Ciotti v HMC Times Sq. Hotel, LP
2021 NY Slip Op 30942(U)
March 26, 2021
Supreme Court, New York County
Docket Number: 162312/2014
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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INDEX NO. 162312/2014

JEFFREY CIOTTI and ROBIN BURKEE,

Plaintiffs,

MOTION SEQ. NO. 005

- v -

HMC TIMES SQUARE HOTEL, LP and SCHINDLER ELEVATOR CORPORATION,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by Jeffrey Ciotti ("Ciotti") and Robin Burkee ("Burkee") (collectively "plaintiffs"), defendants HMC Times Square Hotel, L.P. ("HMC") and Schindler Elevator Corporation ("SEC") (collectively "defendants") move, pursuant to CPLR 3211(a)(7) and 3212, to dismiss the complaint, along with such other relief as this Court deems just and proper. Plaintiffs oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on July 19, 2014,[1] in which plaintiffs, a husband and wife, were allegedly injured when an escalator on which they were riding came to a sudden stop. Doc. 1. The escalator, which was serviced by SEC, was located between the fourth and fifth

[1] Although the plaintiffs allege in their complaint and bill of particulars that the accident occurred on July 9, 2014 (Docs. 1 and 12, respectively), they testified at their depositions, and an incident report (Doc. 124) confirms, that it occurred on July 19, 2014. Doc. 118 at 67; Doc. 119 at 37.

floors of the Marriot Marquis Hotel ("the hotel") located at 1535-1537 Broadway in Manhattan. Id. The hotel was owned by defendant HMC and managed by Marriott International Inc. ("MI").

Plaintiffs commenced the captioned action by filing a summons and verified complaint on December 12, 2014, alleging that they were injured due to the negligence of HMC and SEC in their operation, control, and maintenance of the escalator. Id.

Defendants joined issue by their verified answer filed April 14, 2015. Doc. 3.

In their bill of particulars, plaintiffs reiterated their allegations that they were injured when an escalator in the hotel stopped suddenly and that the incident was caused by the negligence of the defendants. Doc. 12. They further asserted that the defendants were liable pursuant to the doctrine of *res ipsa loquitur*. Id.

At his deposition, Ciotti testified that he and Burkee, who were traveling on a downward escalator, were holding onto the handrail when it stopped suddenly and that, although the stop caused their bodies to move forward and to the right, neither of them fell. Doc. 119 at 47-56. At the time of the incident, Burkee was in front of him and other people were behind him on the escalator. Id. at 52.

Burkee testified that she was holding the handrail and that others were on the escalator at the time of the incident. Doc. 118 at 19-20. She recalled that, when the escalator stopped, her "right foot went down on the step and [she] flailed to the side, both [of her] knees hit the side [of the escalator], [and her] back and hip and [her] hand twisted sideways". Id. at 21, 45-47.

At their depositions, the plaintiffs confirmed that a hotel security video accurately depicted the escalator stopping. Doc. 118 at 15-16; Doc. 119 at 67.

Lou Canton, SEC's service foreman for the hotel, testified that preventive maintenance was performed on the escalator several times per month. Doc. 120 at 18-19, 36. Canton

represented that the escalators at the hotel occasionally shut down when passengers triggered their skirt switches or when kids in the hotel hit the stop switch. Doc. 120 at 27. He could not recall any service call made for the escalator because it stopped suddenly. Doc. 120 at 36. Nor was he aware of any prior accidents occurring on the escalator. Id. at 55. Although Canton acknowledged that SEC's repair log (Doc. 126) reflected that the escalator was shut down on June 8, 2014, approximately one month before the alleged incident, he did not know why it stopped running or if any work was performed on the escalator at that time. Id. at 52-53, Doc. 126. Canton also testified that SEC did not maintain the escalators at off hours or on weekends and that, if work was needed at those times, a service call needed to be made. Doc. 120 at 30.

Scott Henyan, a former SEC employee who worked at the hotel as a mechanic for SEC during 2014, was not aware of any instances in which the escalator stopped with people on it. Doc. 121 at 5-6, 18.

A Marriott "Guest Accident/Illness Report" dated July 19, 2014 reflects, inter alia, that, while plaintiffs were on an escalator going from the 5th to the 4th floor of the hotel, the escalator stopped abruptly. Doc. 124.

Plaintiffs filed a note of issue on February 7, 2020 (Doc. 93) and now defendants move, pursuant to CPLR 3211(a)(7) and 3212, to dismiss the complaint. Doc. 112. In support of the motion, HMC argues that it is entitled to dismissal of the complaint since it is an out-of-possession landlord and did not own, manage or operate the hotel or have notice of any defect in the escalator. Doc. 113. Additionally, urges HMC, there is no evidence that the incident was caused by negligence or even a malfunction of the escalator, and that *res ipsa loquitur* does not apply herein. Id.

SEC argues that, although it had a contract to maintain the escalator, the machine passed an annual inspection conducted by the New York City Department of Buildings ("DOB") five days prior to the incident. Doc. 113. Thus, maintains SEC, the escalator was operating properly, it had no notice of any problem with the escalator, and it is entitled to summary judgment dismissing the claims against it. SEC further asserts that, in an affidavit in support of the motion, its elevator expert, Jon Halpern, a licensed engineer and elevator and escalator expert, opines, inter alia, that the "unexpected stop" of the escalator "most likely" occurred when "an unidentified passenger [caught] the heel of her right shoe between the right side of a step [on the escalator] and the skirt [of the escalator]." Doc. 114 at 3.

Defendants further assert that the doctrine of *res ipsa loquitur* is inapplicable to the facts of this case since neither SEC nor HMC had exclusive control over the escalator.

In an affidavit in support of the motion, Halpern attests that there is no evidence in SEC's records reflecting that there were any prior problems with the escalator skirt switches which, he opines, were triggered and caused the escalator to stop. Doc. 115 at pars. 7-9, 12. The skirt switches were designed to be triggered if they sensed an object between a step on the escalator and the skirt which could be drawn into the combplate at the top or bottom of the escalator. Id.[2] Halpern states that, at 5:25:28 on the hotel security video, he could observe a passenger on the escalator triggering the right upper skirt switch when the heel of her right shoe became trapped between the right side of the step and the skirt. Id. at pars. 7-9. Halpern further attests that, on July 14, 2014, just 5 days before the alleged incident, the subject escalator passed a Category 1 inspection performed by the DOB, which included testing of the escalator's safety devices,

[2] The skirt panel of an escalator is a vertical panel of the balustrade located on both sides of the steps with a specifically authorized distance from them along the entire length of the escalator.

including the skirt switch, thus "indicating the escalator was properly maintained and safe to operate." Id. at par. 13.

Halpern concluded, to a reasonable degree of engineering certainty, that, among other things: the escalator was safely maintained and code compliant; the incident occurred due to the activation of the skirt switch; the escalator had signs warning passengers to avoid the sides; and defendants were not on notice of any problem with the escalator. Id. at par. 14.

HMC also submits an affidavit of Daniel Nadeau, a general manager for MI, in support of the motion. Nadeau represents that MI managed and operated the hotel pursuant to an agreement with HMC ("the management agreement") which was in effect as of the date of the incident and which rendered MI responsible for all maintenance and repairs to the hotel. Doc. 116 at par. 5; Ex. A to Doc. 116. He further states that HMC was a landlord out-of-possession which exercised no involvement in the operation of the hotel. Id. He authenticated the management agreement between HMC and MI[3] as well as the "Elevator/Escalator Maintenance Property Level Agreement" ("the service agreement") between MI and SEC dated May 1, 2013. Docs. 116, 123.[4]

In opposition, the plaintiffs argue that the motion must be denied because the defendants failed to establish their prima facie entitlement to summary judgment. Doc. 131. Specifically, they assert that the defendants failed to establish that they did not have actual or constructive notice of an ongoing issue with the escalator stopping. Id. at par. 29. Alternatively, the plaintiffs argue that, if the defendants did establish their prima facie entitlement to summary judgment,

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[3] Paragraph 8.01(A) of the management agreement required MI to "maintain the [h]otel in good repair and condition" and to "make or cause to be made . . . routine and preventive maintenance, repairs and minor alterations . . . as it deemed necessary. Doc. 116. Paragraph 11.04 of the management agreement allowed HMC "access to the [h]otel at any and all reasonable times for the purpose of inspection . . ." Id.
[4] The service agreement between MI and SEC required that SEC provide preventive maintenance and make certain repairs required by the said agreement. Doc. 125.

then they (the plaintiffs) have raised issues of fact warranting denial of the motion. Id. They further maintain that the defendants have not established as a matter of law that the doctrine of *res ipsa loquitur* does not apply herein since their elevator and escalator expert, Patrick Carrajat, who submits an affidavit in opposition to the motion, opines that the escalator would not have stopped suddenly in the absence of negligence. Id. at par. 35.

Carrajat further states that, although SEC has provided records relating to repairs on the escalator, it does not contain records of any preventive maintenance to the machine. Id. He also represents that, contrary to Halpern's opinion, the videotaped footage of the accident "does not show any entrapment between the step and the adjacent skirt panel." Doc. 131 at par. 15. Additionally, insists Carrajat, the installation of a device on the escalator known as a deflector brush or brush guard would have prevented the skirt switch from activating. Id. at par. 18.

In reply, the defendants argue that the complaint must be dismissed since the escalator passed a DOB inspection on July 14, 2014, just 5 days prior to the incident. Doc. 136. They further assert that they did not violate any code or regulation in failing to install guard brushes since, if they had committed such a violation, the escalator would not have passed the DOB inspection. Id. Additionally, the defendants insist that *res ipsa loquitur* is not applicable herein since neither of them had exclusive control of the escalator. Id.

LEGAL CONCLUSIONS

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

<u>HMC</u>

> It is well settled that "[a] landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision"

(*Malloy v Friedland*, 77 AD3d 583, 583 [1st Dept 2010] [citation omitted]).

HMC has established its prima facie entitlement to summary judgment by submitting, inter alia, the affidavits of Nadeau and Halpern, the testimony of Canton, the management agreement, videotape of the alleged incident, and proof that the escalator passed a DOB inspection on July 14, 2014. Nadeau attests that the management agreement obligated MI to manage the hotel and that HMC had no involvement in operating the same. The management agreement also reflects that MI was responsible for maintenance of the hotel, although HMC had the right to enter the hotel for the purpose of inspecting it. The DOB inspection report confirms that the escalator was in proper working condition as of July 14, 2014, 5 days before the alleged incident. Additionally, Canton testified that he was not aware of any prior occasions on which the escalator stopped suddenly. Finally, Halpern, relying on the DOB inspection, opines that the escalator was operating properly 5 days before the incident.

In opposition to the motion, Carrajat opines that the accident could have been prevented had there been a brush guard or deflector brush installed on the escalator, but fails to cite any statute requiring that such a guard be installed. Since the absence of such a device "was not a

structural or design defect that violated a specific statutory provision, [HMC] cannot be held liable for plaintiff[s'] injuries" and "[w]hether or not [HMC] had notice of the [alleged] defect is immaterial." (*Ortiz v CEMD El. Corp.*, 123 AD3d 463, 463 [1st Dept 2014] [citation omitted]).

Nor does the doctrine of *res ipsa loquitur* apply to HMC. In order to invoke this doctrine, the plaintiff must establish: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." (*Morejon v Rais Constr. Co.*, 7 NY3d 203, at 209 [citations omitted]). Here, Canton testified that escalators in the hotel occasionally stopped when kids pushed the stop buttons on them. Thus, it is possible that the occurrence was not attributable to someone's negligence (*See Fasano v Euclid Hall Assoc.*, L.P., 136 AD3d 478, 479 [1st Dept 2016] [citation omitted]). Additionally, since the escalator was located in an large and busy hotel in midtown Manhattan, the plaintiffs have failed to demonstrate that it was in the exclusive control of HMC (*See Ebanks v New York City Transit Authority,* 70 NY2d 621, 623 [1987]; *Bunn v City of New York*, 180 AD3d 550, 551 [1st Dept 2020] [citations omitted]; *Parris v Port of New York Auth.*, 47 AD3d 460, 460-61 [1st Dept 2008]).

SEC

SEC has established its prima facie entitlement to judgment as a matter of law by demonstrating that the escalator was regularly inspected and maintained, and that it did not have actual or constructive notice of a prior similar incident or recurring condition that would have caused the escalator to stop suddenly (*Parris v Port of New York Auth.*, 47 AD3d at 460-61).

In opposition, the plaintiffs fail to raise a triable issue of fact. In attempting to do so, the plaintiffs rely on the affidavit of Carrajat who opines, contrary to Halpern, that the videotape of the incident does not reflect that a woman's shoe triggered the skirt switch. Although these expert opinions undoubtedly conflict, the contradiction does not give rise to a material issue of fact (*Alvarez*, 68 NY2d at 324), and SEC is nevertheless entitled to summary judgment since the question of whether the skirt switch was triggered is irrelevant to the issue of whether SEC was negligent (*See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978] [irrelevant allegations do not suffice to defeat a motion for summary judgment]).[5]

Further, SEC is not be liable pursuant to the doctrine of *res ipsa loquitur* because the escalator was not within its exclusive control (*See Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *Ebanks v New York City Transit Authority,* 70 NY2d at 623; *Bunn v City of New York*, 180 AD3d at 551; *Parris v Port of New York Auth.*, 47 AD3d at 460-61). The service agreement clearly did not vest SEC with total responsibility for the daily operation, repair, and maintenance of the escalator (*Cf. Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 162 [1st Dept 2015]). Specifically, Canton testified that SEC did not maintain the escalators during off hours or on weekends and that, if work was needed at those times, a service call needed to be made. Finally, as discussed above in connection with HMC, the doctrine does not apply since, according to Canton, the escalator could have stopped for reasons unrelated to possible negligence by SEC, such as kids pressing the stop switch on the machine.

In support of that branch of the motion seeking dismissal as against SEC, the defendants correctly rely on *Isaac v 1515 Macombs, LLC*, 84 AD3d 457 (1st Dept 2011), *lv denied* 17 NY3d

[5] To the extent Carrajat contends that SEC is not entitled to dismissal because it (SEC) failed to provide records of the preventive maintenance it performed, this Court deems the argument to be without merit, since the records were submitted in support of the motion. Ex. A to Doc. 127.

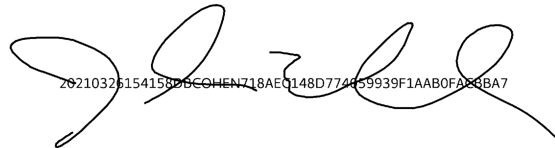
708 (2011), in which case the Appellate Division, First Department held that plaintiff failed to raise an issue of fact regarding whether defendants had actual or constructive notice of any defective condition concerning misleveling of an elevator during the few days which elapsed between the time it passed inspection but prior to the time of the accident in which plaintiff was allegedly injured by the device.

Given the findings above, this Court need not address whether the complaint should be dismissed pursuant to CPLR 3211(a)(7).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendants HMC Times Square Hotel, L.P. and Schindler Elevator Corporation is granted in all respects, and the complaint is dismissed against them; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of said defendants dismissing the claims against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.



3/26/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐ OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐ REFERENCE