Scoles v Econolodge
2014 NY Slip Op 31140(U)
April 29, 2014
Supreme Court, New York County
Docket Number: 108409/11
Judge: Donna M. Mills

[* 1]
SCANNED ON 5/1/2014

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

PRESENT : DONNA M. MILLS **PART** 58

Justice

GARY SCOLES and CAROL SCOLES,

Plaintiffs,

-v-

ECONOLODGE, et al.,

Defendants.

INDEX NO. 108409/11

MOTION DATE

MOTION SEQ. NO. 004+005

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-4
Answering Affidavits– Exhibits	5-7
Replying Affidavits	8, 9

CROSS-MOTION: ✓ YES _____ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

FILED

MAY 01 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/29/14

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----------x

GARY SCOLES and CAROL SCOLES,

Plaintiffs,

-against-

Index No.

ECONOLODGE, A Business Entity; CHOICE HOTELS, A Business Entity; SHERMAN MANAGEMENT LLC, A Business Entity; CRYSTAL WINDOW & DOOR SYSTEMS, LTD., A Business Entity; DOES 1 through 100, Inclusive; DOE CORPORATION and ROE PARTNERSHIP,

108409/11

Defendants.

----------x

DONNA MILLS, J. :

For convenience, the following motions shall be consolidated.

Defendant Crystal Window & Door Systems, Ltd. (Crystal) moves for summary judgment dismissing the complaint against it (Mot. Seq. No. 004). Plaintiffs Gary and Carol Scoles move for partial summary judgment (Mot. Seq. No. 005). Defendants Econolodge, Choice Hotels and Sherman Management LLC (hereinafter the Econolodge defendants) cross-move for summary judgment dismissing the complaint against them.

This a personal injury/negligence action. In the amended complaint, plaintiffs allege the following: on April 30, 2011, plaintiffs occupied Room 602 of the premises owned by Econolodge, located at 302 West 47th Street, New York, New York. Econolodge is a franchise operating pursuant to an agreement with Choice Hotels (Choice), the franchisor. Sherman Management LLC (Sherman) is the manager of the premises. While plaintiff Gary Scoles (Scoles) was attempting to open a window in that room, the top pane suddenly and without warning slammed downward, thereby traumatically severing the tip of the ring finger of his right

hand.

Plaintiffs are suing all defendants for negligence in maintaining a defective and dangerous window on the premises which resulted in Scoles's injuries. Crystal is being individually sued for designing and/or manufacturing a defective window. Carol Scoles, Scoles's wife, is suing all defendants for loss of consortium.

All depositions have been concluded in this action. Plaintiffs now move for partial summary judgment against the Econolodge defendants for negligence, based on the res ipsa loquitur doctrine. The Econolodge defendants oppose this motion and cross-move for summary judgment seeking dismissal of the complaint against them. Crystal moves under a separate motion for summary judgment seeking dismissal.

Plaintiffs rely on deposition testimony for their motion. Testimony from a Nigel Hou, the on-duty manager of the Econolodge on the day of the accident, indicates that he and Ken Moeller, a friend of plaintiffs, entered the room shortly after the accident, after plaintiffs had left the premises. At that time, Moeller, in Hou's presence, undid the latch of the subject window and the upper portion came crashing down. Moeller observed that the window was a two-part window, upper and lower, with a lock/latch between. On the upper section was another locking device that locks the upper section to the window frame. When the top lock was unlocked, the upper portion of the window dropped without restriction. Plaintiffs contend that the freefall of the upper portion caused it to pass the lower frame. Hou, who stated that his responsibilities included window maintenance, testified that he never reported a major problem with a window there, and never asked for outside personnel to perform any repairs. Hou asserted that prior to the accident, the windows of Room 602 had last been inspected in January or February 2011 by

hotel personnel.

At his deposition, John Sharma, owner of Econolodge, testified that in 2005, the premises was entirely renovated, including the creation of a sixth floor. Plaintiffs' room was located on the sixth floor, where Crystal windows had been installed. Sharma stated that the single Crystal window in Room 602 had been installed under his supervision, as he had served as the general contractor in the renovation. Sharma stated that he did not have the windows inspected by a licensed contractor. Plaintiffs argue that at the time of the accident, no records of window maintenance had been kept on the premises.

Vincent Grieco, a regional sales and technical manager for Crystal, testified as to the subject window, which he identified as a Crystal window. Grieco testified that he did not know who installed the window, and he noted some irregularities and claimed that the fasteners used on the window were not acceptable in the industry.

Plaintiffs contend that based on this evidence, there is an inference of negligence. Applying res ipsa loquitur, they state that the window was under the control of the Econolodge defendants, subject to their management, and the accident occurred in the ordinary course of opening a window, indicating a reasonable belief that the accident arose from a lack of care. Plaintiffs conclude that through their proof, they have established that res ipsa loquitur is applicable here, and that the burden of proof of negligence shifts to the Econlodge defendants.

The Ecocolodge defendants state that a prima facie case of negligence against them has not been established. The Econolodge defendants claim that they were not negligent in the ownership, operation, control or maintenance of the window in Room 602. The Econolodge defendants assert that the windows at the premises are regularly inspected and maintained. They

state that this particular window is known as an 1199 window, which is designed with several safety features to prevent accidents like the one involved in this case. According to the Econolodge defendants, none of these defendants know how or why the accident happened, ever had actual or constructive notice of any defects concerning the window, or ever received any complaints about the window prior to the accident.

For this reason, the Econolodge defendants cross-move for summary judgment and dismissal, claiming no liability for the accident. They seek dismissal of all claims and cross claims brought against them. The Econolodge defendants argue that all the evidence leveled against them is purely conclusive and speculative, not sufficient in a negligence suit. As for res ipsa loquitur, the Econolodge defendants aver that they were not in exclusive control of the window at the time of accident, and are not subject to any inference of negligence.

Plaintiffs argue that the Econolodge defendants failed to file an opposition to their motion and filed a late notice of cross motion, failing to seek leave to file from the court. This notice was filed over 120 days after the filing of the note of issue, which is dated August 9, 2013. The Econolodge defendants served their notice of cross motion on December 19, 2013. Therefore, plaintiffs request that the court deny the Econolodge defendants' cross motion. They also request the granting of their motion for partial summary judgment because the Econolodge defendants, in failing to file an opposition, have committed a default.

In reply to plaintiffs' opposition to the cross motion, the Econolodge defendants claim that, although the cross motion is untimely, it should not be denied because the theory in support of its cross motion is similar to plaintiffs' theory, essentially involving principles of common-law negligence. The Econolodge defendants argue that, pursuant to CPLR 3212 (a), the court has

the discretion to set aside untimely motions for summary judgment, if the untimely motion is nearly identical to the timely motion. The Econolodge defendants state that this is the case here.

In a separate motion, Crystal moves for summary judgment, denying any liability with respect to the design or manufacturing of the window, and claiming that the other defendants failed to properly install and maintain the window. Crystal denies any involvement in the installation or maintenance of the windows at the premises. Like plaintiffs, Crystal relies heavily on deposition testimony. Crystal refers to testimony from Sharma and Hau, indicating that no repairs had been made on the window since its installation. It refers to testimony from Grieco, who identified the window and asserted that the window was not manufactured negligently. Crystal refers to the window as an 1199 window, consisting of two sashes, top and bottom. The window is said to have three standard safety features which are sash stops, which stop the window sash from moving beyond a certain point; an anti-drift latch that prevents the top sash from moving when opening and closing the bottom sash; and window balances, that allow one to position a sash anywhere one likes which, if properly balanced, will prevent the sash from freefalling.

Crystal submits an affidavit and report from Ross Adler, a vice-president of Adler Windows, who conducted an expert inspection of the window and concluded that the window was not negligently designed or manufactured. A further affidavit from Grieco is submitted. Both individuals conclude that the accident occurred as a result of improper installation or maintenance of the window. Crystal submits copies of photographs of the window in order to provide an understanding of the components and parts of the window.

Crystal states that the evidence submitted is sufficient proof that it is not liable under

either the standards of common-law negligence or strict products liability. Thus, it seeks the dismissal of all claims and cross claims brought against it.

In opposition, plaintiffs submit the affidavit of plaintiffs' friend Moeller, who states that he examined the window after the accident happened and concludes that it was defective. Plaintiffs also submit an affidavit and report from C. J. Abraham, a licensed engineer, who concludes that Crystal breached a non-delegable duty of due care, specifically by failing to perform a risk analysis for all foreseeable uses and misuses, including a freefall event; failing to perform a risk analysis regarding the degradation of the integrity of the window over time that could result in a freefall event; failing to provide the owner and manager of Econolodge with specific instructions on how to properly install and maintain the window on a periodic basis; and failing to provide warnings.

Plaintiffs contend that this evidence precludes summary judgment, as there is sufficient proof that Crystal could be liable for negligence.

In reply, Crystal states that Moeller's affidavit is not sufficient, since he did not witness the accident and there is no foundation to show that he has any expertise in window design or manufacturing. According to Crystal, Abraham's affidavit and report also lack a foundation to demonstrate his expertise in window design or manufacturing. Crystal contends that Abraham's statements are largely speculative and that the extent of his inspection is not clarified. Crystal argues that Abraham's report lacks the details and consistencies found in Adler's report and should be disregarded by the court.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman,* 43 AD3d 374,

375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted]'" *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment [in their favor] as a matter of law, tendering sufficient evidence to eliminate any absence of any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 (1985). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action." *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 (1986).

This action involves allegations based in common-law negligence and products liability. Plaintiffs are suing all defendants for negligence. "'In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury (citation omitted).'" *Chunhye Kang-Kim v City of New York,* 29 AD3d 57, 59 (1st Dept 2006). This action involves an allegedly defective and dangerous property which was under the ownership or control of all defendants except Crystal. "It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances ... . In 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 (citation omitted)." *Waiters v Northern Trust Co. of N. Y.*, 29 AD3d 325,

326 (1st Dept 2006).

With respect to negligence, plaintiffs are relying on the res ipsa loquitur doctrine to implicate defendants. "Res ipsa loquitur... involves little more than application of the ordinary rules of circumstantial evidence to certain unusual events, and it is appropriately charged when, upon a commonsense appraisal of the probative value of circumstantial evidence, the inference of negligence is justified (internal quotation marks and citation omitted)." *Kambat v St. Francis Hosp.*, 89 NY2d 489, 495 (1997).

> "The granting of summary judgment on the theory of re ipsa is warranted when the plaintiff can establish the following elements: (1) the event is of a type that does not occur in the absence of negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendants; and (3) it must not have been due to any voluntary action or contribution on the part of plaintiff [internal citations omitted]. "

Tora v GVP AG, 31 AD3d 341, 342 (1st Dept 2006).

The granting of partial summary judgment to plaintiffs under such circumstances would be rare, since plaintiffs would have to demonstrate sufficient proof that the inference of negligence is so convincing as to rebut all contrary evidence. The court finds that plaintiffs have not made a case for res ipsa loquitur because the window, as a part of the hotel open to the public, was subject to extensive public contact on a regular basis, and had been utilized by others long before Gary Scoles' accident. Therefore, the Econolodge defendants did not have actual exclusive control over the window. *See Parris v Port of N. Y. Auth.*, 47 AD3d 460, 461 (1st Dept 2008). Because plaintiffs failed to show that these defendants had exclusive control of the window, the motion for partial summary judgment is denied.

Plaintiffs claim that the cross motion brought by the Econolodge defendants is untimely,

as it was made after the expiration of the 120-day period, pursuant to CPLR 3212 (a). Under CPLR 3212 (a), in the absence of a court order or rule, summary judgment motions brought later than 120 days after the note of issue is filed are untimely, and will not be addressed "except with leave of court on good cause shown." *See Brill v City of New York*, 2 NY3d 648, 651 (2004). The Econolodge defendants' reference to *Filannino v Triborough Bridge & Tunnel Auth.*, (34 AD3d 280 [1st Dept 2006]) is an attempt to permit the cross motion in the absence of a showing of good cause. The Appellate Division, First Department, in *Filannino,* held that an untimely cross motion can be considered when it seeks relief "nearly identical" to the timely motion. *Id* at 281. The Econolodge defendants contend that both motions involve elements of common-law negligence, and are similar or nearly identical.

The court finds that the cross motion is "nearly identical" to plaintiffs' motion, as it raises the issue of liability for negligence. The Econolodge defendants assert a lack of liability based on alleged failure to cause or create a dangerous condition on its premises, and a lack of actual or constructive notice of such a condition. The cross motion shall not be dismissed on the ground of untimeliness.

However, the cross motion shall be denied. Through their submission of deposition testimony, plaintiffs have disclosed an issue of fact precluding judgment. The testimony of Econolodge's owner Shama reveals this defendant's responsibility for periodically examining or inspecting the windows on the premises, including the subject window. Shama also asserts that it was Econolodge's responsibility to maintain the windows. Although he states that the subject window had been inspected prior to the accident, there is no written record of regular inspections maintained by Econolodge or Sherman.

The court finds that there is an issue of fact as to whether the subject window had been properly inspected or maintained by Econolodge and/or Sherman prior to the accident. It is Econolodge's and/or Sherman's duty to maintain its windows in a reasonably safe condition. While there is no evidence that they had notice of a dangerous or defective condition here, they might have allowed such a condition to exist due to a failure of a duty of maintenance. Whether or not that duty was breached must be determined by a trier of fact.

Whereas there is not sufficient proof as to whether Choice, which is the franchisor in this action, has a specific duty to maintain or inspect the windows on the premises. There is no evidence which indicates that Choice was involved in any day to day operations on the premises, as is the case with Econolodge and Sherman. Thus, a duty of due care toward plaintiffs is not prescribed to Choice, and this defendant shall be dismissed from this action.

The other motion for summary judgment is brought by Crystal, the designer and manufacturer of the subject window. Plaintiffs are suing Crystal for negligence and strict products liability. Crystal's main argument for its motion is that its window was properly designed and manufactured; that its design has been in existence for many years and is commonplace in buildings across the city; that it is reasonably safe; and that whatever harm it caused was due to the improper installation and/or maintenance by other parties.

> "For there to be a recovery for injuries or damages occasioned by a defective product, however, that defect must have been a substantial factor in bringing about the injury or damage and additionally, among other things, at the time of the occurrence, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable [citations omitted]. "

Amatulli v Delhi Constr. Corp., 77 NY2d 525, 532 (1991).

Crystal relies on the testimony and affidavit of its regional manager Greico, and the affidavit of expert inspector Adler to attest to the quality of the window. Both individuals examined the subject window after the accident. Plaintiffs counter Crystal's evidence by contending that Crystal failed to provide instructions to Econolodge on how to install the window, leading to a possibly improper installation. They rely on the statements of their expert Abraham, who did not personally examine the window, but who read Adler's affidavit, as well as the deposition testimony. Abraham referred to a non-delegable duty attached to manufacturers which Crystal allegedly violated. Abraham concluded that Crystal failed to perform risk analysis prior to putting the window in the marketplace, along with failing to inform Econolodge on how to install and maintain the window.

To succeed in a failure to warn claim, plaintiffs are "required to prove that the product did not contain adequate warnings and that the inadequacy of those warnings was the proximate cause of the injuries." *Mulhall v Hannafin,* 45 AD3d 55, 58 (1st Dept 2007). "'A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known (internal citation omitted).'" *Badalamenti v City of New York,* 78 AD3d 566, 567 (1st Dept 2010).

"[A] manufacturer has a duty to test fully and inspect its products to uncover all dangers that are scientifically discoverable." *See George v Celotex Corp.,* 914 F2d 26, 28 (2d Cir 1990).

The court finds that the evidence submitted by plaintiffs is too speculative to raise an issue of fact as to negligence or strict liability. Plaintiffs have not specified the types of design or manufacturing defects in the window that would necessitate adequate warnings. The evidence centers largely on the statements of Abraham who did not personally inspect the window for

latent defects. His testimony is conclusive and speculative. Therefore, the court shall grant Crystal's motion on the ground that there is insufficient proof to sustain a material issue of fact as to defects in the design and manufacture of the window.

Accordingly, it is

ORDERED that plaintiffs Gary Scoles and Carol Scoles's motion for partial summary judgment is denied; and it is further

ORDERED that defendants Econolodge, Choice Hotels and Sherman Management LLC's cross motion for summary judgment is granted to the extent that defendant Choice Hotels is dismissed from the action and the complaint is dismissed with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant Crystal Window and Door Systems, Ltd.'s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

Dated: 4/29/14

ENTER

J.S.C.