SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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BRODY SOLOMON, an infant by his father and natural guardian, ZACH SOLOMON and ZACH SOLOMON, individually,

Index No. 154218/13
Motion Seqs: 001 & 002

Plaintiffs,

- against-

BARNES & NOBLE, INC., and OTIS ELEVATOR COMPANY,

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendants.

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OTIS ELEVATOR COMPANY,

Third-Party Plaintiff,

-against-

SANTA PAPAGINNAKIS,

Third Party Defendant.

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Motion Sequence Numbers 001 and 002 are consolidated for disposition.

The motion by Barnes & Noble, Inc. (Barnes & Noble) for summary judgment on its cross-claim for indemnification against defendant Otis Elevator Company (Otis), its claim for reasonable attorneys' fees and defense costs, and its request to have Otis immediately assume the defense of Barnes & Noble is denied (MS001).

The motion by Otis for summary judgment dismissing plaintiff's complaint and all cross-claims against it is denied (MS002).

This action arises out of an accident that occurred at the Barnes & Noble store located at 2289 Broadway, New York, NY (Store) on February 22, 2013. Plaintiff Brody Solomon (infant plaintiff), then 21-months old, allegedly sustained an injury to his left hand while riding down an escalator located inside the Store.

The central issue in the instant motions concerns the cause of the accident. Because it is unclear what caused infant plaintiff's left hand to become stuck in the escalator, the Court denies both motions. Motion Sequence 001 is denied because issues of fact exist surrounding Barnes & Noble's alleged negligence in the accident. Motion Sequence 002 is denied because there are issues of fact relating to whether a dangerous condition existed in the escalator and whether this condition caused infant plaintiff's injury.

Background

On February 22, 2013, infant plaintiff was with his nanny, third party defendant Santa Papaginnakis, at the Store around 11:00 a.m. After spending time in the children's section on the second floor, Ms. Papaginnakis and infant plaintiff got on the escalator to travel down to the first floor. Ms. Papaginnakis claims that she held the child's right hand as they traveled down the escalator. A few moments later, the child sat down and Ms. Papaginnakis heard the child scream. She turned and saw that the child's left hand was stuck between the escalator step and the side wall. The escalator was soon stopped by an employee of Barnes & Noble. A maintenance worker used a wrench in order to free the child's hand. The parties disagree over the extent to which the wrench deformed the escalator's side wall.

On the same day as the accident, the New York City Department of Buildings (DOB) issued a violation after inspecting the escalator. The escalator was found to have "excessive skirt

clearance," which means that there was too much space between the edge of the escalator step and the escalator's side wall. DOB also issued a "cease use" order for the escalator.

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Barnes & Noble's Motion

Barnes & Noble claims that its maintenance contract (Contract) with Otis requires that Otis indemnify Barnes & Noble as a matter of law. Barnes & Noble and Otis entered into the Contract on May 12, 2006 and a contract addendum in May 2009. Barnes & Noble claims that

the Contract was effective on the day of the alleged incident involving infant plaintiff. Barnes & Noble also claims that it is entitled to common law indemnification from Otis.

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999].

As an initial matter, Barnes and Noble's claim for contractual liability, to the extent it is sought, is denied because the Contract does not contain a contractual indemnity requirement.

"Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Mgmt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). "[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia,* 259 AD2d at 65).

"An elevator company which agrees to maintain an elevator 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" *(Rogers v Dorchester Assocs.*, 32 NY2d 553, 559, 347 NYS2d 22 [1973]).

Barnes & Noble argues that the Contract requires Otis to maintain the escalator through "inspection, lubrication, adjustment, and if conditions usage warrant, repair or replacement of the following parts . . . escalator handrails . . . alignment devices, steps, step treads, step wheels, step

chains . . . tracks, external gearing and drive chains" (affirmation of Barnes & Noble's counsel, exhibit A, at 2). Barnes & Noble further claims that the Contract granted Otis an exclusive right to perform maintenance on the escalator.

Barnes & Noble asserts that because Otis was exclusively responsible for maintaining and inspecting the escalators at the Store, the gap between the escalator step and the skirt that allegedly caused infant plaintiff's injury was caused by Otis' negligence.

In support of its motion, Barnes & Noble proffers the expert report of Dennis Olson. Mr. Olson claims that on the day of the incident, the DOB found that the escalator was not in compliance with applicable codes and was cited for excessive skirt clearance. The skirt clearance refers to the clearance on each side of the steps between the step tread. Mr. Olson claims that the relevant records indicate that Otis performed inspections of the skirt clearance 24 days prior to the accident and 18 prior to the accident. Based on these facts, Mr. Olson concludes that Otis Elevator failed to adequately inspect, maintain and repair the escalator and that this failure was a cause of the injuries suffered by infant plaintiff.

Barnes & Noble also points out that an Otis repair mechanic inspected and made repairs to the escalator the day before the accident. Barnes & Noble concludes that because there is no evidence of negligence by Barnes & Noble, and Otis assumed full responsibility for the escalator, Barnes & Noble is entitled to full contractual indemnification.

Barnes & Noble made a prima facie showing that it is entitled to summary judgment. The burden shifts to Otis to raise triable factual issues.

In opposition, Otis claims that the Contract with Barnes & Noble was not as comprehensive as the contracts in the cases cited by Barnes & Noble. Specifically, Otis claims

that Barnes & Noble was responsible for posting and maintaining all warnings regarding the use of the escalators. Otis also claims that Barnes & Noble monitored the escalators for malfunctions or dangerous conditions and then notified Otis if such a condition existed. Further, Otis claims that Barnes & Noble was responsible for installing, or arranging the installation of, new equipment such as brush guards. Otis points out that Barnes & Noble turned the escalators off and on each day and that Otis did not have a mechanic at the Store during regular business hours.

Otis claims that Barnes & Noble was responsible for ensuring that the escalator complied with relevant codes under the Contract. Otis further argues that the work performed by an Otis employee the day before the accident would not have affected the clearance between the steps and the skirt in any way.

Otis points to plaintiff's expert's finding that the installation of brush guards, which Otis does not concede were necessary, would have prevented the accident. Otis argues that this conclusion requires a finding of liability against Barnes & Noble because the Contract required that new equipment be installed at the direction of Barnes & Noble.[1]

Otis has raised issues of fact regarding whether Barnes & Noble participated to some degree in the alleged wrongdoing and whether Barnes & Noble's alleged negligence (for example, in failing to have brush guards installed or failing to report a problem with the

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[1]Otis also proffers the affidavit of Mr. Ralph Amato, an Otis employee, who claims that Barnes & Noble rejected a proposal to install brush guards on the escalators at the Store (affirmation of Otis' counsel, exhibit A). The Court did not consider Mr. Amato's affidavit because it is vague and filled with hearsay. Mr. Amato did not explain how he knows that a proposal was submitted to Barnes & Noble, who submitted the proposal, or the basis for his statement that Barnes & Noble did not accept the proposal. Mr. Amato did not attach a copy of the proposal, correspondence about the proposal, or provide a date when the proposal was submitted.

escalator) contributed to causing accident. Therefore, Barnes & Noble is not entitled to common-law indemnity.[2]

Barnes & Noble's reliance on the service contracts in the *Rogers* and *Mas* cases does not compel the Court to rule in its favor. Although the Contract gave Otis exclusive rights to maintain the escalator, it was *not* a contract where the "owner had no functions to perform, as between it and the elevator company" (*Rodgers*, 32 NY2d at 562). Barnes & Noble was responsible for maintaining warnings concerning the use of the escalator, turning the escalator on/off and notifying Otis if a malfunction or dangerous condition occurred. The Contract is also unlike the contract in the *Mas* case, where Otis had someone available 24 hours a day, 7 days a week and an Otis employee inspected and maintained the elevators every day (*Mas v Two Bridges Assocs.*, 75 NY2d 680, 688, 555 NYS2d 669 [1990]). Although Otis provided a dispatching service that was available 24 hours a day to make repairs, the Contract required Barnes & Noble to notify Otis of any issues and shut down the escalator until Otis made the necessary repairs.

Further, the cause of the accident is disputed. It is unclear if DOB issued the violation for excessive skirt clearance because of Otis' failure to maintain the escalator or if the efforts to free infant plaintiff's hand with a wrench caused the excessive skirt clearance. That makes the instant action distinct from the cases cited by Barnes & Noble where the escalator or elevator

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[2]Plaintiff does not take a position on indemnification except to argue that Barnes & Noble has a duty to maintain its property in a reasonably safe condition because Barnes & Noble's lease states that the "tenant shall be responsible for the maintenance of . . . escalators" (affirmation of plaintiff's counsel, exhibit 2). Plaintiff's assertion is correct. Under the terms of the lease, Barnes & Noble is responsible for keeping its escalators in reasonably safe condition.

malfunction was clearly a cause of an injury (*see e.g., Goodlow v 724 Fifth Ave. Realty, LLC*, 127 AD3d 1138, 8 NYS3d 375 [2d Dept 2015] [holding that owner of building was entitled to indemnification by Otis where woman was injured by a closing elevator door]; *Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 852 NYS2d 27 [1st Dept 2007] [ruling that defendant owner was entitled to indemnification from elevator company when plaintiff was injured after elevator doors unexpectedly closed on plaintiff]). Put simply, it is unclear what role the escalator had in the accident. Although Otis was responsible for performing maintenance and repairs on the escalator, the facts do not undisputedly show that infant plaintiff's injury was caused by an escalator malfunction. A jury might conclude that the escalator did not malfunction at all and that the accident happened because the Nanny failed to properly supervise the child or because Barnes and Noble failed to monitor who rides the escalators or that the picture showing how an adult should ride with a child was inadequate, or a combination of one or more of those factors - or others. Of course, these factual determinations must be made by a jury.

Further, plaintiff's expert maintains that brush guards would have prevented the accident (*see* affidavit of Patrick Carrajat at 9). Although the parties dispute whether brush guards would have prevented the accident, the Contract stated that Otis would "not be required . . . (iii) to make any changes in the existing design of the Units, (iv) to alter, updated, modernize or install new attachments to any Units, whether or not recommended or directed by insurance companies or by governmental authorities" (affirmation of Barnes & Noble's counsel, exhibit A at 5). Therefore, an additional factual question exists: whether Barnes & Noble should have had brush guards installed.

Otis' Motion

Otis moves for summary judgement based on its claims that it was not negligent and that Ms. Papaginnakis was the sole proximate cause of the accident. Otis asserts that Ms. Papaginnakis failed to properly supervise infant plaintiff and that this negligence caused the accident. Otis argues that there is no evidence that there was excessive skirt clearance prior to the accident and that even if there was excessive clearance, it is irrelevant because a 21-month old child's fingers are small enough to fit into the clearance permitted by code (3/16 of an inch). Otis also disputes that the presence of brush guards would have prevented the accident. Otis concludes that Ms. Papaginnakis could have prevented the accident if she had not permitted infant plaintiff from sitting down on the escalator step.

In support of their motion, Otis cites the deposition testimony of Papaginnakis who admitted that she rode the escalator with infant plaintiff on many previous occasions. Otis also points out that its service mechanic, Terence Buckley, testified that he performed a check on the skirt clearance during his inspections of the escalator on January 29, 2013 and February 4, 2013. Mr. Buckley claimed that he would have measured the clearance if he had observing something abnormal and that he found nothing wrong with the escalator. Mr. Buckley further testified that brush guards only provide a warning and would not have prevented the accident.

Otis also submits the affidavit of its expert, Gregory DeCola. Mr. DeCola claims that there must be some clearance between the steps and the skirt in order for an escalator to operate properly. Mr. DeCola further notes that because some clearance is necessary, young children's behavior must be closely monitored. Mr. DeCola asserts that the Court should ignore the DOB violation because the skirt was manipulated after the accident to allow the child to remove his

hand. Mr. DeCola concludes that the child's hand could have been caught in the escalator even if the skirt clearance complied with the relevant code.

Otis has made a prima facie case for summary judgment. The burden now shifts to plaintiff and Ms. Papaginnakis to raise a triable issue of fact.

Plaintiff claims that issues of fact exist with respect to whether Ms. Papaginnakis' conduct was the sole proximate cause of the accident, whether the excessive skirt clearance existed prior to the accident, and whether Otis took proper steps to prevent the accident.

Plaintiff claims that Ms. Papaginnakis' deposition testimony does not demonstrate that she was the sole cause of the accident. Plaintiff argues that her testimony indicates that she held onto the child's [other] hand the entire time that they were on the escalator.

Plaintiff also claims that Otis was negligent in its inspection, repair, and maintenance of the escalator. Plaintiff claims that this negligence was a proximate cause of the accident. Plaintiff observes that the DOB issued a violation for excessive skirt clearance after the accident and also issued a "cease use" order. Plaintiff submits the expert report of Mr. Patrick Carrajat, who concluded that the excessive gap in the escalator was not caused by the actions taken to remove the child's hand from the escalator.

Mr. Carrajat also claims that Otis failed to take prudent steps to prevent the accident, including installing brush guards which would have limited the space between the step and the skirt to 1/16 of an inch. Mr. Carrajat further claims that brush guards would have deflected infant plaintiff's hand from the skirt clearance, thereby preventing the accident. Mr. Carrajat concludes the accident would not have occurred if the escalator was properly maintained and that Otis was negligent in allowing excess skirt clearance to exist.

In opposition, Ms. Papaginnakis argues that Otis misrepresents her deposition testimony. Specifically, Ms. Papaginnakis disputes Otis' claim that she failed to pay attention to infant plaintiff for a long period of time.

Plaintiff and Ms. Papaginnakis have raised issues of fact. "Issues of negligence, foreseeability and proximate cause involve the kinds of judgmental variables which have traditionally, and soundly, been left to the finders of fact to resolve even where the facts are essentially undisputed" (*Rotz v City of New York*, 143 AD2d 301, 304, 532 NYS2d 245 [1st Dept 1988]). Here, there are issues of negligence and proximate cause with disputed facts. Issues of fact exist with respect to Ms. Papaginnakis' role in the accident, the excessive skirt clearance and Otis' maintenance of the escalator.

As an initial matter, there is an issue of fact regarding Ms. Papaginnakis' role in the accident. Her deposition testimony makes clear that she was holding onto the child's [other] hand as they descended the escalator and that she instructed the child to be careful. Ms. Papaginnakis was holding infant plaintiff's right hand with her left hand (Papaginnakis tr at 26, lines 14-18). The specific events that led to the child's injury are unclear. Ms. Papaginnakis testified that "He [infant plaintiff] was standing up and then he sit on the stair" (*id.* at 26, lines 9-10). "I only said to him careful. The minute I said that, he had his hands in the escalator" (*id.* at 26, lines 22-25). Ms. Papaginnakis appears to claim that the child sat down and got his hand stuck almost immediately after being told to be careful. The Court cannot conclude that this alleged split-second action renders Ms. Papaginnakis the sole proximate cause of the accident. While a jury might conclude that a reasonable person might have taken different steps to protect a child, such as holding both of the child's hands, the Court cannot make that determination on a summary

judgment motion.

Further, the warning signs attached as exhibit 1 to exhibit L of Otis' motion raises an issue of fact with respect to Ms. Papaginnakis' negligence.[3] This photograph, allegedly taken by Mr. DeCola (Otis' expert), supposedly captures a warning sticker located at the entrance to each escalator at the Store. The picture depicts an adult passenger holding a child's hand with one of her hands and holding the handrail with the other hand. Although Ms. Papaginnakis was not directly asked at her deposition whether she was holding a handrail, her testimony indicates that she was following the other aspects of the photograph until infant plaintiff sat down and got his hand stuck. The picture also shows the adult holding only one of the child's hands, leaving the child's other hand free to touch parts of the escalator, which is what happened here. The record here is devoid of which party, if any, provided the warning signs/how-to-ride-an-escalator-with-a-child signs, or even if a like sign was present on the date of the accident. Besides keeping a loose enough grip which allowed the child to sit, there is no indication that Ms. Papaginnakis was riding the escalator in contravention of the sign.

Of course, there is also an issue of fact regarding whether the escalator had an excessive skirt clearance and whether this clearance was a cause of the accident. It is unclear if DOB issued a violation because of the actions taken to free infant plaintiff's hand or if the violation was issued because of a preexisting condition with the escalator. The key factual issue is whether the use of a wrench to free infant plaintiff's hand had any effect on the skirt clearance and, even if it did, whether DOB measured the skirt clearance at the specific location where the escalator was

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[3]Although Mr. DeCola does not state that this warning sign was present on the date of the accident, the Court seeks to use the picture only for the purpose of demonstrating a potentially non-negligent method for traveling with children on an escalator.

manipulated.

Mr. DeCola, Otis' expert, maintains that the actions taken to free infant plaintiff's hand "could have enlarged the clearance in that area sufficiently to generate the post-accident violation" (affidavit of Gregory DeCola ¶ 16). However, plaintiff's expert concludes that "escalator steps can be easily shifted up to the maximum allowable space on each side (3/16") creating a space of 3/8" and allow the removal of the hand" (affidavit of Patrick Carrajat at 9). Mr. Carrajat maintains that the escalator skirt was not damaged by the steps taken to free infant plaintiff's hand (*id.*).

Because of the disagreement between experts, there is an issue of fact whether the DOB violation constitutes evidence of negligence by Otis. A jury could find that the use of the wrench did not affect the skirt clearance and that the excessive skirt clearance was a cause of the accident. Because Otis was responsible for inspecting, maintaining, and repairing the escalator, there are issues of fact regarding whether it was negligent.

Accordingly it is

ORDERED that the motion for summary judgment by defendant Barnes & Noble on its cross-claim for indemnification is denied; and it is further

ORDERED that the motion for summary judgment dismissing plaintiff's complaint and all cross-claims by Otis is denied.

This constitutes the Decision and Order of the Court.

Dated: May 5, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC