IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7456
Summary Calendar

ETHEL M. FAIRLEY,

Plaintiff-Appellant,

v.

MONTGOMERY ELEVATOR COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-H90-0202(P)(N))

(January 18, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Ethel M. Fairley appeals from the district court's entry of summary judgment against her. Finding that there was no genuine issue of material fact and that Montgomery Elevator Company was entitled to judgment as a matter of law, we affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On September 21, 1987, Fairley, a housekeeper employed by Forrest General Hospital in Forrest County, Mississippi, sustained injuries following the apparent malfunctioning of one of the hospital's elevators in which she was riding. It is undisputed that Montgomery Elevator Company, at the time of Fairley's injuries, had contracted with the hospital to provide regular maintenance and service to the hospital's elevators. According to Fairley, the elevator abruptly dropped from the second floor to a point approximately seven to eight feet above the first floor. Fairley called for assistance and, shortly thereafter, a maintenance man employed by the hospital responded.

The maintenance man opened both the elevator shaft on the first floor and the elevator door. He then instructed Fairley to wait until he could return with a ladder. Fearing that the elevator would fall further, Fairley ignored the maintenance man's instructions and, after approximately a minute's wait, jumped to the floor of the basement before the maintenance man could return with a ladder. Although it is undisputed that Fairley was seriously injured from the impact of the jump, the parties are in dispute whether Fairley also sustained any injuries from the initial plunge of the elevator from the second floor. Fairley herself offered conflicting statements regarding the source of her injuries. In her deposition, she seemed to say that her jump was the only source of her injuries, while in her

answers to Montgomery Elevator's interrogatories she claimed that "[t]he jolt from when the elevator fell . . . caused me to injure my back, neck and legs."

Fairley filed a common law negligence action against Montgomery Elevator Company in Mississippi state court, seeking $650,000 in damages. Fairley alleged that Montgomery Elevator's negligence in failing to properly service and maintain the elevator was the proximate cause of Fairley's injuries. Invoking diversity jurisdiction, Montgomery Elevator proceeded to remove to federal district court in the Southern District of Mississippi. During discovery, Fairley and Montgomery Elevator each submitted interrogatories and requests for production, which were answered. Fairley's deposition was also taken. It is undisputed that during discovery Fairley failed to offer testimony from -- or even offer a single name of -- any potential fact or expert witness who could offer support for Fairley's theory that Montgomery Elevator was negligent or that any purported negligence proximately caused the elevator to fall. Rather, at the conclusion of discovery, Fairley had merely offered conclusory allegations to that extent.

Montgomery Elevator thereafter filed a motion for summary judgment to which Fairley failed to respond. On June 12, 1992, the district judge granted summary judgment for Montgomery Elevator. On July 9, 1992, Fairley filed a timely notice of appeal.

II.

In reviewing a summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989). We ask specifically whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In answering the first part of this question, we view all evidence and the inferences to be drawn from the evidence in the light most favorable to the party opposing the motion. Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979) (citing United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993 (1962)). Furthermore, as the United States Supreme Court held in Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986):

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such an action, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . . " (citations omitted).

We agree with the district court that in the instant case, Fairley has completely failed to make a prima facie case of actionable negligence under Mississippi law. In Mississippi, like most (if not all) other jurisdictions, a plaintiff in a negligence action "bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty, proximate causation and [damages]." Palmer v. Biloxi Regional Medical Center, Inc., 564 So.2d 1346, 1355 (Miss. 1990). Fairley has not only entirely failed to establish that Montgomery Elevator was negligent by breaching a duty owed to Fairley, but also has failed to offer any proof of proximate causation. In particular, in the proceedings below Fairley offered no deposition or affidavit from a fact or expert witness who could testify that Montgomery Elevator was negligent in servicing the elevator or that such purported negligence caused the elevator to fall; nor did Fairley even supply a name of such a witness. Rather, at the conclusion of discovery, she had merely offered a conclusory allegation that Montgomery Elevator failed to properly service and maintain the hospital's elevator in working order and that such a failure proximately caused the elevator to fall.[1] Montgomery Elevator,

[1] We note that Fairley has not propounded the theory of res ipsa loquitur, which would possibly relieve her of some of the evidentiary burden necessary to make a prima facie case of actionable negligence under Mississippi law. See Kussman v. V & G Welding Supply, Inc., 585 So.2d 700, 704-05 (Miss. 1991) (discussing the doctrine of res ipsa loquitur). Even if she had, the evidence she offered at the point that summary judgment was granted would not have been adequate to withstand summary

conversely, offered an affidavit from an expert witness who was prepared to testify that Montgomery Elevator was in no way negligent.

Furthermore, Fairley failed to respond in any way to Montgomery Elevator's motion for summary judgment until this appeal, which is relevant to our analysis. See Eversley v. MBank Dallas, 843 F.2d 172, 173-74 (5th Cir. 1988). Fairley's appellate brief does nothing but repeat the bare allegations of negligence made in the court below. Accordingly, we believe that Fairley has failed to withstand Montgomery Elevator's motion for summary judgment.[2]

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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judgment on that issue. In particular, Fairley neither offered evidence that Montgomery Elevator was in "exclusive control" over the elevator, nor did she prove that the accident was "not . . . due to any voluntary action on the part of the plaintiff." Id.

[2] Fairley contends that a Mississippi statute, Code of Mississippi, § 11-7-17, requires her case to go to a jury since there is a dispute over whether Fairley was contributorily negligent in jumping from the elevator. We disagree. That statute -- even assuming it applied in a federal diversity case, but see Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928, 929 (5th Cir. 1934) -- is irrelevant if a plaintiff has not made a prima facie case of negligence to withstand summary judgment.