

Feurman v Marriott Intl., Inc.
2019 NY Slip Op 32588(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 154317/2015
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 154317/2015

PAUL FEURMAN, as Executor of the Estate of MARTIN
ZEIGER, and ELLEN DAVID,

Plaintiffs,

MOTION SEQ. NO. 003

- v -

MARRIOTT INTERNATIONAL, INC., SPRINGHILL SUITES
ARUNDEL MILLS BWI AIRPORT, MCR DEVELOPMENT,
LLC, MCR DEVELOPMENT, INC., and MCR PROPERTY
MANAGEMENT, LLC,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51,
52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for SUMMARY JUDGMENT

In this personal injury action, defendants Marriott International, Inc. (“Marriott”), Springhill Suites Abundel Mills BWI Airport (“SSAM”), MCR Development, LLC (“MCR LLC”), MCR Development, Inc. (“MCR Inc.”), and MCR Property Management, LLC (“MCRPM”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs Paul Feuerman (“Feuerman”), as Executor of the Estate of Martin Zeiger (“Zeiger”), decedent, and Ellen David (“David”) oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On October 12, 2014, Zeiger was allegedly injured when he tripped over a bathtub in the bathroom of room 202 of The Springhill Suites Arundel Mills BWI Airport (“the hotel”) located at 7544 Teague Road, Hanover, Maryland. Doc. 50.

Plaintiffs Zeiger and David commenced the captioned action by filing a summons and verified complaint against Marriott and SSAM on April 30, 2015. Doc. 50. In the verified complaint, Zeiger alleged that he was injured due to the negligence of Marriott and SSAM, which owned, operated, and/or controlled the hotel. Doc. 50. David asserted a claim for loss of consortium. Doc. 50.

In his bill of particulars against Marriott and SSAM, Zeiger alleged that he was injured in the hotel bathroom at approximately 5 a.m. on October 12, 2014. Doc. 53. He claimed that he was injured due to “an inoperable lighting unit” in the bathroom and that Marriott and SSAM were negligent in creating the condition and in having actual and/or constructive notice thereof. Doc. 53.

A preliminary conference was held in this matter on April 12, 2016. The preliminary conference order provided, *inter alia*, that motions for summary judgment were to be made within 60 days after the filing of the note of issue or would “be denied absent [a] showing of good cause.” Doc. 21.

Zeiger appeared for a deposition by Marriott and SSAM in June 2016. Doc. 54. He testified that he checked into the hotel on October 11, 2014 and that, on October 12, 2014, at approximately 4 a.m., he went to use the bathroom of his hotel room and, while searching for the light switch where he thought it would be, his foot hit the bathtub and he fell over the bathtub and was injured. Doc. 54. Although he wore eyeglasses “all [of] the time”, he could not recall whether he had them

on at the time he fell. Doc. 54. None of the light switches in the hotel room were illuminated. Doc. 54.

In February of 2017, Karen Infrere of MCR LLC, which managed the hotel, admitted at her deposition that there were no illuminated light switches in the hotel. Doc. 65.

Marriott and SSAM thereafter designated Daniel L. Isackson, an architect, as their expert. Doc. 55. Counsel for Marriott and SSAM served an expert disclosure pursuant to CPLR 3101(d) in which they represented that Isackson would testify, inter alia, that Marriott and SSAM were not required to illuminate the light switch in the hotel bathroom. Doc. 55. In a report dated March 16, 2017, Isackson stated, based on applicable codes, that the hotel was not required to illuminate the light switch. Doc. 59.¹

On March 24, 2017, Zeiger and David commenced a separate action against MCR LLC, MCR Inc. and MCRPM under Index Number 154317/15 in which they alleged that those entities owned, operated and/or controlled the hotel. Doc. 1 under Index Number 152801/17.

Zeiger passed away on August 8, 2017 and Feurman was appointed Executor of his Estate on September 11, 2017. Doc. 39. The parties stipulated to amend the caption to reflect this substitution. Doc. 39.

By order entered September 15, 2017, this Court consolidated plaintiffs' action against Marriott and SSAM with their action against MCR LLC, MCR Inc. and MCRPM. Doc. 34.²

At a status conference held July 17, 2018, the parties stipulated that all discovery was complete and that the note of issue would be filed by August 17, 2018. Doc. 40. By stipulation dated August 15, 2018, the parties stipulated to extend the note of issue filing date until October

¹ In the report, which was unsworn and addressed to Liberty Mutual Insurance Company ("LMIC"), Isackson stated, inter alia, that the "report was prepared for the exclusive use of [LMIC] and was not intended for any other purpose." Doc. 59.

² Marriott, SSAM, MCR LLC, MCR Inc. and MCRPM will hereinafter be referred to collectively as "defendants".

5, 2018. Doc. 41. On September 24, 2018, this Court so-ordered a stipulation extending the note of issue filing date until December 7, 2018. Doc. 44.

At a status conference on October 23, 2018, the parties stipulated that defendants were to respond to plaintiff's August 6, 2018 discovery demand by November 6, 2018. Doc. 45. Plaintiffs also stipulated that they would notify defendants by November 6, 2018 if they intended to inspect the hotel room and that such inspection would take place by January 14, 2019. Doc. 45. Further, the parties stipulated to extend the note of issue filing deadline again, this time until January 31, 2019. Doc. 45. A compliance conference was scheduled for March 12, 2019 in the event that the note of issue was not filed by that date. Doc. 45.

In a supplemental bill of particulars dated October 23, 2018, Feurman and David alleged that defendants were negligent in failing to provide the hotel bathroom with an illuminated light switch and that this caused Zeiger to fall and injure himself. Doc. 53.

Plaintiff filed a note of issue and certificate of readiness on November 26, 2018. Doc. 46.

On February 19, 2019, more than 60 days after the filing of the note of issue, defendants filed the instant motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 47. In support of the motion, defendants initially assert that their motion is timely because the note of issue was filed prematurely and discovery was scheduled to continue past the deadline for the filing of the note of issue. Doc. 48. Specifically, counsel for defendants urges that he was under the mistaken impression that plaintiff's attorney planned to inspect the hotel room on January 14, 2019. Doc. 48. Defendants' attorney further asserts that the motion must be granted because Isackson's report establishes that defendants were not obligated to illuminate the light switch in the bathroom. Doc. 48. Although defendants concede that the accident may not have

occurred if the light switch had been illuminated, they insist that they are nevertheless entitled to summary judgment since such illumination was not required by law or any code. Doc. 48.

In opposition to the motion, plaintiffs argue that defendants have failed to establish good cause for the untimely filing of the application. Doc. 61. They further assert that defendants have failed to establish their prima facie entitlement to summary judgment. Doc. 61. Additionally, plaintiffs maintain that their expert, Anthony J. Shinsky, an architect, opines in a report that plaintiff became disoriented and confused because there was no illuminated light switch. Doc. 61. Plaintiffs further maintain that “[d]efendants have failed to even provide any sworn testimony from their own witnesses in support of this motion, relying almost exclusively upon an expert witness report which is contradicted in its entirety by [Shinsky].” Doc. 61. Alternatively, argue plaintiffs, defendants’ own evidence raises questions of fact.

LEGAL CONCLUSIONS

Timeliness of Defendants’ Motion

This Court, in its discretion, finds that defendants demonstrated good cause for bringing their motion after the 60-day deadline set forth in the preliminary conference order. Specifically, defendants’ attorney represented that the note of issue filing deadline was extended in order to give plaintiffs’ counsel an opportunity to inspect the hotel room (Doc. 45) and, although plaintiffs’ counsel did not choose to conduct the inspection, defendants’ attorney was under the mistaken belief that such an inspection would take place on January 14, 2019 and was not aware that the note of issue had been filed. Doc. 48. *See Coon v Hotel Gansevoort Group, LLC*, 150 AD3d 519 (1st Dept 2017); *Pena v Women’s Outreach Network, Inc.*, 35 AD3d 104 (1st Dept 2006).

Merits of Defendants' Motion

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212, subd. [b]).” *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) (internal quotation marks omitted), quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

In a trip-and-fall case such as this, a defendant moving for summary judgment "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." *See Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008); *see also Mitchell v City of New York*, 29 AD3d 372, 374 (1st Dept 2006). In order 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 allow the defendant to discover and remedy it. *See Molina v Dimon*, 171 AD3d 675 (1st Dept 2019).

Here, as plaintiffs' counsel asserts, defendants attempt to establish their entitlement to summary judgment by submitting Isackson's report, in which he represents that defendants had no obligation to provide illuminated light switches. Doc. 59. However, since Isackson's report is

not sworn to under the penalty of perjury, it does not constitute evidence in admissible form and cannot be considered. See *Accardo v Metro-North R.R.*, 103 AD3d 589 (1st Dept 2013). Thus, the motion is denied.

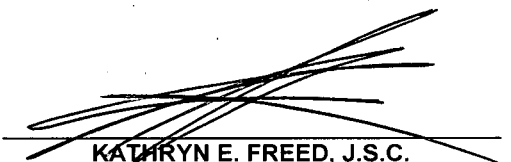
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Marriott International, Inc., Springhill Suites, Abundel Mills BWI Airport, MCR Development, LLC, MCR Development, Inc., and MCR Property Management, LLC for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

9/3/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE