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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

VINCENZO BADALAMENTI and ANTONINA BADALMENTI,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION & G.A.L. MANUFACTURING CORPORATION,

Defendants.

Index No. 26464/03

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to 5 read on this motion,

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	2, 3
Replying Affidavit and Exhibits	4, 5
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	6
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant G.A.L. MANUFACTURING CORPORATION's ("GAL Corp.") motion for an Order pursuant to CPLR § 3212 granting summary judgment is granted as to Plaintiff's claims of a manufacturing defect and the failure to warn, and denied in all other aspects.

Summary

This is a case were Plaintiff is alleging that GAL Corp. provided a pit stop switch ("switch") that was defectively designed. This switch is a device designed to cut the power going to an elevator's motor and prevent it from going up or down. Plaintiff was assigned to modernize elevators within Lincoln Hospital when he used the switch to stop two adjacent elevators, Nos. 7 & 8. He needed to replace some equipment located near the bottom of Elevator No. 8, so he activated the switch to stop that elevator on the lobby level so that he could reach the underside of the elevator while standing in the elevator pit located in the basement. Plaintiff also activated the switch for Elevator No.

7 because decided to wrap his left leg around a ladder installed in the basement pit, in between the two elevator shafts, as extra leverage to reach the area beneath the elevator. Despite activating the switch, however, elevator No. 7 still descended onto his leg, causing him injuries. Four months prior to this, a John Neary was crushed to death by an elevator he was servicing, also inside of Lincoln Hospital.

Consequently, Plaintiff instituted this cause of action claiming that: 1) GAL Corp. breached its warranty regarding the switch; 2) GAL Corp. failed to warn him regarding the switch; 3) the switch was defectively designed; 4) the switch contained a manufacturing defect; and 5) GAL Corp. was negligent.

GAL Corp. is moving for summary judgment and dismissal of Plaintiff's claims on five grounds. First, that the alleged design defect was not a proximate cause of Plaintiff's injuries and the switch was inspected by a third-party and no defects were found. Second, the switch was "state of the art" and exceeded ANSI standards. Third, there is no evidence that the switch was not reasonably safe for its intended purpose. Fourth, there is no evidence that the switch contained a manufacturing defect. Finally, any additional warnings would have been superfluous because Plaintiff knew that the stop switch should be in the fully down position for it to work as intended.

To somewhat simplify matters, there is no evidence in the record that supports Plaintiff's allegation that the switch at issue contained a manufacturing defect, and Plaintiff's have also failed to address that issue in its opposition. As such, that claim is dismissed. See Weldon v. Rivera, 301 A.D.2d 934, 935 (holding that arguments which plaintiff failed to address were deemed conceded). Also, the Court has found that there is

no triable issue of fact as to whether GAL Corp. was required to warn Plaintiff regarding the switch. Thus, Plaintiff's failure to warn claim is also dismissed.

This Court has relied on GAL Corp.'s adoption of the fact that the switch was in the fully down position when Elevator No. 7 descended on Plaintiff's leg to dispose of the remainder of its application. It is reasonable to infer from this bit of circumstantial evidence alone—especially when it is viewed in a light most favorable to the non-moving party—that the switch was defective. This fact, when coupled with GAL Corp.'s failure to provide expert opinion on the issues of proximate cause, the adequacy of its design process and the lack of a feasible alternative, supports this Court's finding that GAL Corp. has failed to meet its initial burden of showing entitlement to judgment as a matter of law. Jaramillo v. Weyerhaeuser Co. & Tech. Licensing Assoc., 12 NY3d 181; Liriano v. Hobart Corp., 92 NY2d 232. Consequently, there is no need to assess the viability of Plaintiff and Co-Defendant's opposition. See George Larkin Trucking Co. v. Lisbon Tire Mart, Inc., 185 AD2d 614 (holding that "[o]nly if the moving party sustains its initial burden does the burden shift to the opposing party to show facts sufficient to require a trial of any issue of fact") (citations omitted).

Factual Background

Plaintiff was a mechanic's helper employed by Nouveau Elevator assigned to assist elevator mechanic Frankie Lawrence to install electrical boxes on elevators within Lincoln Hospital on April 7, 2003. (Badalamenti EBT dtd Sept. 15, 2005 at 16:2-4; 18:11-13; 20:2-14; 45:4-8, 10.) This process involved, in simple terms, running wires from the top of the elevator car to the bottom, which required the car to be stopped on the lobby level so that Plaintiff could stand underneath it in the "pit," located in the basement. (Id. at

37:16-20; 38:4-13; 56:14-20.) The "pit" ran into an elevator "shaftway," where two elevators were located side by side, Nos. 7 & 8. Both elevators needed to be stopped/taken out of service so Plaintiff could complete the task. There were two ways to do this.

First, there was a "lock-out/tag-out" procedure, which was explained by Francis Lawrence, the mechanic Plaintiff was helping that day, as when "[y]ou lock [the elevator], you have your own lock, you shut it down and tag it with a red tag." (Lawrence EBTdtd Nov. 7, 2008 at 13:16-25.) This is done so that "someone doesn't come along and put the switch in," so "they don't electrocute you while working on [the elevator]." (Id. 14:2-7.) Waldro Declou, the lead mechanic on location that day, more specifically described the process:

> "[a] lock-out is a lock that locks the power supply to the elevator or any equipment that you are working on. There comes a lock that fits into the handle that prevents it from being energized while you're working. There is a tag that you put onto this equipment to inform other people that it is being worked on, and its locked out and who has the keys or who's in charge on the lock-out."

(Declou EBT dtd Jan. 23, 2007 at 23:2-11.)

Plaintiff's situation, however, did not require this procedure "[b]ecause he went in the pit [and] threw the pit switch. [The] [b]asement door was open, so that's two switches that were open. The car would not run." (Lawrence EBT at 27:2-14.) Additionally, there was no need to "lock" the car because the pit switch gives the mechanic control of the car. (Declou EBT at 57:4-10.) This brings us to the second way an elevator may have been stopped or taken out of service, the "pit stop switch."

GAL Corp. manufactured the switches in this case, and sold them to Nouveau who installed them. (Id. at 10:19-25; 11:2-3; 12:21-25; 13:2.) A GAL Corp. Vice-President, Herbert Glaser, testified that a switch's function is "to stop the elevator when someone is in the pit" by "remov[ing] power from the driving machine of an elevator." (Glaser EBT dtd May 15, 2007 at 16:14-22.) The switch is akin to a light switch (Badalamenti EBT at 63:18), with the writing "Run" above the "toggle" and "Stop" below, indicating that you flip the switch up to let the elevator run and down to shut the elevator's power. (Id. at 64:8; Pl. Aff. Opp. at Ex. G.)

Plaintiff testified that he used this second method to disable both elevators. (Id. at 64:21-24.) He first placed the switch regarding elevator No. 8 in the "stop" position because had to stop that one at the lobby level so he could work on it. (Id. at 71:21-25; 72:2-16.) He then realized that he would need to also activate the switch for elevator No. 7 since he could not reach the section of elevator No. 8 that he needed to without wrapping his leg around the side of the "pit ladder," located in the shaftway, for leverage. (Id. at 73:16-25; 74: 4-7, 18-21; 75:15-20). Plaintiff testified that he visually confirmed that the switch for elevator No. 7 was in the "stop" position prior to his accident (id. at 80:11-14), and that it was in the "[f]ully down position" (id. at 80:20-21).

While Plaintiff was working underneath elevator No. 8, with his leg wrapped around the ladder located in the pit, elevator No. 7 descended from the lobby level onto Plaintiff's leg (Declou EBT at 33:19-25; 34:2-3), resulting in him suffering an "open femur and tibia fracture to his left leg and knee cap fracture, requiring open reduction and internal fixation." (Pl. Ver. BoP at ¶ 3.) After the elevator came down on Plaintiff's leg, Mr. Declou entered it and tried to access "an inspection piece inside the car," which allows one to

"manually press a button and run the car up," so he could move the elevator up off of Plaintiff's leg. (Declou EBT at 84:15-24.) He explained that he was unable to move the car up this way because when his helper heard Plaintiff's screams, he turned off the main line. (Id. at 85:5-11.) The helper eventually switched the main line back on and Mr. Declou was able to get the car off of Plaintiff's leg. (Id. at 85:14-22.) Mr. Declou testified that if the switch had been in the "stop" position, he should not have been able to move the elevator off of Plaintiff's leg because "that stop switch takes priority over any other key switch or everything else." (Id. at 134:23-25; 135:2-9.)

Douglas Smith, a New York City Department of Buildings Inspector, testified that the elevators in question were subject to various types of inspections, i.e., routine, periodic and five-year. (Smith EBT dtd May 14, 2007 at 32:7-16.) He stated that these inspections generally involved checking the car top, all hoist way equipment, the pit, the bottom of the car, all mounted equipment, the operation of the car, the cab enclosure, safety circuits—which included the switch, and the door circuits. (Id. at 32:19-25; 33:2-14.) Although Mr. Smith indicated that elevator No. 7 received a satisfactory inspection on March 28, 2003 (id. at 36:3-12), he was unable to say "what specifically was done as it relates to an inspection of [that] elevator" (id. at 35:13-16).

Plaintiff brought this cause of action against GAL Corp. on the grounds of product liability, alleging that: 1) GAL Corp. breached its warranty of merchantability of the product at issue (Amend S&C at ¶¶ 43-50); 2) GAL Corp. failed to warn Plaintiff of the purported defect contained in the product at issue (id. at ¶¶ 51-59); 3) the product at issue was defectively designed (id. at ¶¶ 60-67); 4) there was a manufacturing defect in the switch

(id. at ¶¶ 68-73); and GAL Corp. was negligent under the common-law, as well as *Res Ipsa Loquitur* (id. at ¶¶ 74-81).

Plaintiff's counsel expounded on his theory of liability during October 1, 2009 oral arguments. He basically opined that the "pit switches" manufactured by GAL Corp. do not effectively cut the elevator's power unless it is in the full stop position: If the toggle switch is situated anywhere less than the full stop position, the elevator will still run. Thus, Plaintiff argues that an individual may push the toggle switch down into the stop position without realizing that it may not be sufficiently in position to cut the elevator's power until its too late.

Counsel mentioned the case of Neary v. The City of NY, et al., Index No. 16512/03 in support of this theory. Four months prior to Plaintiff's accident in this case, John A. Neary was crushed to death by an elevator within Lincoln Hospital that descended upon him while he was working on it. The issue in that case was also the functioning of the switch manufactured by GAL Corp. Mr. Glaser's testimony regarding that case elucidated those issues when he was asked:

> After you learned of Mr. Neary's accident and learned of the possibility that the toggle switch may have been in a 90 degree position at the time of Mr. Neary's accident, did GAL Corp. consider changing the design of the switch so that it would not be possible for the toggle to be left in a 90 degree position inadvertently?

(Glaser EBT dtd Jan. 7, 2009 at 55:23-25; 56:2-6.) To which he replied, "[n]o, we did not and as a matter of fact, no one suggested we change the design of the switch and the safety authorities do not say that the switch was defective." (Id. at 56:7-11.) He was then asked, "Do you think it would have been feasible or would be feasible after learning of Mr. Neary's accident and the manner in which it might have happened, would it be feasible to

change the design so that someone could not accidentally leave the switch in a 90 degree position? (Id. at 56:12-18.) To which he answered:

> It probably could be done, but in order to do that, you have to introduce springs like light switch has a spring in it and that's not permitted by code, because if the spring fails, then when you switch a light switch where the spring failed, a light may stay on. They want it to be manually operated. I do believe that the code states it should be manually operated without the use or solely dependent on springs.

(Id. at 57:2-12.)

Mr. Neary's incident was investigated by The New York City Department of Buildings in its Report dated December 20, 2002, which concluded that based on its investigation "Mr. John Neary thought the pit stop switch was in the off position when [he] closed the hoistway door." (Pl. Aff. Opp. to the City's Mot. at Ex. O.) Yet, the Report further indicates that "[b]ased on the position of the stop switch and interviews, it can not be determined if the pit stop switch was flipped completely down to the off position before the victim closed the hoistway doors, or if the victim accidentally bumped the switch as he was working in the shaft." (Id.)

In addition to this testimony, Mr. Declou testified that there was an alternative push/pull button design for the switch being manufactured and utilized since at least December 2002. (Id. at 102-04.) Mr. Glaser confirmed that GAL Corp. had manufactured a push/pull switch prior to April 2003, at the same cost as the toggle design at issue. (Glaser EBT at 22:16-25; 23:2-8.) Mr. Glaser also mentioned an "interpretation of the [ANSI] code by the code committees to the stop position," which stated that when the switch is "in the stop position, the fully stopped position it has to stop the elevator." (Glaser EBT dtd Jan. 7, 2009 at 54:19-22; 55:3-8.)

Summary Judgment Standard

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form." Zuckerman v. City of NY, 49 NY2d 557, 562 (citations omitted). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad v. N.Y. Univ. Med. Ctr., 64 NY2d 851, 853.

A. There is No Evidence in the Record of a Manufacturing Defect

> A party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury. **A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product.**

Speller v. Sears, Roebuck & Co., 100 NY2d 38, 41 (emphasis added) (citations omitted).

Manufacturing defects "result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction. Common examples of manufacturing defects are the proverbial hairline fracture in the exploding bottle or the flawed piece of metal in the automobile steering column." Caprara v. Chrysler Corp., 52 NY2d 114, 129. There is no evidence in the record that the switch suffered from "improper workmanship" or from "defective materials" being used. Nor has Plaintiff attempted to raise a triable issue of fact on this point. Thus, his claims in this regard are dismissed.

B. GAL Corp. has Failed to Meet its Initial Burden of Showing that the Switch was Not Defectively Designed

A design defect "presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to the detailed plans and specifications of the manufacturer." Caprara, 52 NY2d at 129.

> A plaintiff is not required to prove the specific defect and that proof of necessary facts may be circumstantial. **In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants**

Speller, 100 NY2d at 41. (emphasis added).

Consequently,

> **It may be inferred** that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, **without proof of a specific defect**, when the incident that harmed the plaintiff:
>
> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution

Speller, 100 NY2d at 42.

First—from the facts as provided—the switch did not perform as intended. It was supposed to cut the power to the corresponding elevator and did not. Though GAL Corp. is silent as to this most salient of facts, it may be presumed that the purpose or intent of the switch was to cut an elevator's power so that repairs, maintenance, modifications, etc., could be performed without risking life and limb. It may also be presumed that that is why Plaintiff activated the switch, so that he could perform his assigned task without getting harmed by a moving elevator. Indeed, GAL Corp. is

relying on Plaintiff's testimony that he placed the switch in the full stop position just prior to his accident as the lynchpin of its application. In addition to this fact, there was testimony that 1) the elevator should not have moved if the switch was in the fully down position and that 2) the elevator did move despite the switch being in the fully down position. GAL Corp. has made no attempts to refute these facts, nor provide a reason other than a possible design defect for why the switch did not cut the elevator's power as intended. See Graham v. Walter S. Pratt & Sons, Inc., 271 AD2d 854 (holding that, "defendant's initial burden on the motion could not be satisfied by merely establishing plaintiff's inability to come forward with evidence of any specific defect").

Simply offering that the switch was state of the art, that it exceeded ANSI standards—without providing evidentiary support—that it was found free of defects after inspections, and that is was placed back in service prior to this accident is unavailing. See Robinson v. Reed-Prentice Div. of Package Machinery Co., 49 NY2d 471, 479 (holding that "[w]here a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed"); Voss v. Black & Decker Mfg. Co., 59 NY2d 102, 107 (holding that "[a] manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product because he is in the superior position to discover any design defects and alter the design before making the product available to the public"). Consequently, GAL Corp. has failed to meet its initial burden of showing that Plaintiff's accident "was [not] of a kind that [would] ordinarily occur[] as a result of" an allegedly defectively designed switch.

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C. GAL Corp. has Failed to Meet its Initial Burden of Showing that the Switch was Not a Proximate Cause of Plaintiff's Injuries

> So, while a producer is not an insurer and its product need not be accident proof, it will not be shielded by the fact that it and its employees put forth their best and most meticulous efforts. **If the product can be found to be defective when it leaves their possession, the defect was a substantial factor in producing plaintiff's injuries, without more, the defendant, the one in the best position to have eliminated those dangers, must respond in damages.**

Caprara, 52 NY2d at 123-24 (citations omitted) (emphasis added).

Nonetheless, GAL Corp. proffers Plaintiff's failure to lock-out/tag-out the elevator as a cause of Plaintiff's injuries other than a possibly defective switch. GAL Corp.'s support for this precept, however, is tenuous at best. GAL Corp. represents to the Court that "plaintiff identified Section 7 of the Nouveau manual regarding lockout and tagout and confirmed that he had read and understood this section prior to the accident." (GAL Corp. Aff. Supp. at ¶ 24.) Plaintiff's testimony on this subject, however, indicates that when he was asked "[w]hat was discussed about lockout and tagout during [safety training]?", he responded, "I don't remember, I don't, I don't remember." (Badalamenti EBT dtd Sept. 14, 2005 at 105:11-13.) He was then asked, "[d]id you read anything in the handbook about lockout and tagout?", to which he replied "[w]hatever I read I forgot at this point, its three years after and I just don't remember." (Id. at 105:15-18.)

Regardless of this apparent overreaching on GAL Corp.'s part, when Plaintiff was asked, "[a]s you sit here today, do you recall under what circumstances you or anyone working for Nouveau was to lockout and tagout an elevator?", he answered, "[i]t was up to the mechanic, I was only the helper." (Id. at 106:7-11.) Furthermore, although the manual section cited by GAL Corp. states that "employees shall not perform any work

on equipment where there is a potential to come in contact with energized mechanical or electrical hazards until all sources of energy have been de-energized, grounded or guarded," it also states "[n]ever access the hoistway unless you have a reliable method of controlling the car." (GAL Corp. Aff. Supp. at Ex. I.)

Since GAL Corp. has failed to point to or provide evidence that: 1) Plaintiff was actually aware of the proffered manual section; 2) it was within his purview to implement the lock-out/tag-out procedure; or 3) locking-out/tagging-out the elevator was necessary under the circumstances, it has not met its initial burden of establishing that Plaintiff's accident "was not . . . solely the result of causes other than" the allegedly defectively designed "pit stop switch." See Nussbaumer v. GE, 11 AD3d 1035 (holding that "[d]efendant failed to sustain its initial burden of establishing that the actions of plaintiff were the sole cause of the accident, inasmuch as defendant submitted conflicting evidence" on the issue); see also Speller, 100 NY2d at 44 (holding that "[w]here causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts"). (citation omitted).

D. GAL Corp. Failed to Meet its Initial Burden of Showing that its Design was Safe And No Feasible Alternative was Available

> Thus, unlike manufacturing defects, design defects involve products, which are made in precise conformity with the manufacturer's design but nevertheless result in injury to the user because the design itself was improper. Moreover, unlike manufacturing defect cases where the decisive issue is the existence of the defect without regard to the care exercised by the manufacturer, **a defendant in a design defect case can avoid liability by demonstrating that he used that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended.**

Caprara, 52 NY2d at 129. (citations omitted) (emphasis added).

> In a strict products liability action based upon design defect, whether the product as marketed was reasonably safe for its intended use is determined by whether a reasonable person with knowledge of the potential for injury of the product and of the available alternatives, **balancing the product's risks against its utility and costs and against the risks, utility and cost of the alternatives,** would have concluded that it should not have been marketed in the condition that it was.

Cover v. Cohen, 61 NY2d 261, 266. (emphasis added).

GAL Corp. contends that Plaintiff's claims must be dismissed because "there is no evidence that a safer, feasible design alternative existed at the time the subject pit stop switch" was manufactured. (GAL Corp. Aff. Supp. at ¶ 46.) GAL Corp. correctly points out that Plaintiff must show that 1) the product as designed posed a substantial likelihood of harm; 2) it was feasible to design the product in a safer manner; and 3) the defective design was a substantial factor in causing Plaintiff's injury.

First, GAL Corp. has failed to meet its initial burden of establishing that the switch was adequately designed—or in other words, a safe product. Indeed, GAL Corp. makes no attempt to present evidence that it subjected the switch to adequate testing and inspection, or that its design was "state of the art" at the time of the accident. See Vincenty v. Cincinnati Inc., 25 AD3d 463-64 (granting summary judgment based on defendant's expert's opinion that its product was "state of the art" at the time of the accident); Voss, 59 NY2d at 111 (defining a "safe product" as "one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost"); see also Arell's Fine Jewelers, Inc. v. Honeywell, Inc., 170 AD2d 1013 (holding that "[d]efendant failed to submit first-hand evidence of product testing, and the record is devoid of evidence that the testing procedures were adequate to

detect latent defects. We are asked to speculate and surmise that, because no defect was detected, the test procedures were adequate, and because the test procedures were adequate, there was no defect. The summary judgment movant must present evidentiary facts by a person having first-hand knowledge; such speculation and surmise cannot support summary judgment").

Second, the record reveals the existence of a push/pull switch design with similar costs. GAL Corp. has failed, however, to establish as a matter of law that this design was not a feasible alternative. See Parra v. D&F Paint, Co., Inc., 38 AD3d 865 (granting summary judgment based on defendant's expert's opinion that there was no "feasible alternative design" available); see also Gardner v. Honda Motor Co., 214 AD2d 1024 (holding that "defendants failed to meet their initial burden of proving that a safer design was not feasible and that there was adequate testing and inspection"). Therefore, GAL Corp. has failed to establish, as a matter of law, that: the switch "as designed" did not pose a substantial likelihood of harm; it was not feasible to design and manufacture a switch in a safer manner; and the allegedly defectively designed switch was not a substantial factor in causing Plaintiff's injuries.

Lastly, The Court has already found that GAL Corp.'s theory that Plaintiff's injuries were the result of his failure to lock-out/tag-out the elevator insufficient to meet its burden of establishing, as a matter of law, that the allegedly defectively designed switch was not a proximate cause of Plaintiff's injuries. Thus, there is no need to re-address this issue now.

E. There is No Evidence that GAL Corp. had either Actual or Constructive Notice of Any Inherent Dangers Associated with the Switch

A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known. Liriano v. Hobart Corp., 92 NY2d 232, 237. That duty to warn "will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer; the existence and scope of such a duty are generally fact-specific." Id. at 240.

> [T]he courts of New York have consistently held that a manufacturer's duty is to warn only of those dangers it knows of or are reasonably foreseeable. **Knowledge, actual or constructive, of a danger inherent in a product is an essential factor in determining whether a manufacturer is liable.** The lack of such knowledge is fatal to a failure-to-warn claim, and in the absence thereof, summary judgment is warranted.

Mulhall v. Hannafin, 45 AD3d 55, 58. (emphasis added); see also Cover, 61 NY2d at 274-75 (holding that "[a] manufacturer . . . may . . . incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale, . . . through being made aware of later accidents involving dangers in the product of which warning should be given to users"); Liriano, 92 NY2d at 240 (holding that "the existence and scope of such a duty are generally fact-specific"). "[T]he manufacturer . . . should not be held bound to anticipate and warn against a remote possibility of injury in an isolated and unusual case. The law requires a person to exercise reasonable care to guard against probabilities, not mere remote possibilities. Kaempfe v. Lehn & Fink Products Corp., 21 A.D.2d 197, 200.

GAL Corp. argues that 1) Plaintiff was aware that the switch had two positions, stop or run and 2) that he was aware that to stop the elevator it had to be placed in the "fully down position," which he testified he did. (GAL Corp. Aff. Supp. at ¶ 83.) Thus, any additional warnings would have been superfluous. The Court is perplexed by this convoluted argument: Does not the fact that the product did not work as expected when it was used as intended hint at a "latent danger" in the switch? Thus begging the question, should GAL Corp. have provided warnings on this product? Although GAL Corp. fails to touch on this issue of notice, the Court finds that there is no evidence in the record that may be construed as requiring warnings on the switch.

Although there is the evidence of Mr. Neary's incident, Plaintiff has failed to raise a triable issue of fact that Mr. Neary's accident was "substantially similar" to the case at bar. See Hyde v. County of Rensselaer, 51 NY2d 927, 929 (holding that "It is well settled that proof of a prior accident, whether offered as proof of the existence of a dangerous condition or as proof of notice thereof, is admissible only upon a showing that the relevant conditions of the subject accident and the previous one were substantially the same").

Although Plaintiff's counsel's theory of this case is that the switch was defective because it would not cut the elevator's power if the toggle was in a position short of the "full stop" position—his client unequivocally testified that he placed the switch in the "fully down position." See Perez v. Bronx Park S. Assocs., 285 AD2d 402, 404 (holding that "where . . . the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise

a triable issue of fact to defeat defendant's motion for summary judgment"). The Court finds that this fact significantly diverges from what we know about Mr. Neary's accident, wherein the Inspector's Report concluded that either 1) Mr. Neary thought he placed the switch in the fully down position but did not or 2) that he accidentally bumped into it while working in the shaft.

Additionally, there is no evidence in the record that these switches ever led to any other accidents with facts similar to the case at bar. See Cover, 61 NY2d at 275 (holding that "notice . . . of problems revealed by use of the product will trigger [the] postdelivery duty to warn [based on] the degree of danger which the problem involves and the number of instances reported"). Consequently, there is no triable issue of fact regarding whether GAL Corp. had notice of the potential dangers of its switches, such to require that it provide warnings to users.

Finally, "[w]ith respect to negligence, defendants failed to meet their initial burdens of proving the reasonableness of their own conduct on those issues." Gardner, 214 AD2d at 1024. As stated—although there is evidence that the switch may have been defective—there is no evidence that: the switch was adequately designed and manufactured; there was not a more feasible alternative to the switch; and the switch was not a proximate cause of Plaintiff's injuries

The foregoing shall constitute the decision and order of this Court.

JAN 1 1 2010

Dated: _____

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J.S.C.