Backus v New Yorker Hotel Mgt. Co.
2016 NY Slip Op 31697(U)
September 8, 2016
Supreme Court, New York County
Docket Number: 161877/13
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF NEW YORK

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MARY THERESA BACKUS,

Plaintiff,

-against-

NEW YORKER HOTEL MANAGEMENT CO. and THYSSENKRUPP ELEVATOR CORP.,

Defendants.

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Index No. 161877/13
Motion Sequence 001, 002

DECISION AND ORDER

HON. SHERRY KLEIN HEITLER

In this personal injury action, motion sequence nos. 001 (MS 001) and 002 (MS 002) are consolidated for disposition. In MS 001, defendant New Yorker Hotel Management Corp. (New Yorker Hotel or Hotel) moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims against it on the ground that no triable issue of fact exists on the issue of liability. In MS 002, defendant Thyssenkrupp Elevator Corporation (TKE) moves for summary judgment dismissing all claims and cross-claims against it because Plaintiff's allegations against it are allegedly no more than mere speculation. TKE opposes New Yorker Hotel's motion only to the extent that it seeks dismissal of TKE's cross-claims. Plaintiff Mary Theresa Backus (Plaintiff or Ms. Backus) opposes both motions and cross-moves for sanctions against New Yorker Hotel pursuant to CPLR 3126.

BACKGROUND

Plaintiff commenced this action to recover for personal injuries allegedly sustained as a result of an incident that occurred on July 3, 2013 at approximately 8:50 pm while attempting to enter elevator #12 (the elevator) in the lobby of the New Yorker Hotel in Manhattan. Ms. Backus and her father were staying at the Hotel as guests and Plaintiff was attempting to use the elevator to take her wheelchair-bound father up to his room. As Ms. Backus approached the elevator the

[1]

hoistway door began to close. She stuck her left hand through part of the hoistway doorway to try to activate the opening mechanism but her hand became lodged between the hoistway door and the door frame. According to Plaintiff the elevator door remained closed on her hand for approximately three to four minutes until it was forced open by a Hotel employee at which point her hand was released. The elevator immediately went back into regular service. Ms. Backus claims she injured her spine while trying to dislodge her hand.

Plaintiff commenced this action by filing a summons and complaint on December 27, 2013. She was deposed[1] on May 18, 2015 and June 24, 2015 and described her incident as follows (Backus Deposition, Exhibit J at 18-22):

Q. When you first got to the elevator where the accident happened, were the doors opened or closed?

A. Open.

Q. What did you do?

A. It was closing, and I put my hand in to stop it.

Q. Was anyone in the elevator?

A. No. . . .

Q. Did it go from left to right and close all the way to the right-hand side of the elevator car?

A. All the way, definitely, all the way to the accident, yes.

Q. What happened when you put your left hand into the door to try to stop it from closing?

A. It went click, click, boom. Two thrusts and boom. . . .

Q. Did the door fully close on your left hand?

A. Yes, indeed.

Q. How would you describe the force of the door closing on your left hand?

A. Strong force.

Q. When you felt the door close on your left hand, what did you do, if anything, with regard to the movement of your body?

A. I don't know what I did. I got scared to death is what I did.

[1] Relevant portions of Ms. Backus' deposition transcripts are annexed to TKE's moving papers as exhibit J and New Yorker Hotel's moving papers as exhibit C (Backus Deposition).

Q. How many times did the door close on your left hand?

A. One time. . . .

Q. Was your hand stuck in the elevator?

A. Yes.

Q. For how long?

A. To me it seemed like a year. I don't know. Three minutes, four minutes. . . .

Q. During this three to four minutes, did you say anything to anyone?

A. The hotel employee seemed to be stationed -- again, when you come from the lobby to the elevator area, maybe security, he was standing there or something. . . .

Q. What, if anything, did this hotel employee do after you asked for help?

A. I remember him telling me he couldn't help me. He picked up his radio, called for others, but I think he came over and tried – there were so many people to try to help. He came over. All I remember is he picked up a black radio and talking to call for help. . . .

Q. Did there come a time when you were able to get your left hand out of the elevator?

A. Yes.

Q. Did someone help you do that, or did the door open by itself or something else?

A. It took three to four guys to get that door opened. One particular tall African hotel employee was able – he was a big guy. He finally just kept trying with his hand to push it backwards, and it jumped opened. . . .

Q. Did you feel the elevator car move in any direction while your hand was stuck?

A. No. I was waiting for that. I didn't want that to happen. I didn't feel anything like that.

Q. Can you describe to me where your left hand or wrist was when the elevator door shut for that three to four-minute period? Was it your fingers, your wrist, forearm, somewhere else? Tell me.

A. My whole left hand was closed and bent inwards to the width of the door.

MR. CIMENT: What part of your hand did the door close on to?

THE WITNESS: Knuckles, fingers bent around and knuckles.

After the incident Ms. Backus expressed her concern that the Hotel's security officer did not personally come to her aid and instead radioed for assistance. She testified that while waiting for help she lunged back in an attempt to dislodge her hand. This lunging movement apparently caused her back injuries (*id.* at 25, Exhibit C at 170-173):

Q. What was the sum and substance of the conversation that you had with that individual while you waited for the paramedics? . . .

A. I was a little disappointed that the other employee told me he couldn't help me and picked up his radio to call for help. He didn't really try that hard. We had a conversation about that.

* * * *

Q. Now, during the time that your hand was between the elevator door and the door buckle wall on the left, do you have any memory of any movement you made?

A. I just remember pulling. . . .

Q. Do you have any memory other than pulling of any movement you made during that time? . . .

A. Pull, push, everything I could try to do to get my hand out. . . .

Q. What else? . . .

A. I stepped back and lunged back and pulled this way (indicating). You saw the video. . . .

Q. What else?

A. The gentleman attendant that I asked to help me, he said he couldn't. I was yelling to him to get someone else and I was yelling to a – a guest came running, saw – I was yelling help, please pull. Please hurry up, hurry up, hurry up, hurry up.

The New Yorker Hotel produced two witnesses for examination before trial. Mr. Jose Siguenza was deposed on November 18, 2015.[2] At the time of his deposition Mr. Siguenza had been employed by the Hotel for 23 years and had been its Chief Engineer since 2011. He testified that TKE was responsible for maintaining the elevators as part of its contract with the Hotel and that a TKE elevator mechanic was stationed at the Hotel every Monday through Friday from 8:00AM to 4:30PM (Siguenza Deposition 6-9, 24-25). Mr. Siguenza was not working the weekend of Plaintiff's incident and only learned about it after reviewing the Hotel's log book. According to Mr. Siguenza no one from the Hotel notified TKE of the incident either during or immediately following the incident. He was not aware of any issues with elevator #12's re-opening mechanism in the six months prior to the incident (Siguenza Deposition pp. 40-41, 61, 64-65):

Q. As part of his job as building manager, if there was a claim that a passenger got her hand caught in a door of an elevator at the New Yorker Hotel, do you have any

[2] Mr. Siguenza's deposition transcript is annexed to New Yorker Hotel's moving papers as exhibit D (Siguenza Deposition).

understanding as to what Greg Kail or another building managers on duty was suppose[d] to do?

A. Building managers are supposed to contact the elevator company, in this case Thyssenkrupp company, and notify them. . . .

Q. If the building manager did call to Thyssenkrupp, should that be reported on the building manager report for the incident?

A. Yes, sir.

Q. And looking at that incident that you have there marked Plaintiff's Exhibit 1 . . . is there any indication there that Greg Kail did call Thyssenkrupp?

A. No, sir.

* * * *

Q. Are you aware, as you sit here, of any operational problems with the door of elevator number 12, other than maintenance procedures that may have had to have been done on it prior to July 3, 2013?

A. No sir. . . .

* * * *

Q. And have you ever seen any elevator in the world where if the doors have begun to close and you wanted them to stop closing and reopen, you could just swipe your arm through the doorway and the doors would stop closing and reopen without you having to touch it? Have you ever seen that?

A. Yes, sir.

Q. Did elevator number 12 have that feature back on July 3, 2013?

A. As described by the mechanic, yes, it does and it has that sensor, yes. . . .

Q. Are you aware of those features not working properly at any time in the six months prior to July 3rd of 2013?

A. No, sir.

The Hotel's building manager, Mr. Greg Kail, described the incident in his report as follows: "20:50; cab 12; Guest tried to stop door but did not break the light beam – hand caught as outer door closed – we where [sic] able to release her hand – Security call EMT". In the "Comments" section he indicates: "light beam safety working as designed when BM tested it".[3]

[3] The building manager's report is annexed to TKE's moving papers as exhibit M.

The Hotel's other witness was its Security Manager, Mr. Ronald Whitaker,[4] who was on duty at the time of the incident in the Hotel lobby only a few feet from the elevators. He testified that he became aware that the Plaintiff was in distress upon hearing her yell for help. His recollection of the incident differs significantly from Plaintiff's (Whitaker Deposition p. 17):

Q. When you [be]came aware that this happened when you saw the woman with her fingers in the elevator doorway, what, if anything, did you do?

A I immediately attempted to provide assistance. By the time I reached her, she had released her hand from – she was able to pull her hand out.

Q. Did anybody else other than this woman pull in any manner on the elevator doors?

A. Not that I saw, no, sir.

Mr. Salvatore Pisciotta was deposed on behalf of TKE on December 21, 2015.[5] He testified that TKE had a contract with the Hotel for elevator maintenance in July of 2013, that he was responsible for regular maintenance and trouble calls, and that the Hotel did not oversee his work (Pisciotta Deposition pp. 7-9, 26-27). Mr. Pisciotta testified that elevator #12 had two doors, an inner door called the cab door and an outer door called the hoistway door. Only the cab door had built-in re-opening technology. Mr. Pisciotta was only notified of the incident involving Ms. Backus several days after it had occurred (*id.* at 16, 18, 22-23):

Q. So the mechanism that would cause the doors to open if someone was coming in as they were closing, would be the sensor, the Pana 40?

A. The detector edge and the door open button.

Q. By "detector edge", are you referring to the Pana 40?

A. The Janus Pana 40.

Q. Car 12, all elevators, do they have two doors, a cab door and then the outer door?

A. Yes, an elevator door and a hoistway door.

Q. The outer door is called the hoistway door?

A. Yes, sir.

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[4] Mr. Whitaker was deposed on December 21, 2015. A copy of his deposition transcript is submitted to TKE's moving papers as exhibit L (Whitaker Deposition).

[5] Portions of his deposition transcript are annexed to the Hotel's moving papers as Exhibit E (Pisciotta Deposition).

* * * *

Q. In the actual Pana 40 sensor, is that on the cab door? Where is that located?

A. On the cab door, it's actually one end of it is on the cab door. . . .

Q. If it doesn't receive the signal, then the doors will –

A. The doors will stay open, as long as the beams are broken.

* * * *

Q. Were you ever notified that there was an incident on July 3rd, involving Mary Backus, Theresa Backus, where she got her arm stuck in car number 12, at The New York Hotel?

A. Not for a very long time. . . .

Q. Did you ever have any discussion with anyone from The New York [sic] Hotel concerning this incident?

A. No, I don't believe so, which is odd, because I used to check in with them every morning and check out with them every night. Security in the lobby and I'd know if there was other incidents are reported immediately, we were told about it.

Mr. Pisciotta opined that if one got his or her hand caught in a hoistway door, the door would likely have to be pushed open (*id.* at 23-24):

Q. If the door in elevator car, like car number 12 closed on someone's hand or arm, and wouldn't open, how would someone get it open?

A. If the doors, if it's at the very end of the door run, within the last four, five inches, the doors kind of split where the outside door closes independently.

Q. Of the cab door?

A. Of the cab door. So now you have the weight of the door with a spring tension on it.

Q. That's the weight of the outer door?

A. Correct.

Q. How would someone –

A. At that point, you just would be able to push it open.

Q. Just –

A. If you were strong enough. A little kid wouldn't have been able to.

Q. Sort of pry it open with your arms?

A. Just slide it open.

In support of its motion TKE submits an affidavit by Mr. Pisciotta[6] which confirms that Plaintiff's claimed incident was not reported to him until several days after it occurred. When he eventually examined the elevator he found it to be operating normally. Mr. Pisciotta attributes Plaintiff's injuries to fact that she did not place her hand deep enough into the doorway past the hoistway door to trigger the re-opening mechanism on the car door (Pisciotta Affidavit, ¶¶ 9, 12):

> In and before July 2013, the reopening device for elevator #12 was a safety edge, which is a device mounted on the door of the elevator car itself which transmits a curtain of infared light beams across the doorway to receptor sensors mounted on the opposite edge of the door frame. When one of the infared beams was blocked, the corresponding receptor sensor would detect that the beam was not being received. It would send this information to the elevator's controller, which would then send the signal to the motor of the door operator on top of the elevator car to stop closing, and to reverse and reopen the doors. The safety edge is designed to avoid any contact between a passenger and the doors as the door close although it cannot guarantee that there could be no contact. One of the ways that the doors can continue closing if a person swiped their hand through the doorway is if the person does not put their hand deep enough into the doorway to block any of the infared beams being transmitted from the closing doors of the elevator car to the receptors on the opposite door frame of the elevator car itself. . . .
>
> * * * *
>
> From my understanding of the incident that Ms. Backus claims, I believe that she did not place her hand far enough into the elevator doorway to block any of the infared beams on the safety edge mounted on the interior doors of the elevator car itself, and as a result the elevator car doors continued to close and pulled the exterior hoistway doors closed on her fingers. As a result, the elevator was not only operating properly under the facts of her claimed incident as I understand them, but also needed no component to be repaired, adjusted, maintained, or replaced.

On December 18, 2014 Mr. Pisciotta re-examined and tested the elevator's closing mechanism along with Mr. James Waters, an elevator consultant hired by TKE in connection with this case.[7] Mr. Waters' description of the elevator is consonant with that of Mr. Pisciotta, particularly with respect to the infared sensors. He too concludes that Ms. Backus' injuries must have been caused by her failing to place her hand far enough into the doorway (Waters Affidavit, ¶¶ 12-14):

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[6] Mr. Pisciotta's affidavit, sworn to March 16, 2016, is annexed to TKE's moving papers as exhibit N (Pisciotta Affidavit).

[7] Mr. Waters' affidavit, sworn to March 17, 2016, is annexed to TKE's moving papers as exhibit O (Waters Affidavit). Mr. Waters was previously employed by the New York City Department of Buildings as Chief Inspector in the elevator division.

> Ms. Backus described her incident as occurring when she hurriedly thrust her hand into the doorway of elevator #12, and the hoistway door made contact with her hand while her fingers curled around the edge of the hoistway door. Her description of her incident could only have happened, and is completely consistent with, her not sticking her hand far enough into the doorway to block any of the infared beams being transmitted across the doorway of the elevator car. Had she done so, the doors would have reopened. Furthermore, she testified that only one set of doors made contact with her hand and that point of contact was near the base of her fingers. I measured the distance between the outside edge of the hoistway doors at the lobby level and the transmitters on the safety edge on the high speed car door panel at the time of my inspection of the elevator. The elevator doors obviously had not been altered or moved in any way since the time of Ms. Backus' incident, and this was confirmed by Mr. Pisciotta.
>
> The distance between the edge of the hoistway door which made contact with the base of Ms. Backus' fingers and the safety edge measured five and one quarter inches. This means that in order to activate the reopening mechanism on elevator #12, Ms. Backus would have had to reach five and one-quarter inches into the doorway at the lobby. She obviously did not do this, particularly since she testified that she wrapped her fingers around the edge of the hoistway door.
>
> As a result, elevator #12 essentially never received a signal to indicate that a passenger was trying to enter the elevator, as none of the infared beams was blocked, and therefore never sent the signal to the controller to reverse the closing process and to reopen the elevator car door. It was only when the controller received the signal that the hoistway doors had not completely closed and locked, because of the presence of Ms. Backus' hand, that the controller sent the signal to reopen the doors. This is entirely normal operation of the elevator under the circumstances. It is not indicative of any improper or defective operation at all.

In opposition to defendants' motions, Plaintiff submits an affidavit by William J. Seymour, an electrical engineer with over 30 years' experience working in the elevator industry, specifically in the design, service, and support of elevator components.[8] While Mr. Seymour did not examine the elevator at issue, he opines that TKE has not established its entitlement to summary judgment because neither Mr. Pisciotta nor Mr. Waters made reference to the make, model, or age of the elevator's sensors and there is no evidence that either of them reviewed or followed any formal test procedures or user manuals prior to conducting their inspection. Mr. Seymour surmises that Mr. Pisciotta may not have tested the infared sensors at the same vertical height at which Plaintiff's

[8] Mr. Seymour's affidavit, sworn to April 19, 2016, is annexed to Plaintiff's opposition papers as exhibit B (Seymour Affidavit).

hand was trapped and criticizes TKE for not establishing whether the elevator door's closing force at the time of the incident was within elevator code compliance. Mr. Seymour criticizes Mr. Waters' failure to indicate how he knew the location of the transmitters on the sensors and faults TKE for not insisting that the Hotel install a state-of-the-art sensor system that would have detected Ms. Backus' father's wheelchair being pushed towards the elevator door.

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).

I. TKE

"An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found." *Rogers v Dorchester Associates*, 32 NY2d 553, 559 (1973); *see also Little v Kone, Inc.*, 139 AD3d 678, 679

(2d Dept 2016). "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 defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

The deposition testimony and the affidavits of Messrs. Pisciotta and Waters are *prima facie* evidence that the elevator's re-opening mechanism was operating normally on the night of the incident. As Ms. Backus herself testified, she swung her hand into the elevator doorway after it started to close. The hoistway door closed on her hand and knuckles such that only the tips of her fingers could bend around the hoistway door. After her hand was released, the elevator went back into service after the building manager tested the infared sensors. The Hotel never saw the need to call TKE to let them know there had been such an incident. There is absolutely no evidence of any complaints about this elevator's closing mechanism prior to the incident.

Mr. Seymour's criticism of Messrs. Pisciotta and Waters for not making reference to the make and model of the elevator's reopening device is unfounded. The undisputed testimony is that the elevator's re-opening mechanism was a Janus Pana 40 Plus (Pisciotta Deposition, p. 14). Having failed to inspect the elevator himself, Mr. Seymour could only speculate that the method used by Mr. Pisciotta to test the elevator may have been inadequate. He also makes an impermissible assumption that the elevator was equipped with a feature that would have allowed a single or even a small group of beams to fail but allow the elevator to keep operating. As sworn to by Mr. Pisciotta[9], this simply was not the case (Pisciotta Supplemental Affidavit, ¶¶ 5-6):

> There was no feature on this elevator in July of 2013, which would allow any individual transmitter to time out or be bypassed. The Janus Pana 40 Plus door reopening device simply is equipped with no such features at the New Yorker Hotel. In the event there was

[9] See Supplemental Affidavit of Salvatore Pisciotta, sworn to May 26, 2016, annexed to TKE's reply papers as exhibit A (Pisciotta Supplemental Affidavit).

> any obstruction which blocked any of the beams of light, the doors would reopen. . . . In addition, the door reopening device essentially operates in a fail safe method. That is to say that if for any reason any of the receptors or transmitters were to be inoperable in any fashion or they were blocked, the elevator doors simply cannot close.

Mr. Seymour's contention that the door closed at an excessive speed is not only unsupported and conclusory but irrelevant given Ms. Backus testimony that she purposefully placed her hand in the doorway to keep it open and has never claimed that the closing speed or force contributed to her injuries. Also unsupported is Mr. Seymour's claim that TKE should have recommended that the Hotel utilize "State of the Art" elevator door re-opening technology. Plaintiff has not shown that the defendants were obligated to install such a device and/or that such technology would have even been feasible.

To the contrary, the April 2012 maintenance agreement between TKE and the Hotel[10] provides, in relevant part, that TKE had no contractual obligation to alter the design of the elevator banks or install additional devices thereon (p. 4):

> . . . We will not be required to make any changes or recommendations in the existing design or function of the units(s) nor will we be obligated to install new attachments or parts upon the Equipment as recommended or directed by insurance companies, governmental agencies or authorities, or any other third party unless mandated to do so by law. Moreover, we shall not be obligated to service, renew, replace and/or repair the Equipment due to any one or more of the following so long as they are not caused by our acts or omissions . . . You expressly agree to release and discharge Us and Our employees for any and all claims and/or losses (including personal injury, death and property damage, specifically including damage to the property which is the subject matter of this Agreement) associated therewith or caused thereby except to the extent that any such claims and/or losses are caused by Our acts or omissions . . .

Other than conjecture and surmise, there is simply no evidence in this case that TKE's acts or omissions contributed in any way to Plaintiff's injuries, and its motion for summary judgment is therefore granted.

[10] See NYSCEF Doc. 70.

II. New Yorker Hotel

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). It has long been held that 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 take reasonable care to ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [they invite] the public to use." *Miller v Gimbel Bros., Inc.* 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. *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006).

There are significant differences between Plaintiff's and Mr. Whitaker's recollection of the sequence of events that took place when Plaintiff's hand became caught in the elevator doorway. Ms. Backus claims that the security officer who first noticed her advised that he could not help but instead had to radio for assistance. Then several hotel employees arrived in the lobby who pushed the door until it "jumped" open. According to Ms. Backus her hand was stuck in the door for three or four minutes. Mr. Whitaker claims to have been stationed at the Hotel's security podium only six feet from the subject elevator. He testified that he immediately began to assist Plaintiff when he noticed that her hand was lodged in the doorway and that by the time he reached her she was able to pull her hand out. According to Mr. Whitaker no one else had come to her assistance. These two diametrically opposed versions present credibility issues that should be resolved at trial. *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321(1st Dept 1996) ("Credibility determinations, the weighing

of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .").

Video footage taken of the minutes before, during, and after the incident adds to the confusion. Apparently the Hotel's camera network was unstable and did not provide a consistent connection between equipment, resulting in intermittent cut-outs of the subject camera.[11] The time counter begins at 20:46:27 when Ms. Backus is not in the picture. The video then jumps 27 seconds to depict Ms. Backus with her hand caught in the door. Not captured was the moment Ms. Backus' hand becomes pinned by the elevator door, making it impossible to determine exactly what happened. What we do see is a security guard and then another man coming to her aid. By 20:48:39 her hand is free, meaning that it took no more than two minutes for her hand to be released. However, there is another gap in the video during much of the time Ms. Backus' hand is caught in the door, and it is unclear exactly how the Hotel or its employees responded to the incident. A report signed by Ms. Backus was apparently created in the aftermath of the incident which details the sequence of events (Backus Deposition pp. 147-150), but such report has not been made part of the record on this motion.

The court's role on a summary judgment motion is issue finding, not issue-determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983). Ms. Backus, whose testimony must be given all favorable inferences as the non-moving party, stated that the Hotel security guard failed to take immediate action and even let other hotel guests come to her aid while he called for assistance. The video footage, while not a complete record of the events, partially corroborates her testimony in that it shows several individuals coming to her aid. Together, they are sufficient to call the Hotel's position into question. Nothing, however, is definitive. Inasmuch as the record does not

[11] See affidavit of Ann Peterson, sworn to July 26, 2016, NYSCEF Doc. 64 ("Peterson Affidavit").

conclusively show how the Hotel responded to Ms. Backus' predicament, an award of summary judgment is not warranted.

III. Res Ipsa Loquitor

Plaintiff asserts that the court should apply the doctrine of *res ipsa loquitor* to deny defendants' motions. The theory of *res ipsa loquitur* is applied to occurrences where the actual cause of an accident is unknown, but permits a factfinder to infer negligence based upon the sheer occurrence of an event and the defendant's connection thereto. *James v Wormuth*, 21 NY3d 540, 546 (2013).

The parameters of the *res ipsa loquitor* doctrine were set long ago by the Court of Appeals in *Digelormo v Weil*, 260 NY192 (1932) and *Manley v New York Tel. Co.*, 303 NY 18 (1951). In *Digelormo* the Court held that "where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed which accords with its absence." *Id.* at 199-200. Later, the *Manley* Court found that *a res ipsa loquitur* charge is justified only if an inference of negligence is "the only one which can fairly and reasonably be drawn from" the facts. *Id.* at 26.

In the context of elevators, the First Department has long since recognized that "elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur." *Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 (1st Dept 2015). However, the doctrine may only be invoked against the defendant in an action involving a malfunctioning elevator if it can be established that: "(1) the occurrence...would not ordinarily occur in the absence of negligence; (2) when the elevator . . . caused Plaintiff injury it was within the exclusive control of the defendants; and (3) nothing plaintiff did in any way contributed to the happening of the event." *Hodges v Royal Realty Corp.*, 42 AD3d 350, 351-52 (1st Dept 2007) (internal citations omitted).

The First Department cases upon which Plaintiff relies in this regard are distinguishable from the case at bar. *See Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272 (1st Dept 2010); *Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297 (1st Dept 2007). In *Singh*, the plaintiff was injured while attempting to enter a building through a set of automatic swinging doors. Plaintiff's colleague, who was walking one or two steps ahead of plaintiff, walked through the doors without incident. As plaintiff walked through, however, the doors closed and hit her and caused injury to her shoulders. Plaintiff alleged that the doors' motion sensor was defective because it failed to detect her as she walked through the doorway, and she sought a *res ipsa loquitor* instruction. In granting plaintiff's motion, the court rejected defendant's claim that the doors were not under its exclusive control. A virtually identical set of facts were alleged by the plaintiff in *Ianotta*, who was injured when a set of elevator doors unexpectedly closed on her. Like Ms. Singh, Ms. Ianotta testified that the elevator doors were fully open when she attempted to enter the elevator right behind her coworker.

Here, it is undisputed that the elevator was empty and the door was in the process of closing when Ms. Backus tried to enter. In other words, unlike in *Singh* and *Ianotta*, she did not follow someone else into the elevator who would have activated the car door's infared re-opening mechanism. It is also undisputed that she knowingly placed her hand into the doorway even though the door had begun to close. Based upon these undisputed facts, a trier of fact could reasonably determine that Ms. Backus contributed to her injuries. This precludes Plaintiff's *res ipsa loquitor* claim.

IV. Sanctions

Plaintiff seeks an order striking the Hotel's answer, claiming it willfully or at least negligently failed to preserve key portions of the video, thereby prejudicing Plaintiff from showing how the elevator malfunctioned and how the Hotel responded to her predicament.

"A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 (1st Dept 2012). "In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness." *Duluc v AC & L Food Corp.*, 119 AD3d 450, 451-452 (1st Dept 2014). The failure of a party to take affirmative steps to preserve surveillance footage of an accident can constitute spoliation of evidence. *See Maiorano v JPMorgan Chase & Co.*, 124 AD3d 536 (1st Dept 2015); *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 (1st Dept 2009).

Ann Peterson, the Hotel's President and General Manager, avers that that the "Flashback" camera system that had been in place at the Hotel since 2000 was not capable of modifying or editing recordings of the video. She attributes the time lapses between the frames due to system malfunctions not known to the Hotel until after Plaintiff's accident. In light of the Peterson Affidavit, the court declines to sanction the Hotel for spoliation.

CONCLUSION

Accordingly, it is hereby

ORDERED that New Yorker Hotel Management Corp.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that Thyssenkrupp Elevator Corporation's motion for summary judgment is granted; and it is further

ORDERED that all claims and cross-claims against Thyssenkrupp Elevator Corporation are hereby severed and dismissed; and it is further

ORDERED that Plaintiff's cross-motion for sanctions is denied; and it is further

ORDERED that the remaining parties shall appear in Part 30, Room 412, 60 Centre Street, New York, NY, on September 12, 2016 at 9:30AM for a settlement conference; and it is further

ORDERED that the Clerk of the Clerk shall mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 9-8-16

SHERRY KLEIN HEITLER, J.S.C.