Josephson v RXR Realty LLC
2019 NY Slip Op 30187(U)
January 10, 2019
Supreme Court, New York County
Docket Number: 157584/2014
Judge: Kelly A. O'Neill Levy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

---X

JORDAN JOSEPHSON,

Plaintiff,

- v -

RXR REALTY LLC, RXR REALTY LLC d/b/a RXR REALTY, THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

---X

INDEX NO. 157584/2014

MOTION DATE 10/31/2018

MOTION SEQ. NO. 004, 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 115, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 133

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 113, 114, 116, 129, 130, 134, 135

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

This is a personal injury action arising from an alleged escalator accident.

Defendant Thyssenkrupp Elevator Corporation (hereinafter, Thyssenkrupp) moves (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint. Plaintiff Jordan Josephson opposes. Defendants RXR Realty LLC and RXR Realty LLC d/b/a RXR Realty (collectively, hereinafter, RXR) move (mot. seq. 005) for an order, pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint and all cross-claims. Plaintiff opposes.

BACKGROUND

On August 16, 2013, plaintiff alleges that he was injured when he tripped and stumbled while climbing the escalator (hereinafter, the escalator) between the first and second floors of the

building located at 926 RXR Plaza in Uniondale, New York (hereinafter, the building). RXR owns the building. Thyssenkrupp was responsible for maintaining, servicing, and repairing the escalator, pursuant to a written service agreement [Service Agreement (ex. L to the Mazzei aff.)].

Plaintiff first testified that he was able to get to the top of the escalator without incident, and as he stepped off the escalator, it grabbed his left flipflop and he tripped on the escalator platform [Deposition of Jordan Josephson (ex. G to the Rosen aff.) at 17, 59-60]. He admits that he was wearing flipflops at the time of the accident (*id.* at 17). Plaintiff further clarified that he did not know what part of the escalator contacted his flipflop, as he did not remember if he was looking down at his feet at the time of the accident and he did not actually see his flipflop get caught (*id.* at 58, 60-61, 100, 109-110). When he tripped, he did not immediately realize he was injured, and a few moments later he noticed that he was bleeding from the bottom of his left foot (*id.* at 17-18, 62-63).

Paul Kuchinkas, Thyssenkrupp's elevator mechanic, testified that no other accidents relating to the escalator had occurred [Deposition of Paul Kuchinkas (ex. F to the Mazzei aff.) at 58] and that the only repairs done to the escalator in the six months prior to the accident pertained to unrelated issues regarding the handrail speed monitor and replacing the comb plate when the teeth were broken (*id.* at 24-25). Mr. Kuchinkas further testified that Thyssenkrupp performed monthly inspections and maintenance of the escalator (*id.* at 21) and never observed any defects with the escalator pursuant to his inspection on August 13, 2013, three days before the accident (*id.* at 30, 58). He explained that the escalator had a comb plate at the top and bottom that goes into the grooves of the escalator steps and functioned to prevent debris, shoes, and feet from going inside or getting stuck in the escalator (*id.* at 22). The steps of the escalator go into the comb plate after they flatten out at the top of the escalator (*id.* at 23). He stated that

when the teeth were broken, he would replace the comb plate (*id.* at 24-25). The ridges of the steps were designed to mesh with each other such that there is no gap between them when the escalator flattened out (*id.* at 28-29). He had never observed any defects in terms of the steps meshing together (*id.* at 30). The escalator had a safety feature where, if anything got caught in the comb plate, the escalator would shut down and would have to be reset and restarted (*id.* at 34). Mr. Kuchinkas had only ever found dirt or leaves in the escalator's internal floor (*id.* at 35). Coins would not even go through the comb plate as they would get stuck before falling through (*id.* at 36).

Richard D'Angelo, RXR's senior property manager, testified that an outside contractor maintained the escalators at the building [Deposition of Richard D'Angelo (ex. G to the Mazzei aff.) at 12]. He believed that the outside contractor was on site almost every day (*id.*). If there was a problem with an escalator, the unit would be shut down and RXR's engineering team would make a notation in their log book (*id.* at 13). The only notation for the escalator in RXR's log book for the period of six months prior to the accident was on July 23, 2013 [RXR Log Book (ex. M to the Rosen aff.)]. That notation does not indicate the nature of the problem or whether the escalator was still operating (*id.*). The subject accident did not appear in the log book (*id.*). He also stated that Nassau County periodically inspected the building's escalators and that prior to August 16, 2013, Nassau County never issued any violations related to the escalator (*id.* at 25). He was not aware of any prior complaints or issues regarding the escalator (*id.* at 30-31). Camelia Pruteanu, RXR's assistant property manager, was also unaware of any prior complaints or issues with the escalator [Deposition of Camelia Pruteanu (ex. E to the Mazzei aff.) at 42].

There is a video from a surveillance camera with a limited and partial view of the escalator at the time of the accident [Video (ex. I to the Rosen aff.)]. The video only depicts the

top portion of the escalator and even that portion of the view is obstructed by a column (*id.*). It appears that plaintiff stumbled prior to reaching the top of the escalator and he grabbed the handrail to stabilize himself (*id.*). When he reached the top of the escalator, it does not appear that he tripped on anything, as he seamlessly walked off the escalator and continued walking a few steps before stopping and looking at the bottom of his foot (*id.*).

Thyssenkrupp submitted an affidavit by licensed professional engineer, Jon Halpern. Mr. Halpern concludes that plaintiff was not properly and safely using the escalator, as he was probably jogging up the escalator and not holding the handrail [Affidavit of Jon Halpern (ex. N to the Rosen aff.) at ¶ 7]. Moreover, Mr. Halpern states that plaintiff's footwear shows no evidence of being entrapped by the escalator (*id.* at ¶ 8). Based upon how the step treads interacted with the comb teeth, along with viewing the surveillance video, Mr. Halpern opines that plaintiff's footwear did not get caught in the comb teeth at the top of the escalator (*id.*).

Plaintiff submitted an affidavit by Patrick A. Carrajat, an escalator consultant [Affidavit of Patrick A. Carrajat (ex. 1 to the Talassazan aff.)]. He states that there is only one place that can cause a shoe to become separated from the foot and permit injuries to the toe and surrounding areas (*id.* at ¶ 6). That place is the juncture of the steps with the comb plate at the top of the escalator (*id.*). Mr. Carrajat opines that if the clearances between the steps and the comb plate were set to proper tolerance, the accident would not have occurred, as a body part or shoe would not get entrapped in a properly maintained and adjusted escalator at the place where plaintiff was injured (*id.* at ¶ 16). He concludes that the type of injury sustained by plaintiff does not occur on a properly maintained and adjusted escalator absent negligence by the parties responsible for its proper maintenance (*id.* at ¶ 18).

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Thyssenkrupp asserts that: (1) plaintiff cannot identify the cause of his injury, (2) there is no evidence that a defect existed at the time of the accident, (3) plaintiff's conduct was the sole proximate cause of the accident, (4) Thyssenkrupp did not have notice of a relevant defect, and (5) res ipsa loquitur is not applicable to this matter.

RXR contends that: (1) plaintiff fails to identify a condition that proximately caused the accident, (2) RXR did not have any prior notice and did not cause, create, or exacerbate the condition alleged, and (3) the court must reject any self-serving affidavits or previously undisclosed witnesses offered by plaintiff in opposition to this motion in an attempt to cure defects in plaintiff's evidence.

Plaintiff states that there are triable issues of fact regarding the cause of the accident. He maintains that (1) defendants cannot meet their burden to show that they did not create the dangerous condition that caused the accident and res ipsa loquitur applies, (2) defendants have

failed to provide conclusive proof that they did not create the dangerous condition that caused the accident, and (3) there is evidence that defendants had actual notice of a condition regarding the escalator less than one month before the accident.

Plaintiff submitted an affidavit attached to his opposition to the motions in which he provides an alternative account of the accident. He states that as he attempted to step off the escalator, his left foot was violently jerked into and lacerated from getting caught between the moving escalator step and the comb plate [Plaintiff Affidavit (ex. 2 to the Talassazan aff.) at ¶ 3]. This testimony directly contradicts his deposition testimony, where he clearly states that he does not know where on the escalator the accident occurred (Plaintiff tr. at 58, 60-61, 100, 109-110), as well as the surveillance video which shows that the accident did not take place at the top of the escalator near the comb plate (Video). Self-serving affidavits submitted in opposition to a motion for summary judgment are insufficient to defeat said motion, where the affidavits clearly contradict prior deposition testimony and have been tailored to avoid consequences of the testimony. *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320 (1st Dep't 2000); *Caraballo v. Kingsbridge Apt. Corp.*, 59 A.D.3d 270, 270 (1st Dep't 2009); *Amaya v. Denihan Ownership Co., LLC*, 30 A.D.3d 327, 327-328 (1st Dep't 2006); *Harty v. Lenci*, 294 A.D.2d 296, 298 (1st Dep't 2002). The court finds that plaintiff's statements in his affidavit submitted in opposition to the motions contradict his testimony during his deposition and the surveillance video evidence. Thus, the court will not consider the contradictory testimony contained in the affidavit.

For the doctrine of res ipsa loquitur to apply, three elements must exist: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it must not have been due to any voluntary action or contribution on the part of the

plaintiff. *Ebanks v. New York City Transit Authority*, 70 N.Y.2d 621, 623 (1987) (internal quotation omitted). Here, the escalator was not within the exclusive control of the defendants, as it was used by commercial tenants of the building and members of the public, and it is exposed to thousands of people each week. Like *Ebanks*, where the Court of Appeals held that the extensive public contact with an escalator in a subway station negated the second element of res ipsa loquitur (*id.*), here, the extensive public contact with the escalator also negates the "exclusive control" element of res ipsa loquitur. *See Bazne v. Port Authority of New York and New Jersey*, 61 A.D.3d 583, 583-584 (1st Dep't 2009) (the plaintiffs failed to demonstrate that the escalator at the bus terminal, which was subject to extensive public contact on a daily basis, was in the defendant's exclusive control); *see also Parris v. Port of New York Authority*, 47 A.D.3d 460, 461 (1st Dep't 2008) (the plaintiff failed to show that the escalator, which was subject to extensive public contact on a daily basis, was in the defendant's exclusive control). Moreover, plaintiff's conduct may have contributed to his accident, as he was wearing flipflops at the time and may have been jogging up the escalator without holding onto the handrail. This would negate the third element of res ipsa loquitur. Thus, res ipsa loquitur does not apply.

Plaintiff fails to demonstrate that defendants had actual notice of a defect with the escalator. The record establishes that the escalator was in good, working condition on the date of the accident, and that there was no defect or problem with it. RXR's log book indicates that Thyssenkrupp was called on July 23, 2013 regarding the escalator, and a handrail issue was addressed on July 25, 2013 and July 30, 2013 (RXR Log Book). Thyssenkrupp performed routine maintenance on the escalator on August 13, 2013, three days before the accident, and no problems were noted (Kuchinkas tr. at 21, 30, 58). Plaintiff failed to produce any evidence of a relevant defect in the escalator at any relevant time. Since the escalator was in good working

order and there was no defect with it, defendants had no prior actual or constructive notice of any dangerous or defective condition with the escalator.

Plaintiff has failed to meet its burden in raising a triable issue of fact in opposition to the motions. Plaintiff was unable to identify where he was injured on the escalator and what caused his injury. He fails to raise an issue of fact of same. Plaintiff testified that he did not actually see his flipflop get caught by the escalator and he did not know what part of the escalator contacted his flipflop (Plaintiff tr. at 100, 109-110). The surveillance video footage clearly shows that plaintiff did not trip at the top of the escalator (Video). Thyssenkrupp's expert, Mr. Halpern, concludes that plaintiff was not properly and safely using the escalator, plaintiff's footwear showed no evidence of being entrapped by the escalator, and plaintiff's footwear did not get caught in the comb teeth at the top of the escalator (Affidavit of Jon Halpern at ¶ 7, 8). Plaintiff has failed to present any evidence of a prior defect or the need for a subsequent repair of the escalator. In the absence of any triable, material issues of fact, the court grants RXR and Thyssonkrupp's respective motions for summary judgment.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that defendant Thyssenkrupp Elevator Corporation's motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint is granted; and it is further

ORDERED, that defendants RXR Realty LLC and RXR Realty LLC d/b/a RXR Realty's motion (mot. seq. 005) for an order, pursuant to CPLR § 3212, granting summary

judgment in their favor and dismissing the complaint and all cross-claims is granted; and it is further

ORDERED, that the complaint and all cross-claims are dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

1-10-19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE