

Robles v Kone Inc.

2008 NY Slip Op 32503(U)

September 3, 2008

Supreme Court, Nassau C ounty

Docket Number: 2345-07/

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

JASON ROBLES, Individually and as Father and
Natural Guardian of SOPHIA ROBLES, an infant
under the age of eight years.

Plaintiffs.

Sequence No.: 001 & 002
Index No.: 012345/07

- against -

KONE INC., J.C. PENNEY CORPORATION, INC.,
And SUNRISE MALL LLC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion and Affidavits Annexed</u>	X
<u>Notice of Cross-Motion and Affidavits Annexed</u>	X
<u>Answering Affidavits</u>	X
<u>Replying Affidavits</u>	X

Upon reading the papers submitted and due deliberation having been had herein, plaintiffs' motion for an order 1) compelling defendants to comply with plaintiffs' demands for discovery and inspection; or 2) directing that said demanded documents be produced for in-camera inspection by the court is granted in part and denied in part as set forth below. Defendants' cross-motion for a protective order pursuant to CPLR 3103 striking demands 9, 10, 11, 12, 13, 14 and 17 in plaintiffs' discovery demands is granted in part and denied in part.

The instant matter is based upon an accident which occurred on July 6, 2006 in which infant plaintiff Jason Robles suffered personal injuries on the escalator at the store operated by defendant J.C. Penney Corporation, Inc. (hereinafter "J.C. Penney") which was located at the property owned by defendant Sunrise Mall, LLC (hereinafter "Sunrise"). Defendant Kone, Inc. (hereinafter "Kone") installed and maintained the subject elevator.

Plaintiff alleges negligence against defendants based upon their alleged inspection, maintenance, repair and adjustment of the subject escalator. Plaintiff served a demand for discovery which sought, *inter alia*, the following:

1) records in defendant Kone's possession relative to "escalators of the same type as was involved in plaintiff's accident wherein a person became entrapped in [a] gap between the escalator stair and side plate [Parry v. Pyramid Crossgates Co., 158 A.D.2d 787]". (Demand 9);

2) records of all prior and subsequent accidents on the same escalator. (Demand 10);

3) records of repair and maintenance for a two year period prior to the accident. (Demand 11);

4) records of repair and maintenance for the six months following the accident specifically to determine the condition of the escalator at the time of the accident. (Demand 12);

5) modernization proposals or correspondence relating to the subject escalator from the its installation in 1973 until the date of the accident. (Demand 13);

6) copies of written communications and e-mails relating to the escalator for a two year period prior to the accident. (Demand 14); and

7) copies of inspection certificates or reports conducted by any government within two years prior to the accident. (Demand 17).

Defendant Kone objected to the specified demands that same were a) overly broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence (demands, 9, 11, 12, 13, 14, 17); b) the demand is not limited to the subject escalator (demands 9 and 11); c) the demand is not limited to the type of accident at issue herein (demand 10); and d) the demand is not limited in time (demand 13).

Plaintiff asserts that she is entitled to the records maintained by Kone relative to all accidents "concerning elevators of the same type" in which a rider was trapped in the gap between the stair and side plate as same goes to the issue of notice of a dangerous condition on Kone's part. Further, plaintiff argues that as set forth in relevant case law, the time frame for such records have gone back for the entire period that the specific model of escalator existed. See, Parry v. Pyramid Crossgates Co., 158 A.D.2d 787 (3rd Dep't 1990).

Plaintiff also claims to be entitled to records of all accidents, regardless of whether they are of the same nature as that in the instant action on the basis that it is plaintiff's position that if defendant Kone had examined this model of escalator on prior occasions, it presented an opportunity to discover the alleged dangerous condition, *i.e.*, the gap between step and side plate.

Plaintiff further contends that production of maintenance records for the two years preceding the accident (defendant Kone had agreed to produce same for one year prior) is reasonable and points out that courts have directed the production of said records for far longer periods of time.

Plaintiff further asserts that she is entitled to records relating to subsequent accidents on the subject escalator for purposes of demonstrating the condition of the escalator at the time of the accident. Plaintiff acknowledges that she will not introduce same for purposes of proving notice.

With regard to maintenance records for the six month period following the accident, plaintiff asserts she is entitled to same on the grounds that same are also relevant to the condition of the escalator at the time of the accident only.

The records of modernization proposals are relevant, asserts plaintiff, because same may demonstrate notice of the condition and failure on defendant's part to take steps to remedy same.

Lastly, plaintiff concedes that her demand for all correspondence and e-mails relating to the escalator are overbroad.

In opposition to plaintiff's motion and in support of their own motion, defendants assert that Kone should not be compelled to produce the documents demanded on the grounds that same are unduly burdensome and overbroad. Further, while records of subsequent accidents are admissible for purposes of demonstrating the existence of a dangerous condition, records of subsequent repairs to the alleged dangerous condition are inadmissible and therefore not discoverable.

Defendants urge the court that Kone only be required to disclose its records for a period of one year prior to the accident relating to the subject escalator. Also, defendants contend that plaintiff's demand relating to all prior and subsequent accidents is overbroad due to its lack of time constraints and is not limited to the specific type of accident. Further, defendants assert the demand for repair and maintenance records should be restricted to the alleged condition herein.

Concerning plaintiff's request for modernization proposals defendants contend that same are overbroad because they are not limited in time. Likewise, defendants claim that demands for letters relative to the escalator are not limited in time or to similar alleged problems with the escalator.

With regard to the demands for e-mails defendants assert that same are improper because it is unlimited in scope and any correspondence produced for purposes of litigation are undiscoverable.

Plaintiff may move to compel discovery pursuant to CPLR 3124.

First, the court finds that plaintiff is entitled to all records relative to accidents in which a rider on the same model escalator as that upon which plaintiff rode was injured between the escalator stair and side plate. Further, such records shall be provided for as long as the particular model was in service. See, Parry v. Pyramid Crossgates Co., 158 A.D.2d 787 (3rd Dep't 1990).

The court also finds that plaintiff is entitled to repair and maintenance records for the subject escalator for the two years preceding the accident. See, e.g., Klatz v. Armor Elevator Co., 93 A.D.2d 633 (2nd Dep't 1983).

Plaintiff's demand for records relating to all accidents that occurred prior to the subject accident is improper. While it is undisputed that records relating to prior accidents of a similar nature to plaintiff's are discoverable because they are relevant on the issue of notice, the court disagrees with plaintiff's position that accidents of a different nature are discoverable. Generally, the court will direct that discovery should be had where the materials sought are "material and necessary", that is, where their usefulness and reason require that they should be produced. See, Mitchell v. Stuart, 293 A.D.2d 905 (3rd Dep't 2002). In her moving papers plaintiff's attorney merely states that plaintiff is entitled to records relating to all accidents because plaintiff's case is partly based on defendant Kone's duty to notice the possible defect each time it was necessary to examine or inspect the escalator. No authority is cited for this position and, indeed the court views same as the essence of an overbroad request. Accordingly, defendants' cross-motion is granted to the extent that plaintiff's request for all prior accidents involving the subject escalator in demand 10 is struck and defendant Kone shall provide said discovery for accidents of a similar nature.

Both parties are in agreement that plaintiff is entitled to records of similar accidents that occurred subsequent to the subject accident. Plaintiff's motion is granted to that extent.

That branch of plaintiff's motion which seeks the production of maintenance records for the six month period following the accident is denied. Such records are not discoverable unless maintenance or control of the instrumentality is at issue. See, Angeronne v. City of New York, 237 A.D.2d 551 (2nd Dep't 1997); Steinel v. 131/93 Owners Corp., 240 A.D.2d 301 (1st Dep't 1997). Such is not the case here.

The court also finds modernization proposals from the time that the escalator was installed until the date of the accident to be relevant and discoverable. See, e.g., Fernandez v. Otis Elevator Co., 4 A.D.3d 69 (1st Dep't 2004); Samuel v. Braun Elevator Consultants, Inc., 204 A.D.2d 176 (1st Dep't 1994). Such proposals, however, are limited to those relating to the stair/side plate area of the subject escalator. See, Ianotta v. Tishman Speyer Properties, Inc., 46 A.D.3d 297 (1st Dep't 2007).

As plaintiff concedes that item 14 in her demands is overbroad, defendants' motion relative to this item is granted.

Lastly, as plaintiff does not at all address her demand for copies of government inspection records and, the court notes that in their response defendants indicate that such documents are not in defendants' possession, the court concludes that plaintiff is satisfied with this response.

Based upon the foregoing, it is directed that:

1) defendant Kone is to produce all records in its possession relative to accidents of the same nature as infant plaintiff's for all escalators of the same model as that on which plaintiff rode on the date of her accident;

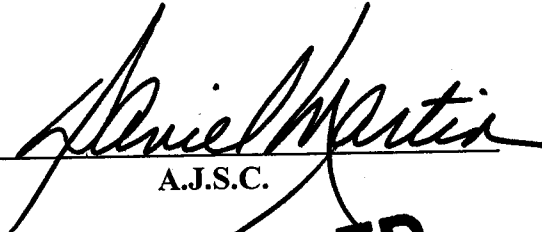
2) defendant Kone shall produce records relating to prior and subsequent accidents on the subject escalator of a similar nature to plaintiff's accident;

3) defendant Kone shall produce all documents in connection with maintenance and repair of the escalator for a two year period preceding the accident;

4) defendant Kone shall produce all modernization proposals for the subject escalator from the time of installation until the date of the accident; and

5) demands numbered 12 and 14 in plaintiff's demand for discovery are struck in their entirety.

So Ordered.


A.J.S.C.

Dated: September 3, 2008

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