Hussey v Hilton Worldwide, Inc.
2016 NY Slip Op 30475(U)
February 4, 2016
Supreme Court, Queens County
Docket Number: 704864/2014
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

HELEN HUSSEY,

Plaintiff,

- against -

HILTON WORLDWIDE, INC. and OTIS ELEVATOR COMPANY,

Defendant.

- x

Index No.: 704864/2014

Motion Date: 1/25/16

Motion No.: 103 & 104

Motion Seq.: **3 & 4**

The following papers numbered 1 to 16 read on this motion (seq. no. 3) by defendant OTIS ELEVATOR COMPANY and on this motion (seq. no. 4) by defendant HILTON WORLDWIDE, INC. for an order pursuant to CPLR 3212 granting summary judgment and dismissing plaintiff's complaint as against both defendants:

	Papers Numbered
Notice of Motion(seq. no. 3)-Affirmation-Exhibits.....	1 - 4
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Affirmation in Opposition-Affidavit-Exhibits.....	9 - 12
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This is an action to recover for personal injuries that plaintiff allegedly sustained on September 17, 2013, on the premises known as New York Hilton Midtown located at 1335 Avenue of the Americas, New York, NY 10019. Plaintiff alleges that the elevator doors closed on her head as she was stepping out of the elevator on the second floor. Hilton Worldwide Inc. (Hilton) owned and operated the subject premises and Otis Elevator Company (Otis) had a contract to service the elevators.

Plaintiff commenced this action on July 14, 2014 by filing a summons and complaint. Otis interposed an answer on August 13, 2014. Hilton interposed an answer on August 28, 2014. Both defendants now seek summary judgment on the grounds that the elevator did not malfunction and neither defendant was negligent.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

In support of the motion, defendants submit attorney affirmations from Diane R. Silvergleid, Esq.; a copy of the pleadings; a copy of plaintiff's bill of particulars; a copy of the note of issue; copies of the transcripts of the examinations before trial of plaintiff taken on January 26, 2015, Winston Matthias, a security officer for Hilton, taken on March 2, 2015, and Vincent Colon, an elevator mechanic, taken on May 29, 2015; a photograph of the button panel in the subject elevator; a video of the incident; and the expert affidavit of Nickolas Ribaudo dated October 14, 2015.

Plaintiff testified that she entered an elevator on the second floor and pressed "S" on the button panel for sub-basement. She did not know whether the button panel had the door open and door close buttons. She had never noticed the door open and door close buttons and never used them in the past. After pushing "S", she remained standing near the button panel. The elevator doors did not close after a period of time, so she concluded that the elevator was not working. She started to walk out of the elevator and the doors closed as she took a step out, and hit her in the head.

At his deposition, Mr. Matthias testified that he was notified of the incident shortly after it happened. He confirmed that the elevator was for employee use only. He testified that the doors were programmed with a closing delay because the elevator was used for freight, and thus, the doors were kept open long enough for employees to have sufficient time to wheel things in and out. He knew that the doors would remain open for approximately 19-20 seconds before starting to close. If a passenger pushed the door close button, however, the doors would close sooner. After the incident, he checked the elevator, and it operated properly. He never received any prior complaints regarding the subject elevator.

Mr. Colon testified that he was responsible for maintaining the Lambda 3D electronic detector in the elevator, and he checked it daily. He acknowledged that it is still possible for properly functioning doors to make contact with a passenger because the door travels an inch or so before it stops when something blocks the edge. He checked the elevator after the subject incident, but did not make any repairs or adjustments.

Defendants also submit the expert affidavit of Nickolas Ribaudo. Mr. Ribaudo affirms that the doors on the subject elevator were programmed to remain open for approximately 20 seconds. Passengers could over-ride the delay by pressing the door-close button. He reviewed the video of the incident, and concluded that there was no question that the door-close button was operating properly to override the closing delay because about six minutes before the incident, another passenger used the door-close button and it worked. He states that the fact that the doors did reverse establishes that the detector was working properly. He also states that due to the inertia of the doors, the doors simply did not have time to stop and reverse direction before making contact with plaintiff. He found no record of any violation issued by the Department of Buildings (DOB) regarding the operation of the detector or door closing speed or force. He also reviewed Otis' records and maintenance procedures for six months prior to the date of the incident. He found that there were no problems or complaints that the doors on the subject elevator were striking people or regarding the length of time the doors remained open or the speed at which they closed. He opines that the elevator did not malfunction in any way at the time of plaintiff's incident, and that the incident was entirely due to plaintiff's inattention as she started to exit the elevator. He concludes that the incident was not due to any negligence or fault on either defendants' part.

Based on the above deposition testimony, defendants contend that there is no evidence establishing or creating an issue of fact as to whether the elevator malfunctioned, whether defendants were negligent in maintaining the elevator, or whether defendant had either actual or constructive notice of previous incidents regarding the subject elevator's doors.

In opposition, plaintiff submits an affirmation from counsel, Stephanie Campbell, Esq. contending that the dectector malfunctioned as the doors made contact with the side of plaintiff's head rather than the front of her head.

Plaintiff submits the expert affidavit of Patrick Carrajat affirming that a signal from the detector was not received by one or more of the components that must be energized or de-energized to set the elevator door in reversal motion, and that such malfunction caused the failure of the elevator door to stop and continue to close on plaintiff. He states that a loose connection or carbonization of the contacts, which defendants failed to maintain and repair, caused the incident. Mr. Carrajat also reviewed the DOB's records and found that there were violating conditions.

Mr. Ribaudo submitted an affidavit in reply to Mr. Carrajat's affidavit. Mr. Ribaudo contends that Mr. Carrajat's explanation regarding the Lambda detector is incorrect. He also states that the DOB records attached to Mr. Carrajat's affidavit are for the wrong elevator.

"The failure of the elevator . . . must be shown . . . to have been due to some specific cause which in the exercise of reasonable care of the defendant should have been found and corrected" (Koch v Otis El. Co., 10 AD2d 464, 467 [1st Dept. 1960]). "An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (Rogers v Dorchester Assoc., 32 NY2d 553, 559 [1973]). An inference of negligent inspection and repair in the maintenance of an elevator may be drawn from evidence that the elevator doors previously malfunctioned (see Fanelli v Otis El. Co., 278 AD2d 362 [2000]; Liebman v Otis El. Co., 127 AD2d 745 [2d Dept. 1987]).

Here, defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidence establishing that they did not have actual or constructive notice of any defect in the elevator that would cause the doors to close too soon or too fast (see Tucci v Starrett City, Inc., 97 AD3d 811 [2d Dept. 2012]).

In opposition, Mr. Carrajat's affidavit is conclusory and factually unsupported, and thus, fails to raise an issue of fact (see Kleinberg v City of New York, 27 AD3d 3178 [2d Dept. 2006]; Karian v G & L Realty, LLC, 32 AD3d 261 [1st Dept. 2006]). Although Mr. Carrajat states that defendants failed to perform proper routine maintenance on the subject elevator, he fails to support such contention. Moreover, it appears Mr. Carrajat never viewed the video of plaintiff's incident.

Additionally, contact with the elevator doors alone does not establish defendants' negligence as the mere happening of an incident, in and of itself, does not establish the liability of a defendant (see Scavelli v Town of Carmel, 131 AD3d 688 [2d Dept. 2015]; Foley v Golub Corp. 252 AD2d 905 [3d Dept. 1998]; Lewis v Metropolitan Transp. Auth., 99 AD2d 246 [1st Dept. 1984]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment granted, plaintiff's complaint is dismissed, and the Clerk of Court is authorized to enter judgment accordingly.

Dated: February 4, 2016
Long Island City, NY

ROBERT J. McDONALD
J.S.C.