SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

NANCY DEPUTRON,

Plaintiff,

- against -

A&J TOURS, INC., ABC COMPANIES AND VAN HOOL, NV

Defendants.

- x

A&J TOURS, INC.,

Third-Party Plaintiff,

- against -

ABC COMPANIES and VAN HOOL NV,

Third-Party Defendants.

- x

Index No.: 10539/08

Motion Date: 3/29/12

Motion No.: 8 & 9

Motion Seq.: 5 & 7

Third-Party Index No. 350154/09

The following papers numbered 1 to 19 read on this motion by ABC Companies (ABC), to dismiss the complaint and all cross claims against it pursuant to CPLR 3212; and motion by A&J Tours, Inc. (A&J), for summary judgment dismissing the complaint pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1 - 8
Answering Affidavits - Exhibits	9 - 13
Reply Affidavits	14 - 19

Upon the foregoing papers it is ordered that the motions are granted.

Plaintiff in this negligence action seeks damages for

personal injuries sustained in a trip and fall accident as she exited a bus on December 23, 2006, at approximately 9:30 p.m. Plaintiff alleges that her fall was caused by a black, raised metal bar located on a black bottom step at the exit of the bus. The bus is owned by A & J, manufactured by Van Hool NC and sold by ABC. A&J and ABC separately move to dismiss the complaint on several grounds as noted below. Plaintiff opposes the motion.

Facts

Plaintiff was deposed on June 16, 2009, and on December 7, 2011. Plaintiff testified as follows: On December 23, 2006, she traveled to Atlantic City with her husband. Throughout the day, she had been on and off approximately four (4) different buses, all of which had the exact same layout. She noticed nothing different about the buses, as the "set-up and the steps were the same." Plaintiff traveled on and off each of these buses without incident. Also, no other passengers had difficulty boarding and exiting the bus. Plaintiff also testified that she saw absolutely no issues with the buses; the lighting was good on each of the buses and she was able to see the steps while boarding and exiting the bus. Plaintiff testified that before the accident, her husband was rushing her off the bus because he was concerned that the bus driver was lost. Plaintiff exited along with two men and her husband, all of whom walked off the bus without incident. Plaintiff walked down the first two steps without incident and claims that she tripped on the third step. Plaintiff does not know which foot she began her descent down the stairs. She does not know which foot landed first on any of the three steps, and doesn't know if any of her feet were on the bottom step after the incident. Plaintiff claims that a bar on the bottom step caused her to trip. However, plaintiff admits that she did not see this bar before her fall, and does not know where she was looking before her fall. Plaintiff is also not sure which foot made contact with the bar.

Plaintiff's husband, Ronald Deputron, testified on May 7, 2010 as follows: He and his wife got off the bus because the driver got lost. Deputron did not see what caused his wife to fall. In fact, he testified that he doesn't know if she missed a step altogether or if she tripped. Deputron admitted that he did not see his wife trip and thus, he doesn't know what actually caused her to fall.

Louis Hotard testified on behalf of ABC as follows: He has seen other similar "bars" on Van Hool buses. The subject bar maintains the "position of the door during the opening and closing cycle." The bar sits affixed to the bottom step against

the left wall when the door is open (as it was in the instant case). When the door is in the open position, Hotard testified, the bar "is visible to a passenger". Hotard further testified that in his 18 years of experience with the Van Hool bus, he knew of no accidents or complaints relating to the bar/door component.

Discussion

Plaintiff admitted at her 2009 and 2011 depositions that she did not see what caused her to fall; it was only after she regained consciousness from the fall that she looked for the source of the fall, saw the bar and assumed it was the bar connected to the bus door that she had tripped on. Plaintiff testified that the lighting was good on the bus and that she was able to see the steps while boarding and exiting the bus. She never stated that she was unable to see and that she mis-stepped as a result (*see Wright v South Nassau Communities Hosp.*, 254 AD2d 277 [1998]). The evidence adduced here establishes nothing more than a *possibility* that the plaintiff's fall was caused by the bar on the stair or the lack of adequate lighting (*see Curran v Esposito*, 308 AD2d 428 [2003]). The trier of fact would be required to base a finding of proximate cause upon nothing more than speculation (*see Hartman v Mtn. Val. Brew Pub*, 301 AD2d 570 [2003]; *Christopher v New York City Tr. Auth.*, 300 AD2d 336 [2002]; *Brown-Phifer v Cross County Mall Multiplex*, 282 AD2d 564 [2001]; *Novoni v La Parma Corp.*, 278 AD2d 393 [2000]; *Visconti v 110 Huntington Assoc.*, 272 AD2d 320, 321 [2000]). Thus, the plaintiff's own deposition testimony that she did not know what caused the accident is fatal to her complaint (*see* CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sanchez v City of New York*, 305 AD2d 487 [2003]; *Christopher v New York City Tr. Auth., supra; Bongiorno v Penske Auto. Ctr.*, 289 AD2d 520, 521 [2001]; *Brown-Phifer v Cross County Mall Multiplex, supra; Barretta v Trump Plaza Hotel & Casino*, 278 AD2d 262, 263 [2000]; *Wright v South Nassau Communities Hosp., supra; Amadio v Pathmark Stores*, 253 AD2d 834 [1998]; *Dapp v. Larson, supra*). In opposition to the motion, the plaintiff did not sufficiently rebut this fatal lapse in her case. Plaintiff's speculation as to the cause of her fall is insufficient to raise an issue of fact (*see Moody v Woolworth Co.*, 288 AD2d 446, 447 [2001] *Fargot v Pathmark Stores*, 264 AD2d 708 [1999]; *Robinson v Lupo*, 261 AD2d 525 [1999]).

Moreover, the record establishes that the bar was readily observable and did not present an inherently dangerous condition. An owner has a duty to exercise reasonable care in maintaining its property in a safe condition under all the circumstances, including the likelihood of injury to others, the seriousness of

the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (*see Rovegno v Church of Assumption*, 268 AD2d 576 [2000]; *Kurshals v Connetquot Cent. School Dist.*, 227 AD2d 593 [1996]; *see also Basso v Miller*, 40 NY2d 233, 241 [1976]). " There is, however, no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*Capasso v Village of Goshen*, 84 AD3d 994 [2011]). Since the bar was readily observable by the reasonable use of one's senses, A&J had no duty to protect or warn against an open and obvious condition. It is noted, nevertheless, that there was a sign on the bus advising passengers to "watch their step."

To impose liability on a defendant in a trip and fall accident, there must be evidence that the defendant either created the condition or had actual or constructive notice of same (*Hayden v Waldbaum, Inc.*, 63 AD3d 679 [2009]). Here, defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law by demonstrating that they neither created nor had actual or constructive notice of the allegedly dangerous bar on the steps. Both ABC and A&J submitted evidence indicating that they had no knowledge of anyone previously tripping or falling on the steps, and that no one had ever made a complaint to them about the bar on the steps. Hotard testified as follows:

> the bus involved in the subject accident was manufactured by Van Hool in 1996. This particular bus model had a bar that extended from the door to the other side of the bottom step of the bus. The bar is an integral part of the operation of the door as it keeps the door in position when it is opened and closed. When the door is opened, the bar is clearly visible to passengers as they descend the steps. The bar is on the corner of the last step on the right side as one is descending the steps. There is still plenty of room for passengers to exit without making contact with the bar. The bus does contain a warning advising passengers to "watch their step." This particular bus was in use for 10 years prior to the alleged incident and ABC never received any complaints about the placement of the bar. ABC also was never made aware of any prior accidents involving the bar.

DeProssino, owner of A&J also testified that he never received any complaints about the metal bar. His company purchased the bus sometime in 2003 or 2004 from Swift Transportation. A&J never received any complaints about how the door operated or that it was difficult for passengers to get on and off the bus. Since there had been no prior incidents or

complaints indicating that the bar posed a tripping hazard, defendants had no notice of the same (see *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2010]; *Hayden v Waldbaum, Inc.*, 63 AD3d 679 [2009]; *Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495, 495-496 [2008]).

Plaintiff's strict products liability claim against ABC, premised upon a design defect (*see Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]), is dismissed. In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product "regardless of privity, foreseeability or the exercise of due care" (*Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]; *see Sukljian v Charles Ross & Son Co.*, 69 NY2d 89, 94-95 [1986]; *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57 [2003]; *Bielicki v. T.J. Bentey, Inc.*, 248 AD2d 657, 659-660 [1998]). The plaintiff need only prove that the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product (*see Sukljian v Charles Ross & Son Co.*, supra; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107 [1983]; *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478-479 [1980]), and that the defect was a substantial factor in bringing about the injury (*see Codling v Paglia*, 32 NY2d 330 [1973]).

Specifically, for a design defect to be actionable, "it must be established that the marketed product in question was designed in such a way that it is not reasonably safe and that the alleged design defect was a substantial factor in causing the [plaintiff's] injuries" (*Blandin v Marathon Equip. Co.*, 9 AD3d 574, 576 [2004]; *see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]). Here, there is no evidence that the bar on the step was defective and not reasonably safe or that it was a substantial factor in causing plaintiff's injuries. Plaintiff merely speculates in her self-serving affidavit that the bar was a tripping hazard and that her fall was caused by the presence of the bar on the steps. Plaintiff's assertions that the metal bar on the steps was inadequate, unsafe, improper, dangerous and hazardous because it posed a tripping hazard are unsupported by industry standards, protocol or expert affidavit which specifies that this is somehow a design defect or negligence on the part of the defendants (*see Sugrim v Ryobi Technologies, Inc.*, 73 AD3d 904 [2010]).

Finally, the branch of the motion by A&J which seeks to dismiss plaintiff's product's liability claim as against it, is granted as unopposed.

Accordingly, the motions for summary judgment dismissing the complaint are granted and the Clerk is directed to enter judgment accordingly.

Dated: Long Island City, NY
May 29, 2012

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ROBERT J. McDONALD
J.S.C.