DiStefano v Kmart Corp. Intl.

2010 NY Slip Op 30553(U)

March 12, 2010

Supreme Court, New York County

Docket Number: 101657-08

Judge: Louis B. York

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SCANNED ON 3/17/2010

[* 1]

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

PRESENT: ~~LOUIS B. YORK~~ Justice J.S.C. PART _____

Distefano

-v- Kmart Corporation International

INDEX NO. 101657-08 ~~101857/08~~

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____, were 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/12/10

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

----------X

ANA DISTEFANO,

Plaintiff,

INDEX NO.
101657/08

-against-

KMART CORPORATION INTERNATIONAL,
770 BROADWAY OWNER LLC and
THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

----------X

FILED
MAR 17 2010
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J.:

Defendant Thyssenkrupp Elevator Corporation ("TEC") moves for summary judgment pursuant to CPLR 3212 dismissing with prejudice plaintiff's complaint and all cross-claims against it.

Defendants Kmart Corporation International ("Kmart") and 770 Broadway Owner LLC ("Owner") cross-move for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against them, and for motion costs.

Plaintiff cross-moves to strike Kmart's answer pursuant to CPLR 3126 on the ground of spoliation of evidence.

Plaintiff brought this action to recover damages for personal injuries she allegedly sustained on December 7, 2007, while riding a down escalator at the Kmart store at Astor Place in Manhattan.

Factual Background

According to her deposition testimony (exhibit E to TEC's moving papers), plaintiff was a regular visitor to the store and had never had any problems with the escalators before. On the day of the accident, she was going to take the escalator down from the second floor of the store to the first floor, and put her left hand and foot on the escalator, but "there was no way that [she could] get [her] right foot onto the step because it was going too fast" (EBT, pp 16-17). Unlike the steps, the handrails were moving at normal speed (*id.*, p 29). As a result, she was pulled down onto the escalator with her legs split and her body in a distorted position, and dragged down by the fast-moving steps until someone stopped the escalator in response to her screams for help (*id.*, pp 20-31). Plaintiff stayed on the escalator in the same position because she couldn't move her leg. An ambulance and plaintiff's daughter were called. Plaintiff's daughter arrived from New Jersey before the ambulance, which took plaintiff to Saint Vincent's hospital (*id.*, pp 34-36). From there, she was transferred to Holy Name Hospital in New Jersey, where she was diagnosed with a broken arm, shoulder and leg, had surgery on her leg, and remained for several months. She then spent another couple of months in a rehabilitation facility, and was in a wheelchair for about six months (*id.*, pp 37-42).

This action ensued, with plaintiff alleging negligence against the store, the property owner and the store's elevator maintenance contractor. Plaintiff filed her note of issue in March 2009. All defendants now move for summary judgment.

TEC's Liability

Under its agreement with Kmart, TEC performed regular maintenance of the elevators and also responded to any repair calls made by Kmart. TEC seeks dismissal of all claims against

it on the ground that "plaintiff has failed to meet its[sic] legal burden in demonstrating that [TEC] caused, created or was aware of an over speed condition on the subject elevator that purportedly caused plaintiff's accident" (Quart supporting affirmation, ¶ 3).

Where, as TEC did here, a party "contractually undert[akes] to provide inspection and maintenance" of an escalator for another, it is "primarily liable" for personal injuries sustained as a result of the escalator's malfunction (see *Sirigiano v Otis Elevator Company*, 118 AD2d 920, 921 [3d Dept 1986], lv den 68 NY2d 604 [1986]). Nonetheless, that liability is not unlimited. Where regular inspections are made and no defect is revealed, no repair calls are made, and no advice of a problem with the escalator is communicated, liability does not lie in the absence of "evidence that any condition existed in the operation of the escalator which [TEC], in the exercise of reasonable care, could have discovered and repaired" (*Birdsall v Montgomery Ward and Company,Inc.*, 109 AD2d 969 [3d Dept 1985], affd 65 NY2d 913 [1985]).

Plaintiff argues that TEC's monthly maintenance calls were irrelevant to plaintiff's accident because TEC did not inspect the speed of the stairs as part of those calls (see McGuire EBT, p 17, at plaintiff's exhibit D). Plaintiff also contends that on December 20, 2006, approximately a year before her accident, TEC was called on to adjust the speed of the elevator in question, and in the two weeks prior to the accident TEC had to repair the elevator twice (November 23 and 28), both times for conditions "possibly caused by excessive speed" (see *id.*, pp 45-47). In addition, plaintiff relies on the doctrine of *res ipsa loquitur* as a basis of TEC's liability.

The court finds that *res ipsa loquitur* does not apply to TEC, since under its contract with Kmart it "was not given exclusive possession or control of the escalator but was merely

burdened with the duty of maintenance" (*Stafford v Sibley, Lindsay & Curr Co.*, 280 AD2d 495, 499 [4th Dept 1952]). At any rate, "*res ipsa loquitur* is not a theory of recovery but an evidentiary doctrine compatible with specific evidence of fault" (*Scope v Federated Department Stores, Inc.*, 26 AD3d 326 [1st Dept 2006]). However, plaintiff has succeeded in raising a triable issue of fact with respect to TEC's liability, given plaintiff's testimony that the steps were moving much faster than usual, TEC's admission that the monthly maintenance calls did not test for speed problems, and the fact that the escalator required two service calls just days prior to plaintiff's accident (contrast *Bazne v Port Authority of New York and New Jersey,* 61 AD3d 583 [1st Dept 2009] – "even assuming a mechanical defect, they were not liable, since there was no record of prior complaints about the escalator, Otis performed regular bimonthly preventive maintenance and no problems were indicated in the service maintenance records it kept" and *Kelly v Old Navy*, 11 AD3d 345, 346 [1st Dept 2004] – "Defendants' evidence ... established that the escalator was regularly inspected and that they had neither actual nor constructive notice of the alleged defect"). "The strength of plaintiff's case is a matter to be resolved at trial, and not on a motion for summary judgment" (*David v New York City Housing Authority*, 284 AD2d 169, 171 [1st Dept 2001]).

Owner's Liability

Owner and Kmart agree that under their lease Kmart was solely responsible for the installation, maintenance and repair of all escalators. Owner also contends that it had no notice of any prior escalator accidents at the store, nor any communication with Kmart about the escalators. Both defendants contend that the speed of the escalator steps was set by the

manufacturer and could not be easily altered, and that speed was consistent with the applicable code requirements.

"Generally, an out-of-possession landlord is not responsible for correcting defective conditions unless they are significant structural failures or specific statutory violations" (*Thomas v Fairfield Investors*, 273 AD2d 118 [1st Dept 2000]), and it "may not be held liable for a third party's injuries on [its] premises unless [it] has notice of the defect and has consented to be responsible for maintenance or repair" (*Velazquez v Tyler Graphics, Ltd.*, 214 AD2d 489 [1st Dept 1995], citations omitted). It has been held that "an absentee landlord's responsibility over unsafe conditions in its building extends beyond structural defects, to transient unsafe conditions" (*Sergio v Benjolo N.V.*, 146 Misc 2d 1011 [Sup Ct, NY Co, Saxe, J, 1990], affd on other grounds 168 AD2d 235 [1st Dept 1990]), but only if that transient condition "is maintained with regularity" (id. at 1013) or is of "long-continued existence" (*Tkach v Montefiore Hospital for Chronic Diseases*, 289 NY 387, 389 [1943]). If none of these conditions apply, the out-of-possession landlord is entitled to summary judgment (*Brockington v Brookfield Development Corporation*, 20 AD3d 382, 383 [2d Dept 2005]) unless plaintiff "produce[s] evidence that defendant had notice of the defect or had entered into a covenant to be responsible therefor" (*Clarke v 158 St. & Riverside Drive Housing Co., Inc.*, 245 AD2d 208, 208 [1st Dept 1997]). Since no such evidence has been adduced here, the court finds that Owner is entitled to summary judgment (see *DeJesus v Todaro*, 7 AD3d 469 [1st Dept 2004]).

Kmart's Liability

Kmart seeks dismissal of all claims against it arguing that it neither created nor had actual or constructive notice of a defective condition of the escalator at the time of plaintiff's accident.

Doyle Jamieson ("Jamieson"), Kmart's loss prevention assistant manager, testified that he checked the offending escalator about 90 minutes prior to plaintiff's accident, as was customary at the beginning of his shift, rode it several times subsequently, and checked it again when it was turned on after plaintiff was removed from it, and did not notice anything wrong on any of those occasions (Jamieson EBT, exhibit G to moving papers, pp 10-11, 14, 71-72).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NYd 836, 837 [1986]). Furthermore, under its lease with Owner, Kmart had the duty to maintain and repair the escalator, a duty which it contractually delegated to TEC. "[S]ince it had contracted with [TEC] to handle all maintenance and repair work, liability could only be found against [Kmart] if it had received actual or constructive notice of a defect and then failed to notify [TEC]" (*Birdsall v Montgomery Ward and Company, Inc., supra*, 109 AD2d at 972).

Under Kmart's version of the facts, "there was no showing that the escalator was defective or that its use ... violated applicable safety codes or specific building code provisions" (*Schurr v Port Authority of New York and New Jersey*, 307 AD2d 837, 838 [1st Dept 2003]). However, plaintiff's testimony is also evidence which cannot be summarily ignored. Plaintiff also relies on the affidavit of her expert witness (plaintiff's exhibit F), a professional engineer who opines that Kmart's contract with TEC was inadequate for a store that size, and TEC's inadequate repairs of the escalator in the two weeks prior to the accident created a dangerous condition.

"[O]n a defendant's motion for summary judgment, opposed by plaintiff [the] decision must be made on the version of the facts most favorable to plaintiff" (*David v New York City*

Housing Authority, supra, 284 AD2d at 171), particularly in this case where the objective version of the accident – the surveillance video – has mysteriously disappeared, and at the time of the accident Kmart identified at least two independent eyewitnesses to plaintiff's accident, but did not get their names before they left the store (Jamieson EBT, pp 29-30).

Kmart's Spoliation of Evidence

Based on the disappearance of the surveillance video, plaintiff cross-moves to strike Kmart's answer pursuant to CPLR 3126 on the ground of spoliation of evidence.

Jamieson testified that the store's security camera had captured a soundless video recording of plaintiff's accident, which he personally viewed three times. In accordance with Kmart's procedures, that recording was downloaded to a computer hard drive and copied onto a disc which was mailed to Sedgwick Claim Services ("Sedgwick"), an independent concern which functions as Kmart's claims department. Kmart's surveillance system was set up to automatically record over downloaded videos in the hard drive every 30 days. The only permanent copy was the one put on the disc for Sedgwick; no back-up disc was made for the store (Jamieson EBT, pp 44-48). Michael Brady ("Brady"), Kmart's loss prevention manager at the time of plaintiff's accident, avers that he downloaded the video recording on the hard drive and then copied it onto a CD-Rom which he mailed to Sedgwick along with a copy of the incident report, which he also personally completed (see Brady affidavit annexed to Kmart's opposing papers). After this action was commenced, it was discovered that the CD-Rom was missing, despite thorough searches at both the store and Sedgwick (see Brady and William Morman affidavits).

Plaintiff argues that the disappearance of the video recording warrants the drastic sanction of striking Kmart's answer because objective evidence of the accident, viewed by Kmart

but not plaintiff, is unavailable as trial evidence, and it also prevented plaintiff's expert witness from giving as thorough an opinion as he would otherwise have been able to give.

"Where a party destroys essential physical evidence such that its opponents are prejudicially bereft of appropriate means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of its pleading.... However, the striking of a pleading is a drastic sanction.... Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" (*Klein v Ford Motor Co.*, 303 AD2d 376, 377 [2d Dept 2003], citations omitted). "The decision to impose sanctions, as well as the appropriate sanction to be fashioned, lie within the sound discretion of the trial court" (*Shaffer v RWP Group, Inc.*, 169 FRD 19, 24 [EDNY 1996]).

Contrary to Kmart's contention, the court finds that the unavailability of the video could be detrimental to plaintiff's case. However, the court also finds credible the testimony of Kmart's former employee, Brady, that the video's disappearance was not intentional. "Under these circumstances ... the extreme sanction of preclusion is not warranted.... Rather, an adverse inference is sufficient to prevent defendant from using the absence of the videotape to its own advantage" (*Minaya v Duane Reade International, Inc.*, 66 AD3d 402, 403 [1st Dept 2009], citations omitted), especially "since the record does not demonstrate that the plaintiff, who can testify at trial about how the accident occurred, has been left without the means to prove h[er] claim" (*Barone v City of New York*, 52 AD3d 630, 631 [2d Dept 2008]), and it "appears that the loss of this video record was the result of inadvertent, technical mishaps" (*Scansarole v Madison Square Garden, L.P.*, 33 AD3d 517, 518 [1st Dept 2006]).

Accordingly, it is

ORDERED that Thyssenkrupp Elevator Corporation's motion for summary judgment

dismissing all claims against it is denied; and it is further

ORDERED that the cross-motion by 770 Broadway Owner, LLC for summary judgment dismissing all claims against it is granted to the extent that all claims against Owner are hereby severed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion by Kmart for summary judgment dismissing all claims against it is denied; and it is further

ORDERED that plaintiff's cross-motion to strike Kmart's answer pursuant to CPLR 3126 on the ground of spoliation of evidence is granted only to the extent that the court will allow a negative inference with respect to the videotape at trial and will charge the jury accordingly. In all other respects plaintiff's cross-motion is denied.

DATED: 3/18, 2010

Enter:

J.S.C.
LOUIS B. YORK
J.S.C.

FILED
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