

Halloran v CVS Albany L.L.C.
2016 NY Slip Op 31221(U)
June 28, 2016
Supreme Court, New York County
Docket Number: 153578/2014
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 153578/2014
HALLORAN, ELLEN
vs.
CVS ALBANY L.L.C.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/27/16
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

Motions sequence 003 and 004 are consolidated for joint disposition as follows:

In this personal injury action, defendant/third-party defendant, ASSA Abloy Entrance Systems US Inc. ("Assa") moves for summary judgment dismissing this action against it (sequence 003). Plaintiff Ellen Halloran ("plaintiff") moves for summary judgment on the issue of liability against CVS Albany LLC and CVS Pharmacy, Inc. (collectively, "CVS") (sequence 004).

Factual Background

Plaintiff claims that on March 17, 2014, she fell when automatic folding exterior doors at a CVS Pharmacy located on Bleeker Street, New York, New York struck her as she was attempting to leave the store. Plaintiff sued CVS for failing to maintain the premises and doors. As against Assa, plaintiff alleges that Assa had a contract with CVS for inspection, maintenance, and replacement services for the automatic doors, and Assa negligently performed its services under the contract.

In support of dismissal, Assa contends that the depositions of Assa, CVS, a former CVS employee, and affidavit of Assa's counsel Jennifer Sadoff, demonstrate that CVS owns and operates the store, and that no service contract between CVS and Assa exists. Instead, CVS hired Assa to perform repairs to the doors upon request, on an as-need basis. Assa argues that as a service repair company hired on an as-need basis, and in the absence of any service contract with CVS, it owed no duty to plaintiff, and there is no evidence that it breached any duty owed to plaintiff. Further, in the absence of any contract requiring Assa to indemnify or insure co-defendant CVS, CVS's third party claims for contribution, indemnification, and/or failure to procure insurance must be dismissed.

Dated: _____

Page 1 of 5, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Plaintiff argues that the evidence demonstrates that she is entitled to summary judgment against CVS under the doctrine of *res ipsa loquitur* and common law negligence. Plaintiff's automatic door expert opines that based on his inspection of the doors on July 7, 2014, video of the incident, and applicable standards and policies in the industry, plaintiff's accident was caused by the failure of, *inter alia*, presence detector to keep the door open when someone stood in the doorway or moving slowly through it.

Both motions are opposed.

Discussion

Since plaintiff and defendant each seeks summary judgment, each side bears the burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 [Sup Ct New York Cty 2012], *aff'd* 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra*, *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v City of New York*, 49 NY2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

As to Assa's motion for summary judgment, where an independent contractor provides services, that contractual duty does not give rise to a duty of care to a noncontracting party, such as the plaintiff herein, unless three exceptions apply (*Corrales v Reckson Associates Realty Corp.*, 55 AD3d 469, 868 NYS2d 2 [1st Dept 2008] *citing Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). There are three exceptions are where 1) the contractor "launches a force or instrument of harm," by negligently creating or exacerbating a dangerous condition resulting in an injury; 2) the performance of contractual obligations has induced detrimental reliance on continued performance of those obligations; and 3) the contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely (*Espinal v Melville Snow Contractors, Inc.*, *supra*). Assa demonstrated that it performed repair work on January 27, 2014, approximately three months before the subject incident, and that the door was working properly when the work was completed. The record demonstrates that no other service calls were made for Assa to perform any work on the subject doors. Thus, there is no evidence that Assa launched a force or instrument of harm. Assa also demonstrated that it was an independent contractor hired on an as-needed basis, and that there is no service contract, comprehensive or otherwise, for preventative maintenance, inspection and repair of the subject doors. Therefore, CVS retained responsibility for and control over maintenance, and Assa did not displace or absorb CVS's responsibility to maintain the premises safely. As such, there is no showing that plaintiff detrimentally relied upon any continued performance of any obligations of Assa under any agreement. Therefore, the record establishes that none of the three exceptions apply so as to give rise to any duty by Assa to plaintiff (*see Eliasberg v Memorial-Sloan Kettering Cancer Center*, 79 AD3d 628, 915 NYS2d 43 [1st Dept 2010]).

Plaintiff failed to raise an issue of fact as to Assa's duty. Plaintiff's claim that Assa did not expressly deny the existence of a service contract is belied by the record. Assa's counsel's affidavit, which is sufficiently specific, the parties' response to discovery demands, and CVS's

motion papers clearly indicate that no service contract between these parties exists.

Further, as to plaintiff's expert's remaining claims that Assa failed to advise or warn of upgrades to the door sensor system, in "the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects (*Daniels v Kromo Lenox Associates*, 16 AD3d 111, 791 NYS2d 17 [1st Dept 2005] citing *Rosa v Mid Hudson Clarklift*, 269 AD2d 266, 703 NYS2d 122 [1st Dept 2000]; *Remekie v 740 Corp.*, 52 AD3d 393, 861 NYS2d 618 [1st Dept 2008]). Plaintiff's expert's opinion also fails to raise an issue of fact as to whether Assa's January 2014 was negligent (*see Eliasberg v Memorial Sloan-Kettering Cancer, supra* [Finding insufficient an expert's conclusion that defendant created a dangerous condition by improperly setting the sensors when it installed them as such conclusion "was based on the fact that the accident happened"])).

In light of the dismissal of the plaintiff's personal injury claim as against Assa, CVS's common law indemnification claim against Assa must also be dismissed (*San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 942 NYS2d 104 [1st Dept 2012]). Nor does a contribution claim lie against Assa, as contribution is "available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 594 [2005]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 764 NYS2d 17 [1st Dept 2003]). And, it is undisputed that no contract exists to support a contractual indemnification claim or breach of duty to procure insurance claim against Assa.

Therefore, Assa's motion for summary judgment dismissing the action and third party action against it is warranted.

As to plaintiff's motion for summary judgment under the theory of *res ipsa loquitur*, this doctrine "permits an inference of negligence to be drawn from the very occurrence of a certain type of accident and the defendant's relation to it. If the requirements for application of the doctrine are met, a plaintiff is allowed to rest her case on circumstantial evidence when the specific cause of the accident is unknown" (*Pavon v Rudin*, 254 AD2d 143, 679 NYS2d 27 [1st Dept 1998]). To prevail under this theory, plaintiff must demonstrate that (1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality causing the accident was within defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff (*Dermatossian v New York City Transit Authority*, 67 NY2d 219, 492 NE2d 1200, 501 NYS2d 784 [1986]).

In *Singh v United Cerebral Palsy of N.Y. City, Inc.* (72 AD3d 272, 896 NYS2d 22 [1st Dept 2010]), plaintiff sued for injuries sustained when automatic swinging doors closed upon her. Plaintiff alleged that the automatic doors' motion sensor, which was mounted over the top of the doors, was defective because it failed to detect her as she walked through the doorway. She also alleged that defendant was negligent in failing to conduct regular inspections of the doors. Defendant moved to dismiss, *inter alia*, the *res ipsa loquitur* claim, arguing that the sensor mechanism was not within its exclusive control because third-party defendant Reliable Door Corp. was responsible for performing repair work on the doors. The Court denied dismissal, explaining that although the door maintenance company was responsible for performing repair work on the doors, such company did so on an as-needed basis without an exclusive maintenance

contract, and thus, the company's work on the doors did not "as a matter of law, remove the sensor from [defendant's] exclusive control." The Court cited caselaw holding that *res ipsa loquitur* "does not require sole physical access to the instrumentality causing the injury and can be applied in situations where more than one defendant could have exercised exclusive control" (72 AD3d at 277).

Thus, contrary to CVS's contention, the fact that Assa performed repair services to the door does not raise an issue of fact as to whether the doors at issue were within CVS's exclusive control for purposes of the doctrine. Notably, there is no evidence that Assa maintained the doors under any exclusive maintenance contract.

However, as pointed out by CVS, a question of fact exists as to whether plaintiff's own actions contributed to the accident. Inasmuch as the operation and opening of the doors correlated with plaintiff's presence and continued presence within a certain range of the door's sensors, and her choosing when to proceed through the door despite her knowledge of the door coming into contact with her previously, it cannot be said that the occurrence was not due to *any* voluntary action or contribution on the part of the plaintiff. Plaintiff testified at her deposition that she passed through the doors upon entry into the CVS store without incident (EBT, pp. 25-26). Plaintiff walked through these doors "maybe" three times within the past year, without difficulty (EBT, pp. 29-30). On the date of the incident, when attempting to exit the store, at one point, plaintiff "stood there for a minute thinking I never saw this happen before, I'll try it again. I approached the door. It opened and it closed before I could actually get, you know, to the real entrance, the threshold." (EBT, p. 36). The record, including plaintiff's deposition and video surveillance of the incident, indicates that the doors came into contact with plaintiff when during her first attempts to exit the store, and that she waited for other patrons to walk by before attempting to exit the store the third time. Plaintiff's third attempt, during which the doors struck her and she fell, was preceded by two previous unsuccessful attempts to walk through the door. As CVS points out, an issue of fact is raised as to plaintiff's knowledge of the doors' inability to remain open for a sufficient length of time to permit her to walk through without being struck, and her voluntary actions in proceeding through the doors despite her knowledge.

"This is not the type of rare case in which the circumstantial proof presented by plaintiff 'is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable'" (*Barney-Yeboah v Metro-North Commuter R.R.*, 25 NY3d 945, 29 NE3d 896, 6 NYS3d 549 [2015] (train car ceiling panels with multiple safety mechanisms fell on plaintiff; *Graham v Wohl*, 283 AD2d 261, 724 NYS2d 416 [1st Dept 2001] plaintiff's version of the incident did not rule out the possibility that her injury was caused by her own voluntary actions, where plaintiff "chose when to enter the elevator and apparently was not watching its door as she did so since, . . . her companion, who was at her side and closer to the closing door, was able to step out of its way. In addition, plaintiff does not claim that she made any attempt to put pressure on the door's safety bumper such as might have caused the door to retract, and testified that she was able to free herself from door, which closed with 'medium' force."); *Feblot v New York Times Co.*, 32 NY2d 486, 299 NE2d 672, 346 NYS2d 256 [1973] (Even if the doors started to close while she was partially in and partially out of the elevator . . . she still had it within her power to cause them to instantly reopen automatically by merely touching the rubber safety edge on the inside of the door with her hand, as countless people entering and leaving

elevators routinely do every day when the door of an automatic self-service door starts to close before they are completely inside or outside the elevator, as the case may be.”); *cf. Pavon v Rudin, supra* (doors mounted on pivot hinges do not generally fall in the absence of negligence (e.g., improper installation, maintenance or repair)).

Plaintiff’s response in reply that the doors were working seconds before the accident and thus, it was reasonable for plaintiff to proceed through the doors, raises an issue of fact as to whether the accident was not due to any voluntary action or contribution by plaintiff.

Therefore, summary judgment on the issue of liability in favor of plaintiff against CVS under the theory of *res ipsa loquitur* is unwarranted (*Marszalkiewicz v Waterside Plaza, LLC*, 35 AD3d 176, 826 NYS2d 34 [1st Dept 2006] (finding plaintiff’s reliance on *res ipsa loquitur* misplaced where defective automatic sliding doors in the lobby allegedly closed on plaintiff, as plaintiff failed to demonstrate that her “alleged injury could not have been caused by any voluntary action or contribution on her part”). Likewise, as a finding of negligence requires a showing that the defendant breached a duty of care owed to the plaintiff (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]), and issues of fact exist as to whether the closing of the doors upon plaintiff under the circumstances depicted in the video was the result of any negligence on the part of the CVS, and whether CVS had actual or constructive notice of such cause (*see generally, Collins v New York City Hous. Auth.*, 2012 NY Slip Op 30710(U) [Sup. Ct., New York Cty, 2012]). The issues of proximate cause and foreseeability are generally for the fact finder to decide (*id.*). Thus, summary judgment on the issue of common law negligence is not warranted.

Conclusion

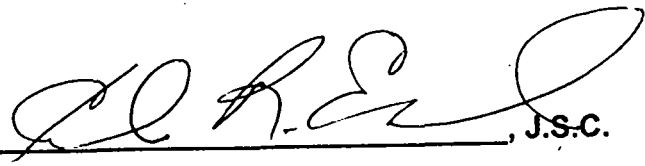
Based on the foregoing, it is hereby

ORDERED that the motion by defendant/third-party defendant, ASSA Abloy Entrance Systems US Inc. is granted, and the action and third party action are severed and dismissed against ASSA Abloy Entrance Systems US Inc.; and it is further

ORDERED that the motion by plaintiff for summary judgment against CVS on the issue of liability is denied; and it is further

ORDERED that defendant/third-party defendant, ASSA Abloy Entrance Systems US Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 6.28.2016 ENTER:  J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE