[Cite as *Osborn Engineering Co. v. K/B Fund IV Cleveland, L.L.C.*, 2011-Ohio-348.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95157

THE OSBORN ENGINEERING COMPANY

PLAINTIFF-APPELLANT

vs.

K/B FUND IV CLEVELAND, LLC

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-703405

BEFORE: Boyle, J., Stewart, P.J., and Gallagher, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, The Osborn Engineering Company ("tenant"), appeals the trial court's denial of its motion for summary judgment and granting of summary judgment in favor of defendant-appellee, K/B Fund IV Cleveland, LLC ("landlord"), on its breach of contract claim. Tenant argues that genuine issues of material fact exist as to whether landlord breached the terms of the lease by failing to keep the elevator at issue in good repair. We disagree and affirm.

Procedural History and Facts

{¶ 2} Tenant leased office space on the 15th floor of the Penton Media Building that is owned by landlord. On June 28, 2005, one of tenant's employees was injured on elevator 9 of the Penton building when the elevator dropped upon his entrance, causing him to fall and sustain injuries. As a result of the injuries sustained, tenant's employee filed for workers' compensation benefits that tenant alleges resulted in it having to pay increased workers' compensation state fund premiums. In September 2009, tenant subsequently filed the underlying action against landlord. In its amended complaint, tenant asserted a single claim of breach of contract arising out of its commercial lease agreement with landlord. Specifically, tenant asserted that landlord had an obligation under the lease to make repairs of the elevator and that it breached such obligation. Tenant further sought economic damages, including the increase in its workers' compensation premiums as a result of its employee's workers' compensation claim.

{¶ 3} Both parties subsequently filed cross-motions for summary judgment. The trial court ultimately denied tenant's motion and granted judgment in favor of landlord, finding that tenant failed to demonstrate that landlord breached any provision of the lease. Tenant appeals, raising the following assignment of error:

{¶ 4} "The trial court erred in denying appellant's motion for summary judgment and instead granting appellee's motion for summary judgment as

there were genuine issues of material fact as to whether appellee breached the terms of the lease by failing to keep elevator number 9 in good repair, which lead to the injury sustained by Biewlawski."

Standard of Review

{¶ 5} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 6} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191, 672 N.E.2d 654.

{¶ 7} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary

judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Breach of Contract Claim

{¶ 8} Initially, we note that although tenant has no standing to recover damages arising out of the injuries sustained by its employee under a tort theory, it may do so under a breach of contract theory. As recognized by the Ohio Supreme Court:

{¶ 9} "'Where a third party negligently injures an employer's employee and such injury is a direct result of a breach of contract which the third party had with employee's employer, and as a direct result of such breach the employer suffers damages, such damages are recoverable by the employer against the third party in an action for breach of contract.'" (Internal citations omitted.) *Cincinnati Bell Tel. Co. v. Straley* (1988), 40 Ohio St.3d 372, 380-381, 533 N.E.2d 764.

{¶ 10} To prevail on a claim for breach of contract, the plaintiff has the burden of proving four elements: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081,

878 N.E.2d 66, ¶18. The only element in dispute is whether landlord breached the lease.

{¶ 11} Tenant relies on the following provisions in the lease as the basis for the landlord's alleged breach:

> 6. Repairs Replacements and Alterations. Lessee shall take good care of the demised premises and the fixtures and appurtenances therein. Lessee shall make at its own expense all repairs and replacements required to keep the demised premises and fixtures in good working order and condition except (a) structural repairs, (b) repairs required to be made by Lessor pursuant to Article 15 hereof, and (c) such repairs as may be required of Lessor in furnishing the services specified in Article 7 hereof * * *.
>
> * *
>
> 7. Services By Lessor. As long as Lessee is not in default under any of the covenants of this Lease, Lessor shall furnish the following services:
>
> * *
>
> (b) Automatic operatorless elevator facilities on business days and have such an elevator available at all other times."

{¶ 12} Tenant contends that the malfunction of the elevator causing its employee's injuries establishes that landlord breached these provisions, i.e., it failed to keep the elevators in "good care." But we find tenant's argument unpersuasive.

{¶ 13} Under the lease, landlord owed a duty to provide automatic elevator service and to provide repairs to those elevators if needed. The evidence demonstrates that landlord complied with these provisions. Specifically, the record establishes the following uncontested evidence: (1)

landlord contracted with Otis Elevator Company, and, subsequently, Schindler Elevator Corporation, to provide repair and maintenance services on the elevators at the Penton building; (2) Schindler had required weekly maintenance on the elevators in the Penton building; (3) the elevator in question had not experienced any problems with misleveling in approximately one and one-half years prior to the incident at issue; and (4) the elevator in question had not been known to drop as alleged before or since the incident at issue.

{¶ 14} The sole occurrence of the underlying malfunction does not establish a breach under the lease. We find no provision in the lease that imposes strict liability in the event an elevator breaks due to unforeseen defects. Indeed, as noted by the trial court, "there is no contract provision that requires landlord to insure tenant against any and all incidents that may occur where, as here, there was no notice of a potential problem despite regular elevator inspection and maintenance procedures."

{¶ 15} We also find that no genuine issues of material fact exist that preclude the granting of summary judgment. Tenant relies on various work orders in support of its claim that the elevator at issue was not in "good care" and that landlord had to have been aware of the elevator's potential malfunction. But tenant failed to present any evidence to connect these work orders in support of this theory. Further, tenant failed to rebut the testimony of the elevator mechanic that all of the work done on the elevator before the

incident was completed and had nothing to do with the claimed incident.

{¶ 16} Finally, we also find tenant's reliance on the Landlord Tenant Act as a basis to impose liability misplaced. Aside from the Landlord Tenant Act being applicable only to residential leases, the Ohio Supreme Court has specified that the only viable claim for recovery of increased workers' compensation premiums is an action based upon breach of contract. *Straley*, 40 Ohio St.3d at 380-381. And the Court specifically rejected the notion that liability could be imposed under a duty not expressly contained in the contract. As stated by the Court: "We do not find that a duty to an injured employee's employer exists by virtue of the pronouncements of common law, by legislative enactment, or by operation of law. It would appear that such a duty could only exist based upon contract or warranty." Id. at 380.

{¶ 17} Accordingly, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
SEAN C. GALLAGHER, J., CONCUR