

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Berkovich v. Judlau Contr., Inc.

2022 N.Y. Slip Op. 01733 (App. Div. 2022) · No. 2021-02004 · Decided March 15, 2022

SUMMARY

The Appellate Division, First Department affirmed an order denying Kone, Inc. and Kone Elevators & Escalators of New York City's motion to compel the plaintiff to supplement interrogatory responses. The court held that a products liability plaintiff may proceed through circumstantial evidence and, where the plaintiff presently lacks knowledge of the specific defect, may testify under oath that the defect cannot yet be identified. The court noted that the plaintiff must promptly supplement his responses if he later obtains pertinent information.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Webber, J.P.; Moulton, J.; Kennedy, J.; Mendez, J.; Pitt, J.
JURISDICTION	New York
DECIDED	March 15, 2022
DOCKET	2021-02004
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants Kone, Inc. and Kone Elevators & Escalators of New York City appealed from an order denying their motion to compel plaintiff to supplement answers to interrogatories concerning alleged escalator defects.
STANDARD OF REVIEW	The court reviewed Supreme Court's discovery ruling and determined that defendants' contentions regarding the sufficiency of plaintiff's interrogatory answers were unavailing.
PRECEDENTIAL VALUE	Published appellate decision; precedential within the applicable New York state court hierarchy.
PARTIES	Kone, Inc., Kone Elevators & Escalators of New York City v. Albert Berkovich

TOPICS

discovery dispute

products liability

construction law

personal injury

civil procedure

PRACTICE AREAS

products liability

civil procedure

discovery

QUESTIONS PRESENTED

1. Whether plaintiff's interrogatory responses were insufficient because he could not identify the specific defect or component that allegedly caused the escalator to start unexpectedly.
2. Whether a products liability plaintiff who presently lacks knowledge of the specific defect may state that lack of knowledge under oath and supplement the interrogatory responses if pertinent information is later obtained.

HOLDINGS

1. The interrogatory responses were not insufficient merely because plaintiff could not presently identify the specific defective component. A products liability claim may be proven by circumstantial evidence, and a plaintiff need not identify a specific defect when proceeding under the applicable circumstantial-evidence framework.
2. When a plaintiff presently lacks knowledge sufficient to identify the nature of a product defect, the plaintiff may testify to that lack of knowledge under oath and must promptly supplement the interrogatory answers if the pertinent information is later acquired.

KEY QUOTATIONS

"It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect" (223)

"a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to [the] defendants" (223)

"presently lacks the knowledge" (941)

FACTUAL BACKGROUND

Plaintiff was injured while working in the pit of an escalator at the South Ferry subway station in Manhattan. The escalator allegedly began moving at high speed without warning or intentional human intervention, catching plaintiff's right foot and causing injuries that required amputation of part of his leg. In response to interrogatories, plaintiff identified several alleged design defects but could not identify the specific component that caused the escalator's unexpected movement.

PROCEDURAL HISTORY

Supreme Court, New York County, denied defendants' motion to compel plaintiff to supplement his interrogatory responses. The Appellate Division, First Department, affirmed the order insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- Ramos v. Howard Indus., Inc., 10 N.Y.3d 218, 223 (2008)
- Speller v. Sears, Roebuck & Co., 100 N.Y.2d 38, 42 (2003)
- Cornachio v. General Motors Corp., 63 A.D.2d 941, 941 (1st Dep't 1978)

OPINION

PER CURIAM.

Berkovich v Judlau Contr., Inc. (2022 NY Slip Op 01733) Berkovich v Judlau Contr., Inc. 2022 NY Slip Op 01733 Decided on March 15, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: March 15, 2022 Before: Webber, J.P., Moulton, Kennedy, Mendez, Pitt, JJ. Index No. 151498/19 Appeal No. 15513 Case No. 2021-02004 [*1]Albert Berkovich, Plaintiff-Respondent, vJudlau Contracting, Inc., et al., Defendants, Kone, Inc., et al., Defendants-Appellants.

Ansa Assuncao LLP, White Plains (Thomas O. O'Connor of counsel), for appellants. Alexander J. Wulwick, New York, for respondent. Order, Supreme Court, New York County (Frank P. Nervo, J.), entered May 5, 2021, which, to the extent appealed from as limited by the briefs, denied defendants Kone, Inc. and Kone Elevators & Escalators of New York City's motion to compel plaintiff to supplement his answers to their interrogatories, unanimously affirmed, without costs.

Plaintiff was injured when working on an escalator at the South Ferry subway station in Manhattan. He alleges that while he was working in the "pit" at the escalator's base, the escalator began moving at high speed without warning and without intentional human intervention, catching his right foot in the mechanism and causing injuries requiring the amputation of a portion of his leg.

Defendants contend that plaintiff's answers to certain interrogatories directed to identifying the escalator's alleged defects were insufficient. Supreme Court rejected that assertion, and we agree. "It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect" (Ramos v Howard Indus., Inc. 10 NY3d 218, 223 [2008]).

In the absence of evidence identifying a specific defect "a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to [the] defendants" (id. at 223 [internal quotation marks omitted]). If a "plaintiff is

unable to prove both elements, 'a jury may not infer that the harm was caused by a defective product unless [the] plaintiff offers competent evidence identifying a specific flaw'" (id.,quoting *Speller v Sears, Roebuck & Co.*, 100 NY 2d 38, 42 [2003]).

In his interrogatory responses, plaintiff identified several alleged design defects, including the design of the pit, that contributed to his injury. However, he did not identify a cause for the unexpected start up of the escalator. Plaintiff's response that "[t]he software, circuitry, controller or other componentry allowed the inadvertent, unexpected and unintended movement of [the] escalator, without the activation of the key 'start-stop station'" does not specify the defect which allegedly caused the escalator to start unexpectedly at high speed.

Presently, plaintiff asserts that he cannot pinpoint the defective component that allowed the escalator's machinery to begin moving without warning. In an instance where plaintiff "presently lacks the knowledge" to specifically identify the nature of the defect, plaintiff can testify to that "under oath" (*Cornachio v General Motors Corp.*, 63 AD2d 941, 941 [1st Dept 1978]).

As plaintiff concedes, if he acquires the pertinent information he would be under an obligation to promptly supplement his answers to the interrogatories at issue (see *Cornachio*, 63 AD2d 941). We have reviewed defendants' remaining contentions and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, [*2]FIRST DEPARTMENT.

ENTERED: March 15, 2022