

Tate v Hampshire Hotel & Resorts LLC

2008 NY Slip Op 30312(U)

January 31, 2008

Supreme Court, New York County

Docket Number: 0113266/2004

Judge: Walter Tolub

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

PRESENT:

WALTER B. TOLIN

PART 15

Justice

Index Number : 113266/2004

TATE, MARLENE

vs.

HAMPSHIRE HOTEL & RESORTS

SEQUENCE NUMBER : # 002

SUMMARY JUDGMENT

INDEX NO.

113266-04

MOTION DATE

MOTION SEQ. NO.

#002

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum opinion.

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

FILED

FEB 05 2008

COUNTY CLERK'S OFFICE NEW YORK

Dated:

1/31/08

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REFERENCE

WALTER B. TOLIN

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
MARLENE TATE

Plaintiff,

Index No.
Mtn Seq.

-against-

HAMPSHIRE HOTEL & RESORTS LLC and
SURREY HOTEL ASSOCIATES, LLC

Defendants.

-----x
HAMPSHIRE HOTEL & RESORTS LLC and
SURREY HOTEL ASSOCIATES, LLC

Third-Party Plaintiffs

-against-

THE MARTACK CORPORATION,

Third-Party Defendant.

-----x
WALTER B. TOLUB, J.:

This action arises out of an incident which occurred at the Majestic Hotel in Manhattan (the "Hotel"), which is owned and operated by defendants/third-party plaintiffs (the "hotel defendants"). Plaintiff claims that on January 2, 2004, she was injured when she was struck on the head by a ventilation grate (the "grate") which fell from the hotel's heating and ventilation system. The grate, located just outside plaintiff's hotel room, was installed by third-party defendant The Martack Corporation (defendant "Martack") during the wide-scale 2003 renovation of the hotel. Those renovations were completed in December of 2003.

By this motion, defendants/third party plaintiffs Hampshire Hotel & Resorts LLC and Surrey Hotel Associates, LLC (the "Hotel Defendants") move for summary judgment and dismissal of plaintiff's complaint pursuant to CPLR 3212, predicated upon the claim that they lacked either actual or constructive notice of the claimed dangerous condition which resulted in plaintiff's accident. The hotel defendants further claim that the doctrine of *res ipsa loquitur* is inapplicable because they did not have exclusive control over the circumstances, i.e. the hotel renovations, leading up to plaintiff's accident. Plaintiff, in response, cross-moves for summary judgment under the claim that the doctrine of *res ipsa loquitur* is applicable.

Both motions are denied.

Application of the doctrine of *res ipsa loquitur* is warranted where a plaintiff establishes that the accident suffered (1) does not occur in the absence of negligence; (2) was caused by an agent or instrumentality within the exclusive control of the defendant; and (3) was not the result of plaintiff's actions (*Dermatossian v. New York City Transit Authority*, 67 NY2d 219, 226 [1986]). The doctrine "does not create a presumption in favor of plaintiff, but instead permits the inference of negligence to be drawn from the circumstance of the occurrence. The doctrine creates a prima facie case of negligence sufficient for submission to a jury, and the jury may,

but is not required to, draw the permissible inference" (Mejia v New York City Transit Authority, 291 AD2d 225 [1st Dept 2005]; Dermatossian 67 NY2d 219, 226 [1986]).

Although determination of the applicability of *res ipsa loquitur* is based on a three-pronged test, courts have routinely held that the requirement of demonstrating "exclusive control" over a situation is not a fixed rule. What is required, is a demonstration "that it is more likely than not that defendant caused the accident" (Mejia, 291 AD2d 225, 227; Rountree v. Manhattan & Bronx Surface Transit Operating Authority, 261 AD2d 324, 327 [1st Dept 1999], *lv denied*, 94 NY2d 754 [1999]; Nesbit v. New York City Transit Authority, 170 AD2d 92, 98 [1st Dept 1991]). Furthermore, "exclusive control" does not require that there be a single person responsible for the situation causing the damage (Schroeder v. City and Country Sav. Bank of Albany, 293 N.Y. 370, 374 [1944]; Stone v. Courtyard Management Corp., 353 F.3d 155 [2nd Cir 2003]).

Plaintiff's accident in the instant case, was called by a ventilation grate falling off of a wall. This is clearly the type of accident that does not does not ordinarily occur in the absence of some kind of negligence (see, Greenridge v. HRH Construction Corp., 279 AD2d 400 [1st Dept 2001]). According to the deposition testimony of the Harry Persaud, the hotel's engineer, the grate fell because it was not affixed to the wall:

[* 5]

A: [...] Then the first thing that I saw was the grating against the wall, the air conditioning grate leaning against the wall

Q: What did you do, if anything?

A: I looked for the screws. There was [sic] no screws, and I immediately called an engineer to come back to bring some screws so we could screw it back on.

Q: You said there were supposed to be six screws?

A: It is actually held with six screws.

Q: And you said none of them were there?

A: No, there were no screws on the floor.

Q: Were you able to determine why six screws were missing?

A: No.

Q: Was there any indication that six screws had ever been in the grille?

A: No.

(Deposition Transcript of Harry Persaud p. 31-32, Notice of Motion Exhibit F).

Contrary to the arguments advanced, the hotel defendants had a duty to maintain the hotel to ensure the reasonable safety of their patrons and guests (see, Stone, 353 F.3d 155; Jungjohann v. Hotel Buffalo, 5 AD2d 496 [4th Dept 1958]; Taieb v. Hilton Hotels Corp., 131 AD2d 257 [1st Dept 1987]). This obligation was not obviated when they hired third-party defendant Martak to perform renovations. More significantly, the fact that Martak performed renovations and may have been responsible for not properly installing the ventilation grate does not render the doctrine of *res ipsa loquitur* inapplicable as to either the Hotel defendants or third-party defendant Martak.

Having reviewed the record in this action, it is this

