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SHORT FORM ORDER

INDEX No. 07-36695
CAL. No. 10-02395OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-10-11 (#001)
MOTION DATE 4-28-11 (#002)
ADJ. DATE 5-26-11
Mot. Seq. # 001 - MotD; CASEDISP
002 - XMG

PATRICIA FAMIGLIETTI, Plaintiff, - against - BURLINGTON COAT FACTORY WAREHOUSE CORPORATION, Defendant.	FERRO, KUBA, MANGANO, SKLYAR, P.C. Attorney for Plaintiff 825 Veterans Highway Hauppauge, New York 11788 PENINO & MOYNIHAN, LLP Attorney for Defendant/Third-Party Plaintiff 180 East Post Road, Suite 300 White Plains, New York 10601
BURLINGTON COAT FACTORY WAREHOUSE CORPORATION, Third-Party Plaintiff, - against - SCHINDLER ELEVATOR CORPORATION, Third-Party Defendant.	KELLER, O'REILLY & WATSON, P.C. Attorney for Third-Party Defendant 242 Crossways Park West Woodbury, New York 11797

Upon the following papers numbered 1 to 57 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 47; Answering Affidavits and supporting papers 48 - 49; Replying Affidavits and supporting papers 50 - 51, 52 - 53, 54 - 55; Other 56 - 57; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant/third-party plaintiff Burlington Coat Factory Warehouse Corp. for summary judgment dismissing the complaint and for summary judgment against third-party defendant Schindler Elevator Corporation on its indemnification claims is granted to the extent that summary judgment dismissing the complaint is granted and is otherwise denied; and it is further

ORDERED that the cross motion (002) by third-party defendant Schindler for summary judgment dismissing the complaint and the third-party complaint as asserted against it is granted.

In this action sounding in negligence, plaintiff, a 52 year-old woman, seeks to recover damages after allegedly sustaining injuries from a fall on an escalator owned and operated by defendant Burlington Coat Factory Warehouse Corp. (hereinafter referred to as "Burlington") on December 5, 2005. The plaintiff's fall allegedly occurred at the premises located at 196 East Main Street, Patchogue, New York.

Defendant/third-party plaintiff Burlington now moves for summary judgment dismissing the complaint and all cross claims, as well as for summary judgment or conditional summary judgment over third-party defendant Schindler Elevator Corporation (hereinafter referred to as "Schindler") on the third-party complaint. Schindler cross-moves for summary judgment dismissing the complaint and third-party complaint.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Insurance Co. v Equitable Land Servs, Inc***,207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

To prove a prima facie case of negligence, a plaintiff is required to show that the defendant either created the condition that caused the accident or had actual or constructive notice thereof (*see,* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; ***McKain v Metropolitan Transp. Auth.***, 274 AD2d 504, 712 NYS2d 380 [2d Dept 2000]; ***Carrillo v PM Realty Group***, 16 AD3d 611, 793 NYS2d 69 [2d Dept 2005]). Liability is predicated only on a failure of defendant to remedy the danger presented after actual or constructive notice of the condition (*see*, ***Murphy v Conner***, 84 NY2d 969, 622 NYS2d 494 [1994]). It must be demonstrated, by admissible evidence, that the accident occurred because of the negligence of the party being charged; the fact of an accident alone is insufficient to maintain a cause of action for negligence (***Sheikh v New York City Transit Auth.***, 258 AD2d 347, 685 NYS2d 223 [1st Dept 1999]).

In support of its motion, Burlington submits, *inter alia*, the pleadings, the bill of particulars, and the deposition transcripts of the plaintiff, William Wells, and Christopher Lamm, the personal affidavit of Lilly Mihajlov, the personal affidavit of Carl Cicali, and a copy of the maintenance agreement between Burlington and Schindler. Initially, the Court notes that plaintiff's claim for damages pursuant to the Americans with Disabilities Act is dismissed as a matter of law inasmuch as the statute does not provide for a private right of action (***Lugo v St. Nicholas Associates, Inc.***, 18 AD3d 341, 795 NYS2d 227 [1st Dept 2005], *see generally* 42 USC §§ 12101 - 12213).

In the bill of particulars, plaintiff alleges that defendant Burlington was negligent in forcing her to use the escalator instead of providing her with access to the freight elevator, thereby creating a dangerous condition. Plaintiff further alleges that Burlington had actual and constructive notice of a defective condition on the premises, and that the condition should have been repaired in a timely manner. Plaintiff alleges that Burlington violated the Americans with Disabilities Act. As a result of defendant's alleged negligence, plaintiff sustained fractures of the right tibia and fibula which required surgery and long term rehabilitative therapy.

Plaintiff testified that, on the date of the accident, she entered the Burlington store with the intent of buying a coat on the second floor. She was using a walker after having undergone knee replacement surgery. She stated that she took two pain medications, oxycontin and fentanyl, sometime that morning. Plaintiff stated that she had shopped at Burlington before and used the escalator without incident approximately one year ago, however, she was not using a walker at that time. At the bottom of the escalator, she folded the walker and held it in her right hand. She then stepped onto the escalator. Approximately halfway up to the second floor, she fell backwards and her shoe got stuck in the stair. She stated that it all happened so fast, and that she did not recall whether she became dizzy or lost her balance prior to falling. She stated that she was not making a claim that the escalator malfunctioned. Plaintiff stated, however, that she did not see any signs which advised her to take an elevator. She did not ask an employee for assistance and did not see any warning labels on the escalator before stepping on.

William Wells testified that he was employed by Burlington as a loss prevention officer and his duties were to prevent merchandise from being stolen. Although he is aware of a sign which states "Freight elevator is available for access to and from second floor," he did not recall when it was placed on the first floor. He witnessed plaintiff's fall on the escalator. He was stationed at the front entrance of the store and observed plaintiff enter with her walker. He saw her walk toward the escalator and he walked toward her to ask if she needed any help. By the time he started to walk toward her, she had stepped onto the escalator. Wells stated that as plaintiff proceeded about halfway up, she appeared to be off balance and fell backward. He stated that plaintiff was unable to adjust to the moving escalator. He ran up the escalator steps in time to catch plaintiff by the shoulders and upper back and rode up the escalator with her to the second floor. When they reached the top he moved plaintiff to the side of the escalator. The manager, Lilly Mihajlov, and other customers stepped forward to help and Wells returned to his post at the store entrance. He stated that Mihajlov filed an incident report. Wells stated that there were no signs posted at the time of plaintiff's fall to contact security or an employee if an elevator was needed. He stated that if the employees saw someone with a wheel chair or stroller, they would contact security to escort customers to the elevator, which was not open to the public.

Christopher Lamm testified that he was an employee for third-party defendant Schindler and was assigned to provide service to the subject escalator once per month. He was aware of three stickers on the escalators. One sticker depicted an adult holding the hand of a young child, which stated "Please hold children's hands." The second sticker depicted an adult pushing a stroller, which stated "Please use elevator." A third sticker stated "Please use handrail." He stated that if the stickers were torn or illegible, he would replace them. He stated that he did not receive training regarding the stickers and was not aware of any regulations regarding the stickers. He ordered replacement stickers from Schindler. He was unaware of a sticker on the escalator which instructed the rider to use an elevator. When he arrived at the store, he signed

his name in a binder at the front of the store. He did not keep written records regarding regularly scheduled maintenance visits. In 2005, Schindler utilized an electronic link system with the technician and eliminated paper services tickets.

Lamm stated that he performed routine maintenance each month by making a visual check of the escalator while it was running, and riding it. He normally performed more extensive maintenance every other month, by opening the escalator, lubricating the chains, running the escalator, and checking for abnormalities. Lamm recalled that he responded to service calls on October 21, 2005 and October 23, 2005, and the escalator was fully functional after each service call. Lamm testified that, according to the Site History Report, another technician fixed a problem with the handrail of Escalator Number 1, also known as the "up" escalator, on October 21, 2005. Lamm responded to the call on October 23, 2005, which involved adjusting the spring tension on the carriage and restarting the escalator. He had no recollection of returning to Burlington prior to plaintiff's accident for maintenance visits. Lamm verified that he saw signs posted at the entry of the escalator which informed a customer that there is a freight elevator that can be used to get to and from the second floor. He did not recall when the signs were placed in the store. He was not notified of plaintiff's accident.

Lilly Mihajlov avers in her affidavit that she was employed at Burlington on the date of the accident as the store manager. Her responsibilities included overseeing the day-to-day operation of the store and supervising the employees. Each day before opening the store, she conducted a walk-through inspection of the store, including the escalators. On December 5, 2005, she conducted her daily walk-through and the escalators were found to be in good working condition. At approximately 1:00 p.m. on December 5, 2005, she was advised by Wells that there was an accident on one of the escalators. The subject escalator was stopped following the accident involving the plaintiff, and it was found to be in good working condition after it was restarted.

Mihajlov further stated that all escalators were regularly maintained by Schindler who was the sole maintenance contractor for the escalators on the date of the alleged incident. There was an elevator available for use by any customer, if needed. Further, on the date of the accident and prior to the plaintiff's accident, there was a sign advising customers with strollers to "Please use the elevator." She attached two photos of the stickers placed at the bottom of the escalator, which were previously described by Lamm during his testimony. Mihajlov stated that plaintiff did not ask her or any staff member for assistance to take the freight elevator prior to the accident.

Carl Cicali avers in his affidavit that he has been employed by Burlington since 2002. He is the facilities manager and his responsibilities include maintaining contracts for the Burlington stores. He states that on the date of plaintiff's accident, Schindler was the sole contractor for the purpose of maintaining the escalators at the subject store pursuant to an Executive Account Maintenance Agreement (hereinafter referred to as "the Agreement"), effective September 19, 2002, and amended on June 30, 2005 to extend the terms until October 1, 2010.

The Indemnity clause of the Agreement provides as follows:

> Schindler shall act as an independent contractor in providing the service to be provided hereunder and not as an agent of any

> Burlington entity or owner. Schindler shall indemnify and hold harmless Burlington, and the owner . . . from and against any and all claims, losses, damages, liability or expenses including, without limitation, reasonable attorneys' fees, or whatever, and whether by reason of death or injury to any person or loss or damage to any property or otherwise, arising out or in any way connected to this Agreement, the services provided by Schindler or any subcontractors of Schindler hereunder to the extent caused by an act or failure to act by Schindler or its representatives during the term hereof, except for claims caused by Burlington's negligent or intentionally tortuous acts, and except for strikes, lockouts, flood, theft, vandalism, acts of God or insurrection or riot, embargo or delay in transportation.

In support of its cross motion for summary judgment, Schindler submits, *inter alia*, the third-party pleadings, copies of the function location site history report and copies of service operations work reports, and the affidavit of Jon Halpern. The site history report reveals that technicians responded to calls regarding the subject escalator on October 21, 2005, and October 23, 2005, at which time the upthrust switch was reset and the spring tension on the lower carriage was adjusted. In addition, the service operations work reports reveal that preventive maintenance was performed at the subject Burlington store on March 2, 2005, July 29, 2005, September 9, 2005, October 13, 2005, November 10, 2005, and November 29, 2005.

Mr. Jon Halpern avers in his affidavit that he is a licensed professional engineer. He opines, within a reasonable degree of engineering certainty, that Schindler maintained, inspected, and when necessary, repaired the subject escalator in accordance with all applicable safety codes and industry standards prior to plaintiff's alleged incident on December 5, 2005. It is further his opinion that the incident was not caused, in any respect, by any deficiency in the maintenance performed by Schindler, which comported in all respects with the requirements of the relevant contract between Burlington and Schindler. He notes plaintiff's testimony, wherein she stated unequivocally that the escalator upon which she was riding at the time of the incident did not malfunction in any respect so as to have caused her fall. In addition, he relies upon the testimony of Mr. Wells who looked at the escalator to see if there was anything caught or stuck in the escalator after plaintiff's fall and did not observe anything out of the ordinary. Mr. Halpern also reviewed the sworn statement of Ms. Mihajlov, who found the escalator to be in good condition on the morning of the incident and after plaintiff fell, and that there was no need to call Schindler for repair. The testimonies are consistent with his opinion that the maintenance, servicing, inspection and repair performed by Schindler prior to the date alleged was appropriate, and that no actions or inactions on the part of Schindler were the cause of plaintiff's fall. Mr. Halpern also noted that Mihajlov's testimony confirmed the existence of signage, in the form of stickers, which complied with the requirements of ANSI/ASME A17.1 elevator/escalator safety code and with all industry standards in effect at the time. He also notes that the testimony of Christopher Lamm demonstrated that Schindler complied with industry standards and was in conformance with the terms of the Agreement between Burlington and Schindler. In addition, the fact that Lamm was not notified of plaintiff's accident is consistent with the above-stated testimonies by Wells and Mihajlov that there was nothing wrong with the operation of the escalator in question. Halpern concludes that there is no evidence of negligence on the part of Schindler which caused or contributed to the incident alleged by plaintiff.

"A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). "Encompassed within this duty is the duty to warn of dangerous conditions existing on the property" (***Doyle v State***, 271 AD2d 394, 395, 705 NYS2d 389 [2d Dept 2000]). However, "a landowner has no duty to warn of an open and obvious danger" (***Tagle v Jakob***, 97 NY2d 165, 169, 737 NYS2d 331 [2001]; *see*, ***Cupo v Karfunkel***, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003]) which, as a matter of law, is not inherently dangerous (*see*, ***Espinoza v Hemar Supermarket, Inc.***, 43 AD3d 855, 841 NYS2d 680 [2d Dept 2007]; ***Sclafani v Washington Mut.***, 36 AD3d 682, 829 NYS2d 553 [2d Dept 2007], or where the allegedly dangerous condition can be recognized simply as a matter of common sense (*see*, ***Bazerman v Gardall Safe Corp.***, 203 AD2d 56, 57, 609 NYS2d 610 [1st Dept 1994]), because "'[t]he situation is then a warning in itself'" (***DeMarrais v Swift***, 283 AD2d 540, 541, 724 NYS2d 766 [2d Dept 2001], *quoting* ***Olsen v State***, 30 AD2d 759, 759-760, 291 NYS2d 833 [4th Dept 1968], *affd* 25 NY2d 665, 306 NYS2d 474 [1969]).

Here, plaintiff has not alleged that Burlington failed to remedy a dangerous or defective condition on its property, but only that Burlington failed to warn her of the danger posed by taking a walker onto the escalator (*see*, ***Cupo v Karfunkel***, 1 AD3d at 51-52). It is undisputed that plaintiff was unable to explain how the accident occurred, or to connect the accident to any negligence on the part of Burlington. In support of its motion for summary judgment, Burlington demonstrated, *prima facie*, that the danger arising from the act of boarding a moving escalator with a walker was open and obvious and readily perceptible by the plaintiff (*see*, ***Grossman v Target Corp.***, __ AD3d __, 924 NYS2d 141 [2d Dept 2011]). Accordingly, Burlington established that it had no duty to warn the plaintiff of the risks of such behavior (*see*, ***Maria Jilma Rivas-Chirino v Wildlife Conservation Socy.***, 64 AD3d 556, 883 NYS2d 552 [2d Dept 2009]; ***Negin v New York Aquarium***, 4 AD3d 511, 771 NYS2d 716 [2d Dept 2004]). In opposition, plaintiff failed to raise a triable issue of fact by the affirmation of her attorney (*see generally*, ***Alvarez v Prospect Hosp.***, *supra*). Accordingly, plaintiff's complaint is dismissed as against Burlington.

Dismissal of the complaint as against defendant Burlington necessarily results in dismissal of its third-party complaint against Schindler for common-law and contractual indemnification and contribution. It is well settled that at common law, a party can seek indemnification only if it was not negligent and its liability is vicarious (*see e.g.*, ***Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC***, 61 AD3d 554, 877 NYS2d 72, 75 [1st Dept 2009]). Because Burlington has no vicarious or other liability, it may not seek common-law indemnification. Likewise, Burlington is not entitled to contractual indemnity inasmuch as plaintiff made no allegations of escalator malfunction, and there is no evidence of negligence by Schindler. Therefore, the contractual indemnity clause in the Agreement has not been not triggered. Accordingly, Burlington's third-party complaint against Schindler is dismissed.

Dated: July 26, 2011

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION