SCANNED ON 1/8/2008

[* 1]

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

PRESENT: MARTIN SHULMAN J.S.C. Justice PART 1

Index Number : 102071/2006
BAZNE, LUCKNER
VS.
PORT AUTHORITY OF NY AND NJ
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. 102071/06
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-P 1
Answering Affidavits — Exhibits A-I 2
Replying Affidavits 3

FILED
JAN 08 2008
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order. Motion to seal the instant motion papers (seq. 003) was previously denied by decision/order dated August 9, 2007 and entered August 16, 2007.

RECEIVED
JAN 7 2008
MOTION SUPPORT OFFICE

CASE DISP

Dated: JAN 3 2008

MARTIN SHULMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----------x

LUCKNER BAZNE and EDITH BAZNE,

Plaintiffs,

Index No: 102071/06

-against-

Decision and Order

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY and OTIS ELEVATOR COMPANY,

Defendants.

----------x

Hon. Martin Shulman, J.:

Defendants Port Authority of New York and New Jersey ("PA") and Otis Elevator Company ("OTIS")(collectively, "Defendants") move for summary judgment pursuant to CPLR §3212 dismissing this action plaintiffs Luckner Bazne ("Luckner") and Edith Bazne ("Edith") (collectively, "Plaintiffs" or "Baznes") initiated for their personal injuries sustained on August 22, 2005 (the "Accident Date"), when they fell down a PA Bus Terminal escalator which had abruptly stopped. Plaintiffs oppose the summary judgment motion.[1]

Brief Description of the Accident

On the Accident Date, at about 10:15 a.m., the Baznes were ascending on Escalator #13. It remains unclear if they shared the same step or if Edith was one step ahead of her husband. As plaintiffs jointly describe the situation, the escalator suddenly started shaking for a few seconds and abruptly stopped, causing the Baznes to tumble

[1] Prior to Defendants filing their summary judgment motion, Plaintiffs filed a motion for discovery sanctions against Defendants purportedly based upon spoliation of evidence which has been withdrawn.

backward injuring themselves. Edith did not recall seeing any person ahead of or behind Plaintiffs at the time of the accident.

Defendants' Motion

To support its summary judgment motion of dismissal, Defendants *inter alia* attach copies of OTIS's October 1997 service contract with the PA (*see* Contract BT-372M as Exhibit E to Summary Judgment Motion), a deposition transcript of Bernard D'Aleo, a PA Contract Administrator with a 13 year work history there (Exhibit K to Summary Judgment Motion), a deposition transcript and supporting affidavit of Vincent Orzo, an OTIS Foreperson at the PA for 6 years (who parenthetically has a 26 year work history at OTIS) (Exhibits L and P to Summary Judgment Motion), OTIS computer maintenance records for a three year period prior to the accident (Exhibit F to Summary Judgment Motion), OTIS Elevator Service Maintenance Forms from January to September 2005(Exhibit G to Summary Judgment Motion) and escalator fault finder diagram and legend, hand written mechanical sheet forms and additional OTIS computer records for the same preceding period (Exhibit H).

Relying on the foregoing, Defendants argue that: (1) OTIS fully complied with its contract obligations and exercised reasonable care when promoting a regular program of preventative maintenance; (2) to that end, OTIS inspects each escalator including Escalator #13 twice a month, complies with its contract obligations to maintain preventative maintenance records (admittedly without documenting "trouble calls") and timely resolves shutdowns and repairs; (3) prior to the Accident Date, OTIS, and for that matter the PA, had neither received any complaints about Escalator #13, nor observed this escalator ever abruptly stop when fully operational; (4) absent negligence, any of

the 51 fault finder/safety switches could have triggered a stoppage due to various actions (e.g., strong force against a side panel, debris or item caught on the handrail, jumping on a fall plate, sudden mechanical failure, rapid movement on the escalator stairs, etc.); (5) there is no evidence that Escalator #13 had a dangerous condition before the Accident Date; (6) there is no evidence that Defendants "created or had actual or constructive notice of any defect or condition . . ." (Alampi Aff. in Support of Summary Judgment Motion at ¶49) attributable to Escalator #13; (7) there is no evidence that Plaintiffs can point to as the cause for the alleged shaking movement and abrupt stop; and/or (8) there is no evidence that either Defendant had exclusive control of Escalator #13, implicating the doctrine of *res ipsa loquitur.*

Plaintiffs' Opposition

In opposition, Plaintiffs turn the court's attention to Item 10 of OTIS's service contract (Exhibit I to Del Pilar Ocasio-Douglas Opp. Aff. at p. M85) which states, in relevant part, that OTIS "shall maintain . . . [PA] provided service log books kept in a designated location for the Escalators . . . [OTIS] shall make the following entries upon each visit to the service equipment . . . [2.] Note purpose of visit, i.e., routine P.M. [preventative maintenance] or call back, repair, inspection, etc . . ." (bracketed matter added).

Plaintiffs then turn to Patrick A. Carrajat ("Carrajat"), a vertical transportation consultant and expert, who *inter alia* opined as follows (Exhibit H to Del Pilar Ocasio-Douglas Opp. Aff.):

- OTIS did not strictly adhere to its contractually required record-keeping concerning all its escalator maintenance activities including, but not limited to,

"equipment outage history" which would otherwise have rendered Plaintiffs' accident "both foreseeable and preventable" (*Id.*, at ¶¶10 and 14);

- Without any record of "trouble calls" or call backs, there is no paper trail illustratively verifying the possible malfunction of a fault finder or micro switch and OTIS's alleged inadequate maintenance and repair of this component which would likely have been the cause of the abrupt stoppage on the Accident Date (*Id.*, at ¶13);

- Absent such required record-keeping of "trouble calls," Defendants cannot possibly prove that no repairs were performed immediately prior and subsequent to the Accident Date (*Id.*, at ¶13); and

- The PA failed to properly conduct regular inspections, record their inspectorial findings and maintain such records, and their failure to do so presents material questions of fact as well as a real possibility that a defective component (e.g., fault finder switch, etc.) may have been the cause of the abrupt stoppage on the Accident Date (*Id.*, at ¶ 13).

In reply, Defendants restate their entitlement to summary judgment because: Plaintiffs have not shown that Defendants created or had actual or constructive notice of any defective condition pertaining to Escalator #13; Plaintiffs' expert's opinion raises speculative questions of fact and offers no credible mechanical explanation for how Plaintiffs' accident actually happened; and based upon undisputed facts, *res ipsa loquitur* is inapplicable.

DISCUSSION

Summary Judgment

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment

as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

Res Ipsa Loquitur

In *St. Paul Fire & Marine Ins. Co. v. City of New York*, 907 F.2d 299 (2d Cir., 1990), the Second Circuit Court of Appeals remarked that *res ipsa loquitur* "...is an often confused and often misused doctrine that enables a jury presented only with circumstantial evidence to infer negligence simply from the fact that an event happened [and that] since the time it was crafted by Baron Pollock in *Byrne v. Boadle*, 2 H. & C. 722 ... (1863), in which a now-legendary barrel of flour rolled out of a window, its use has expanded to cover a myriad of accidents and incidents." (*Id.* at 302).

For the doctrine of *res ipsa loquitur* to apply, the following prerequisites must be met: (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. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 655 N.Y.S.2d 844 (1997); *Corcoran v. Banner Super Market, Inc.*, 19 N.Y.2d 425, 280 N.Y.S.2d 385 (1967).

"The doctrine of *res ipsa loquitur* is not an arbitrary rule, but, rather, 'a formulation of a species of circumstantial evidence.' A condition precedent to its application requires requisite proof that the event, *inter alia*, was caused by an instrumentality within the exclusive control of defendant. While more than one defendant may be held liable under the doctrine in certain circumstances, it is nevertheless plaintiff's burden to establish the negligence of each of the defendants against whom the doctrine is sought to be invoked (internal citations omitted)." *Cooke v. Bernstein*, 45 A.D.2d 497, 499, 359 N.Y.S.2d 793, 795 (1st Dept., 1974). These essential elements must be established after the plaintiff has first demonstrated the nature of the instrumentality which caused the injury and its connection to the defendant to make out a prima facie case of negligence (internal citations omitted). *Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219, 227, 501 N.Y.S.2d 784, 788 (1986). If the evidence is capable of an interpretation equally consistent with the presence or absence of a wrongful act, that meaning must be given which accords with its absence. *Manley v. New York Tel. Co.*, 303 N.Y. 18, 26 (1951).

"In a *res ipsa* case, as in any other, the plaintiff must establish first and foremost the nature of the instrumentality which is alleged to have caused the injury. . . While the actual sequence of events may be established by inference, the circumstances must be such as to indicate negligence, and there must be more than mere speculation, guess or surmise . . . The mere fact that an accident has happened and that injury followed does not give rise to a presumption of negligence on the part of the one charged." *Manley, supra*, at 25.

Because Defendants have enumerated a number of potential causes for escalator stoppage directly resulting from public use (and which Carrajat does not dispute), Plaintiffs have "failed to establish control by [D]efendants 'of sufficient exclusivity to fairly rule out the chance that . . . [the abrupt stoppage of Escalator #13 was] caused by some agency other than [D]efendant[s'] negligence' . . ." (bracketed matter added). *Ebanks v. New York City Transit Authority*, 70 N.Y.2d 621, 623, 518 N.Y.S.2d 776, 777 (1987); *Marszalkiewicz v. Waterside Plaza, LLC*, 35 A.D.3d 176, 826 N.Y.S.2d 34 (1st Dept., 2006)(plaintiff failed to prove sliding door was in defendant's exclusive control); *see also*, *Wang v. Alexander's Dept. Store, Inc.*, 247 A.D.2d 467, 668 N.Y.S.2d 104 (2nd Dept., 1998). Accordingly, Defendants are entitled to summary judgment dismissing Plaintiffs' cause of action grounded on *res ipsa loquitur*.

No Material Issues of Fact

Here, Defendants have established their *prima facie* case. The burden of proof shifted to Plaintiffs to demonstrate by admissible evidence the existence of any factual issue requiring a trial. *Zuckerman, supra*; *see also*, *Desouter v. HRH Const. Corp.*, 216

A.D.2d 249, 628 N.Y.S.2d 691 (1st Dept., 1995). As set forth in *Spearmon, supra*: "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted]. *Id.*, 96 A.D.2d at 553. Mere conclusory allegations, expressions of hope, speculation or conjecture are not sufficient to resist summary judgment. *Zuckerman, supra.*

After searching the record, this court finds that Plaintiffs have failed to produce any competent evidence that Defendants created or had actual or constructive notice of a defective condition that may have purportedly caused Escalator #13 to abruptly stop and Plaintiffs' resulting accident. Any admitted gaps in recording call backs *inter alia* against a backdrop of corroborated bi-weekly inspections, a regular preventative maintenance program and no reported problems on Escalator #13 at least two weeks before and/or after the Accident Date do not "raise any triable issue of fact as to [D]efendant[s'] actual or constructive notice of . . . [any] alleged defect." (bracketed matter added). *Marszalkiewicz, supra*, 35 A.D.3d at 177, 826 N.Y.S.2d at 35. Plaintiffs' expert relies on record-keeping gaps about "trouble calls" to raise a specter of negligence, but without offering any factual basis to "counter the [D]efendants' prima facie showing that the . . . [escalator] functioned properly . . ." (*Hardy v. Lojan Realty Corp.*, 303 A.D.2d 457, 755 N.Y.S.2d 901, 902 (2nd Dept., 2003), and/or without mechanically explaining what happened on Escalator #13 on the Accident Date. Stated differently, Carrajat's opinion solely rests on some record-keeping gaps in Defendants'

escalator maintenance records to speculatively prove a negative and is "patently insufficient to meet the [P]laintiffs' burden . . ." (*Wang, supra*, 247 A.D.2d at 468, 668 N.Y.S.2d at 104); *see also, Seda v. Port Authority of New York and New Jersey*, 29 A.D.3d 305, 816 N.Y.S.2d 15 (1st Dept., 2006)(expert's statements found to be conclusory and unsupported by the record). Based upon the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is granted dismissing Plaintiffs' complaint in its entirety with prejudice. The Clerk shall enter a judgment accordingly.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
January 3, 2008

HON. MARTIN SHULMAN, J.S.C.