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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

OSBORN ENGINEERING CO.
Plaintiff

B FUND IV CLEVELAND LLC K
Defendant

Case No: CV-09-703405

Judge: BRENDAN J SHEEHAN

JOURNAL ENTRY

96 DISP.OTHER - FINAL

OPINION AND JUDGMENT ENTRY. O.S.J.
COURT COST ASSESSED AS EACH THEIR OWN.

Judge Signature Date

- 96
05/03/2010

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE OSBORN ENGINEERING COMPANY, Plaintiff, v. K/B FUND IV CLEVELAND LLC, Defendant.	)	CASE NO. CV 09 703405 JUDGE BRENDAN J. SHEEHAN **OPINION AND JUDGMENT ENTRY**

I. ISSUE PRESENTED.

This matter is before the Court on cross-motions for summary judgment. The issues have been fully briefed to the Court.

Plaintiff The Osborn Engineering Company ("Osborn") leased office space on the 15th floor of the Penton Media Building ("Penton building"), which is owned by Defendant K/B Fund IV Cleveland LLC ("K/B"). On or about June 28, 2005, one of Osborn'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. Osborn filed its Complaint on September 8, 2009 alleging a claim of negligence against K/B and filed its Amended Complaint *instanter* on November 2, 2009 revising its claim to allege that the elevator incident constitutes a breach of the terms of its lease with K/B. Osborn seeks economic damages including costs for wage continuation to be paid to Osborn's injured employee during his time off work, for short-term and long-term insurance policy premiums paid for by Osborn, for lost profits as a result of the employee's lost time at work and for an increase in its Workers' Compensation premiums.

II. LAW AND ANALYSIS.

Both parties now seek summary judgment. Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414; *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327. When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111. Further, to survive summary judgment, a plaintiff must produce more than a scintilla of evidence in support of her position. *Markle v. Cement Transit Co., Inc.* (1997), 1997 WL 578940, 2, *citing Redd v. Springfield Twp. School District* (1993), 91 Ohio App.3d 88, 92.

With regard to claims by an employer to recover damages arising out of an injury to an employee, the Ohio Supreme Court has held:

> We also reiterate the view espoused in the third paragraph of the syllabus of *Midvale* which was buttressed by the judgment in *Ledex* [*Ledex, Inc. v. Heatbath Corp.* (1984), 10 Ohio St.3d 126]:
>
> "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." See, also, *Midvale Coal Co. v.*

Cardox Corp. (1952), 157 Ohio St. 526, 47 O.O. 380, 106 N.E.2d 556.

Cincinnati Bell Telephone Co. v. Straley (1988), 40 Ohio St.3d 372, 380-381.

The contract between the parties at issue in this case is an Indenture of Lease ("Lease") dated November 21st 1996, which provides in pertinent part:

> 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.
>
> * * *
>
> 6. Repairs Replacements and Alterations. Lessee shall take good care of the demise premises and the fixtures and appurtenance therein. Lessee shall make at its own expense all repairs and replacements required to keep the demise premises and fixtures in good working order and condition except (a) structural repair; (b) repairs required to be made by [Defendant] pursuant to Article 15 hereof, and (c) such repairs as may be required of [Defendant] in furnishing the services specified in Article 7 hereof . . .

Lease, p.5-6.[1]

In order to state a claim for breach of contract under Ohio law, the plaintiff must establish: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the

[1] Osborn also references R.C.§ 5321.04, which imposes a duty on a landlord to "[m]aintain in good and safe working order and condition all . . . elevators, supplied or required to be supplied by him". However, even if K/B had violated the referenced statute, the proper claim would be one of negligence per se. *Sabolik v. HGG Chestnut Lake Ltd. Partnership* (2009), 180 Ohio App.3d 576, 581. Further, in *Straley, supra,* the court stated: "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 on contract or warranty." *Id.* at 380.

defendant; and (4) damage or loss to the plaintiff. *DPLJR, Ltd. v. Hanna* (2008), 2008-Ohio-5872.

The Lease, as a contract, is subject to traditional contract principles. *Guardian Tech., Inc. v. Chelm Props., Inc.*, (2002), 2002-Ohio-4893. The interpretation of a contract is a matter of law. *Saydell v. Geppetto's Pizza and Ribs Franchise Sys., Inc.* (1994), 100 Ohio App.3d 111, 118.

Construing the Lease terms most strongly in favor of Osborn, K/B owed a duty to provide automatic elevator service and to effect repairs to those elevators.

The uncontested evidence presented by the parties establishes that:

1. K/B 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 Elevator Corporation is qualified to perform elevator maintenance and repair;

3. Elevator consultants are periodically employed by K/B to evaluate the Penton building elevators;

4. Schindler had required weekly maintenance on the elevators in the Penton building;

5. The elevator in question had not experience any problems with misleveling[2] in approximately one and one-half years prior to the incident at issue; and

6. The elevator in question had not been known to drop as alleged before or since the incident at issue.

[2] Misleveling has been defined as an elevator stopping an inch or two above or below floor level.

The Court finds that Osborn has failed to present any evidence that K/B breached the terms of the Lease. K/B fulfilled its contractual obligation by retaining qualified professionals to regularly repair and maintain the elevators at the Penton building. There is no contract provision that requires K/B to insure Osborn 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.

Plaintiff The Osborn Engineering Company's Motion for Summary Judgment is DENIED.

Defendant K/B Fund IV Cleveland LLC's Motion for Summary Judgment is GRANTED.

Judgment in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

JUDGE BRENDAN J. SHEEHAN

Dated: 5/3/10

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GERALD E. FUERST, CLERK

BY DEP.

CERTIFICATE OF SERVICE

A copy of the foregoing was served by facsimile and mail this 3rd day of May, 2010 on the following:

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