

Lauren v Hotel Pa.

2023 NY Slip Op 33614(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 150626/2013

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART 49M

Justice

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GRACE M. LAUREN, as Administrator of the Estate of MOON G. NAM, Deceased, and GRACE M. LAUREN, individually,

Plaintiffs,

- v -

HOTEL PENNSYLVANIA, 401 HOTEL REIT, LLC, VORNADO REALTY TRUST, 401 HOTEL, L.P., BOARD OF MANAGERS OF 401 SEVENTH AVENUE CONDOMINIUM, 401 SEVENTH AVENUE CONDOMINIUM, 15 PENN PLAZA ASSOCIATES F/K/A ABELCO II ASSOCIATES, ASCOT ASSOCIATION LIMITED PARTNERSHIP, 401 HOTEL TRS, INC., 401 HOTEL MANAGEMENT COMPANY, LLC, 401 COMMERCIAL, L.P., 401 COMMERCIAL SON, LLC, 401 COMMERCIAL SON, II, LLC, VNO 100 WEST 33RD STREET, LLC, MANHATTAN MALL EAT LLC, J.C. PENNEY CORPORATION, INC., PENNCO 401, LLC, JVA ASSOCIATES, BALLY TOTAL FITNESS OF GREATER NEW YORK, INC., 770 BROADWAY COMPANY LLC, FULLER MADISON, LLC., LEHMAN BROTHERS HOLDINGS, INC. D/B/A LEHMAN CAPITAL, A DIVISION OF LEHMAN BROTHERS HOLDINGS, INC., SPORTS AUTHORITY, INC., ABC CORPS 1-10, JOHN DOES 1-10, JOHN ROES 1-10, DEF CORPS 1-10, ROE DOE 1-10, ROE DOES 1-10, and XYZ CORPS 1-10,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 161, 162, 163, 164, 165, 167, 168, 169, 170, 171, 171, 172, 173, 174, 175, 176

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff Grace M. Lauren, as Administrator of the Estate of Moon G. Nam and in her individual capacity (plaintiff), brings action against defendants 401 Hotel REIT, LLC (also s/h/a Hotel Pennsylvania), 401 Hotel TRS, Inc., 401 Hotel

Management Company, LLC, and 401 Commercial, LP (collectively, defendants),¹ alleging negligence in connection with an accident involving decedent Moon G. Nan (decedent), which occurred on January 23, 2011, at the Hotel Pennsylvania (NYSCEF # 2). Presently before the court is defendants' motion, pursuant CPLR 3212, seeking summary judgment dismissing plaintiff's claims. The motion is unopposed (NYSCEF # 161).² For the following reasons, defendants' motion is granted.

Background

The following facts are drawn from the exhibits affixed to the affirmation of Ellyn B. Wilder submitted in support of defendants' motion, as well as a review of defendants' Rule 202.8-g statement (NYSCEF # 163 – defs 202.8-g).³

The Accident

Plaintiff's bill of particulars state that on Sunday, January 23, 2011, at approximately 6:30 a.m., decedent fell from the fourth-floor roof landing of the Hotel Pennsylvania on to the street below (NYSCEF # 169 ¶¶ 3, 8; NYSCEF # 170 at 25).

¹ Through various stipulations filed between 2013 and 2016, plaintiff has discontinued this action against defendants Vornado Realty Trust, 401 Hotel, LP, 401 Seventh Avenue Condominium, 401 Commercial Son, LLC, 401 Commercial Son, II, LLC, VNO 100 West 3rd Street, LLC, Manhattan Mall EAT, LLC, 770 Broadway Company, LLC, Fuller Madison, LLC, Lehman Brothers Holdings, Inc., J.C. Penny Corporation, Bally Total Fitness of Greater New York, Inc, and The Sports Authority, Inc. (*see* NYSCEF #'s 7, 36, 37, 38, 39, 42, 44). Defendants Board of Managers of 401 Seventh Avenue Condominium, 15 Penn Plaza Associates f/k/a Abelco II Associates, Pennco 401, LLC, and JVA Associates have not appeared in this action (*see* NYSCEF # 44 at 3).

² Plaintiff filed an affirmation in opposition to defendants' motion, as well as a counterstatement of material facts and an affidavit of expert David Bradley Bonnell, on the afternoon of March 20, 2023 (*see* NYSCEF #'s 182, 183, 184). Plaintiff's submission came just one day before the return date on defendants' motion (*see* NYSCEF # 182). Accordingly, on March 24, 2023, defendants moved, by order to show cause, for an order striking plaintiff's untimely opposition, counterstatement, and any and all exhibits in support of plaintiff's opposition (*see* NYSCEF # 195). By order dated April 20, 2023, this court granted defendants' motion, explaining that even after requesting and receiving multiple adjournments, plaintiff ultimately filed an untimely opposition without leave of the court, without offering good cause, and in disregard for this court's rules (*see* NYSCEF # 199).

³ The court notes that defendants' submission fails to comply with Rule 202.8-g(d) because none of the statements of material facts are accompanied by a citation to the evidence submitted. Although this motion is unopposed, out of an abundance of caution, the court will perform a careful review of evidence submitted by defendants to resolve this motion and rely on factual assertions contained in the Rule 202.8-g statement only to the extent supported by the record.

Upon landing on the pavement, decedent suffered severe multiple blunt force impact injuries to his head, internal organs, and other bodily parts (NYSCEF # 169 ¶ 11; NYSCEF # 170 at 2, 13, 17; NYSCEF # 171 at 2-6). Decedent was pronounced dead at 6:30 a.m. (NYSCEF # 170 at 3; *see also* NYSCEF # 169 ¶ 11). At the time of death, decedent had a blood alcohol level (BAC) of 0.31% and his vitreous humor alcohol level was 0.29% (NYSCEF # 171 at 9).

The Leadup to the Accident

According to the record, decedent and his friends had checked into Room 495 at the Hotel Pennsylvania on January 22, 2011 (NYSCEF # 169 ¶¶ 5, 8; NYSCEF # 170 at 10, 21, 23). That night, the group went out for dinner, drinks, and dancing, and they returned to the hotel at approximately 2:17 a.m. on January 23 (NYSCEF # 170 at 8, 23). Decedent and his friends continued to hangout in their room, but at some point, decedent indicated that he planned to return home to New Jersey (*id.* at 8). At approximately 6:11 a.m., decedent exited his room without his cellphone (NYSCEF # 169 ¶ 8; defs 202.8-g ¶ 2; NYSCEF # 170 at 13). Both police reports and deposition testimony from the record indicate that, according to the surveillance footage, decedent ended up in the service area of the fourth floor and took a service elevator down to the hotel's "A level," which is where the "Gold Ballroom" is located (NYSCEF # 170 at 13; NYSCEF # 175 – Alleva tr at 44:14-20, 59:9-20). The service door through which decedent entered contained a sign stating, "NO TRESPASSING AUTHORIZED PERSONNEL ONLY" (NYSCEF # 173 at 5). Soon after, upon arriving at the "A level," decedent followed a "long corridor" from a set of three doors (Alleva tr at 45:14-21, 97:20-11). These three doors had an "exit sign" above them (*id.* at 45:14-24; NYSCEF # 170 at 13). One door contained a sign stating "NO TRESPASSING AUTHORIZED PERSONNEL ONLY" (NYSCEF # 173 at 1-2; Alleva tr at 47:4-12, 93:19-94:5). Decedent then arrived at the Gold Ballroom area and proceeded to another door leading to "stairwell H" (*see* NYSCEF # 170 at 13; Alleva tr at 45:25-46:3; *see also* NYSCEF # 169 ¶¶ 3, 8). There were "Exit" signs leading to and above this door (*see* NYSCEF # 173 at 6; NYSCEF # 170 at 13).

According to Billy Alleva, director of security at Hotel Pennsylvania (assistant director at the time of the incident), there were two options for decedent upon entry into stairwell H (Alleva tr at 46:4-10). He could either make a left and proceed to the "high keeper area where [] employees come in and out" or he could make a right to the top of the staircase to a door leading to the fourth-floor rooftop (*id.*; NYSCEF # 173 at 6-7). Decedent ultimately went up to the rooftop landing (defs 202.8-g ¶ 4; NYSCEF # 170 at 13; NYSCEF # 169 ¶¶ 3-4, 8). This was a self-locking door and once closed, no re-entry was permitted (NYSCEF # 169 ¶¶ 7-9; Alleva tr at 39:9-12). There were neither alarms on the door nor signage indicating that this was a self-locking door, but, as noted above, there were several "authorized personnel only" signs throughout the path that decedent had followed (*see* Alleva tr at 35:10-14, 46:19-47:12; defs 202.8-g ¶ 3; NYSCEF # 169 ¶ 7). The rooftop landing was situated between Hotel Pennsylvania's two towers (NYSCEF # 169 ¶ 3; Alleva

tr at 30:10-31:9). There was a parapet wall on the rooftop between the two towers, which was approximately three to four feet in height (*see* NYSCEF # 170 at 13; Alleva tr at 40:17-21; defs 202.8-g ¶ 5).

There were no cameras in this area (NYSCEF # 170 at 13; Alleva tr at 42:4-12). But plaintiff's bill of particulars indicates that, while on the rooftop, decedent attempted to alert pedestrians that he was trapped on the roof prior to his fall (NYSCEF # 169 ¶ 8). According to the police report, there were snow markings on the parapet wall, which was consistent with someone leaning over the edge (NYSCEF # 170 at 13). Defendants were not issued any violations of citations following the incident (defs 202.8-g ¶ 10).

Defendants' Expert Submissions

Defendants offer two experts in support of their motion. Their first expert, board certified medical doctor, Lewis S. Nelson M.D., explains that decedent's BAC levels were nearly four times the legal driving limit, which indicated that, based on his body weight, decedent had consumed approximately 12 to 15 alcoholic beverages prior to his fall (NYSCEF # 174 – Nelson aff ¶ 4). At this BAC level, decedent would have experienced cognitive impairment, slurred speech, tunnel vision, impaired reaction time to environmental changes, and negatively impacted decision-making ability (*see id.* ¶¶ 5-8). Further, as Dr. Nelson also observes, decedent's ability to walk safely and make rational decisions was significantly diminished at the time of his accident (*see id.* ¶ 6). Dr. Nelson opines, based on a reasonable degree of certainty, that decedent's intoxication greatly impacted his decisions and actions prior to his accident, and that decedent's fall would have been much less likely to have occurred had he not been intoxicated (*see id.* ¶¶ 3, 7-8).

Defendants' next expert is professional engineer Jeffery J. Schwalje, P.E. (NYSCEF # 175 – Schwalje aff). Based on his inspection of the premises, Mr. Schwalje explains that the doors decedent opened on his path were fully compliant with all codes, statutes, and ordinances (*id.* ¶¶ 6, 9). Specifically, Mr. Schwalje states, the building codes only require that doors remain unlocked to access the outside of the building in the event of a fire or emergency, and that there is no requirement that these doors remain unlocked from the outside, be equipped with an alarm, or advise that there is no re-entry (*id.* ¶ 6).⁴ As for the parapet wall, Mr. Schwalje affirms that he measured that the parapet wall at thirty-six inches in height, which was compliant with all applicable building codes, and that the parapet wall was the same height at the time of the incident (*id.* ¶ 7). Based on his inspection and related observations, Mr. Schwalje opines that the parapet wall was too high and wide for decedent to have stepped over the wall or have leaned over and fallen over the wall (*id.* ¶ 8). Thus, Mr. Schwalje concludes, decedent likely fell

⁴ Mr. Schwalje explains that the self-locking doorway to the fourth-floor rooftop was a common design in many buildings for security purposes (Schwalje aff ¶ 6).

off the roof due to his own actions rather than any condition with the rooftop or parapet wall (*id.* ¶¶ 8-9).⁵

Legal Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Although summary judgment is “considered a drastic remedy,” “when there is no genuine issue to be resolved at trial, the case should be summarily decided” (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]).

Discussion

Plaintiff alleges that defendants were negligent in their ownership and operation of the premises by, *inter alia*, failing to protect and warn guests at the Hotel Pennsylvania from entering unsecured dangerous areas (NYSCEF # 164 ¶¶ 21-27; NYSCEF # 169 ¶¶ 5-9). Specifically, plaintiff claims that defendants failed to secure the doors leading up to the fourth-floor rooftop landing, failed to install exterior door handles, failed to warn that re-entry was barred, failed to install emergency door alarms, and the roof landing railings that were installed were improper (NYSCEF # 169 ¶¶ 8, 9). Because of defendants’ alleged negligence, plaintiff claims that decedent mistakenly exited to the rooftop landing, was trapped on the rooftop, attempted to alert pedestrians from the rooftop, and fell to his death (*id.* ¶ 8).

To establish a claim for negligence, a plaintiff must show that (1) the defendants owed a duty to plaintiff, (2) defendants breached that duty, and (3) defendants’ breach proximately caused the plaintiff harm (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1st Dept 2016]). In moving for summary judgment, defendants argue that plaintiff has failed to establish that defendants breached any applicable duty owed to decedent (NYSCEF # 176 at 4, 7). Specifically, defendants contend that decedent’s accident was an unforeseeable occurrence in which an intoxicated individual walked to a rooftop and fell over a three-foot high parapet wall (*id.* at 7-8).

It is well settled that a property owner seeking summary judgment in a negligence action is “required to establish that it maintained its [property] in a

⁵ Mr. Schwalje notes that, had decedent merely stumbled and fell off the parapet wall, he would have landed on the sidewalk closer to the building, rather than the street (Schwalje *aff* ¶ 8).

reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property” (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). The scope of this duty is, however, defined by the “foreseeability of the possible harm” (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). In fact, foreseeability is “an essential element of a negligence cause of action because a person can only be ‘negligent’ when the event giving rise to the injury could have been reasonably anticipated—and thus avoided with the exercise of appropriate care” (*Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251, 252 [1st Dept 2002], citing *Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). For this reason, plaintiff must show that “the risk of injury as a result of defendant’s conduct [was] not [] merely possible” but was “natural or probable” (*id.*). Courts can determine issues of foreseeability as a matter of law when only “a single inference can be drawn from the undisputed facts” (*Mei Cai Chen v Everprime 84 Corp.*, 34 AD3d 321, 322 [1st Dept 2006]; *Pepic v Joco Realty, Inc.*, 216 AD2d 95, 96 [1st Dept 1995]).

Here, the record indicates that decedent’s accident was the result of a various actions and decisions that could not have been reasonably anticipated by defendants. To start, decedent’s path to the Hotel Pennsylvania’s fourth-floor rooftop landing required him to pass through restricted service areas and elevators within the hotel (*see* Alleva tr at 35:10-14, 44:14-20, 46:19-47:12, 59:9-20, 93:19-94:5). To do so, he seemingly ignored, at various points, signage prohibiting trespass and making it clear that only authorized personnel were permitted in these areas (NYSCEF # 173 at 1-2, 5, 6). Eventually, decedent reached the Gold Ballroom area, approached and opened door to the Stairwell H exit, and, after being presented with the option to go up or down the stairwell, he ventured toward the rooftop landing (*see* NYSCEF # 170 at 13; NYSCEF # 169 ¶¶ 3-4, 8). Thereafter, while on the rooftop landing, he attempted to alert pedestrians of his situation but, at some point, fell over the landing’s parapet wall and on to the street (NYSCEF # 169 ¶ 8; NYSCEF # 170 at 13). Notably, based on decedent’s BAC level, it was likely that decedent’s rationale decision-making and motor skills were negatively impacted at the time of his accident (*see* Nelson aff ¶¶ 5-8). And given the parapet wall’s 36-inch height, as Mr. Schwalje opines, decedent’s fall was likely caused by his own actions rather than some issue with the wall or its design (*see* Schwalje aff ¶¶ 7-9).

These facts, considered in their totality, support the conclusion that decedent’s death was not the natural or probable outcome of defendants’ operation and maintenance of the Hotel Pennsylvania. Indeed, even if defendants had added additional warnings or taken other additional types of precautions in its hotel facilities and services areas, nothing suggests that there was any amount of appropriate care that defendants could have taken to prevent the unfortunate chain of events that resulted in decedent’s death (*see Schreiber v NYC Health and Hosp. Corp.*, 216 AD3d 496, 498-99 [1st Dept 2023] [explaining that defendant could not have prepared for unforeseeable circumstances, including patient accessing a freight elevator, walking out to a patio only reachable through a construction site,

and climbing onto a ledge]). This is particularly true where, as here, the at-issue exits and walls complied with all applicable building codes and regulations (see *Wright v Frawley Plaza Houses, Inc.*, 107 AD3d 449, 450 [1st Dept 2013] [upholding summary judgment dismissing complaint where defendant established, among other things, that a parapet wall complied with applicable building codes]; *Moncion v Infra-Metals Corp.*, 20 AD3d 310, 312 [1st Dept 2005] [concluding that nothing in record suggested defendant was negligent where, among other reasons, defendant violated no rule, code, or regulation]).

In sum, defendants have established that they did not breach any duty owed to decedent, and, as a result, they are entitled to summary judgment dismissing plaintiff's complaint. Defendants' motion is therefore granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants 401 Hotel REIT, LLC (also s/h/a Hotel Pennsylvania), 401 Hotel TRS, Inc., 401 Hotel Management Company, LLC, and 401 Commercial, LP's motion for summary judgment is granted; and it is further

ORDERED that plaintiffs' complaint is dismissed; and it is further

ORDERED that that defendants are to serve a copy of this order with notice of entry upon the other parties and the Clerk of the Court within ten days of the date of this order.

This constitutes the Decision and Order of the court.

10/12/2023
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE