

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

CORRINE V. SMITH,) DOC. CI11-2314
)
Plaintiff,)
)
vs.) ORDER AND JUDGMENT
)
WALTER ROBERTS MANOR, and)
DARLAND PROPERTIES, L.L.C., A)
Nebraska Limited Liability Co.,)
)
Defendants)

This matter came before me the 19th day of April, 2012, on the motion for summary judgment filed by the defendants. Parties appeared through counsel. Plaintiff's oral motion to conduct additional discovery prior to hearing on the motion for summary judgment was overruled, as plaintiffs have not shown by affidavit reasons why they cannot present evidence to oppose the motion for summary judgment.. Evidence adduced, and being fully advised, I find as follows:

On July 25, 2007, plaintiff was exiting the elevator at the Walter Roberts manor, when she fell, claiming that the elevator had not yet descended all the way to the floor. Two exhibits were received without objection: E1 is the affidavit of the defendants' property manager, Lisa Clapp, and E2 is the affidavit of the plaintiff. Clapp indicates that the elevator is serviced twice a month by O'Keefe Elevator Company, and is inspected annually by the State of Nebraska. One the day plaintiff fell, Clapp had received no complaints about the elevator not performing normally.

Summary judgment is properly granted when the pleadings and evidence allowed in the hearing disclose no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 385, 702 N.W.2d 792, 808 (2005). The party that makes the motion for summary judgment has the burden of producing evidence and demonstrating that there are no genuine issues

of material fact. *Wolfe v. Beckon Dickinson & Co.*, 266 Neb. 53, 56, 662 N.W.2d 599, 602-03 (2003). The moving party makes a prima facie case by offering sufficient evidence to demonstrate they are entitled to a judgment if the evidence is undisputed at trial. *Cerny v. Longley*, 270 Neb. 706, 710, 708 N.W.2d 219, 223 (2005).

Once the moving party has made out a prima facie case, the burden of production shifts to the party opposing the motion. *Id.* at 710, 708 N.W.2d at 223. However, on a summary judgment motion, the evidence is viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences deducible from the evidence are decided in their favor. *Blinn v. Beatrice Comm. Hosp. and Health Center, Inc.*, 270 Neb. 809, 814, 708 N.W.2d 235, 242 (2006).

“For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.” *Topil v. Hub Hall Co.*, 230 Neb. 151, 154, 430 N.W.2d 306, 309 (1988) (quoting *Tiede v. Loup Power Dist.*, 226 Neb. 295, 299, 411 N.W.2d 312, 316 (1987)).

For liability to attach to a landowner, the plaintiff must establish:

1. The landowner created the condition, knew of it, or would have discovered it by exercising reasonable care;
2. The landowner should have realized that the condition created an unreasonable risk of harm to lawful entrants;
3. The defendant should have expected that lawful visitors would not discover or realize the danger or would fail to protect themselves against the danger;
4. The defendant failed to use reasonable care to protect lawful visitors against the danger;
5. The condition was the proximate cause of some damage to the lawful visitor.

See *Herrera v. Fleming Cos*, 265 Neb. 118, 655 N.W.2d 378 (2003).

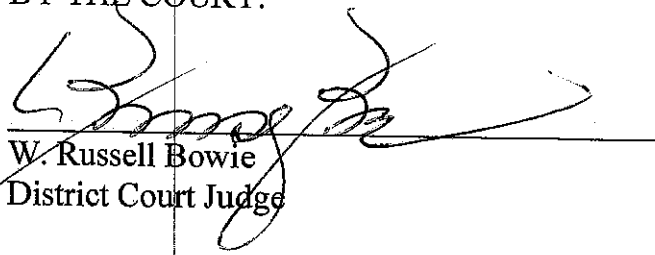
In this case, the evidence shows that the defendant had a bi-monthly elevator

inspection performed by an elevator company. There is no evidence of a history of a leveling problem with the elevator, and no evidence that the defendants knew of a leveling problem either in the past, or on the date of plaintiff's fall. Accordingly, defendants' motion for summary judgment should be granted.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is sustained, and plaintiff's complain is dismissed with prejudice at plaintiff's cost.

DATED June 26, 2012

BY THE COURT:


W. Russell Bowie
District Court Judge