

**Alvarez v Denihan Hospitality Group**

2016 NY Slip Op 30772(U)

April 25, 2016

Supreme Court, New York County

Docket Number: 154961/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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ROCIO ALVAREZ,

INDEX NO. 154961/13

Plaintiff,

-against-

DENIHAN HOSPITALITY GROUP, AFFINIA-150  
EAST 34<sup>TH</sup> STREET CO., LLC, and PEBBLE BROOK  
HOTEL TRUST,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendants DHG Management Company LLC, d/b/a Denihan Hospitality Group (“DHG”), 150 East 34<sup>th</sup> Street Co., LLC s/h/i Affinia-150 East 34<sup>th</sup> Street Co., LLC, and Pebblebrook Hotel Trust (collectively “defendants”) move for summary judgment dismissing the complaint. Plaintiff opposes.

Plaintiff was employed by defendant DHG as a spa attendant at the hotel known as the Affinia Dumont located at 150 East 34<sup>th</sup> Street in Manhattan. Plaintiff alleges she was injured on December 23, 2012 at approximately 11:30 a.m., when the door of the men’s spa bathroom closed on her right hand. Plaintiff concedes she was injured during the course of her employment with DHG, and filed for and received workers’ compensation benefits. It is undisputed that plaintiff’s employer, defendant DHG, managed the hotel pursuant to a management agreement, defendant 150 East 34<sup>th</sup> St Co., LLC is the fee owner of the building and hotel premises, and defendant Pebblebrook Hotel Trust is a real estate investment trust that is a minority owner of the building and hotel premises.

In support of their motion for summary judgment, defendants argue that the door of the men's spa bathroom was not in a dangerous or defective condition, and that defendants had no actual or constructive notice of the allegedly dangerous or defective door. Defendants also argue that under the workers' compensation law, plaintiff cannot maintain this action against her employer, defendant DHG, and the two co-defendants are also entitled to the protections of the worker's compensation law, since they "compromise a single integrated entity for purposes of ownership, operation and management of the hotel."

Plaintiff does not oppose dismissal as to her employer DHG. With respect to defendants 150 East 34<sup>th</sup> Street Co., LLC and Pebblebrook Hotel Trust, plaintiff argues they are not entitled to dismissal based on the workers' compensation law, since they have failed to submit prima facie proof that they are the alter ego of or the joint venturer with her employer, DHG. Plaintiff also argues that issues of fact exist as to whether the door in the men's spa bathroom was a defective or dangerous condition, and whether defendants had actual or constructive notice of the dangerous or defective condition of the door.

To succeed on a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case." Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once the proponent has made such a showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that a material issue of fact exists which requires a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). A property owner is under a duty to maintain its premises in a reasonably safe condition in view of all circumstances, including among others, the likelihood of avoiding injury

to others and the burden of avoiding the risk. See Basso v. Miller, 40 NY2d 233 (1976). Where as here, defendants are moving for summary judgment, they have the initial burden of making a prima facie showing that they neither created the dangerous condition, nor had actual or constructive notice of its existence. See Keita v. City of New York, 129 AD3d 409 (1<sup>st</sup> Dept 2015); Smith v. Costco Wholesale Corp, 50 AD3d 499 (1<sup>st</sup> Dept 2008); Mitchell v. City of New York, 29 AD3d 372 (1<sup>st</sup> Dept 2006). Once defendants establish entitlement to such relief as matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to defendants' notice or creation of the defect. See Smith v. Costco Wholesale Corp, *supra*.

Turning first to the issue of whether plaintiff's claims are barred by the workers' compensation law, given the absence of opposition and plaintiff's admissions that she was injured during the course of her employment and that she applied for and received workers' compensation benefits, plaintiff's exclusive remedy against her employer, defendant DHG, is workers' compensation. Defendant DHG is therefore entitled to summary judgment dismissing the complaint as against it.

The question remains as to whether co-defendants 150 East 34<sup>th</sup> Street Co., LLC and Pebblebrook Hotel Trust have made a sufficient prima facie showing that the claims against them are likewise barred by workers' compensation. Defendants bear the burden of establishing the defense of workers' compensation by a preponderance of the credible evidence. See Donatin v. Sea Crest Trading Co, Inc, 181 AD2d 654 (2<sup>nd</sup> Dept 1992).

When a corporation is an alter ego of or joint venturer with the injured plaintiff's employer, the protections of workers' compensation are extended to cover that corporation, as well as plaintiff's employer. See Morato-Rodriguez v. Riva Construction Group, Inc, 88 AD3d

549 (1<sup>st</sup> Dept 2011); Masley v. Herlew Realty Corp, 45 AD3d 653 (2<sup>nd</sup> Dept 2007); Johnson v. Urena Service Center, 227 AD2d 325 (1<sup>st</sup> Dept), lv app den 88 NY2d 814 (1996). “A defendant may establish itself as the alter ego of a plaintiff’s employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity.” Samuel v. Fourth Avenue Assocs LLC, 75 AD3d 594 (2<sup>nd</sup> Dept 2010); see Quizhpe v. Luvin Construction Corp, 103 AD3d 618 (2<sup>nd</sup> Dept 2013). “However, a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other.” Samuel v. Fourth Avenue Assocs LLC, *supra*.

Here, defendants submit an affidavit from Tom Felderman, Senior Vice President Finance for defendant Denihan Hospitality Group, stating that the “business” of the three defendant entities is “inter-related” and “one in the same” for the “ownership, operation and management of the hotel.” Felderman further states that defendant 150 East 34<sup>th</sup> Street Co., LLC is the fee owner of the hotel building and premises, which is owned in a joint venture between Denihan and Pebblebrook Hotel Trust; “corporate officers” of defendant 150 East 34<sup>th</sup> Street Co., LLC are “representatives of both Denihan and Pebblebrook”; and the three defendants are covered under the same policy of workers’ compensation insurance. Defendants also submit the workers’ compensation policy, DHG’s management agreement with an unexplained non-party entity, 150 East 34<sup>th</sup> Street Co. Lessee LLC, and the lease agreement between that unexplained non-party as “lessee” and defendant 150 East 34<sup>th</sup> Street Co., LLC as “landlord.”

While defendants essentially rely on an alter ego theory by asserting that they operate as one company, the evidence submitted is insufficient to make that determination as a matter of law. Felderman provides little evidentiary support for his bare and conclusory statement that

defendants function as “one in the same” for the business of owning, operating and managing the hotel. Even assuming without deciding that the three defendant entities are named as insureds in one workers’ compensation insurance policy, and that 150 East 34<sup>th</sup> Street Co., LLC and Pebblebrook own the hotel premises as a joint venture, defendants have failed to demonstrate that the joint venture entities which own the hotel premises, function as one company with plaintiff’s employer, the entity that manages and operates the hotel. Defendants do not identify the specific “corporate officers” of 150 East 34<sup>th</sup> Street Co., LCC who serve as “representatives” of Denihan and Pebblebrook, nor explain the functions and responsibilities of a “representative” as opposed to a corporate officer. Notably, defendants fail to submit any factual details or documents showing that one or more of the entities controls the day-to-day operations of the others. See Samuel v. Fourth Avenue Assocs LLC, *supra*. Thus, although there is some evidence that the three entities are related, defendants have failed to make a prima facie showing that 150 East 34<sup>th</sup> Street Co., LLC and Pebblebrook are the alter ego of plaintiff’s employer, so as to be entitled to the immunity conferred by the workers’ compensation law.

In the alternative, defendants argue they are entitled to judgment as matter of law dismissing the complaint on the grounds that the door in the men’s spa bathroom was not in a dangerous or defective condition, and that they had no actual or constructive notice of any dangerous or defective condition of the door.<sup>1</sup> To support their arguments, defendants submit the transcripts of plaintiff’s deposition and the deposition of the hotel’s general manager, Alex

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<sup>1</sup>Defendants 150 East 34<sup>th</sup> Street Co., LLC and Pebblebrook Hotel Trust have not taken the position that they are an out-of-possession landlord with no duty to maintain the premises, see Kittay v. Moskowitz, 95 AD3d 451 (1<sup>st</sup> Dept 2012), lv app den 20 NY3d 859 (2013), which position would conflict with their position on this motion that they are one in the same with plaintiff’s employer, co-defendant DHG.

Spektor, and an affidavit from Marta Sak, a housekeeping manager and plaintiff's supervisor on the day of the accident.

Spektor testified that within two days of plaintiff's accident, he and the director of engineering personally examined the door in the men's spa bathroom and found nothing "unusual, out of the norm with this door." He explained that "we recreated this scenario" and found the door "absolutely normal with any other bathroom when you use one hand to open it and close it, and we did not have any difficulty or challenges opening it or closing." Describing the door as "standard door" that was "average" in weight and "pretty light," Spektor testified that the door "did not close on its own" and "required to pull and push, and that's how the door operated when we tested it." He also testified that the hotel managers conduct monthly "walkthroughs" of public areas, including the "spa area," and the hotel also has an "engineering team" which has a "regular schedule of preventative maintenance" where they "cover the entire building every three months." Spektor further testified that as a "standard operating procedure," he receives all incident and accident reports, and prior to plaintiff's accident, he received no complaints about the door and there were no "incidents" involving the door.

In her affidavit, Marta Sak states that she has been employed as a housekeeping manager at the hotel since December 2012, and was present at the hotel on the day of plaintiff's accident, and was one of plaintiff's supervisors. She states that she saw plaintiff immediately after the accident and "covered a bruised finger on her right hand with band aids," but plaintiff did tell her then or any time afterwards that the "incident was caused by the men's spa bathroom door closing too fast or not opening in a safe and proper manner." She also states that as part of her duties as a housekeeping manager, "I visually and physically inspect the men's spa bathroom,

including the bathroom door, at least once every month,” and that during her inspections of the door prior to December 23, 2012, “I never found said door to close too fast or not operated in a safe and proper manner.”

Defendants also rely on plaintiff’s deposition testimony describing the events leading up to the accident and the condition of the door. Plaintiff testified that after she finished cleaning the men’s spa bathroom, she was carrying a basket with cleaning supplies in her left hand, and began to exit the bathroom by using her right hand to lower the handle to open the door. She testified that she pushed the door forward, “[h]olding it with my hand and my body because it was too heavy . . . I was holding the door with my back because the door was very heavy and it was too fast, and it would close very rough and very fast.” She testified that as she was using her right hand and back to push the door open, the door “came on top of me. I exited and it came on me to remove my body, and it grabbed my right hand. It grabbed my right hand. It grabbed me right here (indicating). I tried to remove it and it grabbed my fingers, and my fingers got trapped there.” When asked to describe the door, she responded, “It was a big door, made of metal, heavy. It didn’t have, you know, that object that tends to be on top of doors that makes it slow, like close slowly.” She was asked to describe the “speed” of the closing door, and answered, “very fast.”

Based on the foregoing, defendants have established that they conducted regular inspections of the men’s spa bathroom door, examined the door within two days of plaintiff’s accident, and received no complaints about the operation of the door. This is sufficient to show prima facie that the door was not dangerous or defective. See Davila v. City of New York, 95 AD3d 560 (1<sup>st</sup> Dept 2012); Fontana v. RHC Development, LLC, 69 AD3d 561 (2<sup>nd</sup> Dept 2010);

DeCarlo v. Village of Dobbs Ferry, 36 AD3d 749 (2<sup>nd</sup> Dept 2007); Hunter v. Riverview Towers, Inc, 5 AD3d 249 (1<sup>st</sup> Dept 2004); Aquila v. Nathan's Famous, Inc, 284 AD2d 287 (2<sup>nd</sup> Dept 2001). The only evidence that the door was dangerous or defective was plaintiff's testimony that the door was heavy and closed "very fast." While plaintiff contends the door was dangerous or defective due to its excessive weight and closing speed, "it cannot be inferred that the door was defective or improperly maintained because it could close fast enough or hard enough, to cause the plaintiff's injuries." Fontana v. RHC Development, LLC, *supra*; accord Davila v. City of New York, 95 AD3d 560 (1<sup>st</sup> Dept 2012) (no dangerous condition where plaintiff and his brother testified the doors were heavy and closed with enough force to injure plaintiff); DeCarlo v. Village of Dobbs Ferry, *supra* (defective condition not established merely because door closed with sufficient force to sever the tip of plaintiff's finger); Lezama v. 34-15 Parsons Blvd, LLC, 16 AD3d 560 (2<sup>nd</sup> Dept 2005) (door that abruptly or rapidly closed on plaintiff was not a defective or dangerous condition); Hunter v. Riverview Towers, Inc, *supra* (cannot infer that door was defective or improperly maintained merely from the fact that it could be opened fast enough, or hard enough to knock plaintiff down); Aquila v. Nathan's Famous, Inc, *supra* (no defective condition where plaintiff alleged excessive weight of door and a defective closing device proximately caused the accident); Maldonado v. Lee, 278 AD2d 206 (2<sup>nd</sup> Dept 2000) (door not defective where plaintiff claimed the excessive force with which the door closed was a proximate cause of her accident). Thus, contrary to plaintiff's contention, a defective condition cannot be inferred from the fact that the door to the men's spa bathroom door closed with sufficient force to injure her hand. See Hunter v. Riverview Towers, Inc, *supra*. "Such inference, absent any other evidence of a defect, is too speculative to impose liability." *Id.*

Although the burden shifts to plaintiff to raise a triable issue of material fact, she has failed to do so. Plaintiff does not submit an expert's affidavit, so the only evidence as to the dangerous and defective condition of the door is plaintiff's testimony. Plaintiff argues that her testimony that the door was "heavy," closed "very fast" and "grabbed," raises an issue of fact as to whether the door posed a danger to persons using it, even if the door or its hinge was not "technically defective," citing Chafoulias v. 240 E. 55<sup>th</sup> St Tenants Corp, 141 AD2d 207 (1<sup>st</sup> Dept 1988). Plaintiff's argument is contrary to case law authorities cited above, and Chafoulias is distinguishable on its facts, as it involved a question of whether a dangerous condition was created by the color and arrangement of the vestibule area which made the stairs where plaintiff fell indistinguishable. Id. Plaintiff's additional argument that an issue of fact exists as to whether the door's allegedly "self-closing" hinges were operating properly or whether a door check was required to make the door safe, is unavailing in the absence of an expert's affidavit. See Aquila v. Nathan's Famous, Inc, supra. Moreover, by itself, plaintiff's allegation as to a nearly identical accident six months earlier, is insufficient to raise an issue of fact as to the defective condition of the door.

Thus, since plaintiff has failed to raise a triable issue of material fact as to whether the door was defective, defendants are entitled to summary judgment dismissing the complaint in its entirety. See Davila v. City of New York, supra; Fontana v. RHC Development, LLC, supra; DeCarlo v. Village of Dobbs Ferry, supra; Hunter v. Riverview Towers, Inc, supra; Aquila v. Nathan's Famous, Inc, supra.


Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety against all defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: April 25, 2016

ENTER:

  
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HON. JOAN A. MADDEN  
J.S.C.