

Difo v American Airlines, Inc.

2011 NY Slip Op 32371(U)

August 25, 2011

Sup Ct, NY County

Docket Number: 104970/07

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

EPIFANIA DIFO,
Plaintiff,

Index No.: 104970/07

Motion Date: 04/21/11

- v -

Motion Seq. No.: 03

AMERICAN AIRLINES, INC. and SCHINDLER
ELEVATOR CORPORATION,
Defendants.

FILED

AUG 30 2011

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

NEW YORK
COUNTY CLERK'S OFFICE

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1
Answering Affidavits - Exhibits	No (s) .	2
Replying Affidavits - Exhibits	No (s) .	3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

In this personal injury action, defendants American Airlines, Inc. (American Airlines) and Schindler Elevator Corporation (Schindler) move for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint.

Plaintiff Epifania Difo (Difo) alleges that on May 12, 2004, she was caused to fall and sustain serious injuries to parts of her body while riding a down escalator at Luis Munoz Marin International Airport in Carolina, Puerto Rico, more commonly known as San Juan Airport (San Juan Airport, or Airport, as appropriate). More specifically, Difo claims that she, along

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

with her cousin's young son, had just flown on American Airlines, flight 1639, from New York's JFK Airport to the San Juan Airport. After deplaning at Terminal E, Gate 8, the passengers from this flight, including Difo, were directed onto a nearby down escalator to reach the baggage claim area. According to Difo, the escalator was shaking and/or jerking during her ride, and when she neared the bottom, an older woman riding directly in front of her, fell down. Difo tried to lift up the woman, but then she herself was caused to fall onto her arm and knee on the still-moving escalator. Her clothing then became caught, or "wedged," in the escalator's moving steps, causing plaintiff to sustain additional injury and bleeding to an area around her hip which, evidently, had also been drawn into the moving steps by the combplate at the bottom of the escalator. Difo received medical treatment in Puerto Rico and later in New York for her various injuries, including treatment for the parallel keloid scars which developed in the area of her hip.

Difo commenced the instant action for damages by filing a summons and complaint on or about April 12, 2007, charging both American Airlines and Schindler with negligence in their ownership, operation, and/or maintenance of the escalator. Issue was joined by service of defendants' joint answer on or about May 3, 2007, and a period of discovery ensued. The note of issue was filed on December 30, 2009, and defendants now move for a summary

judgment dismissal of the complaint on the grounds that: (1) they lacked actual or constructive notice of a dangerous or defective condition involving the escalator; (2) the evidence does not support plaintiff's res ipsa loquitur claim; and (3) the evidence indicates that plaintiff's fall was caused by the actions of an independent third party over whom neither defendant had control.

"It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances." Waiters v Northern Trust Co. of N.Y., 29 AD3d 325, 326 (1st Dept 2006). Furthermore, "[i]n order to recover damages for a breach of this duty, a plaintiff must establish that the defendant created, or had actual or constructive notice of the dangerous condition that precipitated the injury." Id. It is also well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

To this end, defendants assert that it was Difo's attempt to lift up the woman which precipitated her own fall and injuries, not a malfunction of the escalator. They deny that the escalator was in a dangerous or defective condition at the time of her accident, and they deny having notice or knowledge of a

mechanical problem involving the escalator either on the day of the accident, or in the days or weeks prior to the accident. In support of their motion, defendants offer copies of the party deposition transcripts, event detail reports, handwritten work tickets for the period between January 2004 - May 2004 (work tickets), and approximately 1,000 pages of maintenance, service and repair reports entitled "Service Operations Work Report - Preventative Maintenance" (Service Operations Work Reports) which cover the period of May 12, 2003 through May 12, 2004, and which are, almost entirely, in Spanish.

American Airlines produced for deposition its current facility maintenance manager, Aimet Ardin (Ardin), who, in May 2004, held the position of customer service manager for the ground equipment shop (service manager). Ardin testified that, as the service manager back in 2004, she was the person responsible for overseeing the maintenance of the building occupied by American Airlines, including the terminal (Terminal E). She described the layout of the terminal and the location of two down escalators, situated between baggage claim belts B and C, to which passengers arriving at Gate 8 are routinely directed in order to claim their baggage.

When questioned about the history of these escalators, Ardin testified that they had been installed prior to 2000, in or about 1996, and that American Airlines had contracted with Millar

Elevator Service (Millar), by written agreement dated May 1, 1996, for the maintenance and repairs of these escalators. She also explained that, when Schindler acquired Millar in or about 2001/2002, Schindler took over Millar's duties under the contract and was the party responsible for the maintenance and repair of the escalators in Terminal E in May 2004.

With respect to passenger complaints about the escalators, Ardin stated that, procedurally, the complaints would be relayed to an American Airlines supervisor who would then contact the on-site Schindler mechanic to investigate and correct the problem. Ardin denied having personal knowledge of, or knowing of complaints about, the escalator either jerking or jolting prior to May 12, 2004, but acknowledged that as the service manager, she would not have been aware of these types of complaints. She explained that department supervisors were required to prepare an incident report when an event occurred in the American Airlines facility, and that an event report would then be generated based upon the information contained in the incident report. With respect to plaintiff's accident, an incident report was prepared by F. Ramirez, who was a baggage supervisor in May 2004, and an event report (entitled "Event Detail") was then written up by someone named Susan Simmons at American Airlines' headquarters in Dallas, Texas.

For its deposition, Schindler produced one of its mechanics, Angel Perez-Santiago (Perez-Santiago), who, back in 2004, was assigned to the San Juan Airport. According to Perez-Santiago, only mechanics employed by Schindler handled escalator repairs within the Airport's terminals. He testified that in May 2004, his work shift was from 6:00 A.M. to 3:00 P.M., and that it was his duty, each morning, to verify that the equipment was functioning properly, and if it was not, to make the necessary repairs. He was also responsible for general maintenance, attending to calls about stopped machinery, and generating written reports (the Service Operations Work Reports) accounting for each day's work. Perez-Santiago explained that the daily reports were prepared using a computer-based program called "Field Link," and that a separate weekly report was submitted to American Airlines by one of his coworkers. The weekly reports contained information about the general maintenance of the equipment.

Perez-Santiago testified that he had no independent recollection as to the condition of either down escalator back in May 2004. The testimony as reflected in the transcript is unclear about information contained on some of the Service Operations Work Reports; that is it is unclear which Service Operations Work Report was the subject of any particular question posed by counsel or any particular response given by Perez-

Santiago. The witness' responses set forth that maintenance and repair work had been conducted on the escalators either earlier that day or on other occasions in the months prior to May 12, 2004, but the responses are unclear as to which day which what work was performed on any part of any given escalator, including the combplates at the base of the two down escalators.

Moreover, the, approximately, 1,000 pages of Service Operations Work Reports submitted in support of the motion are unhelpful in resolving the factual issues presented on the current application. These documents are, according to the witnesses' testimony, intended to be the written record of the Schindler mechanics' daily activities with respect to the escalator, including information as to any stoppages or malfunctions. As such, they are relevant on issues pertaining to the escalator's condition and whether defendants had actual or constructive notice of any dangerous or defective condition involving the escalator prior to plaintiff's accident.

Despite their relevancy, the annexed Service Operations Work Reports cannot be considered by the court because they are written almost entirely in Spanish and are not accompanied by the requisite English translation. Section 14 (a) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County, and CPLR 2101 (b), require that: "[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it

shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." Defense counsel's affirmation stating that

[a]lthough the records provided are in Spanish, your affirmant states, upon information and belief, that there is no reference to any "shaking" and/or "jerking" of any of the three escalators which run from Gates "5" and/or "8" down to the baggage claims area for the entire one year period prior to and including the date of plaintiff's incident; [and]

[i]n fact, there are no references to any complaint of 'jerking' and/or 'shaking' of any of the escalators at the airport during this time frame,

does not remedy the inadequate and defective submission as counsel cannot act as a translator of his client's evidentiary proof. Accordingly, these records cannot be considered as to issues pertaining to the condition of the escalator at the time of, and the days immediately prior to, May 12, 2004, and whether defendants had actual or constructive notice of any such condition.

The parties also dispute issues surrounding the combplate and safety-switch, and whether the fall of one or both of the women, or the catching of Difo's clothing at or near the combplate should have automatically caused the escalator to stop moving. Plaintiff contends that the doctrine of *res ipsa loquitur* applies to her causes of action because the very fact that escalator did not immediately shut off its movement when

Difo's clothing was pulled into the teeth of the combplate, constitutes evidence of defendants' negligence. Defendants disagree.

It is well settled that *res ipsa loquitur* applies only to causes of action in which: "(1) the event [is the] 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." Corcoran v Banner Super Mkt., 19 NY2d 425, 430- (1967) (internal quotation marks and citation omitted); Crawford v City of New York, 53 AD3d 462, 464 (1st Dept 2008).

Defendants' reliance upon Bilbao v Westinghouse Elec. Corp., (300 AD2d 23, 24 [1st Dept 2002]) is misplaced because in that case it was "uncontested that the escalator would have stopped sooner if a comb plate stop switch had been installed." In this case the issue is not one of defective design, that is whether or not a safety switch should have been install, the issue is one of malfunction, that is whether the installed safety switch malfunctioned.

While the parties disagree, with the support of their respective experts, as to whether there was a malfunction on May 12, 2004, and to what degree the element of "exclusive control" is affected by the continued use of the escalator by people

passing through this public airport (first and second prongs), it is undisputed that immediately prior to her own accident, Difo reached out to help the individual in front of her (third prong).

The parties sharply dispute whether this, or the escalator's alleged malfunction, was the precipitating cause of her accident and injuries. Therefore, subject to the admissible evidence produced at trial, plaintiff's own conduct on the escalator may, in fact, result in a denial of a request for a *res ipsa loquitur* charge to the trier of fact.

Defendants argue that the plaintiff cannot rely upon the doctrine of *res ipsa loquitur* in the case of an accident involving a public escalator citing Ebanks v New York City Transit Authority, (70 NY2d 621, 623 [1987]) wherein the Court stated that charging the jury upon the doctrine was error because the plaintiff "did not adequately refute the possibility that the escalator--located in a subway station used by approximately 10,000 persons weekly--had been damaged by a member of the public either through an act of vandalism or, as defendant's witness suggested, by permitting an object such as a hand truck to become caught in the space between the step and sidewall. . . [and therefore] plaintiff failed to establish control by defendant of sufficient exclusivity to fairly rule out the chance that the defects were caused by some agency other than defendant's negligence." However, defendants read Ebanks too broadly and

depending on the evidentiary proof res ipsa may be charged in circumstances such as those presented here. As stated by the Court

We do not read the memorandum of the Court of Appeals in Ebanks as forever removing escalator accidents from the ambit of res ipsa loquitur. We find several features which distinguish this case from Ebanks, even though the escalators in both were available to substantial public access. Among other things, the gap between the step and the side panel in the instant case is far smaller than the two-or-more-inch gap in Ebanks, and is therefore less likely to have been caused by vandalism. Moreover, unlike Ebanks, there was no testimony in this record that the gap could only have been created by vandalism; evidence of scratches on the side panel is simply consistent with how narrow the escalator was (passengers could only ride in single file), not that it had been vandalized. Also significant, in our view, is the undisputed fact that just a few hours before this accident occurred, Westinghouse had shut down the escalator to make inspection and repair, an unambiguous exercise of control greatly diminishing the possibility of vandalism as a causal factor.

Chang v F.W. Woolworth Co., Inc., 196 AD2d 708, 709 (1st Dept 1993).

These precedents illustrate that the issue of exclusive control in the context of res ipsa requires the court to determine the applicability of the doctrine based upon the facts presented. Movants here have failed to carry their burden of establishing that they did not exercise exclusive control over the safety switch alleged to have malfunctioned.

In light of the fact that the movants have failed to carry their evidentiary burden on this motion, the court shall deny the application.

Accordingly, for the reasons set forth above, it is ORDERED that the motion by defendants American Airlines, Inc. and Schindler Elevator Corporation for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint is denied; and it is further

ORDERED that the parties are to appear at the mediation conference scheduled in Part Mediation-1.

FILED

This is the decision and order of the court.

Dated: August 25, 2011

ENTER: **AUG 30 2011**

NEW YORK COUNTY CLERK

Debra A. James

DEBRA A. JAMES

J.S.C.