Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ILIE MARINESCU,

Plaintiff,

-against-

THE PORT AUTHORITY OF NY & NJ and TERMINAL ONE GROUP ASSOCIATION LP,

Defendants.

Index Number 34312 2009

Motion Date July 1 2013

Motion Seq. No. 1

The following papers numbered 1 to 16 read on this motion by the Port Authority of New York and New Jersey (Port Authority), and Terminal One Group Association, LP (TOGA), for summary judgment in their favor pursuant to CPLR 3212; and cross motion by plaintiff for summary judgment in his favor and for leave to supplement his bill of particulars to assert the doctrine of res ipsa loquitur.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 7
Notice of Cross Motion - Affidavits - Exhibits	8 - 11
Answering Affidavits - Exhibits.....	12-14
Reply Affidavits.....	15-16

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on March 9, 2009, at Terminal 1 at John F. Kennedy International Airport (Airport), in Jamaica, New York. On the date in question, plaintiff had accompanied a friend to the Airport. When a door through which plaintiff was attempting to enter became stuck, plaintiff pulled on the door repeatedly "with all [his] might" until the door jerked forward striking plaintiff above

the left eyebrow causing him injury. Defendants move for summary judgment in their favor on the ground that they did not create the alleged dangerous condition and did not have actual or constructive notice of the same. Plaintiff opposes the motion and cross moves for summary judgment in his favor and for leave to amend the bill of particulars to assert the doctrine of *res ipsa loquitur*. Defendants oppose plaintiff's cross motion.

Facts

Plaintiff testified that on the date in question, he and his daughter accompanied a friend to Terminal 1 because his friend was taking his father, Nelu, and his friend's daughter to the Airport to take an airplane to Romania. According to plaintiff, Nelu opened one of the terminal doors near Austrian Airlines and entered the Terminal. Nelu had no problem opening the door and going to the Terminal. After Nelu opened the door and entered, plaintiff tried to open the same door but it was stuck. According to plaintiff, he put his left hand on the door handle and tried to open the door but it did not open. Plaintiff again tried to open the door by pulling on it, but it did not open again. At this point, plaintiff testified, he "pulled [the door] a third time with all his might" with both hands. After doing so, the door jerked forward and opened, striking plaintiff in the face, above the left eyebrow.

Plaintiff testified that several weeks after the accident, he returned to Terminal 1 with an investigator who took pictures of the door where plaintiff was injured. Plaintiff claims that the door still was not working properly. According to plaintiff, the investigator took a video of the door in question. The video had not been produced by the time of plaintiff's deposition but was eventually produced. It depicted plaintiff opening and closing the door without incident on the later date.

During his deposition, plaintiff also identified photographs taken about three weeks to a month after the accident and marked as exhibits at the deposition. Using the photographs, plaintiff testified that the door appeared to be in the same condition as on the date of the accident. Using the photograph identified as Exhibit "C", plaintiff testified that the photograph depicted that the door was not parallel, was cracked, and that the door was sealed and had "dropped" and that this condition was what was jamming the door. Using Exhibits "D", "E", "F" and "G", plaintiff testified that the photographs depicted that the scratched aluminum had turned black due to longstanding friction, that the hydraulic door had "lost oil" evidencing that the cylinder was not replaced and so the door would get stuck; that there was scratched aluminum on the door edge caused by the friction of the door against the door frame and that the photograph depicted oil that had [allegedly] leaked from the door and turned black.

Herb Sterbenz testified on behalf of TOGA as follows: he believed that the door in question was inspected on a monthly basis. The maintenance of the door was performed by

a company known as ABM Engineering (ABM). Sterbenz described the door as a manual door with a closer that operates pneumatically. TOGA would not be given any records from ABM regarding its inspection of the terminal doors. He was not aware of any repairs being made to the doors where plaintiff was injured prior to the date of the accident. Sterbenz testified that he would walk through Terminal 1 each day inspecting different areas of the terminal, including the doors. He had not knowledge of there being any problems with the door where plaintiff was injured within three months prior to the subject accident. Sterbenz also testified that, after receiving the security report about the incident on the day of the occurrence, he inspected the door and found that it opened properly.

A copy of the lease between the Port Authority and TOGA indicates that the Port Authority did not have a duty or responsibility to maintain the Terminal 1 premises, including the area where plaintiff was injured.

Discussion

"It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair or maintain the premises" *(Dalzell v McDonald's Corp.,* 220 AD2d 638 [1995]; *see, Putnam v Stout,* 38 NY2d 607 [1976]). Reservation of the right to enter the premises for the purpose of inspection and repair may constitute sufficient retention of control to permit a finding that the landlord had constructive notice of a defective condition provided a specific statutory violation exists and there is a significant structural or design defect *(see, Guzman v Haven Plaza Hous. Dev. Fund Co.,* 69 NY2d 559 [1987]; *Velazquez v Tyler Graphics,* 214 AD2d 489 [1995]; *Gantz v Kurz,* 203 AD2d 240 [1994]; *Manning v New York Tel. Co.,* 157 AD2d 264 [1990]).

The court grants the branch of the motion by defendants which is for summary judgment dismissing the complaint insofar as asserted against the Port Authority, since this defendant was not obligated under the lease to repair the door and there was no evidence that it retained a sufficient degree of control over the premises to provide a basis for liability *(see, O'Gorman v Gold Shield Sec. & Investigation,* 221 AD2d 325 [1995]; *Love v Port Auth.,* 168 AD2d 222 [1990]). Plaintiff failed to offer evidence of a significant structural defect or of any specific statutory violations.

A defendant who moves for summary judgment in a hazardous condition case has the initial burden of making a prima facie showing that it did not create the hazardous condition that allegedly caused the accident, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*see Molloy v Waldbaum, Inc.*, 72 AD3d 659, 660 [2010]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2009]; *Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 742 [2009]; *Britto v Great Atl. & Pac.*

Tea Co., Inc., 21 AD3d 436 [2005]). To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall (*see Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2009]; *Holub v Pathmark Stores, Inc.*, 66 AD3d at 742; *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d at 437).

Here, TOGA failed to sustain its initial burden of demonstrating that it did not have constructive notice of the alleged hazardous condition involving the door of its premises because the deposition testimony of its employee failed to establish when the door was last inspected relative to the date of plaintiff's accident (*see Farrell v Waldbaum's, Inc.*, 73 AD3d 846, 847 [2010]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2009]; *Rodriguez v Hudson View Assoc., LLC*, 63 AD3d 1135, 1136 [2009]; *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d at 437; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410 [2004]). Defendants' witness, Sterbenz testified that he believed that the door in question would be inspected on a monthly basis, and that the maintenance of the door would be performed by ABM Engineering, but that Sterbenz would not be notified or given repair records if there was something wrong with the door. Prior to the accident, Sterbenz "might have" inspected the door "at random", but he had no specific recollection of having inspected the door in question within three months before the accident.

Defendant TOGA also failed to establish that the alleged defect in the door could not have been discovered upon a reasonable inspection of the door (see *Colon v Bet Torah, Inc.*, 66 AD3d 731, 732 [2009]; *cf. Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 799-800 [2003]).

Moreover, while TOGA contends that ABM was exclusively responsible for maintaining the door in question, the court cannot consider the agreement indicating the same between TOGA and ABM, submitted for the first time in reply (*see Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826 [2008]).

Accordingly, the branch of the motion by defendants which is to dismiss the complaint, insofar as asserted against TOGA, is denied.

Cross Motion

The branch of the cross motion which is to supplement the bill of particulars to assert the doctrine of res ipsa loquitur, is denied. This doctrine is properly invoked where an injured party lacks direct evidence of negligence or the specific cause of an event or occurrence, and must rely solely upon circumstantial evidence; in such circumstances a jury may be allowed to infer that a defendant "was negligent in some unspecified way" if the

plaintiff demonstrates the existence of three specific criteria (*Morejon v Rais Constr. Co.,* 7 NY3d 203, 205–206, 209 [2006]; *see Kambat v St. Francis Hosp.,* 89 NY2d 489, 494 [1997]; *see also* 1A N.Y. PJI3d 2:65, at 378–379 [2011]). The three criteria are: (1) the event must be of a 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; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.,* 67 NY2d 219, 226 [1986]). Here, the uncontroverted record reveals that plaintiff repeatedly pulled at the door until it jerked open. This direct evidence is sufficient to support a cause of action sounding in negligence, rendering the res ipsa claim inapplicable (*compare Bonura v KWK Assoc.,* 2 AD3d 207, 208 [2003]).

The branch of the cross motion which is for summary judgment in plaintiff's favor, is denied. The issue of causation is generally resolved by the fact finder *(Kriz v Schum,* 75 NY2d 25 [1989]; *Derdiarian v Felix Contr. Corp.,* 51 NY2d 308 [1980]). The undisputed record indicates that the door opened for plaintiff's friend immediately prior to plaintiff's accident and that it was working properly when TOGA inspected it after the accident. Plaintiff's admitted conduct in pulling the door with all his might after it failed to open on his earlier attempts, raises an issue of fact as to whether such conduct was a superseding, intervening event (*see Mercado v Vega,* 77 NY2d 918, 920 [1991]; *Derdiarian v Felix Contracting Corp., supra).*

Conclusion

The branch of the motion which is for summary judgment dismissing the complaint insofar as asserted against the Port Authority, is granted. The branch of the motion which is for summary judgment dismissing the complaint, insofar as asserted against TOGA, is denied.

The branch of the cross motion which is to supplement the bill of particulars to assert the doctrine of *res ipsa loquitur*, is denied. The branch of the cross motion which is for summary judgment in plaintiff's favor, is denied.

Dated: November 15, 2013
D:48

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J.S.C.