Selby v 247 Deli, LLC
2016 NY Slip Op 30885(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 159209/13
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JULIE SELBY,

Plaintiff,

-against-

247 DELI, LLC, d/b/a DELICATESSEN MACCBAR, 247 DELICATESSEN MANAGEMENT GROUP, LLC, LAFAYETTE STREET REALITY ASSOCIATIONS, LLC, 265 LAFAYETTE RISTORANTE, LLC, and GILMAN MANAGEMENT CORPORATION,

Defendants.

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Index No. 159209/13
Motion Seq. 002

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this personal injury action, defendants 247 Deli, LLC and 247 Delicatessen Management Group ("247 Deli" or "Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them on the grounds that they did not cause and had no notice of the condition that is alleged to have caused plaintiff Julie Selby's ("Plaintiff") injuries. For the reasons set forth below, Defendants' motion is denied.

This action arises out of an accident which occurred on or about May 24, 2013 when a glass door located at the entrance to the restaurant "Delicatessen" in Manhattan allegedly snapped back upon and caused injury to Plaintiff's left middle finger. The building which houses Delicatessen is owned by defendant Lafayette Street Reality Associates, LLC and managed by defendant Gilman Management Corporation. The basement and the first floor of the building were leased by the moving Defendants for the operation of Delicatessen.

Ms. Selby, a resident of the United Kingdom, was visiting New York on the date of the

accident. Her bill of particulars alleges that she was exiting Delicatessen when "a glass door violently and without warning struck her left middle finger, causing serious personal injuries."[1] This door is one of three connected to Delicatessen's vestibule. One door is used to enter and exit from the vestibule into the restaurant. The other two doors are used to access Prince and Lafayette streets, respectively. The door complained of opens up onto Lafayette street from inside the vestibule. Its interior hinges are on the left, and its handle is on the right ("Subject Door").

Four depositions were conducted in this case, the first being the Plaintiff's on January 7, 2015[2], who testified in relevant part as follows (Selby Deposition, pp. 17, 78-81):

Q. Could you describe your accident for me?

A. Well, I got up -- do you want detail? I got up from the table, walked through the restaurant. It was quite busy. I went through the first door into a sort of vestibule type area. I then pushed the outer door. I pushed it with my left hand the best account I can give. I then -- it swang back very, very quickly and violently hit my finger and then there was just blood everywhere and just all over the place. . . .

* * * *

Q. When you pushed open the second door, did you actually take a step out onto the concrete?

A. The sidewalk.

Q. From the vestibule out onto the sidewalk?

A. Yes.

Q. How many steps did you take out onto the sidewalk?

A. Possibly one and a half and I stepped out and I was in the middle of stepping out when it swung out. . . .

Q. Was there a part of your body that was caught in between the door and something else?

A. Yes.

Q. What was that something else your body was caught between, was it a door frame or

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1 Defendants' exhibit E, ¶¶ 4-6.

2 A copy of the Plaintiff's deposition is submitted as Defendants' Exhibit F ("Selby Deposition").

something else?

A. Yes, I mean, I was halfway out.

Q. What got caught between the door and the door frame itself?

A. Well, me.

Q. What did your finger get caught on, if anything? . . .

A. The edge of the door which was very heavy and it was the force that did it.

Three witnesses were deposed on behalf of the defendants: Delicatessen general manager Kirsten Carsrud on June 8, 2015, Gilman superintendent Roy Matthew on June 16, 2016, and Delicatessen co-owner Andrew Glassberg on August 27, 2015.[3] Ms. Carsrud was on duty on the date of Plaintiff's accident but was hired only two weeks earlier. She testified that she was not aware of any defects and had not received any complaints regarding the Subject Door (Carsrud Deposition, pp. 41-44). Mr. Matthew ate breakfast at Delicatessen every weekday morning. He also testified that there had been no complaints regarding the Subject Door, and that he was not aware of any problem with it since the restaurant first opened (Matthew Deposition, pp. 21, 29, 32-33). Mr. Glassberg confirmed that the Subject Door had been in place since the restaurant opened and never presented any problems (Glassberg Deposition, pp. 29, 34, 44).

Pursuant to CPLR 3101(d), Plaintiff disclosed that she had retained Stanley Fein, a licensed engineer, in connection with this case, and that it was anticipated he would testify, in part, to the following (Defendants' exhibit J, ¶ 3):

> [T]he subject door at the aforementioned location was in a dangerous and defective condition and had not been properly installed, serviced, maintained or repaired. It is anticipated that he will testify and give his opinions that the subject door was controlled by a floor-mounted door closer manufactured by Dorma. It is anticipated that Mr. Fein will also testify that the subject door required maintenance and/or service at least once a month to ensure that it was working

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[3] Copies of their deposition transcripts are submitted as Defendants' exhibits G, H, and I, respectively ("Carsrud Deposition", "Matthew Deposition", "Glassberg Deposition").

properly. Mr. Fein will testify that the defendants failed to properly install, maintain, service, and repair the subject door and that there was a pressure differential between the inside and outside of the premises. Specifically, Mr. Fein is expected to testify that the operator on the subject door should have been adjusted to permit the door to close slowly during the last three (3") inches of its travel, even with varying pressure differentials between the inside and the outside of the premises.

Defendants hired Vincent A. Ettari, a licensed professional engineer, to inspect the Subject Door on October 5, 2015.[4] He concludes that it did not violate any of the administrative codes and industry standards which Plaintiff alleged were violated in her bill of particulars.[5] His Report notes that Plaintiff's reliance on New York City's building codes is flawed because they do not regulate door closure time.[6] Mr. Ettari explains that American National Standards Institute ("ANSI") A156.15 is also inapplicable because it only prescribes the way doors should operate in a laboratory setting, and does not provide performance standards for doors that have actually been installed. The Report also contends that ANSI A156.15 is irrelevant because it focuses on closing speeds when a door is three inches from its closed position, whereas Plaintiff testified that she was almost through the doorway when the accident occurred, meaning the Subject Door had to be more than three inches from its closed position at the moment of impact.[7] The Report goes into great detail in respect of the applicability of ANSI A117.1-2003, which had not been referred to by Plaintiff. It provides that a door's closing speed from start until twelve degrees from closure must be at least

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4 A copy of Mr. Ettari's report, sworn to December 19, 2015, is submitted as Defendants' exhibit K ("Ettari Report").

5 Plaintiff's bill of particulars alleges violations of sections 28-301.1 and 29-107.5 of the 2008 New York City Building Code, sections 27-354, 37-356, 27-357, 27-359, 27-371, 27-383 of the 1968 New York City Building Code, and American National Standards Institute A156.15.

6 Ettari Report, pp. 9-10.

7 Ettari Report, pp. 11-13.

five seconds.[8] Mr. Ettari reports that he tested the door ten times, and in each instance the specified time period exceeded five seconds.[9]

The Ettari Report also discounts Plaintiff's pressure differential theory which Plaintiff had alluded to. Mr. Ettari explains that in order for the Subject Door to experience such a differential both it and the inner door would had to have been within three inches of their fully closed positions, which could not have been possible in this case given Plaintiff's testimony that she was almost outside when the accident occurred.[10]

Plaintiff's expert, Stanley Fein, inspected and took photographs of the Subject Door and its surrounding area on April 22, 2014.[11] He concluded that the "only manner in which the plaintiff's incident could have happened is if the subject door was not maintained in a safe manner, that is, that the door closer was not regularly inspected and adjusted monthly." *Id.* at ¶ 7 (emphasis in original). In this regard, Mr. Fein explains that the Subject Door was controlled by a floor-operated closer which should have permitted it to close slowly so that it did not spring back, even with varying pressure differentials. He did not find anything wrong with the Subject Door but observed that "the door closer on the adjacent door in the same vestibule was not functioning properly, as it permitted that door to remain in an 'open' position . . . ." Fein Affidavit, ¶ 6.

Mr. Fein also takes issue with Defendants' claim that the door had not been manipulated

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8 The 2003 edition of ANSI A117.1 was in effect when the door was originally installed in 2008. Section 404.2.7 of that standard provides that "[d]oor closers shall be adjusted so that from an open position of 90 degrees, the time required to move the door to an open position of 12 degrees shall be 5 seconds minimum." See Defendants' exhibit S.

9 Ettari Report, p. 15.

10 Ettari Report, pp. 16-18.

11 A copy of Mr. Fein's affidavit, sworn to February 2, 2016, is submitted as Plaintiff's exhibit H ("Fein Affidavit").

prior to Mr. Ettari's inspection, which took place nearly two and one half years after Plaintiff's incident (*id* at ¶ 9):

> [T]he fact that the adjacent door's closer at the time of my inspection was not in proper working order is proof that these doors had been manipulated prior to Mr. Ettari's inspection. In fact, the list of invoices from "My High Security Locksmith" provided by the defendants in discovery indicates that this company had been to "Delicatessen" on numerous occasions both before and after the plaintiff's incident, amassing $17,909.00 worth of charges from May, 2010 through May, 2015 . . . These thirty-five visits were not made in any regular pattern, let alone were they made monthly, as the subject door is required to be to ensure that it is maintained in a safe condition. Notably, this locksmith company visited "Delicatessen ten (10) [times] during the almost two and a half (2.5) years between the plaintiff's incident and Mr. Ettari's inspection of the subject door.

Based on the foregoing, Mr. Fein concludes that the Subject Door was a safety hazard which could not have injured the Plaintiff in the manner it did unless its closing mechanism was malfunctioning.

On this motion Defendants assert that the Subject Door was not defective, that they did not create or have notice of any alleged defective condition, and that Plaintiff could not have been injured as claimed given her testimony that she was struck on the same hand with which she held the Subject Door open. In opposition Plaintiff argues that even if Defendants were not negligent *per se* in terms of violating applicable building codes and regulations they have failed to establish their entitlement to summary judgment on her common law negligence claim, specifically that Defendants have not shown that the Subject Door was adequately inspected, maintained, and adjusted prior to the accident or satisfied their burden regarding lack of notice since their own records show numerous unexplained visits by a locksmith prior to the accident. In reply Defendants argue that Mr. Fein was unable to identify any specific defect with the Subject Door, and dispute the assertion that it must have been defective simply because Delicatessen occasionally hired a locksmith.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

It is settled that landowners and business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). While they are not insurers of the safety of people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]) they must reasonably ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use." *Miller v Gimbel Bros.*, 262 NY 107, 108 (1933); *see also Hackbarth v McDonalds Corp.*, 31 AD3d 498, 498 (2d Dept 2006). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances,

including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *See Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006). Businesses owners who operate places of public assembly have a duty to provide members a "safe means of ingress and egress". *Id.*

A defendant moving for summary judgment also "has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition." *Mitchell v City of New York*, 29 AD3d 372, 374 (1st Dept 2006); *see also Keita v City of New York*, 129 AD3d 409, 410 (1st Dept 2015). "Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . . ." *Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008).

The Ettari Report is impressive in its depth and analysis, but it is significant that Defendants waited almost two and a half years after Plaintiff's accident to have Mr. Ettari perform his inspection. Defendants employed the services of a locksmith several times during this period, and Defendants do not show whether such work was limited to Delicatessen's two other front doors. A reasonable inference may therefore be drawn that Subject Door's condition was materially altered from the date of the accident to the date of Mr. Ettari's inspection. This inference may be drawn

despite Ms. Carsrud's uncross-examined assertion that the condition of the door remained unchanged since May 24, 2013 (see Defendants' exhibit L, ¶ 3) given her admission she has no training or experience with construction, doorways, engineering, or door hinges (Carsrud Deposition p. 9).

Defendants point out that Plaintiff's expert does not cite to any codes, provisions, guidelines or industry standards on which his claim of a defect is or could be based. Defendants also assert that Mr. Fein's expert opinions have been rejected by several appellate and trial level courts for this very reason. *See, e.g., Jones v City of New York*, 32 AD3d 706, 707 (1st Dept 2006); *Kopsachilis v 130 E. 18 Owners Corp.*, 43 AD3d 744, 749 (1st Dept 2007) (Catterson, J., dissenting), *reversed*, 11 NY2d 512 (2008); *Bean v Ruppert Towers Hous. Co.*, 274 AD2d 305, 308 (1st Dept 2000); *Torres v Nine-O-Seven Holding Corp.*, 2015 NY Misc. LEXIS 2863, *5 (Sup. Ct. NY Co., Wooten, J., Aug. 3, 2015); *Sarg v Twelfth St. Corp.*, 2012 NY Misc. LEXIS 628, *7-8 (Sup. Ct. NY. Co., York, J., Feb. 12, 2012); *Reeves v Georgia Props. Inc.*, 2013 NY Misc. LEXIS 6929, *8-9 (Sup. Ct. Queens Co., McDonald, J., Oct. 28, 2013); *Kuzma v Skanska USA Building, Inc.*, 2008 NY Misc. LEXIS 9577, n.5 (Sup. Ct. Kings Co., Balter, J., Aug. 29, 2008).[12] The court has read each of the decisions cited by Defendants in this regard, and as with most cases where summary judgment is sought it is the facts that control.

In *Jones, Kopsachilis, Bean*, and *Sarg*, for example, Mr . Fein's report was the only evidence

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[12] *See also Saul v Sutton House Associated*, 2015 NY Misc. LEXIS 3426, *15 (Sup. Ct. NY Co., Kalish J., Sept. 18, 2015); *Green v City of New York*, 2014 NY Misc. LEXIS 5760, at *17 (Sup. Ct., Bronx Co., Danziger, J., Dec. 14, 2014); *Greco v Pisaniello*, 2014 NY Misc. LEXIS 5451, *7 (Sup. Ct. Bronx Co., Aarons, J., Nov. 24, 2014); *Caputo v Amedeo Hotels LP*, 2011 NY Misc. LEXIS 5394, *16 (Sup. Ct. NY Co., Madden, J., Oct. 18, 2011); *Zizzo v Port Auth. of NY & N.J.*, 2011 N.Y. Misc. LEXIS 2895, *5 (Sup. Ct. Queens Co., Siegal, J., June 17, 2011); *Laster v 125-129 Park Ave. Realty LLC*, 2009 NY Misc. LEXIS 1463, *12 (Sup. Ct. Kings Co., Bunyan, J., May 13, 2009); *Mejia v ERA Realty Company*, 2008 NY Misc. LEXIS 9334, *7-8 (Sup. Ct. Nassau Co., Phelan, J., May 19, 2008).

proffered to defeat summary judgment. In *Reeves* the plaintiff tripped over a radiator that was installed in the wrong location. And in *Kuzma* Mr. Fein had not personally examined the alleged defect. In this case Mr. Fein did personally inspect the premises; there is an abundance of unrefuted testimonial and documentary evidence that the Subject Door was problematic; and Plaintiff's argument is not that the Subject Door was installed in the wrong location, but that it was not properly maintained.

Torres actually works to Defendants' detriment in this case. There the court took issue with the fact that Mr. Fein inspected the site more than two years from the date of plaintiff's accident after changes had been made to the site. Given that Mr. Ettari inspected the Subject Door two and one half years after several visits from a locksmith had been required, an argument could be made here that his Report should be rejected. At most, therefore, these cases stand for the proposition that the court should refrain from giving any weight to Plaintiff's negligence *per se* claims.

Notwithstanding, Defendants' compliance with industry codes and standards is not entirely determinative of whether they maintained the Subject Door in a reasonably safe condition. *See Kellman v 45 Tiemann Associates, Inc.*, 87 NY2d 871, 872 (1995) ("alleged compliance with the applicable statutes and regulations is not dispositive of the question of whether it satisfied its duties under the common law"); *Swerdlow v WSK Properties Corp.*, 5 AD3d 587, 588 (2d Dept 2004) (property owner had a duty to maintain its property in a reasonably safe condition even though it did not fall within the purview of the building code).

In this regard, none of the Defendants' representatives could recall whether the Subject Door was inspected or adjusted prior to Plaintiff's accident (Carsrud Deposition p. 26; Glassberg Deposition p. 36):

Q. Do you know if there is any type of inspections or maintenance done to the external doors of Delicatessen?

A. I do not.

Q. Have you ever seen anyone performing any maintenance or adjustment work on the external door from Delicatessen onto Prince Street [sic]?

A. Yes.

Q. When did you see that?

A. I can't recall exactly.

Q. Was is before May of 2013 or after.

A. After.

Q. Do you remember how far after; was it a couple of months, weeks, years, something else?

A. A couple of months.

* * * *

Q. Are you aware of any type of maintenance performed on this particular door at any given time?

A. Not that I recall . . . .

Q. Any type of work done to the door since it was installed?

A. I don't recall specifically, it's possible.

What Defendants' witnesses did remember is that the Subject Door occasionally had to be tied open with a string. This permits a reasonable inference that the closing mechanism malfunctioned prior to Plaintiff's accident (Carsrud Deposition p. 45, Glassberg Deposition pp. 31-32):

Q Have you ever seen either of the external glass doors at Delicatessen be tied open, and what I mean, using a rope or string to keep the door permanently open for a time?

A Yes.

Q Did you ever see that prior to Miss Selby's accident?

A No.

Q Who would tie the door open?

A I'm not sure.

Q Why would the door be tied open?

A I do not know.

* * * *

Q Have you ever seen the door . . . tied back such that it was open, you know, consistently?

A Consistently, you mean stay in place open?

Q That it was tied open?

A I believe so.

Q When have you seen that?

A I don't remember.

Q Was it before May of 2013 or after?

A I don't remember.

Q How many times have you seen that door tied open?

A I wouldn't be able to say, I just don't remember . . . I would say more than once.

Q Do you know why the door was tied open?

A I'm not sure.

Consistent therewith is Plaintiff's exhibit F which depicts the "Voucher History" of invoices from Defendants' locksmith, My High Security Locksmith, showing that work was performed on the premises twenty-five times between May, 18, 2010 and the date of the accident. Such invoices are not in any regular pattern or for the same or similar amounts, eliminating any claim of regular inspections and or maintenance on Defendants' part.[13]

The Voucher History also rebuts the testimony by all three defense witnesses that there was nothing wrong with the Subject Door. In fact, My High Security Locksmith performed work on the premises more than two dozen times in the roughly three years prior to the accident. For example, work was needed on October 12, 2011 because the "Macbar door wouldn't close". On January, 8, 2013, the "closer [was] adjusted." Later that month, "Emergency Service" was performed in order to "adj for top/bottom pivot for temporary function of door". The court notes that no further

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[13] Of some note is the entry dated May 28, 2013, four days after Plaintiff's incident, for $1,633.13.

documentation or explanation has been provided as to the specific work performed on such dates.

Also notable is Plaintiff's testimony that moments after her accident she spoke with Jeff Orban, Delicatessen's general manager at the time, who stated "[o]h dear, we have had problems with that door." (Selby Deposition p. 82). Mr. Orban then proceeded to tie the door open with a string (*id* at 31-32, 82-83):

A. Did I mention the door was afterwards tied back. . . .

Q. And they did it after the accident someone tied the door open? It wasn't like that before?

A. No, the manager did. He said there had been problems with the door and he came and tied it back.

Q. He said that there had been problems with the door?

A. Yes.

Q. Do you remember what he tied the door with?

A. Not precisely. It was some sort of -- he ran and got -- it was some sort of string. It wasn't a specialist piece of equipment.

* * * *

Q. I know you told me some of what you guys talked about but can you tell me the sum and substance of what you and Jeff Orban spoke about?

A. I believe that I said the door hit my finger. He said, Oh dear, we have had problems with that door. He went back inside, you know, to get this whatever it was, string that he tied it back. I'm not sure if he called an ambulance or if he asked a member of his staff to call the ambulance and I didn't talk a whole lot to him after that.[14]

The court finds this to be significant evidence on the issue whether Defendants knew or should have known the Subject Door was prone to malfunction.

The foregoing facts and circumstances raise a material issue of fact whether the Subject Door had ongoing issues requiring the services of a locksmith, and, *a fortiori*, whether Defendants

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14 It is permissible to consider Mr. Orban's hearsay testimony on this summary judgment motion (*see Zimbler v Resnick 72nd St Assoc.*, 79 AD3d 620, 621 [1st Dept 2010]; *Oken v A.C.&S.*, 7 AD3d 285, 285 [1st Dept 2004]).

were on notice of the condition alleged to have caused Plaintiff's injuries.

As to Defendants' causation argument, the court rejects their contention that the accident could not have occurred as alleged because it was "mechanically impossible". Plaintiff's explanation of her injury is not unreasonable and the cases upon which Defendants rely to demonstrate otherwise are misplaced.[15] Unlike *Santoni, Ardolic*, and *Williams*, the Defendants in this case have not come forward with any evidence concerning inspections they may have performed on the Subject Door prior to Plaintiff's accident. The court is cognizant that Mr. Fein's reports have been rejected as speculative in other cases based on different facts and circumstances. In this case, under these facts and circumstances, Mr. Fein's opinion is based on his personal inspection of the premises, the Voucher History, and the parties' respective depositions. While Mr. Fein could be wrong, these questions nevertheless boil down to credibility determinations that should be resolved by a jury. *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75 (1st Dept 2015); *Melendez v Dorville*, 93 AD3d 528 (1st Dept 2012).

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[15] *Santoni v Bertelsmann Prop.*, 21 AD3d 712 (1st Dept 2005) involved a woman who upon entering her office building sought to use the elevator. According to the plaintiff, both elevator doors opened, but only the right elevator door began to close. Then both elevator doors closed on her right side, allegedly causing injuries to arm, elbow and wrist. The court rejected the opinion of plaintiff's expert because he did not inspect the premises and speculated that the doors failed because of carbonized build-up on one of the elevator's safety features, which defendant's expert has already inspected and found to be in working order. The court also explained that the movant was not on notice of the alleged defective condition because it had just undergone several mandatory inspections and no defects were discovered.

In *Ardolic v New Water St. Corp.*, 907 NYS2d 435 (1st Dept App. Term 2010), another elevator case, the plaintiff claimed to have tripped because the elevator was misleveled four inches as she attempted to exit. However, plaintiff's expert did not address, let alone refute, the movant's expert evidence and testimony showing that it was mechanically impossible for the elevator door to open if it was misleveled by more than one inch.

In *Williams v Port Auth.*, 247 AD2d 296 (1st Dept 1998) the plaintiff alleged that she stepped about halfway up a moving escalator when it suddenly reversed itself and proceeded in a downward direction. The escalator repair company moved for summary judgment on the basis of its expert engineer, who averred that to reverse direction the escalator must be stopped by the use of the stop button and restarted using a specific. Plaintiff unsuccessfully argued that the case should be submitted to a jury on the basis of *res ipsa loquitur*.

CONCLUSION

The court has considered Defendants' remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants 247 Deli, LLC and 247 Delicatessen Management Group is denied.

This constitutes the decision and order of the court.

DATED: 4.26.16

SHERRY KLEIN HEITLER, J.S.C.