

Nelson v Bryant Park Hotel

2004 NY Slip Op 30050(U)

November 17, 2004

Supreme Court, New York County

Docket Number: 0107420/7420

Judge: Marylin G. Diamond

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND
Justice **PART 48**

THOMAS NELSON and DELLA NELSON,

Plaintiffs,

-against-

BRYANT PARK HOTEL et al.,

Defendants.

And Related Third-Party Action.

INDEX NO. 107420/02

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

FILED

NOV 23 2004

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 004-006 are consolidated herein for decision. This is a personal injury action arising out of an accident which occurred on May 23, 2001 while the plaintiff Thomas Nelson was a guest staying at the defendant Bryant Park Hotel, located on West 40th Street in Manhattan. The plaintiff alleges that when he finished showering in his room, he attempted to exit the stall by pushing the inside handle. When the door failed to open, he pushed the handle again and the glass exploded into tiny pieces, cutting him in various parts of his body and causing him serious injuries. He brings this action against the hotel and the related corporations which own and manage the premises (Philips Bryant Park, LLC and Philips International Holding Corp. [hereafter "Philips"]), the company which manufactured the shower door glass (Arch Aluminium & Glass Co., Inc.), the company which supplied the hinges which supported the door (Ketchum Company Reflexions) and the company which installed the shower door (Creative Living Enclosures, Inc. ["CLE"]). The plaintiff also sued Elite Lifestyles of Metro New York, a nonexistent entity. In motion sequence number 004, Arch has moved for summary judgment dismissing all claims against it. In motion sequence number 005 and motion sequence number 006, Ketchum and CLE have, respectively, brought their own summary judgment motions seeking dismissal of all claims which have been asserted against them.

Initially, the court notes that photographs of the accident scene in the bathroom were taken soon after the incident. However, at some point shortly thereafter, the broken glass was swept away. Moreover, since none of the parties has suggested that any components of the shower door were ever physically examined, the court assumes that these components were discarded prior to the commencement of this lawsuit.

As to Arch, it argues that there is no evidence that the glass exploded because of any inherent defect. It asserts that the glass was manufactured according to the specifications, dimensions and characteristics which were ordered by Philips's architect. It also asserts that the fact that the glass exploded into tiny fragments indicates that the glass was properly tempered.

In opposition to Arch's motion, Philips has submitted an affidavit from Eugene M. Negrin, an expert in the manufacture and installation of glass, who states that even though the glass may have been properly tempered, it could nevertheless have exploded if nickel sulfite was present in the glass. Mr. Negrin asserts that Arch failed to subject the glass to a "heat soak test" which could have ruled out this possibility.

Mr. Negrin's suggestion that the glass may have spontaneously exploded because of the presence of nickel sulfite is belied by the plaintiff's explanation of how the incident occurred. The glass did not spontaneously explode under normal operating conditions. Rather, the glass broke only after the door itself failed to open and plaintiff attempted to push it open a second time. Clearly, something was preventing the door from opening and whatever was doing so caused the glass to break when pressure, even mild pressure,

was applied to the door handle. Although it is entirely possible that there was a defect in the glass which caused it to be more fragile than it should have been, there is no direct evidence to support any such conclusion. It is true that New York has long recognized that circumstantial evidence may be used to prove that a product was defective. See *Speller v. Sears Roebuck and Co.*, 100 NY2d 38, 41 (2003). However, in order to establish a defect in the absence of direct evidence, a plaintiff must exclude all other causes for the product's failure that are not attributable to the manufacturer. *Id.* at 41. In view of plaintiff's allegation that the glass, pursuant to the architect's specifications, may have been too thin, that necessary washers may not have been placed between the glass and the door handle or that the hinge was not properly installed, it is clear that plaintiff is unable to exclude the possibility that the glass broke for some reason other than the presence of nickel sulfide.

Indeed, it is notable that plaintiff himself has not argued that the glass broke because of a defect which made it subject to a spontaneous explosion. Rather, he argues that the glass was not properly tempered so as to prevent large pieces of glass from remaining after the door broke and that, as a result, he was seriously cut. The plaintiff, however, testified at his deposition that when the door exploded, the glass immediately shattered into very small pieces, a clear indication that the glass had been properly tempered. Although plaintiff now contends that what he really meant to say was that he was struck by large pieces of glass which shattered into small pieces only after they hit the ground, that was not what he said at his deposition. He specifically stated that the glass shattered into "very tiny pieces from floor to ceiling immediately." It is well settled that a plaintiff cannot create an issue of fact by submitting a self-serving affidavit contradicting prior sworn testimony. See *Garcia v. New York City Industrial Development Agency*, 279 AD2d 328 (1st Dept 2001); *Kistoo v. City of New York*, 195 AD2d 403 (1st Dept 1993). Thus, there is no evidence that the glass was defectively manufactured.

In his affidavit, Mr. Negrin also suggests that Arch, which cut notches in the glass onto which the door hinges were attached, may have improperly done so because it never obtained the hinge manufacturer's specifications. This suggestion is purely speculative. There is no evidence that the hinge cuts which Arch made were improperly designed. Indeed, there is no evidence that CLE, which assembled the various door parts and then installed the door in the shower, has ever suggested that there was anything wrong with Arch's hinge cuts. Under the circumstances, the court is persuaded that there is no evidence that Arch was responsible for the incident which resulted in plaintiff's injuries and all claims against it must therefore be dismissed.

As to Ketchum, there is no evidence that its negligence was a proximate cause of the accident. As Ketchum points out, it merely supplied the hinges which were specifically ordered by Philips and CLE. Although Mr. Negrin states in his affidavit that the hinges should have been supplied with instructions and warnings, it is entirely speculative that the absence of such information contributed to the accident. Indeed, the court has not been referred to any deposition in which a witness testified about not having known how to install the hinges. Nor has any party cited a case in which the supplier of a simple part such as a door hinge has been held liable for having failed to provide the sort of basic warnings which Mr. Negrin has suggested should have been given.

In addition to the failure to provide instructions, the parties have suggested a number of other reasons for holding Ketchum liable for the plaintiff's accident, such as its failure to independently determine that the hinge which was ordered was the correct type of hinge for the door. No case, however, has been cited which places any such responsibility on the supplier of a product such as a mere hinge. In the absence of any evidence that the hinge itself was defective, the court is persuaded that all claims against the supplier should be dismissed.

Finally, as to CLE, it argues that it cannot be liable for negligence because it merely assembled and installed the shower door in accordance with the designs, specifications and instructions of the project manager. See, e.g., *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 (1924); *Horowitz v. Marel Electrical Services*, 271 AD2d 572 (2nd Dept 2000). However, it is well settled that such a legal exemption from liability only applies where the alleged defects were not so obvious as to put the installer on notice that it was constructing something likely to cause injury. See *Dear v. Falk*, 252 AD2d 961 (4th Dept 1998).

Here, there is a question of fact as to whether there were any defects in the door assembly which were sufficiently evident so as to put CLE on notice of a potentially dangerous condition. Indeed, CLE's vice-president, Theodosios Siskos, testified at his deposition that the hinge at issue was not suitable for the glass door which CLE was installing and that adjustments had to be made prior to installation. Although some adjustments were ultimately made, there is a factual issue about the extent of CLE's involvement in determining the procedure for doing so. In any event, there is also a question of fact as to whether washers or bushers were ever installed between the handle and glass door. In his affidavit, Mr. Negrin states that the absence of such parts may have caused the glass door to break. In view of these factual issues, CLE's motion for summary judgment must be denied.

Accordingly, in motion sequence numbers 004 and 005, the respective motions for summary judgment by Arch and Ketchum are granted and all claims asserted against them are hereby dismissed. In motion sequence number 006, CLE's motion for summary judgment is denied.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on December 14 at 2:30 p.m. to pick a trial date.

ENTER ORDER.

Dated: ¹⁷11/12/04

MGD
MARYLIN G. DIAMOND, J.S.C.
[X] NON-FINAL DISPOSITION

Check one: [] FINAL DISPOSITION

FILED
NOV 23 2004
NEW YORK
COUNTY CLERK'S OFFICE