SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 17**
WELQUIS LOPEZ,	
Plaintiff,	**INDEX # 21366/07**
	Motion Seq. 8
-against-	**Motion Date 1.12.12**
	Submit Date 4.3.12
THE RETAIL PROPERTY TRUST and KONE, INC.,	
	XXX
Defendants.	
----------X	

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1,2
Answering Affidavit	3
Reply Affidavit.....	4
Memorandum of Law	5

This motion by the defendants The Retail Property Trust and Kone, Inc., for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is determined as provided herein.

The plaintiff in this action seeks to recover damages for personal injuries he sustained at Roosevelt Field Mall on January 3, 2007 as the result of the alleged malfunction of escalator No. 10. He testified at this examination before trial that the escalator he was riding down abruptly jolted to a stop for a couple of seconds causing him to begin to fall but then it began moving

again which, he alleged in his third Supplemental Bill of Particulars, caused his boot to get caught between the step and the side of the escalator and caused him to be thrown down the steps. The plaintiff also claims that the escalator continued to run despite the fact that he had fallen to the bottom and that it did not stop until the emergency stop switch was activated. Plaintiff alleges that he hurt his knee and forearm. The defendant Retail Property Trust owns the property and the defendant Kone, Inc., a vertical transportation company, was under contract to maintain the escalator.

The defendants seek summary judgment dismissing the complaint against them. They maintain that the escalator worked properly before and after the incident; that it did not have actual or constructive notice of any defect; and that it is physically and mechanically impossible for the accident to have occurred as the plaintiff has described it.

"On a motion for summary judgment the facts must be viewed 'in the light most favorable to the non-moving party' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499 (2012), quoting *Ortiz v Varsity Holdings, LLC,* 18 NY3d 335, 339 (2011). 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., supra*, quoting *Alvarez v Propsect Hosp., supra*, at p. 324). "The moving party's '[f]ailure to make [a] *prima facie* showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers.' " (*Vega v Restani Constr. Corp., supra, quoting Alvarez v Propsect Hosp., supra*, at p. 324).

"As owner of the building [Retail Property Trust] had a nondelegable duty to maintain and repair the escalators on its premises" (*Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864, 867 [2nd Dept 2011], citing *Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2nd Dept 2006]; *Fuchs v Elo Group*, 297 AD2d 658, 659 [2nd Dept 2002]). "To establish that a building owner is liable for an [escalator]-related injury, a plaintiff must establish that there was a defect in the [escalator], and that the building owner had actual or constructive notice of the defect" (*Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2nd Dept 2010], citing *Lee v City of New York*, 40 AD3d 1048, 1049 [2nd Dept 2007]). "If the owners hire an [escalator] maintenance company to maintain the [escalator], liability can be found against the owners if they received notice of a defect and failed to notify the [escalator] company about it" (*Cilinger v Arditi Realty Corp., supra; Oxenfeldt v 22 N. Forest Ave. Corp., supra*). "[A]n [escalator] company which agrees to maintain an [escalator] 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 [citations omitted]" (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *see, Hudson v Tower El.*, 60 AD3d 906, 907 [2nd Dept 2009]; *see also, Cilinger v Arditi Realty Corp., supra*, at p. 882-883).

Retail Property Trust can establish its entitlement to summary judgment by "producing evidence that the [escalator] was functioning properly before and after the accident and that, even if a defect existed, they did not have actual or constructive notice of any such defect" (*Lasser v Northrop Grumman Corp.*, 55 AD3d 561 [2nd Dept 2008], citing *Lee v City of New York, supra; Santoni v Bertelsmann Prop. Inc.*, 21 AD3d 712, 713-714 [1st Dept 2005]; *Farmer v Central El.*, 255 AD2d 289, 290 [2nd Dept 1998]; *Tashjran v Strong & Assoc.*, 225 AD2d 907, 908-909 [3rd

Dept 1996]; *see also, Forde v Vornado Realty Trust*, 89 AD3d 678 [2nd Dept 2011]; *Rivera v Merrill Lynch/WKC/L/Inc.*, 84 AD3d 524, 525 [1st Dept 2011], citing *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 [1st Dept 2004]), *lv den.*, 4 NY3d 705 [2005]). A defendant can also establish its entitlement to summary judgment by establishing that the plaintiff's allegations regarding the occurrence are impossible. (*Forde v Vornado, supra*; *see also, Hardy v Lojan Realty Corp.*, 303 AD2d 457 [2nd Dept 2003]; *Williams v Port Auth. of N.Y. & N.J.*, 247 AD2d 296 [1st Dept 1983]).

In support of their motion, the defendants have submitted affidavits of Kone's mechanic Kevin Goodspeed; Robert Beyer, Kone's lead mechanic for all of the escalators at Roosevelt Field Mall; and, expert engineer David C. Steel, who has specialized in vertical transportation in varying capacities for over 50 years.

Beyer attests that he has worked for Kone, Inc. for 12 years and that he has been the "lead mechanic" for all of the escalators at Roosevelt Field since 2003. He has never known of escalator No. 10, a Schindler SWE escalator, to stop and start again during operation. In addition, he did not think it possible for an SWE escalator to do so because it has "so many redundant and multiple failsafe systems that plaintiff's stop-and-start story is mechanically impossible." He also attests that he was not aware of a single instance where escalator No. 10 did not meet the code requirements for permissible distance or gap between the step and skirt. Similarly, he attests that he is unaware of a single instance when a rider got his or her foot caught on the skirt or entrapped his or her foot at all on escalator No. 10. In fact, he has never known of a thick-soled workboot becoming entrapped between the step and skirt of any escalator; the only things he has even seen become entrapped between the step and skirt are made of soft material

like Crocs or flip-flops. As for maintenance, Beyer attests that the escalator underwent step-indexing by Kone on May 11, 2005, whereby the escalator was tested to determine the accuracy of distances between the step and skirt as well as the distance from skirt to skirt. He explains that this test is the standard in the industry for measuring entrapment potential. Beyer further attests that on January 20, 2006, the escalator underwent an eight hour "clean down" by him and Kone mechanic Kevin Dowd, *i.e.*, a rigorous maintenance step performed by two mechanics every other year which comprehensively cleans, adjusts and lubricates an escalator. He further attests that approximately two months before the plaintiff's accident on October 31, 2006, the escalator was audited by an independent vertical transportation consulting agency which involved eight hours of inspection and comprehensive maintenance review. His work was praised for the high level of maintenance proficiency as a result of that audit. He attests that if the distance between the step and skirt is even greater than 3/16th of an inch, he immediately red tags the escalator and takes it out of service until it is repaired. However, he has never had to do that to escalator No. 10 because the distance always met the code requirement. Beyer testified at his examination before trial that he tested the gap with a feeder gauge at every preventative maintenance and audit and that he applied silicone lubricant to the skirts of the escalators every seven to ten days.

Kevin Goodspeed, a mechanic employed by defendant Kone, Inc., for eight years, has 25 years of experience in maintaining and repairing vertical transportation systems. Having reviewed the ticket for escalator No. 10 dated December 28, 2006, he attests on that day, he "replaced missing hardware on inlet covers and ch[ecked] for proper op[eration]." He explains that "[t]he inlet cover is simply the metal shroud that prevents riders' fingers from being caught

in the handrail and it disappears and enters into the unit. It has nothing to do with foot entrapments nor can it cause the escalator to jolt to a stop and start again."

The defendants' expert Mr. Steel attests that he has 53 years experience in the field of mechanical engineering with a speciality in escalators and moving walkways. He worked for Otis Elevator for four decades managing, developing, designing and testing escalators and moving walkways. He is currently a member of the American Society of Mechanical Engineers (ASME) A17.1 Standards Committee and Escalator and Moving Walk Committee and was the chairman of the ASME A17.1 Escalator and Moving Walk Committee for twenty-five (25) years, a vice-chairman of the ASME A17.1 Standards Committee for six (6) years and a member of the ASME A17.1 International Standards Committee.

Steel opines that the Schindler SWE escalator is recognized as one of the safest escalators manufactured. Having examined, *inter alia,* the escalator and reviewed the complaint, the Bills of Particulars, the deposition testimony, the applicable Kone Time Ticket Detail reports, the Schindler SWE service repair manual, codes handbook and electronic system schematic as well as Beyer and Goodspeed's affidavits, he attests that the plaintiff's account of the incident is impossible. He explains that "[o]nce the escalator stops while in operation [as the plaintiff testified it did], it cannot start again without a mechanic's intervention. It must be manually restarted by inserting a key into it. There is no engineering or physical means to override that system." He explains that, even then, the computerized analysis takes five to seven seconds to run, which is longer than the plaintiff testified the escalator was stopped. He notes that both Beyer and Dowd agree.

Steel further opines that the lack of physical evidence also demonstrates that the plaintiff's account is impossible. He explains that "[t]he kinetic energy associated with an event as described by plaintiff would far exceed the design and material strength parameters of nearly every component on the escalator. The force would result in metal fatigue and structural damage to the escalator's components." Steel notes that "not a single component [of the escalator] sustained any damage or stress related to the incident." Steel also notes that Kevin Dowd, the mechanic who responded to the incident, found the escalator to be running fine when he restarted it.

He additionally opines that the escalator's rate of deceleration is too slow to have propelled the plaintiff forward. He explains that "[t]he escalator's stopping force simply does not create the energy or force sufficient to cause a person of plaintiff's size who is holding onto the handrail to be propelled forward as plaintiff claims." He notes that Beyer testified that he personally torques the escalator's braking system to the manufacturer's specification of 35 Newton meters, which gives the escalator a very tolerable stopping distance.

Steel further opines that the escalator's skirt and balustrade are smooth surfaces of stainless steel and glass, respectively, which Beyer testified were lubricated with silicone every seven to ten days to prevent the very type of accident alleged here. Accordingly, Steel opines there is "simply no instrumentality surface or condition that could have 'grab[bed]' the thick sole of a Timberline workboot as a rider was falling." Beyer also testified that the gap between the step and the skirt was never excessive and in his 50 years of experience, he never heard of a thick-soled workboot getting caught between the step and the side of an escalator. Finally, Steel

opines that the escalator was properly maintained, citing the procedures employed by Beyer when he serviced escalators as well as the aforementioned three tests attested to by Beyer.

The May 11, 2005 step-indexing by Kone, the eight hour "cleandown" on January 20, 2006 and the audit on October 31, 2006 standing alone do not establish the frequency or regularity of the maintenance. Beyer's affidavit does not conclusively establish that, either. While Steel has opined that the escalator was properly maintained, he has not cited evidence in support of that conclusion.

Nevertheless, Retail Property Trust has established that it did not have actual or constructive notice of a defect which caused the plaintiff's accident (*Rivera v Merrill Lynch, WFC/L/Inc., supra*), and in any event, it was not possible that the accident happened as the plaintiff has described (*Forde v Vornado Realty Trust, supra; Hardy v Lojan Realty Corp., supra; Williams v Port Auth. of N.Y. & N.J., supra*). While the maintenance company Kone has not adequately established its maintenance of the escalator, either (*compare, Parris v Port of New York Authority*, 47 AD3d 460, 460-461 [1st Dept 2008]; *Bazne v Port Auth. of NY. & N.J.*, 61 AD3d 583 [1st Dept 2009]; *Santoni v Bertelsmann Property, Inc., supra*), it also has established that the plaintiff's accident could not have happened as alleged. The burden accordingly shifts to the plaintiff to establish the existence of a material issue of fact.

In opposition, the plaintiff has submitted the affidavit of Ronald Schloss, an elevator/escalator expert who inspected the subject escalator as well as its maintenance records. He opines that the plaintiff's fall was caused by an excessive gap between the step and skirt of the escalator owing to inadequate maintenance and excessive friction between the plaintiff's workboot and the skirt of the escalator. He opines that "such conditions necessarily did exist, in

order for the accident to happen in the way it did" and that they existed for a sufficient length of time for Kone to have discovered and repaired them in the course of ordinary maintenance. This opinion simply lacks support in the records. (*See, Kleinberg v City of New York*, 27 AD3d 317 [1st Dept 2006]). In addition, Schloss draws conclusions as to how the accident could have happened which clearly contradict the plaintiff's testimony as well as his Verified Bills of Particulars regarding how the accident occurred. More specifically, the plaintiff has repeatedly maintained that the elevator stopped and restarted. The defendants' expert as well as Beyer have explained that this could not have happened. Rather than address that fact, Schloss instead opines that the plaintiff's boot entrapment caused him to "feel like" the escalator stopped and then started again. Not only is this totally inconsistent with the plaintiff's testimony, the plaintiff testified that it was not until after the escalator began moving again that his foot got caught, rendering Schloss' description of the accident totally incongruous with the plaintiff's. This is unacceptable in an attempt to establish the existence of a factual issue. (*Owens v Cooper Square Realty,* 91 AD3d 515 [1st Dept 2012]; *Tuntunjian v Cove Landing on Sound Homeowners Ass'n Inc.*, 38 AD3d 531 [2nd Dept 2007]). In any event, this opinion is based on biomechanical engineering which Schloss has testified he is not qualified to testify about. As such, his analysis must be rejected (*see O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512 [2nd Dept 2007]; *Paul v Cooper,* 45 AD3d 1485 [4th Dept 2007]).

Schloss' opinion regarding inadequate maintenance also fails for want of evidentiary support (*see, Vasil v Trump Marine Hotel and Casino*, 2006 WL 941764 [N.J. Super A.D. 2006).

Schloss' conclusion that the escalator could have stopped and started again if it was not wired properly fails, too, because that is speculative and there is no such evidence.

The plaintiff has failed via its expert's affidavit to establish that Retail Property Trust had any notice of a defect and/or that the plaintiff's accident could have happened as he described.

In conclusion, the defendants' motions for summary judgment are **GRANTED** and the complaint is dismissed.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 9, 2012

ENTER:

HON. JEFFREY S. BROWN, JSC
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