was "always concerned" about the behavior of fans at football games. He testified that he spoke to stadium managers "all the time" regarding overloading of the escalators with unruly fans and suggested they take steps to prevent overcrowding of the escalators. Each escalator step was "rated for 300 pounds," and Scairpon believed that "barricades [should be placed] in front of the escalators so the people aren't piling on at one time."

Scairpon relayed his concerns to James Minish, executive vice-president of the facility. Minish denied this in his deposition. John Duffy, another vice-president, agreed with Minish that Scairpon only informed NJSEA of the problems concerning patrons "crowding out of the stadium simultaneously" after December 2007, when another escalator incident occurred.

On December 29, 2007, a different escalator at the stadium malfunctioned and caused injuries. On July 23, 2008, the New Jersey Department of Community Affairs (DCA) issued an order

requiring NJSEA to "ensure that all such devices are properly maintained and operated in a safe condition." DCA further required NJSEA to

[d]evelop and implement a plan to prevent exceeding the design load of all escalators with a travel distance of greater than sixty feet . . . [and] . . . implement[] . . . a maintenance schedule . . . [that] shall be performed at regular intervals following high-attendance events.

Plaintiff's expert, Robert L. Saxon, P.E., prepared a report. After reviewing discovery, Saxon noted that the escalator steps had been "rated for 300 pounds," and, that while this was "consistent with the building code design load ratings," it was inadequate for "two average men per step." Saxon further opined that given "the load limitation[s] . . . , and the propensity for patrons to crowd the escalator after games, it was reasonable for crowd controls to be in place." Saxon believed "some permanent method of controlling egress, supplemented by authoritative monitors . . . was necessary." He concluded that the escalator "had been overloaded on the evening of [plaintiff's] incident, and . . . had gone into a safety stop, which was preceded by an uncontrolled motion, described by various witnesses as a 'free fall.'" Saxon also concluded that Schindler adequately provided "the contracted maintenance services," and there was no evidence of a "maintenance defect."

Defendants moved for summary judgment. Oral argument on the motions took place on January 8, 2010. The judge determined that plaintiff had failed to establish any theory of liability against Schindler, but reserved decision on NJSEA's motion. In a written decision that accompanied orders granting both defendants summary judgment, the judge concluded that plaintiff failed to "establish a prima facie cause of action" under the Tort Claims Act," N.J.S.A. 59:1-1 to 12-3 (the TCA). The judge further determined that plaintiff "c[ould not] identify a dangerous condition" since the "escalator in question was properly maintained[,]. . . working properly," and being used "for its intended purposes." He concluded that plaintiff failed to prove that the escalator was "a 'dangerous condition' under the [TCA]," and further that "an escalator mechanic's alleged statement to defendants [wa]s insufficient to put the public entity on notice of the overcrowding." The judge entered two orders dismissing plaintiff's claims against each defendant; this appeal ensued.

We first consider plaintiff's appeal from the grant of summary judgment to Schindler. He argues that application of the doctrine of *res ipsa loquitor* provides an available inference that Schindler, which was contractually obligated to service and maintain the escalator, was negligent in its

performance of those duties. Schindler argues that plaintiff cannot now invoke res ipsa loquitor because he failed to raise it below. Alternatively, Schindler argues that the doctrines of judicial estoppel and invited error bar plaintiff from raising this argument on appeal. Plaintiff, in reply, contends that he never waived his right to assert res ipsa loquitor, and, alternatively, that material factual disputes exist such that summary judgment as to Schindler should have been denied.

When Schindler moved for summary judgment, it specifically made two arguments: Saxon's expert report concluded Schindler's maintenance and service of the escalator was appropriate; and res ipsa loquitor did not apply. During oral argument, plaintiff contended only that summary judgment should be denied because a factual dispute existed, i.e., whether Scairpon did, or did not, warn NJSEA of the dangers of overloading.

Ordinarily, an appellate court will refrain from considering "questions or issues not properly presented to the trial court when [the] opportunity" was available to the party unless those issues "concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (citations omitted). Plaintiff acknowledges in his brief that res ipsa loquitor was "[n]ot [r]aised [b]elow." Since plaintiff

failed to assert this claim below, we refuse to consider it now as a basis to forestall summary judgment to Schindler.

The motion judge correctly determined that there was simply no proof of Schindler's negligence. Saxon opined that the company's maintenance of the escalator was more than appropriate. Under the service agreement, NJSEA retained ownership of the escalator as well as the duty to "advis[e], warn[], or instruct[] passengers in the proper use of the equipment." Schindler never assumed such a duty. Thus, even if a factfinder were to believe Minish and Duffy that Scairpon never warned them about overloading until after plaintiff's incident – Schindler breached no duty and cannot be liable. We affirm the grant of summary judgment to Schindler.

We reach a different result as to NJSEA. Plaintiff argues that summary judgment should have been denied because overcrowding on the escalator created a dangerous condition and Scairpon's warning had placed NJSEA on notice of the problem.

NJSEA counters that the escalator was not a dangerous condition because it functioned properly for its intended use, and, therefore, plaintiff's claim devolves entirely to one that rests upon a purported failure to supervise patrons exiting the game. NJSEA argues it is immune from such claims pursuant to N.J.S.A. 59:2-7.

As the Court has explained,

[I]n order to impose liability on a public entity pursuant to [the TCA], a plaintiff must establish the existence of a "dangerous condition," that the condition proximately caused the injury, that it "created a reasonably foreseeable risk of the kind of injury which was incurred," that either the dangerous condition was caused by a negligent employee or the entity knew about the condition, and that the entity's conduct was "palpably unreasonable."

[Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 125 (2001) (quoting N.J.S.A. 59:4-2).]

At issue in this case is whether plaintiff demonstrated the existence of a dangerous condition.

Pursuant to N.J.S.A. 59:4-1, a dangerous condition is a "condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Thus, unreasonable uses of public property entitle a public entity to immunity from claims by those injured through the misuse of the property. Garrison v. Twp. of Middletown, 154 N.J. 282, 286-87 (1998). A "substantial risk is 'one that is not minor, trivial or insignificant,'" Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 458 (2009) (citing Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)), and exists where "the condition was one that created a hazard to a person who foreseeably would use the property . . .

with due care." Furey v. Cnty. of Ocean, 273 N.J. Super. 300, 312 (App. Div.) (emphasis omitted) (citing Speziale v. Newark Hous. Auth., 193 N.J. Super. 413, 419 (1968), certif. denied, 138 N.J. 272 (1994)).

Generally, "courts have understood a 'dangerous condition' . . . to refer to the physical condition of the property itself and not to activities on the property." Levin v. Cnty. of Salem, 133 N.J. 35, 44 (1993) (quotation omitted). Thus, in Levin, the Court concluded that the parapet of a vehicular bridge over the Maurice River used for recreational diving was not a "dangerous condition" even though the public entity knew that the water below the bridge was shallow and that the public used the bridge as a diving platform. Id. at 38-40.

However, the plaintiff's activities are not irrelevant to consideration of whether the public property presents a dangerous condition. In Garrison, decided after Levin, the Court observed:

[C]ourts concentrate on the activity in which the plaintiff engaged. The purpose of the evaluation is to ascertain whether the plaintiff had engaged in an activity that is so objectively unreasonable that liability for resulting injuries may not be attributed to the condition of the property. The focus of the inquiry is not on the details of the plaintiff's activity, but on the nature of the activity itself. Although the inquiry does not refer to the actual activities of the plaintiff, . . . it invites examination

whether the plaintiff's conduct while engaging in a foreseeable activity amounts to an objectively reasonable use of the property.

[Garrison, supra, 154 N.J. at 292 (citation omitted) (quotations omitted) (emphasis added).]

See also King by King v. Brown, 221 N.J. Super. 270, 275 (App. Div. 1987) ("application of the dangerous condition standard requires consideration of both the physical characteristics of the public property as well as the nature of the activities permitted on that property").

In Garrison, supra, plaintiff was injured on the uneven surface of the public entity's parking lot as he played touch football at night. 154 N.J. at 285. The Court, however, noted that the condition of the parking lot was not a "dangerous condition" because "[n]othing indicate[d] that the declivity posed a risk to commuters or to other persons who parked their cars or walked to the train station." Id. at 293.

Garrison thus describes a three-part analysis. The first consideration is whether the property poses a danger to the general public when used in the normal, foreseeable manner. The second is whether the nature of the plaintiff's activity is "so objectively unreasonable" that the condition of the property cannot reasonably be said to have caused the injury. The answers to those two questions determine whether a plaintiff's claim satisfies the Act's "due care" requirement. The third

involves review of the manner in which the specific plaintiff engaged in the specific activity. That conduct is relevant only to proximate causation, N.J.S.A. 59:4-2, and comparative fault, N.J.S.A. 59:9-4.

[Vincitore, supra, 169 N.J. at 126 (quoting Garrison, supra, 154 N.J. at 292).]

In this case, providing plaintiff with all favorable evidence and inferences, he demonstrated that when the escalator was being used in a normal and foreseeable manner, it posed a danger to the general public exiting a game. Plaintiff's conduct was not unreasonable; it was consistent with the intended use of the escalator. The dangerous condition was NJSEA's policy of operating escalators that were rated for only 300 pounds per step even though it was foreseeable and likely that greater loads would routinely be applied. See e.g., King, supra, 221 N.J. Super. at 275 ("[A] bridge designed solely for pedestrian use may become dangerous when converted to use by vehicular traffic if its structure cannot support the additional load.").

Applying summary judgment standards, plaintiff marshaled sufficient proof to demonstrate that a dangerous condition existed, that it proximately caused his injury, that it created a reasonably foreseeable risk, and that NJSEA knew about the condition. Vincitore, supra, 169 N.J. at 125. It is a question

reserved for the factfinder whether NJSEA's lack of response to the situation was palpably unreasonable. Id. at 130.

NJSEA argues that plaintiff's claim is essentially a criticism of its failure to supervise patrons alighting on the escalator. N.J.S.A. 59:2-7 provides

A public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition

"This section has been broadly construed to mean that a public entity need not undertake at all the supervision of public recreational facilities." Margolis and Novack, Claims Against Public Entities, comment on N.J.S.A. 59:2-7 (citing Verni ex rel. Burstein v. Stevens, 387 N.J. Super. 160, 210 (App. Div. 2006), certif. denied, 189 N.J. 429 (2007)). We have construed "supervision" to mean "some conduct, no matter how minute, evidencing an intention to supervise by way of monitoring, entering into or becoming a part of the activity itself from which the injury sprang." Morris v. City of Jersey City, 179 N.J. Super. 460, 464 (App. Div. 1981).

We reject NJSEA's argument for two reasons. First, there is some reference in the record to NJSEA having in fact "posted security personnel . . . to maintain order as well as to assist patrons." "[A] potential for liability might . . . result[] had

[NJSEA] undertaken supervision despite this immunity[.]” Id. at 463 (citing Costa v. Josey, 83 N.J. 49 (1980)). It is an issue that we are unable to resolve on the appellate record, although we do not foreclose the possibility that on the full record, NJSEA might be able to establish that it never undertook any supervision of the egress of patrons from the stadium.

Secondly, and more importantly, plaintiff's claim in this case is not that NJSEA needed to necessarily "become . . . part of the activity" – directly supervise the patrons boarding the escalator – in order to ameliorate the dangerous condition. Saxon proposed other solutions that might lessen the likelihood that each escalator step would bear more than 300 pounds. He suggested the possibility of turnstiles or "permanent queuing barricades which would have forced single file entry to the escalators." These alternatives would not have required NJSEA to supervise the actual egress of patrons from the stadium.

On the record presented, NJSEA was not entitled to summary judgment based upon the immunity provided in N.J.S.A. 59:2-7. In short, we reverse the order granting it summary judgment.

Plaintiff has specifically advanced an argument that evidence of the December 2007 escalator malfunction, DCA's response and NJSEA's subsequent conduct are relevant to show either a dangerous condition existed in October 2006, or that

NJSEA's failure to implement some controls in 2006 was "palpably unreasonable." As a result of our holding, future proceedings are possible, but we decline the opportunity to provide any specific guidance on the evidential question based upon the appellate record before us. Instead, we leave resolution of the issue to the sound discretion of the trial judge who will have the benefit of plaintiff's specific proffers, a full discovery record and any potential testimony. See Benevenga v. Digregorio, 325 N.J. Super. 27, 32-33 (App. Div. 1999) (noting the "substantial deference [accorded] to a trial court's evidentiary rulings" regarding the "probative value" of proffered evidence versus its potential prejudicial effect), certif. denied, 163 N.J. 79 (2000).

Affirmed in part; reversed in part; remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


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