**[Cite as *Matteucci v. Cleveland State Univ.*, 2011-Ohio-2114.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Vincent Matteucci, | : | |
| Plaintiff-Appellant, | : | |
| | | No. 10AP-576 |
| v. | : | (C.C. No. 2008-08906) |
| Cleveland State University, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on May 3, 2011

*Lallo & Feldman Co., L.P.A.,* and *Michael J. Feldman,* for appellant.

*Michael DeWine,* Attorney General, *Velda K. Hofacker,* and *Kristin S. Boggs,* for appellee.

APPEAL from the Court of Claims of Ohio.

BRYANT, P.J.

**{¶1}** Plaintiff-appellant, Vincent Matteucci, appeals from a judgment of the Court of Claims of Ohio granting the summary judgment motion of defendant-appellee, Cleveland State University ("CSU"), on plaintiff's claim that CSU negligently caused him injury as a result of a defective elevator in a dormitory subject of a renovation project. Plaintiff assigns a single error:

**The trial court committed prejudicial error in granting defendant-appellee's motion for summary judgment because there are facts that remain to be litigated.**

Because (1) CSU did not have possession or control of the building at the time of plaintiff's injury, and (2) the alleged defect in the elevator did not exist at the time CSU transferred possession of the building housing the elevator, we affirm.

**I. Facts and Procedural History**

**{¶2}** On August 8, 2008, plaintiff filed a complaint in the Court of Claims alleging that on or about July 1, 2005 he was a business invitee working in a faulty elevator in Fenn Tower, a dormitory CSU owned and operated. Plaintiff alleged CSU negligently allowed the faulty elevator to exist on its premises, failed to warn plaintiff of the dangerous condition of the elevator, and failed to properly maintain or repair the elevator, all of which proximately caused plaintiff bodily injury when the elevator malfunctioned and fell eight stories.

**{¶3}** On September 8, 2008, CSU filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to comply with the applicable two-year statute of limitations contained in R.C. 2743.16. Plaintiff responded that the Ohio Savings Statute, contained in R.C. 2305.19, precluded dismissal. Plaintiff noted he timely filed the action in the Cuyahoga County Court of Common Pleas on July 2, 2007, that court dismissed the action without prejudice on August 20, 2007, and plaintiff re-filed his complaint in the Court of Claims within one year, as R.C. 2305.19 requires.

**{¶4}** The Court of Claims denied CSU's motion to dismiss, stating that "[a]lthough plaintiff's assertions regarding his common pleas court case are not set forth in the complaint, the court is reluctant to dismiss the claim as being time-barred under

circumstances where the saving statute may apply." (R. 14.) On November 24, 2008, CSU answered the complaint, admitting it owned Fenn Tower but denying it maintained, operated or controlled Fenn Tower on the date plaintiff was injured.

**{¶5}** CSU subsequently filed a Civ.R. 56 motion for summary judgment, asserting plaintiff could not establish a prima facie case of negligence. CSU supported the motion with the affidavit of George E. Hamm, Jr., associate general counsel to CSU. The affidavit stated CSU leased Fenn Tower to a developer and did not have possession or control of the building at the time of plaintiff's injury. The affidavit further stated that prior to "transferring possession to the developer, CSU quarantined the subject elevator and posted signs stating that it was not suitable for use." (R. 30, Exhibit A, ¶2-4.)

**{¶6}** Plaintiff opposed the motion, relying on *Kauffman v. First Central Trust Co.* (1949), 151 Ohio St. 298. Plaintiff noted the general rule in *Kauffman* provides that "if a lessee has the sole control and management of an elevator in a leased building, he and not the lessor must usually answer to one who is injured because of defects in the elevator." Id. at 302-03. Plaintiff conceded that because CSU leased the building to a developer and did not have control of the building, CSU could not be liable under the general rule applied in *Kauffman*. Id.

**{¶7}** Plaintiff nonetheless noted the exception in *Kauffman* that "[i]n order to charge owners of leased premises with responsibility for the existence of the alleged defective elevator * * * it was necessary for plaintiff to allege and prove that the conditions complained of existed at the time of the letting." Id. at 303, quoting, *Marcovitz v. Hergenrether* (1922), 302 Ill. 162. With that premise, plaintiff argued the Hamm affidavit showed the defective condition of the elevator existed at the time CSU

transferred possession and control of Fenn Tower to the developer, since CSU quarantined the elevator and posted signs stating the elevator was not suitable for use.

**{¶8}** The Court of Claims denied CSU's motion for summary judgment. The court stated CSU undisputedly did not have possession or control of the premises, because it leased the building to a developer. The court, however, concluded pursuant to *Kauffman* that genuine issues of material fact existed regarding CSU's knowledge of the defective condition of the elevator. Trial was set for December 14, 2009.

**{¶9}** On December 7, 2009, plaintiff filed a motion to continue the trial date, stating CSU just notified plaintiff of a potential error with the Hamm affidavit. In responding the next day to plaintiff's motion, CSU advised it just learned that some of the information in the Hamm affidavit was inaccurate. CSU noted specifically it quarantined the entire building, not just the elevators, and was unaware of any particular problem with the elevator. CSU accordingly stated it would not object if plaintiff needed a continuance. After conducting a status conference, the court continued both the trial date and the final date for filing dispositive motions.

**{¶10}** CSU filed its second summary judgment motion on April 15, 2010, arguing CSU owed plaintiff no duty because CSU did not possess or control the building, CSU was not actively participating in renovating the building, and plaintiff was not CSU's business invitee. CSU finally asserted that, even if CSU owed plaintiff a duty, it did not breach its duty. CSU supported its motion with a second Hamm affidavit containing new information, as well as the affidavit of W. Randy Painter, a project executive working for Turner Construction Company, the general contractor in charge of the Fenn Tower Renovation Project.

**{¶11}** Plaintiff responded on May 7, 2010 to CSU's summary judgment motion and filed as well a motion to strike CSU's summary judgment motion and a motion for sanctions. The motions to strike and for sanctions argued CSU presented the newly attached affidavits in bad faith or solely for delay. Plaintiff further asserted CSU's summary judgment motion was not well-taken because the contradiction between the two Hamm affidavits created a genuine issue of material fact that precluded summary judgment. Plaintiff presented no Civ.R. 56(C) materials to support his response.

**{¶12}** On May 26, 2010, the court filed its decision both granting CSU's motion for summary judgment and denying plaintiff's motions for sanctions and to strike. In denying the latter motions, the court noted it continued the trial on plaintiff's request and at the same time extended the dispositive motion deadline that rendered CSU's second summary judgment motion timely filed. In granting CSU's summary judgment motion, the court quoted from the second Hamm affidavit and the Painter affidavit attached to CSU's motion, concluded CSU had relinquished possession and control of the premises at the time of plaintiff's accident, rejected the *Kauffman* exception based on CSU's evidence, and determined no genuine issues of material fact precluded judgment for CSU. Plaintiff's single assignment of error contends the court erred in so concluding.

**II. Summary Judgment Properly Granted**

**{¶13}** An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and

(3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.,* 78 Ohio St.3d 181, 1997-Ohio-221.

**{¶14}** Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. Id.; *Vahila v. Hall,* 77 Ohio St.3d 421, 1997-Ohio-259. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

**{¶15}** Plaintiff's complaint alleges CSU negligently allowed a defective and dangerous elevator to exist on its premises. To establish a cause of action for negligence, plaintiff was required to present evidence of (1) the existence of a duty, (2) a breach of that duty, and (3) an injury resulting proximately from the breach. *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77, citing *DiGildo v. Caponi* (1969), 18 Ohio St.2d 125; *Feldman v. Howard* (1967), 10 Ohio St.2d 189. In the negligence context, a trial court properly grants a motion for summary judgment "[w]hen the

defendants, as the moving parties, furnish evidence which demonstrates the plaintiff has not established the elements necessary to maintain his negligence action." *Feichtner v. Cleveland* (1994), 95 Ohio App.3d 388, 394, citing *Keister v. Park Centre Lanes* (1981), 3 Ohio App.3d 19.

A. Relationship among CSU, the Lessees and Contractor

**{¶16}** Plaintiff initially contends the court erred in granting summary judgment to CSU because CSU attached only one page of a lease agreement to the second Hamm affidavit. Plaintiff asserts that because CSU did not attach the entire agreement, "it is impossible to determine the entire relationship between CSU and any lessees or contractors and the specific terms of the relationship between the parties" concerning "the remodeling and reconstruction of Fenn Tower and the amount of involvement by CSU." (Appellant's brief, 4.)

**{¶17}** Plaintiff is correct insofar as he asserts a page from a lease agreement alone is not proper evidence under Civ.R. 56, as it is not among the documents listed in Civ.R. 56(C). When a party to summary judgment proceedings wishes to present the court with a document not of the type listed in Civ.R. 56(C) " 'it may be introduced as proper evidentiary material if incorporated by reference in a properly framed affidavit.' " *Hart v. Columbus Dispatch/Dispatch Printing Co.*, 10th Dist. No. 02AP-506, 2002-Ohio-6963, ¶18, quoting *Buzzard v. Public Emp. Retirement Sys. of Ohio* (2000), 139 Ohio App.3d 632, 636. Even a single page of a larger document may be incorporated by reference through a properly framed affidavit. *Hudson Presbyterian Church v. Eastminster Presbytery*, 9th Dist. No. 24279, 2009-Ohio-446, ¶18. Here, Hamm properly

incorporated by reference the single page of the lease agreement attached to his second affidavit.

**{¶18}** Moreover, other evidence CSU submitted explains the relationship among CSU, the lessees and the contractor in the Fenn Tower renovation. Hamm's original affidavit stated the elevator in question was located in a building "that was leased to a developer [who] employed contractors to perform work on the building. Possession and control of this building had been transferred from CSU to the developer." (R. 30, Exhibit A, ¶2.) Hamm's second affidavit supplemented his first regarding the relationships among those involved in the renovation. The affidavit clarified that CSU leased the building to Euclid Avenue Housing Corporation, which subleased it to American Campus Communities, Inc. ("ACC"); ACC hired the contractors to renovate the building. Painter's affidavit supplemented Hamm's affidavit by explaining the contractor ACC hired to complete the Fenn Tower renovation was Turner Construction Company. Concerning CSU's involvement in the project, Painter's affidavit stated "Turner was in control of the ongoing work, and CSU was not directing activity within Fenn Tower." (R. 56, Exhibit B, ¶10.)

**{¶19}** The affidavits attached to CSU's second motion for summary judgment sufficiently explained the relationships between the parties and CSU's involvement in the project. Plaintiff then had the opportunity in responding to CSU's summary judgment motion to supply the entire lease agreement if he believed it revealed a basis for CSU's liability not reflected in the materials CSU submitted. CSU's failure to attach the entire lease agreement to the second Hamm affidavit in itself did not create a genuine issue of material fact for trial.

B. The Hamm Affidavits

**{¶20}** The seminal issue is not whether the entire agreement should have been attached to Hamm's affidavit, but whether the material CSU submitted with its summary judgment motion demonstrated that it was not liable to plaintiff for injuries he sustained in the accident involving the elevator in Fenn Tower. If so, the burden shifted to plaintiff to present evidence of a genuine issue of material fact that remained for trial.

**{¶21}** In addressing the merits, plaintiff admits under *Kauffman* that CSU did not have possession or control of the elevator when plaintiff's accident occurred, given the lease to Euclid and subsequent transfers. Plaintiff, however, contends the exception to the general rule in *Kauffman* applies, noting the initial Hamm affidavit suggests CSU believed the elevator was defective at the time CSU transferred possession. Plaintiff further contends Hamm's second affidavit does not alleviate the problems with the first affidavit but creates a conflict that leaves a genuine issue of material fact for trial.

**{¶22}** As Civ.R. 56(E) permits, portions of the second Hamm affidavit merely supplement the original affidavit. In other relevant respects the affidavits differ. The first Hamm affidavit suggests CSU believed the elevator was defective at the time it transferred possession, because CSU quarantined the elevator and posted signs stating the elevator was not suitable for use. By contrast, the second Hamm affidavit states CSU was unaware of any particular problem with the elevator, but an inspection was required prior to use because the elevator had not been used for some time.

**{¶23}** Generally, "[w]hen a litigant's affidavit in support of his or her motion for summary judgment is inconsistent with his or her earlier deposition testimony," or as here an earlier affidavit, "summary judgment in that party's favor is improper because there

exists a question of credibility which can be resolved only by the trier of fact." *Turner v. Turner*, 67 Ohio St.3d 337, 1993-Ohio-176, paragraph one of the syllabus. Cf. *Darden v. Columbus*, 10th Dist. No. 03AP-687, 2004-Ohio-2570, ¶28 (concluding that when a non-moving party's earlier statement conflicts with a later affidavit, the later affidavit "can not be used to create a reasonable issue of fact without specific sworn testimony delineating why the earlier statement was not true"). See also *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶28 (stating "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment"); *Fiske v. Rooney* (1998), 126 Ohio App.3d 649, 661 (determining "a non-movant could still contradict prior deposition testimony and defeat a motion for summary judgment if his affidavit contained an explanation for the conflict").

**{¶24}** Here, the Hamm affidavits, by inferences drawn under the first affidavit, were inconsistent regarding CSU's knowledge of a defect in the elevator. The first affidavit reflects CSU's decision that the elevator be quarantined. Although that act may suggest a problem with the elevator, the affidavit does not state either that the elevator was defective or that CSU knew it was defective. Rather it indicates CSU acted against a possible defect, noting, for whatever reason, the elevator was not suitable for use. The second affidavit disclaims knowledge of a defect, indicating inspection only because the elevator had not been used in some time.

**{¶25}** Although the Hamm affidavits differ in whether CSU knew of a defect in the elevator at the time it transferred possession of the elevator to Euclid, the issue under the exception to *Kauffman* is not CSU's knowledge of a defect but whether the elevator

actually was defective when CSU transferred possession of it. Other evidence in the record addresses the dispositive issue, so that differences in the Hamm affidavits concerning CSU's knowledge of a defect do not create a genuine issue of material fact for trial.

**{¶26}** The Painter affidavit states Turner Construction Company, pursuant to its contract with ACC, "was required to have the elevator inspected prior to use and make any necessary repairs. Accordingly, Turner contracted with Schindler's Elevator Corporation (Schindler) to have the elevator inspected for any safety hazards." (R. 56, Exhibit B, ¶5.) On December 15, 2004, Schindler inspected the elevator and found it met all necessary safety requirements. The Schindler report attached to the Painter affidavit thus presents evidence the elevator was in good working order as of the date ACC possessed it, a date subsequent to CSU's transferring Fenn Tower for renovation. Plaintiff submitted no evidence to dispute the Schindler inspection and report.

**{¶27}** As a result, even though Hamm's first affidavit, by inference, suggests CSU believed the condition of the elevator to be less than adequate, the Painter affidavit, coupled with the Schindler inspection and report, states the elevator was not defective when CSU transferred possession of it, whatever CSU may have believed. Because the undisputed evidence supports the conclusion the elevator was not defective when Fenn Tower left CSU's control, *Kauffman's* exception does not support plaintiff's case. Cf. *Hendrix v. Eighth and Walnut Corp.* (1982), 1 Ohio St.3d 205, syllabus (holding a lessor "is not liable to third parties for damages resulting from the defective condition of an elevator on the leased premises when the lessor was not in possession or control of the

leased premises and the lessee agreed to keep the elevator in good working condition and repair").

**{¶28}** Based on the foregoing, plaintiff's sole assignment of error is overruled and the decision of the Court of Claims of Ohio granting summary judgment to CSU is affirmed.

*Judgment affirmed.*

FRENCH and DORRIAN, JJ., concur.

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