At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of December, 2018.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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MYRTLYN BARRETT,

Plaintiff,

- against -

PORT AUTHORITY OF NEW YORK & NEW JERSEY, US AIRWAYS, INC., AMERICAN AIRLINES, INC., and SCHINDLER ELEVATOR CORPORATION,

Defendants.

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Index No.: 501854/2014

DECISION AND ORDER

Motions Sequence #4

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from an alleged trip and fall incident that purportedly occurred on September 12, 2013. On that day the Plaintiff, Myrtlyn Barrett (hereinafter "the Plaintiff"), allegedly injured herself on an escalator at John F. Kennedy International Airport. In her Notice of Claim and Amended Verified Complaint the Plaintiff states that she was on her way to Terminal 36 at the time of the accident. Specifically, the Amended Verified Complaint states (See Defendants Motion, Exhibit B, Paragraph 4) that while she was on an upward moving escalator, she felt a jerk and "[a]s a result she fell backwards on the upward moving escalator, violently tossing Ms. Barrett backward hitting the escalator steps injuring her shoulder, hip and back." During her Examination Before Trial (EBT), the Plaintiff testified (See Defendants Motion, Exhibit N, Pages 53 through 55) that the alleged incident occurred within Terminal 7 of John F. Kennedy International Airport.

Defendants Port Authority of New York & New Jersey, American Airlines, Inc., and Schindler Elevator Corporation (hereinafter named individually or collectively as "the Defendants") now move (motion sequence #4) for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint of the Plaintiff against the Defendants. The Defendants contend that their motion should be granted because the Plaintiff has failed to properly identify the escalator involved in her alleged accident and as a result Plaintiff has failed to articulate the instrumentality that caused her alleged injuries. What is more, the Defendants argue that the doctrine of *res ipsa loquitor* is not available given that an escalator is used by the public and as a result is not in the exclusive control of the Defendants.

Also, in the alternative, the Defendants argue that the failure to identify the location of the alleged incident renders the Notice of Claim against Defendant Port Authority of New York & New Jersey defective. As a result, the Defendants argue that the matter should at least be dismissed as against Defendant Port Authority of New York & New Jersey. As to Defendant American Airlines, the Defendants contend that Defendant American Airlines had no responsibility for the maintenance of any escalator in Terminal 7 at the time of the alleged incident. Finally, the Defendants contend that as the Plaintiff never specifically identified the escalator involved in her alleged incident, there is no indication of any elevator malfunction, and no evidence of prior notice.

The Plaintiff opposes the motion and argues that it should be denied, as the Defendants have failed to meet their *prima facie* burden. The Plaintiff contends (Affirmation in Opposition, Paragraph 29) that the "deposition testimony of the Plaintiff is insufficient to demonstrate [sic] absence of triable issues of fact regarding whether defective dangerous condition existed, and notice." Specifically, the Plaintiff contends that her EBT testimony clearly described the events at issue and where they took place. The Plaintiff also contends that her use of the words "terminal

36" was a typographical error that was ultimately corrected during her EBT testimony. The Plaintiff contends that during her EBT she clarified that the incident at issue occurred in Terminal 7, Gate 36. The Plaintiff also contends that there is an issue of fact as to whether the doctrine of *res ipsa loquitor* applies given that the mechanism for controlling the escalator was locked and accessible only by a specific key. As to the Notice of Claim, the Plaintiff argues that any error in the original Notice of Claim is not fatal, and that Defendant Port Authority had actual knowledge of the location from the description and the Plaintiff's testimony. The Plaintiff also argues that Defendant American Airlines was identified by the Defendants as having responsibility for the escalators at Terminal 7.

As an initial matter, the Court grants that aspect of the Defendants' motion that seeks to dismiss the claim as against Defendant Port Authority of New York and New Jersey for failing to properly identify the site of the accident in the Notice of Claim. The Defendants contend that a notice of claim must properly identify the location of the accident with sufficient particularity, pursuant to General Municipal Law § 50–e(2). In fact, a notice of claim filed as against the Port Authority of New York and New Jersey is governed by Unconsolidated Laws of N.Y. §§ 7107 and 7108. §7108 provides that such a Notice of Claim served on the Port Authority of New York and New Jersey must identify the place where the alleged incident occurred. *See Unconsolidated Laws of N.Y. § 7108*; *Port Auth. of N.Y. & N.J. v. Barry*, 15 Misc. 3d 36, 38, 833 N.Y.S.2d 839, 840 [App. Term, 2nd and 11th Judicial Districts, 2007]. "Absent compliance with the notice of claim requirement, the court lacks subject matter jurisdiction." *Belpasso v. Port Auth. of New York & New Jersey*, 103 A.D.3d 562, 959 N.Y.S.2d 442 [1st Dept, 2013]. As a result, the claim by Plaintiff as against Defendant Port Authority of New York and New Jersey is hereby dismissed.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the

absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

"'In a slip and fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation.'" *Rajwan v. 109-23 Owners Corp.*, 82 A.D.3d 1199, 1200, 919 N.Y.S.2d 385 [2nd Dept, 2011], *quoting Patrick v. Costco Wholesale Corp.*, 77 A.D.3d 810, 810, 909 N.Y.S.2d 543, 544 [2nd Dept, 2010]. "Where the actual or specific cause of an accident is unknown, under the doctrine of *res ipsa loquitur* a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it." *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 678 N.E.2d 456, 458 [1997]. "In order to rely on the doctrine of *res ipsa loquitur*, a plaintiff must show that the event was of a kind that

ordinarily does not occur in the absence of someone's negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and that it was not due to any voluntary act or contribution on the part of the plaintiff." *Ramjohn v. Port Auth. of New York*, 151 A.D.3d 1090, 1092, 57 N.Y.S.3d 516, 519 [2nd Dept, 2007].

Turning to the merits of the instant motion, the Court finds that the Defendants have established their *prima facie* entitlement to summary judgment in as much as they have presented evidence that Plaintiff is unable to identify the escalator at issue and as a result unable to identify the cause of her fall. In support of their application, the Defendants rely primarily on the Plaintiff's Notice of Claim to the Defendant, Port Authority of New York & New Jersey, the Amended Verified Complaint, the Response to Demand for Verified Bill of Particulars, the deposition testimony of the Plaintiff, an Affidavit of Dianne Taglich-Oh, and an Affidavit of Joseph Daly. In the Plaintiff's Notice of Claim, the Amended Verified Complaint and the Response to Demand for Verified Bill of Particulars, the Plaintiff identifies Terminal 36 as the area where the escalator at issue was located. As the Affidavit of Dianne Taglich-Oh makes clear, there is no Terminal 36 at JFK Airport.

In opposition, the Plaintiff has failed to raise a material issue of fact that would prevent this Court from granting summary judgment to the Defendants. In opposition to the Defendants' motion, the Plaintiff contends that the Plaintiff mistakenly named Terminal 36 as the site of the alleged incident in the Notice of Claim, the Amended Verified Complaint and the Response to Demand for Verified Bill of Particulars. The Plaintiff argues however that the issue was clarified during the Plaintiff's deposition testimony, during which the Plaintiff identifies the location as in Terminal 7 near gate 36. However, even assuming, *arguendo*, that the Plaintiff's testimony serves to correct the deficiencies related to misidentifying the location at issue, the Court finds that the Plaintiff has not adequately identified the specific escalator at issue in Terminal 7.

The Court does note that the Plaintiff did allege that the Defendant did not provide the Plaintiff with access to Terminal 7, in order for her to determine and identify which specific escalator in this terminal allegedly malfunctioned, thereby causing the Plaintiff's injuries. However, the Plaintiff did not seek to resolve this problem, by moving for access or otherwise seeking Court intervention. The note of issue was filed by the Plaintiff on January 30, 2018.

This is also significant because without identifying which specific escalator was at issue, the Plaintiff cannot establish that the doctrine of *res ipsa loquitor* is appropriate in this case. *See Guarracino v. Cent. Hudson Gas & Elec. Corp.*, 274 A.D.2d 551, 551, 712 N.Y.S.2d 389 [2nd Dept, 2000].

Based on the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment (motion sequence #4) by the Defendants is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

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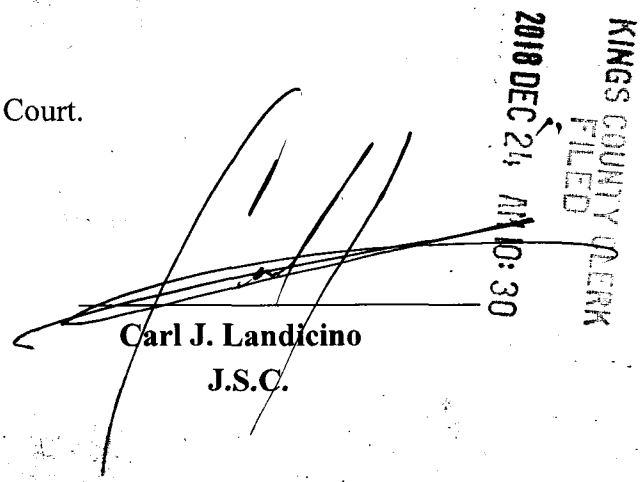

Carl J. Landicino
J.S.C.