

<b>Harmon v Metropolitan Opera</b>
2013 NY Slip Op 31390(U)
June 28, 2013
Sup Ct, Queens County
Docket Number: 2329/2011
Judge: Robert J. McDonald
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The gravamen of the complaint is that while the plaintiff was on an escalator going down to a lower level at the Metropolitan Opera House at Lincoln Center, a handrail malfunctioned on the escalator causing the plaintiff to fall forward and to sustain personal injuries. The plaintiff alleges that Lincoln Center, The Metropolitan Opera, New York Elevator and Electrical Corp., and Thyssenkrupp Elevator Corporation were negligent in the ownership, operation, maintenance, repair and control of the escalator.

In December 2012 defendant Lincoln Center moved for an order granting summary judgment and dismissing the plaintiff's complaint and all cross-claims asserted against it on the ground that Lincoln Center, the owner of the Metropolitan Opera building, is an out-of-possession landlord who does not retain control of the premises and is not contractually obligated to perform maintenance and repairs on the escalator in question.

In a decision dated March 12, 2013, this court denied the defendant's motion for summary judgment finding that the evidence submitted by Lincoln Center was insufficient to demonstrate, prima facie, as a matter of law, that as a landlord and under the terms of the lease, it was not liable for making repairs or maintaining the escalator in the Metropolitan Opera on which the defendant was injured (see Harmon v Metropolitan Opera, 38 Misc. 3d 1231(A) [Sup Ct, Queens County, 2012]). This court found, inter alia, that pursuant to the terms of the portion of the lease submitted to the Court, Lincoln Center specifically retained control over certain easements and over certain areas of the Opera House as well as public areas and common facilities. However, it was determined that the portions of the lease which delineate the areas over which Lincoln Center retained control were not submitted to the court and that without submitting a complete copy of the lease and without evidencing those portions of the lease which describe the areas over which Lincoln Center maintained control, the defendant did not establish prima facie, that they were not contractually obligated to maintain the subject escalator or repair the alleged defect that allegedly caused the plaintiff's accident.

Lincoln Center now moves to renew and reargue this Court's decision based upon new evidence and on the ground that certain matters of law and facts were overlooked and/or misapprehended by the court. In support of the motion, Lincoln Center submits "newly found evidence" in the form of the exhibits to the lease not previously submitted to the Court. Lincoln Center contends that the exhibits show that Lincoln Center did not have a contractual obligation within the lease to maintain the particular escalator that is the subject of this case.

Defendant's counsel, Evy Kazansky, Esq., states that she has recently come into possession of the exhibits to the lease that were not submitted with the original motion. Counsel states that the exhibits were not in her possession at the time the motion was submitted. Counsel submits that the exhibit makes clear that Lincoln Center did not have a contractual obligation to maintain the subject escalator. The newly submitted exhibits consist of a list of eleven areas at the Metropolitan Opera which are stated to be under the control of Lincoln Center. The areas listed are also delineated on submitted diagrams of the Metropolitan Opera House which have been notated by Sara E. Chang, Esq., Associate General Counsel for Lincoln Center. The areas stated to be under Lincoln Center's control include, the fourth cellar, third cellar, second cellar, first cellar, plaza level, promenade, cooling towers, paint shop, and main roof. Counsel also points out that the deposition testimony of all parties showed that there was an understanding between the Metropolitan Opera House and Lincoln Center that the escalator in question was the Met's obligation to maintain. Thus, counsel argues that the defendant has now sustained its burden of demonstrating that Lincoln Center was an out-of-possession landlord with no duty to maintain the escalator.

In opposition, plaintiff's counsel, Jay J. Masssaro, Esq. argues that the defendant, although submitting certain portions from the lease that were omitted from the original motion, failed to adequately explain or set forth a justifiable reason for its failure to produce the exhibits to the lease as part of its original motion other than merely stating that the documents have recently come into counsel's possession. Secondly, plaintiff argues that the newly submitted evidence is not sufficient to change the prior determination as there is insufficient proof that the newly submitted documents are part of the lease in question and, moreover, the attachments are generally illegible except for the annotations inserted on the diagrams by Ms. Chang, Lincoln Center's counsel.

Counsel for defendant, Thyssenkrupp Elevator Corporation, also submits opposition stating that Lincoln Center should not be permitted to submit new evidence without providing reasonable justification for not submitting the evidence earlier (citing Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636 [2d Dept. 2000]; Greene v. N.Y. City Hous. Auth., 283 A.D.2d 458 [2d Dept. 2001]). In addition, Thyssenkrupp asserts that there is no concrete evidence that the documents submitted on the instant motion which are not signed, dated or otherwise identified, are those intended to be part of the original lease. Counsel further asserts that the new exhibits do not demonstrate, as a matter of law, that the subject escalator is not within the

areas over which Lincoln Center maintains control.

Upon review and consideration of defendant Metropolitan Opera's motion to reargue, plaintiff and co-defendant's affirmations in opposition and defendant's reply thereto, this court finds that the motion by Lincoln Center to renew and reargue the prior motion and decision of this court dated March 12, 2013 is granted, and upon reargument the prior determination of this court is adhered to in its entirety.

A motion for leave to renew "shall be based on new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; see Empire State Conglomerates v. Mahbur, 105 AD3d 898 [2d Dept. 2013][while a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance]; Wells Fargo Bank, N.A. v Russell, 101 AD3d 860[2d Dept. 2012]; Yerushalmi v Yerushalmi, 82 AD3d 1217[2d Dept. 2011]; Matter of Leyberman v Leyberman, 43 AD3d 925 [2d Dept. 2007]). Here, this court finds that the moving defendant has failed to present a reasonable justification for not submitting the entire lease when filing its summary judgment motion. "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Matter of Catherine V.D. [Rochel G.], 100 AD3d 992 [2d Dept. 2012] quoting Worrell v Parkway Estates, LLC, 43 AD3d 436 [2d Dept. 2009]). Although the defendant had portions of the lease in its possession at the time it filed the motion defendant has not provided a reasonable explanation as to why the balance of the lease containing the relevant exhibits was not submitted other than merely stating that counsel did not have the document at that time and they recently obtained it. There is no statement as to whether the document was in the possession of their client when the motion was brought.

In any event, this court finds that the newly submitted exhibits do not clearly demonstrate, as a matter of law, that the escalator in question is not part of the areas set forth in the lease as being under the control of Lincoln Center. Pursuant to the lease, Lincoln Center maintained control over, inter alia, the fourth cellar, third cellar, second cellar, first cellar, plaza level and promenade. As the diagrams submitted are not completely legible, the evidence still does not eliminate all questions of fact as to whether the escalator in question is

included within the areas specified or within the easements or public areas of the Metropolitan Opera House.

Dated: June 28, 2013  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**