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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 111235/2010
GELL-TEJEDA, NATALIA
vs.
MACY'S RETAIL HOLDING
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is



MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/10/13

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NATALIA GELL-TEJADA, as mother and natural Guardian of and on behalf of MAXLEE TEJADA, an infant, and NATALIA GELL-TEJADA, individually,

Plaintiffs,

-against-

MACY'S RETAIL HOLDING INC., MAINCO ELEVATOR & ELECTRICAL CO. and THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

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Index No. 11235/2010

DECISION and ORDER
Mot. Seq.005



HON. EILEEN A. RAKOWER:

This is an action for negligence and loss of services. Plaintiff Natalia Gell-Tejada, as mother and natural guardian of and on behalf of Maxlee Tejada, an infant, and on behalf of herself individually (collectively, "Plaintiff"), seeks to recover damages arising from injuries that Maxlee sustained when his finger was severed after being caught underneath the comb plate of an Otis L-type escalator (Escalator 16) located within the Macy's Department Store at 151 West 34th Street in New York, New York ("the Premises") on July 2, 2010. Defendant Macy's Retail Holding Inc. ("Macy's") is alleged to be the owner of the Premises, and as such responsible for the escalators. Defendants Mainco Elevator & Electrical Co., and Thyssenkrupp Elevator Corporation ("Thyssenkrupp") are alleged to be the entities responsible for the maintenance, upkeep and structure of the escalators located at the Premises.

Thyssenkrupp now moves for an Order, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff's complaint and all cross-claims against it, and granting common law and contractual indemnification to Thyssenkrupp against Macy's and compelling Macy's to reimburse Thyssenkrupp for all costs incurred in the defense of this action. Plaintiff opposes the portion of Thyssenkrupp's motion which seeks dismissal of the Complaint. Macy's opposes the motion in its entirety.

In support of its motion, Thyssenkrupp submits the following: the summons and verified Complaint; Thyssenkrupp's answer to the Complaint; Macy's answer to the Complaint; the Maintenance Contract between Thyssenkrupp and Macy's; Plaintiff's Bill of Particulars and Supplemental Bill of Particulars; maintenance and repair records for the subject escalator; photographs of the escalator; the deposition transcript of Plaintiff Natalia Gell-Tejada; the deposition transcript of Kristopher McCrossen, a loss prevention manager at Macy's at the time of Plaintiff's accident; the deposition transcript of Thurman Brown, an employee of Macy's at the time of the accident; the deposition transcript of Randy Czyzewski, of Macy's; the deposition transcript of Jason Pacifico on behalf of Thyssenkrupp; the deposition transcript of Melvin Pope on behalf of Thyssenkrupp; the deposition transcript of Dave Pennino on behalf of Thyssenkrupp; a copy of the Macy's accident report for the July 2, 2010 incident; records from the New York City Department of Buildings; and the affidavit of Pat McPartland, a licensed professional engineer.

At the time of Plaintiff's accident, Macy's had retained Thyssenkrupp to perform elevator/escalator services for the Macy's Herald Square Department Store pursuant to a Vertical Transportation Maintenance Agreement ("the Agreement").

According to the Agreement, Thyssenkrupp, as "contractor," "shall furnish to Owner certain maintenance and other services . . . with respect to the Owner's entire elevator and escalator equipment and associate systems situated at the Owners locations specified in Attachment "A". Pursuant to Section 1.01 of the Agreement, "Contractor shall utilize its trained employees to keep the Owner Equipment in proper adjustment and in safe operating condition in accordance with all applicable codes, ordinances, regulations and law." Pursuant to Section 1.02, "[i]n order to perform the Contractor Services, the Contractor shall examine all Owner Equipment to determine existing conditions under which the Contractor Services shall have to be performed and shall check other factors that may affect the Contractor Services. Failure to do so shall not relieve the Contractor from performing in accordance with this Agreement . . ."

Pursuant to Section 1.03, "Contractor Services" included "at a minimum" the following: "(a) Maintenance of all parts of each individual unit of Owner Equipment . . . including, but not limited to machines, motor, brushes, controllers, selectors, worms, gears, thrust bearings, brake magnet coils or brake motors, brake shoes,

windings, rotating elements, contact coils, resistance for operating and motor circuits, magnet frames, sheaves, ropes, leveling devices, cams, car hoistway door hangers, tracks and guides, door operating devices and door motors, push buttons, indicators, hall lanterns, solid state and microprocessor component systems, safety devices, power drives, communication systems and all wiring for communication systems extending from the elevator cab to the controller . . . , electrical wiring, door protection and safety systems; (b) Monthly systematic examinations, adjustments, cleaning and lubrication of all machinery ... Contractor shall devote not less than one (1) hour per month per Device to such routine and preventative maintenance; provided that, time spent in performing repairs and/or other service calls shall not be considered part of the minimum required preventive maintenance hours."

Pursuant to Section 1.04 of the Agreement, "With respect to all escalators within the Owner Equipment, the Contractor Services, shall included a cleandown and replacement of work parts preformed, at a minimum, once every three years without such process to include a complete cleaning, inspection, readjustment and testing of all escalator components, all performed continuously, without interruption until completed ..."

Section 12 of the Agreement provided, "The Contractor shall comply with all written recommendations of the Site manager ... for maintenance, adjustment and repair as covered herein. However, Contractor is not required hereunder to install new attachments on the Owner Equipment or parts other and different than those now constituting the owner equipment ... unless requested by the Owner and, in such latter circumstances, shall be compensated for such additional work as set forth herein."

Rider No. 2 of the Contract specifically refers to the Otis L Escalators and provides:

> Excluded from this contract are specific REPAIRS, RENEWALS, AND REPLACEMENTS on Otis "L" type escalators. All refurbishment re manufacturing or purchasing of steps, step components, step chains, step chain pins, and all cost associated thereof are the responsibility of the owner. Quality and design to assure exact form and interchangeability are the responsibility of the owner.
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> ***
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> Contractor accepts no liability for any work or results of work not performed

by contractor. No warranty of materials either returned or supplied by owner or their application, is extended, accepted, or implied by contractor.

Randy Czyzewski, the district director of operations at the Herald Square Macy's, testified that Thyssenkrupp performs maintenance on the elevators/escalators at the Herald Square Macy's location.

Dave Pennino, a Thyssenkrupp employee that has been stationed exclusively at Macy's Herald Square for the past seventeen years, testified that he has worked and currently works with Mainco/Thyssenkrupp and is responsible for fixing the elevators and escalators in Macy's. Pennino testified that he is familiar with Macy's Escalator 16 and has personally performed maintenance on Escalator 16. Pennino further testified that he performs maintenance on Escalator 16 once a month, which includes cleaning, lubrication, and adjustment of components, as well as observing the condition of the escalator and the condition of the combs on the escalator. Pennino testified that Thyssenkrupp maintains a maintenance log book for maintenance performed on escalator 16.

Pennino also testified that, although Thyssenkrupp is not responsible for the replacement of the comb plates, a Thyssenkrupp employee notifies Macy's of any issues it observes with respect to the comb plates, and will shut the escalator down if an issue is observed during a maintenance inspection. Furthermore, Pennino testified that he tightens the comb plates (the bolts on the comb plate) and that he checks for broken comb fingers when he checks the condition of the comb plate. Pennino testified that, over the course of his years of service at Macy's, he has observed several articles trapped in the comb plates on Escalator 16.

Robert Burgos, an electrician employed by Macy's Herald Square, testified that Macy's employees perform outside inspections of the escalators prior to turning them on each day, and that the employees would check for any items protruding from the escalator at that time. Burgos testified that he has seen screws protruding from escalator 16 in the past, though not often. Burgos testified that he is referred to as a "snoopy," that snoopies do not perform work on the escalators at Macy's and that, other than Thyssenkrupp, himself, and the other persons working in Burgos' department, there are no other individuals or companies with any responsibility with respect to the maintenance of Escalator 16.

As Plaintiff testified, on July 2, 2010, Maxlee Tejada was riding on the subject Otis L Type escalator (Escalator 16) when his right pinky finger was caught

underneath the comb plate of the escalator after reaching to grab a water bottle that he had dropped onto the escalator stair, severing the finger. Upon Maxlee's finger becoming caught, the escalator did not appear to be immediately affected and continued to operate until a Macy's employee pressed the stop button.

Jason Pacifico, a journeyman elevator/escalator mechanic for Thyssenkrupp, testified that he has performed work at the Herald Square Macy's for Thyssenkrupp, and responded to the scene of the July 2, 2010 accident on behalf of Thyssenkrupp to assist maintenance personnel in locating the Plaintiff's finger in the escalator. Pacifico testified that there are Thyssenkrupp employees physically located at Macy's on a regular basis and that Thyssenkrupp had an office located in one of the elevator motor rooms at Macy's. Pacifico further testified that the Thyssenkrupp employees regularly stationed at Macy's would perform maintenance and answer trouble calls on the elevators and escalators as part of their regular business within the service department, and that he does not know of anyone else that performs maintenance on the Macy's Herald Square escalators other than Mainco and Thyssenkrupp.

Pacifico testified that he arrived at Escalator 16 approximately 45 minutes after the accident and slowly reversed the escalator steps approximately 10-15 steps until the finger was located. Upon Pacifico's arrival, the comb plate on the bottom of Escalator 16 had already been removed by a Macy's employee.

Pacifico further testified Escalator 16 remained out of service at Macy's from the time of the accident (Friday, July 2, 2010) until after the second New York City Department of Buildings ("DOB") Inspection on Tuesday, July 6, 2010.

As set forth in the Elevator Division Accident Report Narrative, the DOB inspector determined that the escalator was working properly and no visible defects were present, though the inspection notes explicitly state that "it is unclear if the comb plate switch as operating at the time the accident accrued [sic]" as the comb plate had already been removed prior to the DOB's arrival. The inspector concluded that, based on his inspection and investigation, "the accident appears to have been caused by human error" and "the escalator did not contribute to the accident." Additional inspection notes state that there was one tooth bent on the steps (comb plates), which "could have been caused when the comb plate was removed by EMS," that the top and bottom comb plate switches were working but adjustment was needed, and that a citation was issued for oil-soaked brake pads on the escalator in question (noting that the defect was unrelated to the accident).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. *CPLR §3212*. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. *Royal v. Brooklyn Union Gas Company*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2nd Dept 1986). Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. (*See CPLR 3212[b]; Bachrach v. Farbenfabriken Bayer et al.*, 36 N.Y.2d 696, 325 N.E.2d 872 [1975]). The affirmation of counsel, alone, is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). In addition, bald , conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 257 N.E.2d 890, 309 N.Y.S.2d 341 (1970); *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 538 N.Y.S.2d 249 (1st Dept. 1989).

Plaintiff's Common Law Negligence Claims

To make out a prima facie case of negligence in cases involving defective or dangerous conditions on a particular property, a plaintiff must "demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it." *Mitchell v. City of New York*, 29 A.D.3d 372 (2006), citing to *Leo v. Mt. St. Michael Academy*, 272 A.D.2d 145, 146 (2000). To constitute constructive notice, "a defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986). In circumstances where a defendant moves for summary judgment, the defendant has the initial burden of showing that it neither created the dangerous condition nor had actual or constructive notice of its existence prior to the accident. *Giuffrida v. Metro N. Commuter R.R. Co.*, 279 A.D.2d 403, 404 (2001); *Bernardo v. P. & J. Edwards*, 246 A.D.2d 950, 667 N.Y.S.2d 851 (3rd Dept 1998).

Thyssenkrupp contends that it is not liable for negligence because it did not create or have actual or constructive notice of a defect or a dangerous condition; the incident occurred due to the design of the subject escalator and not due to any act or omission of Thyssenkrupp, and the Department of Buildings inspected the escalator subsequent to the incident and concluded that the incident was due to human error.

Thyssenkrupp has provided evidence that it did not create or have actual or constructive notice of a defect or a dangerous condition and that the incident occurred due to the design of the subject escalator and not due to any act or omission on its behalf. As set forth in its accident report, the DOB inspector determined that the escalator was working properly and no visible defects were present and concluded that, based on his inspection and investigation, "the accident appears to have been caused by human error" and "the escalator did not contribute to the accident." In addition, Thyssenkrupp's liability expert, Pat McPartland, concurs with the DOB's conclusion that the accident was caused by human error and opines that there was insufficient force to activate the escalator's vertical comb plate. McPartland contends that the escalator's brake would not have been activated in any event and therefore whether there was oil on the brake pads is irrelevant to the cause of this accident.

However, Plaintiff submits the expert testimony of Patrick A. Carrajat, an escalator consultant, in which he opines that: if the clearances between the moving steps and comb plate fingers were set to proper tolerance, the accident would not have occurred; if the comb plate impact device was working properly it would have reduced the severity of the injuries to the Plaintiff; the oil-soaked brake pads were a contributing factor in the severity of the injury, and the amputation of a finger does not occur on a properly maintained and adjusted escalator absent negligence by the parties responsible for its proper maintenance.

Additionally, the inspection done by the DOB raises issues of whether a defect existed at the time of the accident or was created post accident.

Thereby, a question of fact remains as to the actual cause and/or contributing factors to the Plaintiff's accident.

Thyssenkrupp's Common Law Indemnification Claims

Thyssenkrupp seeks summary judgment on its cross claims against Macy's for common law and contractual indemnification on the basis that Plaintiff's accident was not caused by any negligence on the part of Thyssenkrupp, nor did the accident arise out of Thyssenkrupp's work under its contract with Macy's. Macy's opposes.

Common law indemnification is predicated on "vicarious liability without actual fault." *Edge Mgt. Consulting, Inc. v. Blank*, 25 A.D.3d 364, 367 (1st Dept.

2006). This requires that "a party who has itself actually participated in some degree in the wrongdoing cannot receive the benefit of the doctrine." *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 895 (2003); *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 567 (1987). "[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 for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law." *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 64 (1st Dept. 1999).

Here, Thyssenkrupp's motion seeking summary judgment on the common law indemnification claim is premature, as triable issues of fact remain as to the determination of both Thyssenkrupp's and Macy's negligence in regards to Plaintiff's accident.

Thyssenkrupp's Contractual Indemnification Claim

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence and was held liable . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *Correia v. Professional Data,* 259 A.D. 2d 60, 64 (1st Dept 1999).

The indemnification provision in the Macy's/Thyssenkrupp contract provides:

> Each party agrees (as "Indemnitor") to indemnify, defend, and hold harmless the other and its respective affiliates and the officers, directors, employees, agents, insurers, subcontractors, successors and assigns (collectively, "Indemnitee") from and against any and all claims, damages, obligations, injuries, judgments, costs and expenses (including reasonable attorneys fees and expenses) *as may be incurred by any Indemnitee due to the negligent or wrongful act or omission of the Indemnitor or of its officers, directors, employees, agents, subcontractors, successors and assigns, including, without limitation, by any breach or default of its obligation under this Agreement.* (emphasis added).

Here, Thyssenkrupp's motion for summary judgment on the contractual indemnification claim is premature, as issues of fact remain as to whether Thyssenkrupp was negligent, and if so, to what extent. Furthermore, the indemnification provision in the Macy's/Thyssenkrupp contract specifically indemnifies Thyssenkrupp only from those damages resulting from "a negligent or wrongful act or omission" of Macy's or its agent(s) (as indemnitor). This requires a finding of negligence against Macy's (as well as a determination of Thyssenkrupp's non-negligence) in order for Thyssenkrupp to be permitted to recover under the indemnification clause and, as issues of fact remain as to the negligence, if any and to what extent, of both Thyssenkrupp and Macy's, Thyssenkrupp's motion for summary judgment is premature.

Wherefore, it is hereby,

ORDERED that defendant Thyssenkrupp Elevator Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 9/10/13

EILEEN A. RAKOWER, J.S.C.