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

**PRESENT:** Hon. Shlomo S. Hagler *Justice* **PART:** 17

**JEFFREY TOBEY, as Executor of the Estate of JEAN TOBEY, Deceased,**

**Plaintiff,**

**- against -**

**THE MOUNT SINAI HOSPITAL, and MACKENZIE AUTOMATIC DOORS, INC.,**

**Defendants.**

**INDEX NO.:** 107965/2008

MOTION SEQ. NO.: 001

Motion by defendant Mount Sinai Hospital for summary judgment dismissing the complaint and all cross-claims.

| | Papers Numbered |
|---|---|
| Defendant's Notice of Motion with Affirmation of Defendant's Counsel & Exhibits A through R ..... | 1, 2, 3 |
| Affirmation of Plaintiff's Counsel in Opposition to Defendant's Motion with Exhibits A and B and Affidavits of Plaintiff Jeffrey Tobey and of Laurie Tobey-Freedman ..... | 4, 5, 6, 7 |
| Affidavit of Plaintiff's Expert Jon B. Halpern with Exhibit A in Opposition to Defendant's Motion .... | 8 |
| Defendant's Counsel's Reply Affirmation ..... | 9 |
| Transcript of Oral Argument of May 7, 2012 ..... | 10 |
| Other: _____ | |

**Cross-Motion:** ☑ No ☐ Yes **Number of Cross-Motions:** 0

Cross-Motion(s) by _____ for _____

**Upon the foregoing papers, it is hereby ordered that this Motion is granted as set forth in the attached separate written Decision and Order.**

FILED
DEC 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 14, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

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|---|---|---|---|---|
| Check one: | ☑ **Final Disposition** | | ☐ **Non-Final Disposition** | |
| Motion is: | ☑ Granted | ☐ Denied | ☐ Granted in Part | ☐ Other |
| ~~Cross-Motion is:~~ | ~~☐ Granted~~ | ~~☐ Denied~~ | ~~☐ Granted in Part~~ | ~~☐ Other~~ |
| Check if Appropriate: | ☐ SETTLE ORDER | | ☐ SUBMIT ORDER | |
| | ☐ DO NOT POST | | ☐ REFERENCE | |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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JEFFREY TOBEY, AS EXECUTOR OF THE GOODS, CHATTELS AND CREDITORS OF THE ESTATE OF JEAN TOBEY, DECEASED,

Plaintiffs,

-against-

THE MOUNT SINAI HOSPITAL and MACKENZIE AUTOMATIC DOORS, INC.,

Defendants.

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Index No.: 107965/08

Motion Seq. Nos. 001 & 002

DECISION AND ORDER



SHLOMO S. HAGLER, J.S.C.:

In a case involving an automatic door at a hospital that allegedly closed on an elderly woman, defendants The Mount Sinai Hospital ("Mount Sinai" or "the hospital") and Mackenzie Automatic Doors, Inc. ("Mackenzie") move separately, under CPLR § 3212, to dismiss plaintiff's complaint (Motion Seq. Nos. 001 and 002, respectively). Both motions are consolidated herein for disposition.

## BACKGROUND

Plaintiff Jeffrey Tobey, as executor of the estate of his mother Jean Tobey ("Mrs. Tobey" or "the deceased"), brought separate actions for negligence and wrongful death on behalf of his mother against Mount Sinai and Mackenzie, which were consolidated for all purposes by a stipulation so-ordered by Judge Emily Jane Goodman, and filed on May 11, 2009. Plaintiff claims that Mrs. Tobey's injury and subsequent death were caused by defendants' negligence. Mount Sinai owns the subject property and operates the hospital where Mrs. Tobey's accident took place. Mrs. Tobey was admitted to the hospital immediately following the accident and she died there approximately 55 days later without having been released. Mackenzie provides service and repair for the automatic doors within the hospital.

According to Mrs. Tobey's son, Jeffrey Tobey, and her daughter, Laurie Tobey-Freedman ("Tobey-Freedman"), neither of whom witnessed the accident but both of whom spoke with their parents afterwards, Mrs. Tobey escorted her husband, Dr. Hyman Tobey, to the emergency room at Mount Sinai on March 1, 2007. Dr. Tobey, confined to a wheelchair, was being pushed by a driver from the car service that the Tobeys hired to take them to Mount Sinai. While Mrs. Tobey was walking behind her husband and the driver, an automatic sliding door closed on her, knocking her down and injuring her hip (Jeffrey Tobey Deposition, at 26, 39-40; Tobey-Freedman Affidavit, ¶¶ 2-5) (See also Mount Sinai Incident Report, Exhibit "A" to Plaintiff's Opposition to Defendants' Motions). Mrs. Tobey died on April 23, 2007, nearly two months after her accident, and her husband died the following year (Jeffrey Tobey Deposition, at 68).

## DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

### The Accident and Its Location

Defendants Mount Sinai and MacKenzie both argue that summary judgment should be granted to them dismissing the complaint since there is no non-hearsay evidence of how Mrs. Tobey

came to be injured or the exact location of the alleged accident. Defendants argue that plaintiff cannot identify which of the three automatic sliding doors leading to the waiting area for the emergency room allegedly struck Mrs. Tobey. However, defendants' own submissions undermine this argument and makes it clear that the accident happened at the middle set of the automatic sliding doors leading from Madison Avenue to the Mount Sinai emergency room, where the decedent was found lying on the floor between those doors. As plaintiff notes, Zita Concepcion-Viste ("Concepcion-Viste"), an emergency room nursing coordinator at Mount Sinai, who came to the scene immediately after Mrs. Tobey fell, testified as to the location of plaintiff's accident:

Q: Now, do you have an understanding of what part of the hospital this incident occurred in?

A: Yes.

Q: Where was that?

A: Right by the entrance of the emergency room by Madison Avenue.

Q: And that's the emergency room where you performed your job duties and functions?

A: Yes.

* * *

Q: Do you have to go through sets of doors in order to do that?

A: Yes.

Q: How many sets of doors?

A: One, two, three.

Q: Now, this incident, did it occur by a set of doors?

A: Yes.

Q: Do you remember which set of doors it would have occurred by?

A: The second one.

Q: . . . You are using the middle set of doors as the second set?

A: Yes.

(Concepcion-Viste EBT from p. 9, line 23, through p.11, line 12.)

In addition, Michael Edwards ("Edwards"), a Mount Sinai security guard, testified in his deposition that he was directed to go to the accident location where he saw someone on the floor along with Concepcion-Viste and another Mount Sinai security guard (Edwards EBT from p.13, line 22, through p. 14, line 16). The person on the floor was the decedent, Mrs. Tobey (Edwards EBT, from p. 15, line 16, through p.16, line 6). Edwards also completed a "Security Incident Report" (Exhibit A to plaintiff's opposition to both defendants' motions) ("the incident report") which gave the location of the accident and attached photographs to the incident report that showed where the accident occurred.

While defendants contend that all of plaintiff's evidence is inadmissible hearsay, Concepcion-Viste's testimony regarding the location of the accident is not hearsay. As such, defendants fail to make a prima facie showing of entitlement to judgment through its argument that plaintiff cannot identify where Mrs. Tobey's accident took place.

Regarding how the accident happened, Jeffrey Tobey argues that both he and his sister were told by their mother and their father (who was an eyewitness to the accident), both of who died afterwards, that as the deceased was going through the middle set of the double sliding doors leading to the emergency room, a door struck her hip and knocked her to the ground. Both Jeffrey Tobey and his sister, Tobey-Freedman, submitted affidavits in opposition to the defendants' motions relating the above description as what their mother and father had told them regarding Mrs. Tobey's accident . In addition, Edwards, the Mount Sinai security guard who prepared the incident report, reported that Mrs. Tobey stated that "she fell when the sliding door hit her upon entering." [1]

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1. Even if the Mount Sinai "Security Incident Report" is admissible as a business record made in the ordinary course of business (Edwards EBT, from p. 12, line 25, through p. 13, line 9), the deceased's statement therein, which was not made directly to Edwards, the security guard

While Mrs. Tobey's and Dr. Hyman Tobey's statements to their son and daughter and Mrs. Tobey's statement in the Mount Sinai Security Incident Report are hearsay, as defendants point out, and would not ordinarily be admissible at trial or in support of a motion for summary judgment, such decedent hearsay statements are allowed to be used to defeat a motion for summary judgment in the First and Fourth Departments. (*Lancaster v 46 NYL Partners*, 228 AD2d 133, 140 [1st Dept 1996]; *Lopez v Town of Gates*, 258 AD2d 961[4th Dept 1999]. *But see, Stock v Otis Elevator Co.*, 52 AD3d 816 (2nd Dept 2008) [plaintiff wife's deposition testimony "was based on speculation and hearsay since she admitted that she did not witness the accident and her testimony was based on information she received from the decedent]). *See also, Phillips v Kantor & Co.*, 31 NY2d 307, 314 (1972); *Arnold Herstand & Co. v Gallery: Gertrude Stein, Inc.*, 211 AD2d 77, 82-83 (1st Dept 1995).

**Issue of Notice to Mount Sinai**

Mount Sinai argues that it is entitled to dismissal of this action as it had no notice of any defect regarding the subject automatic door. "A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it" (*Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 275 [1st Dept 2010]). "Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

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who prepared the incident report but which was relayed to him second hand through another security guard, would be inadmissible as double hearsay.

Mount Sinai contends that it did not have notice of the subject defect, and submits the deposition testimony from Thomas Van Cott ("Van Cott"), its maintenance manager, that prior to the date of Mrs. Tobey's accident, he had received no complaints involving the subject doors closing on people passing through them (Van Cott Deposition, at pp. 20-21). Mount Sinai also points to the deposition testimony of Concepcion-Viste, the Mount Sinai emergency room nursing coordinator, who came to the scene immediately after Mrs. Tobey fell. Concepcion-Viste testified that, although she regularly entered the hospital through the emergency room entrance where Mrs. Tobey's accident occurred, she had never seen the automatic doors there malfunction such that they closed on someone (Concepcion-Viste Deposition, at p. 21).

In addition, Mount Sinai submits Mackenzie work orders for the emergency room doors (Exhibit "L" to Mount Sinai's Motion) and a computer printout of Mount Sinai's own work orders concerning its doors from January 2006 through the accident date (Exhibit "M" to Mount Sinai's Motion). None of the Mackenzie or Mount Sinai work orders refers to a problem with either the subject doors, or any other of the automatic sliding doors, closing on people. Mount Sinai also submits an affidavit from Annabelle Nieves ("Nieves") (Exhibit "R" to Mount Sinai's Motion), its manager of security services who states that she performed a diligent and thorough search for security incident reports at the hospital for the period March 2006 through March 2007 and personally reviewed the reports retrieved from that search. Nieves avers that, other than the incident report for this case, she neither found any security incident reports during the time period searched that referenced any malfunctioning or defective sensor in the subject doors nor whereby those doors closed on a person walking through the doors.

Finally, Mount Sinai submits an affidavit from David A. Guido, P.E., CSP ("Guido"), a New York State licensed professional engineer and certified safety professional employed by Affiliated Engineering Laboratories (Exhibit "P" to Mount Sinai's Motion). Guido states he reviewed the relevant work orders from Mackenzie, the computer printout of Mount Sinai's work orders for its doors, the Mount Sinai incident report and related photos, and the deposition transcripts of Van Cott, Concepcion-Viste, Edwards, and Donald Mattson ("Mattson"), an employee of Mackenzie. Based on his review of the Mackenzie work orders, Guido concluded that none of Mackenzie's work was based on the subject doors improperly closing. Guido also states that his review of the Mount Sinai work order printout also reveals that none of the work orders for the subject doors indicated problems with their sensors or injuries to persons walking through the doors. Finally, Guido avers that none of the documents he reviewed showed any evidence that the sensors on the subject doors at the time of the accident were defective or malfunctioned.

In opposition, plaintiff submits an expert affidavit from John Halpern ("Halpern"), a licensed New York State professional engineer with extensive experience in the operation, design and maintenance of automatic doors and door protection (Halpern Affidavit, ¶ 1). Halpern stated that he reviewed the Bill of Particulars, the defendants' motions, the Mackenzie maintenance and repair records, and the American National Standards Institute ("ANSI") Standard for Power Operated Pedestrian Doors, and that he examined the subject automatic doors on April 25, 2010, which was more than three years after the accident (Halpern Affidavit, ¶ 3). Halpern stated that his inspection indicated that the motion sensors we improperly installed and adjusted so that they did not meet the ANSI standard. (Halpern Affidavit, ¶ 7). Halpern also asserted that "[s]uch a defect can easily be detected through the proper inspection and maintenance of doors" (Halpern Affidavit, ¶ 8) and that

the closing force exceeded the maximum force allowable under the ANSI standard (Halpern Affidavit, ¶ 9).

Neither Mount Sinai nor Mackenzie designed, manufactured, or installed the subject doors. As to notice of the defects Halpern describes, plaintiff argues that prior similar incidents, involving similar doors, occurred at the hospital, providing notice. Plaintiff also refers to the deposition testimony of Edwards, who testified as follows:

Q: Prior to March 1, 2007, had you ever received or prepared a report where people claim to have been hit by the doors?

* * *

A: These doors?

Q: Yes.

A: Yes.

Q: The hospital has similar doors in different locations?

A: A lot.

Q: That work similar to these doors?

A: Not exactly.

Q: Regarding the same doors as these, had you had to prepare a report prior to March 1, 2007 by people claiming to have been hit by the doors?

A: Mostly the reports are slip and fall, slipping in the rain, most of the reports.

* * *

Q: Did you ever respond to an incident like this one before this one?

A: No. It is just people slipping in the door, not being hit by the door.

(Edwards Deposition, at 17-18, 35).

While Edwards' answers cited at the beginning of this quoted section might seem to mistakenly indicate that people had been hit by the automatic doors, Edwards' testimony in the

middle and at the end of the quoted section makes it very clear that any injury incidents were **not** due to doors closing on people but primarily slips and falls.

Plaintiff also refers to the deposition testimony of Mattson, a vice president at Mackenzie, which, like Edwards's testimony, was submitted by both defendants. Mattson testified that he had heard, in general, rather than specifically at Mount Sinai, of incidents with the Dura-Glide 3000 doors, the model involved in Mrs. Tobey's accident, where people complained that the doors closed on them (Mattson Deposition, at 21). However, Mattson added that these incidents actually involved people walking into the non-sliding part of the doors, or incidents that took place prior to 1979 (Mattson Deposition, at 21-22, 33-34). Finally, plaintiff submits several pages of case summaries, purportedly the results of an internet search for lawsuits involving Stanley Doors, the manufacturer of the Dura-Glide 3000.

None of the items put forward by the plaintiff raises an issue of fact as to whether Mount Sinai or Mackenzie had actual or constructive notice of a defect in the subject automatic door. Clearly, the other lawsuits do not refer to the specific set of doors where plaintiff's accident took place, and the testimony of Edwards and Mattson, respectively, each fail to show that Mount Sinai actually knew of a defect in the subject automatic door, or establish that a defect existed for a long enough period that Mount Sinai should have known about it. (*See Cruz v New York City Hous. Auth.*, 92 AD3d 615, 615 [1st Dept 2012] [granting defendant dismissal where it did not have actual or constructive notice, as "[p]laintiff did not provide evidence demonstrating that there were prior accidents involving a similar malfunctioning of the **elevator at issue**" (emphasis added)]; *Gjonaj v Otis El. Co.*, 38 AD3d 383, 385 [1st Dept 2007] ["In order to establish notice based on prior accidents, plaintiff was required to produce evidence that the prior accidents were similar in nature

to the accident alleged here and caused by the same or similar contributing factors (*Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60-61 [2006]; *see also Mitchell v New York Univ.*, 12 AD3d 200 [2004] [notice must call attention to specific defect alleged]); *Nivens v New York City Hous. Auth.*, 246 AD2d 520 [2d Dept 1998] ["There is no evidence to support the conclusion that prior work upon the elevator performed by Otis had any connection to the door's condition of dragging on the floor [which related to the cause of the accident] or that the condition resulted from defective maintenance"] ).

Furthermore, Halpern's inspection of the subject doors more than three years after the accident makes his conclusions regarding their condition at the time of the accident speculative, as any number of factors could have influenced or contributed to the condition of the subject doors during the intervening time period. (*Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 338 [1st Dept 2008].) Finally, much of Halpern's suppositions as to what may have caused Tobey's accident were conclusory and speculative, and thus insufficient to raise a triable issue of fact. (*Id.)*

As plaintiff has failed to rebut Mount Sinai's prima facie showing that it did not have notice of any problem with the subject doors closing on anyone prior to Mrs. Tobey's accident, Mount Sinai is entitled to summary judgment dismissing all claims and cross-claims as against it.

**Mackenzie**

Mackenzie contends that plaintiff's wrongful death cause of action should be dismissed as plaintiff died of causes unrelated to her accident on March 1, 2007. In addition, Mackenzie also argues, like Mount Sinai, that plaintiff's complaint should be dismissed as against it as it also had no notice of the defect in the subject door.

**Wrongful Death Claim**

Mackenzie argues that plaintiff cannot show that Mrs. Tobey died as a result of the accident. Mackenzie fails to make a prima facie showing of entitlement to judgment with respect to plaintiff's wrongful death claim, as Mackenzie does not submit any expert medical testimony as to the cause of Mrs. Tobey's death. Furthermore, Mrs. Tobey was admitted into Mount Sinai immediately upon suffering her injury and remained at Mount Sinai until her death on April 23, 2007. As such, it is a question of fact for the jury to decide if Mrs. Tobey's death was a result or consequence of her accident and injury.

**Notice**

In arguing that it did not have notice of a defect that would cause the subject doors to close on Mrs. Tobey, Mackenzie marshals much of the same evidence and arguments as those of Mount Sinai, the substance of which was discussed above. Mackenzie submits, for example, deposition testimony from Van Cott, Mount Sinai's maintenance manager, who testified that there had never been any complaints involving the subject doors closing on pedestrians passing through them (Van Cott Deposition, at 20-21). Mackenzie also submits testimony from Mattson, Mackenzie's vice president, who testified as follows regarding work orders related to the subject doors:

Q: Did you review work orders or tickets or whatever you reviewed in reference to these specific doors?

A: Yes, I did.

Q: And what did you note from your review of those records?

A: The majority of the stuff, the service that was done on these doors were for bottom pivots and guides and the majority of the calls were that the doors were not closing.

(Mattson Deposition, at 40).

While Mattson's testimony alone is insufficient to make a prima facie showing of entitlement to judgment on the issue of notice, as he refers only to a "majority of the calls" rather than the all of them, Van Cott's testimony is enough to make such a showing.

Plaintiff argues that Mackenzie had constructive notice based on the affidavit of Halpern, plaintiff's expert, who testified that a defect involving the zone of protection offered by the subject door's automatic sensor was detectible through inspection (Halpern Affidavit, ¶¶ 7-8). Therefore, plaintiff contends that there is a question of fact as to whether Mackenzie should have discovered the alleged defect through its inspections of the door.

However, as discussed above, the Halpern affidavit is insufficient to defeat the defendants' motions for summary judgment. As a result, Mackenzie is also entitled to summary judgment dismissing all claims and cross-claims as against it, since Mackenzie did not have notice of a defect in the subject doors that would cause them to close on Mrs. Tobey

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED, that defendant The Mount Sinai Hospital's motion for summary judgment (Motion Seq. No. 001) is granted, and plaintiff's claims against it are dismissed; and it is further

ORDERED, that defendant Mackenzie Automatic Doors, Inc.'s motion for summary judgment (Motion Seq. No. 002) is granted, and plaintiff's claims against it are dismissed; and it is further

ORDERED, that the Clerk is to enter judgment accordingly.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

**ENTER:**

Dated: December 14, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.