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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. S. SOLOMON Justice PART 55

Index Number : 104417/2005
GUERRERO, FILADELFIA
VS
MANHATTAN PLAZA
Sequence Number : 006
AMEND SUPPLEMENT PLEADINGS

INDEX NO.
MOTION DATE 3/12/07
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

FILED
APR 30 2007
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-7
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided as follows:

Plaintiff Filadelfia Guerrero is an elderly resident of a rental building owned by defendant Manhattan Plaza, Inc. ("Owner"). She was injured when automatic sliding doors in the building lobby shut on her as she exited the building, causing serious injuries. Defendants On The Spot Maintenance, Inc. ("Maintenance"), Mackenzie Automatic Door, Inc. ("Mackenzie") and Owner each move for summary judgment dismissing the complaint. Plaintiff moves for leave to amend the pleadings to permit her to assert a res ipsa loquitur claim, and for summary judgment as to liability under the res ipsa theory. That branch of Maintenance's motion for indemnification on its cross-claim against Mackenzie is withdrawn.

Plaintiff has established that the defendants here had control over the door, and were responsible for its maintenance. Owner's employee was stationed in the lobby, and he had a switch that could open or close the door (There is no indication that he was operating the switch at the time of the accident). Owner had a contract with Maintenance, whereby Maintenance was responsible for daily inspection of the door, and to conduct bi-annual inspections. Maintenance entered into a contract with Mackenzie whereby it was fully responsible for maintenance. Under the

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Dated:

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

contract, Maintenance was obligated to call Mackenzie if a Maintenance employee observed a defective condition.

The door was equipped with a motion sensor. If a person was near the door, it should have remained open. There is no way that it could have closed on plaintiff while functioning properly, and there is no evidence that plaintiff's negligence in some way contributed to the accident.

There also is no evidence of actual or constructive notice of any defect before the accident, and no record that this door had ever malfunctioned before as it did on this occasion. At deposition, Mackenzie's witness, who has many years experience servicing automatic doors, testified that motion sensors have been to known to malfunction. After the incident, Owner's maintenance supervisor tested the doors by walking through them, and the door malfunctioned on one occasion by closing on him, just as it did with plaintiff. The door was removed and replaced three days later.

Generally, a claim for negligence will be dismissed if plaintiff cannot establish that defendant had notice of a defective condition. In rare circumstances, a plaintiff may survive a motion for summary judgment if she can establish that a jury should nevertheless hear the case under the doctrine of res ipsa loquitur. To establish res ipsa, plaintiff must show that the injury-causing event is of the sort that it does not happen without negligence; the injury-causing instrumentality was an agent or under the exclusive control of defendant; and it was not due to any voluntary action or contribution on plaintiff's part. Nesbit v NYCTA, 170 AD2d 92 (1st Dept 1991).

Here, there is no evidence that plaintiff's injury resulted in any way from her voluntary action or contribution. The door was serviced and replaced by defendants three days after the accident, showing control. See, Marszalkiewicz v Waterside Plaza, Inc., 35 AD3d 176 (1st Dept 2006). Unlike the facts presented in the case of Fetterly v Golub Corporation, 300 AD2d 1056 (4t Dept 2002), cited by defendants, where defendant was able to refute plaintiff's allegation that it had exclusive control of an automatic door, the facts here show that Owner's employee was present in the lobby and had a switch he could use to operate the door. Any suggestion that members of the public tampered with the door would be purely speculative, and not supported by the evidence. Cf, Dermatossian v NYCTA, 67 NY2d 219 (1986) (plaintiff unable to eliminate possibility that escalator was tampered by vandals where it was used by thousands of people a day).

The remaining question is whether the injury-causing event is one that does not occur absent negligence. In light of the undisputed description of the automatic door, and plaintiff's description of how the accident occurred, plaintiff has met her burden in this regard.

Defendants' motions for summary judgment are denied because a question of fact remains. Plaintiff has made a prima facie showing that her claim falls under the res ipsa doctrine, so that her motion to amend the pleadings to conform to the evidence and to assert her claim under the res ipsa doctrine is granted. However, summary judgment in favor of a plaintiff on liability is rarely granted on the basis of res ipsa loquitur, and the circumstantial proof is not so strong here that the "inference of defendants' negligence is inescapable." Morejon v Rais Constr. Co., 7 NY3d 203 (2006). Accordingly, it hereby is

ORDERED that defendants motions (sequence numbers 2, 3 and 5) for summary judgment are denied; and it further is

ORDERED that plaintiff's motion to amend the pleadings (sequence number 6) is granted, and she is permitted to assert a claim under the res ipsa loquitur doctrine; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on May 14, 2007 at 2 PM, of which notice is given by the courtesy copies hereof sent by my staff. Because plaintiff is entitled to a trial preference, counsel shall know witnesses identity and availability through July.

Dated: April 24, 2007

ENTER:

J.S.C

JANE S. SOLOMON