

Palladino v Fifth Ave. 58/59 Acquisition Co. L.P.

2010 NY Slip Op 30243(U)

February 2, 2010

Supreme Court, New York County

Docket Number: 113820/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Index Number : 113820/2007
PALLADINO, RICHARD
vs.
FIFTH AVENUE 58/59
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 12/7/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in 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

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Fifth Avenue 58/59 Acquisition Co. L.P., Fifth Avenue 58/59 Acquisition Co. GP Corp., Fifth Avenue 58/59 Acquisition Co., LLC, Macklowe Management Co., Inc., Macklowe Management, LLC, Macklowe Properties, Inc., Macklowe Properties, LLC for summary judgment dismissing the plaintiffs' complaint and all cross and counter-claims as asserted against them, is denied; and it is further

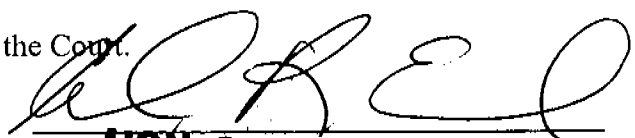
ORDERED that the motion by Plumb Door, (NY) Inc. and Plumb Door, Inc. for summary judgment dismissing the plaintiffs' complaint and all cross and counter-claims as asserted against them, is granted, and the complaint and all cross and counter-claims asserted against Plumb Door, (NY) Inc. and Plumb Door, Inc. are severed and dismissed; and it is further

ORDERED that Plumb Door, (NY) Inc. and Plumb Door, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 2/2/10


HON. CAROL EDMEAD 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 35

-----X
RICHARD PALLADINO and CARMELLA
PALLADINO,

Index No. 113820/07
Sequence 002 and 003

Plaintiffs,
-against-

FIFTH AVENUE 58/59 ACQUISITION CO. L.P.,
FIFTH AVENUE 58/59 ACQUISITION CO. GP CORP.,
FIFTH AVENUE 58/59 ACQUISITION CO., LLC,
MACKLOWE MANAGEMENT CO., INC.,
MACKLOWE MANAGEMENT, LLC, MACKLOWE
PROPERTIES, INC., MACKLOWE PROPERTIES, LLC,
PLUMB DOOR, (NY) INC. and PLUMB DOOR, INC.,

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, Fifth Avenue 58/59 Acquisition Co. L.P., Fifth Avenue 58/59 Acquisition Co. GP Corp., Fifth Avenue 58/59 Acquisition Co., LLC, Macklowe Management Co., Inc., Macklowe Management, LLC, Macklowe Properties, Inc., Macklowe Properties, LLC (collectively, "Macklowe") move and by separate motion, Plumb Door, (NY) Inc. ("Plumb Door NY") and Plumb Door, Inc. ("Plumb Door Inc.") (collectively, "Plumb Door") also move, for summary judgment dismissing the complaint of the plaintiffs Richard ("plaintiff") and Carmella Palladino and all cross and counter-claims as asserted against them.¹

Factual Background

According to plaintiff's Bill of Particulars, plaintiff was injured on March 10, 2005 at approximately 10:30 a.m. while entering the "swing doors at the Madison Avenue entrance" of the premises known as 767 Fifth Avenue, New York, New York (the "premises").

¹ The motion by Macklowe bearing sequence 003 and the motion by Plumb Door bearing sequence 002 are consolidated for joint disposition.

Macklowe now moves for summary judgment on the ground that plaintiff cannot make a *prima facie* case of negligence against Macklowe. Macklowe argues it did not create or have actual or constructive notice of the alleged defective condition that led to plaintiff's injury. There is no evidence that Macklowe was aware, or should have been aware of any problems with the subject doors prior to plaintiff's accident. There is also no evidence indicating that Macklowe created the alleged condition that led to plaintiff's injury.

Macklowe contends that at plaintiff's deposition, he testified that at the time of the accident, he was a construction supervisor for Ambassador Construction Corporation, which was the general contractor at a construction site at the premises. The construction project had begun at the end of February 2005, and plaintiff would visit that site three to five times a week, using the Madison Avenue entrance.

Plaintiff described the entrance to the premises as consisting of a revolving door, with a set of two swinging doors on either side of the revolving door. On the date of the accident, plaintiff entered the building through the swinging doors located on his right; the swinging doors were glass panels. He usually entered through the revolving door, but could not use that door on March 10, 2005 as it was being worked on by two men wearing "Plumb Door" uniforms. He did not recall what that work consisted of specifically; nor did he recall either man directing him away from the revolving door and to use the swinging door that he used.

As plaintiff opened one door on the right side of the revolving door and was going through the door, "it seemed like a gust of air hit the door, or whatever the case, pulled the door close[d], [and] caught me in the shoulder." Plaintiff then explained that there were "two swinging doors" that he entered through, and that one part of the door struck the front of his

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shoulder, and the "other part of the door" struck the back of his shoulder. It was a "very windy" day. As the plaintiff opened the door he recalled being struck by a gust of wind.

According to the plaintiff, during the weeks prior to his accident, he did not see anyone experiencing similar problems with these doors. Nor was he aware of any complaints about the manner in which the doors operated. Plaintiff testified that during the few weeks prior to the accident, he did not observe "Plumb Door" employees working on the swinging doors at any time prior to the accident.

According to the incident report prepared in response to plaintiff's report to security guards inside the premises, plaintiff was struck on the right shoulder by a "handicap door" as he entered the building, and that the "door closed too fast on" the plaintiff. Plaintiff sent a letter to Macklowe's building manager, Paul Gordon, wherein he states a "wind tunnel" caught the doors causing this injury. The letter reads as follows: ""While passing through these doors, a wind tunnel caught them and I got caught between the doors causing injury to the front and back of my shoulder." This was also stated in an incident report prepared for plaintiff's employer.

According to Macklowe's own records, *i.e.*, the invoice issued by Plumb Door, the work performed on March 10, 2005 by Plumb Door Inc. was on the north revolving door on Madison Avenue.

Macklowe contends that while plaintiff alleges that it was the failure to properly maintain the revolving door which led to this accident, it was not the revolving door which caused the plaintiff's injury. Additionally, with regard to the "swinging doors" which struck the plaintiff, there is no evidence that these doors were in any way dangerous or defective. By plaintiff's own admission, the wind (a force of nature that is not under the control of any of the defendants)

caused him to be caught between the doors. Therefore, based on the above, Macklowe argues that plaintiff cannot establish that Macklowe created or had actual or constructive notice of the condition which caused his injury.

In its motion, Plumb Door reiterates many of Macklowe's arguments, and adds that as to Plumb Door NY, the incorporation filing receipt regarding this defendant indicates that it was incorporated four months after the date of the accident. As such, Plumb Door NY has no liability with respect to this matter, and summary judgment should be granted in its favor.

As to Plumb Door Inc., it is argued that plaintiffs failed to provide any evidence imputing any negligence to Plumb Door Inc. It is undisputed that Plumb Door Inc. did not own the premises, and did not assume the building owners' duty of care *via* contract. According to Macklowe's Response to Plaintiff's Notice to Produce, there is no contract between Plumb Door NY or Plumb Door Inc. and any of the other defendants in this lawsuit. Thus, Plumb Door Inc. did not owe a duty of care to the plaintiff and the other elements of negligence cannot apply.

Further, there is also no evidence that Plumb Door Inc. caused or created any alleged defective condition at the subject swinging doors. The only records produced in this matter concerning Plumb Door Inc. relate to work performed on the revolving door at the premises on the day of the accident. There is no evidence to suggest that Plumb Door Inc. performed any work on the subject swinging doors prior to the accident. John A. Staub ("Staub") testified that he is employed as Manager of Engineering by Macklowe Management, the owner of the premises. Staub did not recall any construction work or repairs being done to the Madison Avenue doors in 2005. Staub was not aware of whether any other contractor's performed maintenance in 2005 on the subject swinging door or any of the other doors. Staub stated that

Plumb Door Inc. was "called in if there were any problems with any doors in the building" but was not aware of Plumb Door Inc. performing any work to the doors at the Madison Avenue doors in March 2005. Robert Magaraci ("Magaraci"), the owner of Plumb Door NY, and former salesman for Plumb Door Inc. in 2005, testified that in 2005, Macklowe would call Plumb Door Inc. for repairs to the premises. Plumb Door Inc. has since gone bankrupt.

There is no evidence to show notice on the part of Plumb Door Inc. any alleged defective condition concerning the subject swinging doors. In addition, there were no prior accidents concerning the doors at the Madison Avenue entrance and no evidence of any prior defect. Staub was not aware of any accidents involving the doors of the building at the Madison Avenue entrance prior to the accident which is the subject of this lawsuit.

Moreover, plaintiff has not testified that the subject swinging door was in any way defective. Plaintiff testified that his accident resulted from a door hitting his shoulder because of a gust of wind. A "very windy" day is the proximate cause of his accident and is not actionable.

Thus, as plaintiff cannot show that Plumb Door Inc. created or had actual or constructive notice of the existence of the allegedly dangerous condition that caused his accident, summary judgment is appropriate.

In opposition, plaintiffs argue that defendants' motion papers are insufficient, in that defendants failed to provide an affidavit from the individuals who were deposed, any current officer or employee or anyone with personal knowledge of this matter or of the policies and procedures in place. In their supporting Affirmations, defendants' counsel does not claim to have any personal knowledge of any of the underlying events, and as such, are insufficient to support their motion. And, defendants may not submit any factual affidavits in reply.

Further, plaintiffs contend that defendants failed to meet their burden of showing no actual or constructive notice. Plaintiffs contend that Macklowe had prior knowledge that the Madison Avenue entrance to the premises was being used by the public to enter and exit the building. Therefore, Macklowe had a non-delegable duty to provide the public with a safe means of ingress and egress. Staub testified that he was unsure if there was any mechanical problems with the electrical door on Madison Avenue, prior to the plaintiffs accident. Staub also testified that it was not part of his job responsibilities to inspect the doors of the premises, but inspections were done by his superiors. However, he could not say with what frequency they would be done or if any reports were generated as a result of those inspections. Staub further testified that he was unsure if any work was being done on the Madison Avenue doors on the day of the plaintiff's accident. Staub stated that if work had been done by Plumb Door in 2005, his superiors would have inspected it.

Plaintiffs, in their Summons and Complaint, alleged that Macklowe failed to use ordinary care and diligence to design, build, keep and maintain the doors in a condition reasonably safe for its intended uses and reasonably free from defects and conditions which would render it dangerous or unsafe for the plaintiff. The Court has held that where there is a claim that the design of the premises was defective, plaintiff need not establish that defendants had notice of the condition. Macklowe failed to establish that the maintenance of the glass door was reasonably safe in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. Macklowe did not offer any expert testimony, or affidavit, establishing that the door in question, as designed, was consistent with industry standards. Thus, summary judgment should be denied in its entirety.

As to Plumb Door, material issues of fact exist as to what role the defendant played, on the day of plaintiff's accident, in the plaintiff's use of the glass swing doors due to Plumb Door's, maintenance work on the revolving glass doors. Plumb Door's witness, Magaraci did not have sufficient knowledge of the relevant facts of this accident, or of the business aspects of the Plumb Door Inc., at the time of plaintiff's accident to eliminate any factual issues that exist. Magaraci testified that as a salesman with Plumb Door Inc., he did not do any physical work but sold revolving door repairs. During the time he was employed by Plumb Door Inc., he never worked at the premises. Magaraci did not recall ever hearing that Plumb Door, Inc. was doing work at the premises in March of 2005. Thus, the record does not establish that Plumb Door lacked actual or constructive notice of the alleged hazard. Therefore, Plumb Door's motion for summary judgment should be denied.

In reply, Macklowe argues that plaintiffs failed to raise any triable issues of fact as to whether Macklowe had prior notice, either actual or constructive, concerning the door which allegedly caused the plaintiffs injuries. Plaintiffs' argument that the summary judgment motions are insufficient overlooks the fact that both motions rely on admissible evidence in the form of the plaintiff's deposition testimony (and in the case of Plumb Door's motion, the deposition testimony of the witnesses produced on behalf of both sets of defendants). Furthermore, plaintiffs failed to set forth any evidence to rebut defendants' contention that there is neither actual nor constructive notice of any problem with the entrance door prior to the date of the plaintiff's accident. In fact, plaintiff submits his own affidavit in which he again states that the accident was caused by a "gust of wind."

Although plaintiffs rely on the deposition testimony of the plaintiff as well as the

witnesses produced on behalf of both Macklowe and Plumb Door, none of such testimony raises a triable issue of fact as to the existence of a dangerous or defective condition with regard to the entrance doors. With regard to Macklowe's witness Staub, none of the testimony cited by plaintiffs indicates that Macklowe had notice of a dangerous condition with regard to the doors prior to plaintiff's accident, or that such a condition existed so that Macklowe should have had constructive notice of it. This is true also of the testimony of the Plumb Door witness. As for the plaintiff's deposition testimony, as well as the affidavit that he submits in opposition to the present motion, it has already been established in the initial motion papers that plaintiff was not aware of any prior problems with any of the doors before his accident. There is nothing contained in his affidavit to change this conclusion; in fact, he once again states that the cause of the accident was "a gust of wind."

In Plumb Door's reply, Plumb Door argues that it submitted proof in admissible form in support of its motion and that the caselaw cited by plaintiffs is inapplicable. Further, plaintiff failed to address the issue raised by Plumb Door that it owed no duty of care to the plaintiff and the fact that Plumb Door NY was not incorporated until after the date of the alleged accident.

In addition, if there is no defect, there can be no prior notice of same, and plaintiff has not ever set forth that any defective condition existed at the swinging doors involved in the alleged accident. Plumb Door did not perform any work on the door which plaintiff alleges caused his accident nor did they direct the plaintiff to the subject door. It is also undisputed that Plumb Door, Inc. did not own the property where the accident occurred; it did not owe a duty of care to the plaintiff, it did not have any contract creating a duty of care; it did not have any notice of any alleged defective condition; and it did not perform any maintenance work on subject doors.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the defendant, as proponent of a motion for summary judgment must advance sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The party opposing the motion must set forth evidentiary proof in admissible form and “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” (*Zuckerman*, *supra* at 562; *Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept

1983], *affd*, 62 NY2d 686 [1984]).

Contrary to plaintiffs' contention, the Court may consider the documentary evidence, *i.e.*, the deposition transcripts and all other reports that were identified at the pertinent depositions of the parties, to ascertain whether defendants have established their entitlement to judgment as a matter of law. A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]; *Zuckerman, supra* [The affirmation of an attorney, even if he or she has no personal knowledge of the facts, may, serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form," *e. g.*, documents, transcripts]; *Hoeffner v Orrick, Herrington & Sutcliff LLP*, 61 AD3d 614, 615 [1st Dept 2009])("The fact that defendant's supporting proof was placed before the court by way of an attorney's affidavit annexing . . . plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment"). The cases cited by plaintiffs in this regard are inapplicable.

Turning to the merits, in order to make out a *prima facie* case of negligence in cases involving defective or dangerous conditions present on property, a plaintiff must "demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it" (*Mitchell v City of New York*, 29 AD3d 372, 815 NYS2d 55 [1st Dept 2006]). To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234,

supra; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Gutierrez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). Where a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition (*Mitchell*, citing *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404, 720 NYS2d 41 [1st Dept 2001] (“ . . .it is not plaintiff’s burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition”)).

Notwithstanding the additional reference in the Bill of Particulars to “revolving” doors, plaintiff stated at his deposition and in his affidavit in opposition, that he was injured when he was entering through the swing doors at the Madison Avenue entrance of the premises. Plaintiff’s testimony also establishes that he did not see anyone experience similar problems with the subject doors or was aware of complaints regarding the subject doors. However, Macklowe failed to establish, as a matter of law, that no work was performed upon the subject swing doors prior to the accident or that the subject swing doors were not dangerous or defective at the time of the accident. Macklowe relies upon plaintiff’s deposition testimony, several incident reports prepared after the accident, and Plumb Inc.’s invoice for work performed to the revolving door on the date of the accident.

First, plaintiff’s testimony that a gust of wind pushed the swinging doors upon him does not establish that the swinging doors were maintained in a reasonably safe manner or that such doors were not dangerous or defective. Further, the incident reports merely confirm that plaintiff

was injured due to his use of the subject door. Notably, one incident report states that “door closed too fast on” plaintiff. Further, Macklowe’s contention that “there is no indication in the invoice from Plumb Door of any defects or need for repairs in the ‘swinging doors’ at the Madison Avenue entrance on the date of this incident” is plainly insufficient. Such invoice speaks only to the condition of the unrelated revolving door on the date of plaintiff’s accident.

Furthermore, Macklowe produced no deposition testimony or affidavit from a Macklowe representative with knowledge, affirmatively stating that no complaints were received or work was performed as to the subject swing doors for any particular time period prior to plaintiff’s accident. The Plumb Door invoice for the date of the accident does not establish that *no* other work was performed or requested for the swing door for any period prior to plaintiff’s accident. And, that plaintiff “will be unable to establish that the condition which allegedly caused his injury” was created or Macklowe or that Macklowe had knowledge of same, as Macklowe contends, does not establish that Macklowe maintained the premises in a reasonably safe condition or lacked notice of any defective condition of the subject door. Macklowe’s failure to make a *prima facie* showing of entitlement to judgment as a matter of law results in the denial of its motion, regardless of the sufficiency of the opposing papers (*see Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept 2000] citing *Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985, 599 NYS2d 526; *see Diaz v Nunez*, 5 AD3d 302 [1st Dept 2004]). Therefore, Macklowe’s motion for summary judgment is denied (*Whitley v Buffalo Mun. Housing Auth.*, 34 AD3d 1368, 824 NYS2d 509 [4th Dept 2006] (“Although defendant established that plaintiff did not report the condition to it, defendant did not establish that no one else had reported the condition and therefore failed to establish that it lacked actual

notice as a matter of law”).²

As to Plumb Door Inc., there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care-and thus be potentially liable in tort-to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm”; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]).

Plumb Door Inc. established its entitlement to judgment as a matter of law by demonstrating that it did not owe a duty of care to the plaintiff by virtue of Plumb Door Inc.'s limited revolving door repair work. The deposition of Magaraci establishes that Plumb Door Inc. was in the business of performing revolving door maintenance and repairs on an as need basis, and the record indicates that there were no contracts between Plumb Door Inc. and Macklowe such that Plumb Door Inc. displaced the Macklowe's duty to maintain the premises safely. Further, the Invoice to Plumb Door, Inc. states that it “[p]rovided door services on Thursday, March 10, 2005 at 767 Fifth Avenue to the north *revolving door* on Madison Avenue. . . .” There is no reference in the Invoice to any other door at the premises. Therefore, the record establishes that Plumb Door Inc. did not “launch” a force or instrument of harm, that plaintiff did not detrimentally rely on Plumb Door Inc.'s continued performance of its duties, and that Plumb

² The Court notes that the deposition of Macklowe's Manager of Engineering, Staub, submitted by its co-defendant Plumb Door, indicates that Staub was not asked to perform a search for any documents and that “Paul Gordon or Rod Johnson” of Macklowe were responsible for inspecting the premises. Staub did not know whether Plumb Door would have performed maintenance on the revolving or swing doors, or if any other company performed such work. Staub also did not know who installed the subject swing door, if records were retained concerning such installation, or whether inspections were in fact performed upon the swing doors.

15] Door Inc. did not entirely displace Macklowe's duty to maintain the premises safely. Therefore, since plaintiff failed to raise an issue of fact as to whether Plumb Door Inc. owed plaintiff a duty of care under the circumstances, Plumb Door Inc. is entitled to summary judgment in its favor.

Finally, it is undisputed that Plumb Door NY was incorporated after the date of the alleged accident and thus, summary judgment dismissing the complaint as asserted against it is warranted.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion by Fifth Avenue 58/59 Acquisition Co. L.P., Fifth Avenue 58/59 Acquisition Co. GP Corp., Fifth Avenue 58/59 Acquisition Co., LLC, Macklowe Management Co., Inc., Macklowe Management, LLC, Macklowe Properties, Inc., Macklowe Properties, LLC for summary judgment dismissing the plaintiffs' complaint and all cross and counter-claims as asserted against them, is denied; and it is further

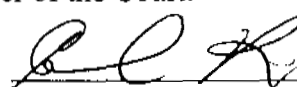
ORDERED that the motion by Plumb Door, (NY) Inc. and Plumb Door, Inc. for summary judgment dismissing the plaintiffs' complaint and all cross and counter-claims as asserted against them, is granted, and the complaint and all cross and counter-claims asserted against Plumb Door, (NY) Inc. and Plumb Door, Inc. are severed and dismissed; and it is further

ORDERED that Plumb Door, (NY) Inc. and Plumb Door, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: February 2, 2010


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

