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

PRESENT: **DEBRA A. JAMES** **PART 59**
Justice

JAMES GOODWIN,

Plaintiff,

- v -

NATIONAL RAILROAD PASSENGER CORPORATION
NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK, NEW JERSEY TRANSIT
and GUARDIAN SERVICE INDUSTRIES, INC.,

Defendants.

Index No.: 152909/13
Motion Date:
Motion Seq. No.: 02
Motion Cal. No.:

The following papers, numbered 1 to 124 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1-64
Answering Affidavits - Exhibits	83-121
Replying Affidavits - Exhibits	121-124

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this action involving a trip and fall accident on a platform escalator at Pennsylvania Station, New York, defendants move for summary judgment dismissing plaintiff's complaint. On Motion Sequence No. 2, defendants New Jersey Transit (NJT) and Guardian Services Industries, Inc. ("Guardian") move and on Motion Sequence No. 3, the National Railroad Passenger Corporation (Amtrak) moves. The court shall consider the applications for summary judgment by all the defendants together

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

herein.

Plaintiff was injured in July 2012 in a trip and fall accident at Penn Station while climbing a stopped escalator from the platform level to the concourse level. Defendants argue that the action should be dismissed based upon the First Department's decision Schurr v Port Auth. of New York and New Jersey, (307 AD2d 837, 838 [1st Dept 2003] [internal quotations and citations omitted]) wherein the Court held that

> The spacing of the stationary escalator risers was open and obvious to any observer reasonably using his or her senses and there is thus no ground to conclude that the risers were not safely traversable in the exercise of ordinary care. Moreover, as plaintiff herself recognized, the decrease in riser height at the bottom of the escalator is a condition found on moving escalators as well as those that are stationary. Defendants were under no duty to warn of or otherwise protect plaintiff from a condition that posed no reasonably foreseeable hazard.

The Court similarly held that in the case of an escalator like the one in the case at bar that nothing that plaintiff's proofs "suggests that the mere act of walking up and down a stopped escalator is unsafe or that the uneven spacing of risers or steps near the top or bottom somehow creates a dangerous condition." Adamo v Natl. R.R. Passenger Corp., 71 AD3d 557, 558 (1st Dept 2010).

This court agrees with the defendants that if the plaintiff here merely claimed that the uneven steps of the stopped escalator caused his fall then such a claim would be subject to dismissal under the aforementioned precedents binding upon this

court. However, the decisions in Schurr and Adamo were both based upon the fact that in those cases there was no evidence that the condition of the escalator as far as the differential in riser height was anything other than open and obvious and thus foreseeable. The Court in those cases specifically distinguished its holdings from cases where there is evidence that the escalator steps are defective or the condition of the uneven steps is not obvious (see Adamo, supra, 71 AD3d at 558).

In opposition to the motions plaintiff claims that due to insufficient lighting and the absence of warning strips on the escalator the uneven steps which are alleged to have caused his fall did not constitute an open and obvious condition and that the failure to have sufficient lighting and edge demarcation of the escalator steps caused his accident. As insufficient lighting can be a condition upon which premises liability can attach to an owner where a defective condition is created thereby, defendants seeking summary disposition were under a burden to demonstrate that there is no issue of fact as to the obviousness of the condition. See Guzman v Haven Plaza Hous. Dev. Fund Co., Inc., 69 NY2d 559, 565 (1987).

Defendants have failed to establish that there is no issue of fact as to the deficiencies in lighting that plaintiff claims caused the accident. The defendants assert that plaintiff's claims of deficiencies in lighting are raised for the first time

on this motion, but at his deposition, in response to the question "Do you recall the lighting conditions? Was there light overhead?", plaintiff answered "It was dark" and "[p]robably some small overhead lights, most likely covered with dirt." Thus plaintiff's testimony is not inconsistent with the proffered theory that the diminished and insufficient lighting created a hazardous condition with respect to the escalator, and that the defendants were negligent in "failing to provide adequate lighting". To the extent that defendants counter such assertions with evidence of their own, an issue is raised for the trier of fact.

As to Guardian, the issue of whether Guardian had a duty to the plaintiff is not subject to summary disposition as plaintiff submits proof of time sheets indicating that Guardian had worked on the escalator two days before the accident thus raising an issue of fact as to whether any acts of Guardian caused or contributed to any defective lighting condition.

Accordingly it is

ORDERED that the motion is DENIED.

This is the decision and order of the court.

Dated: May 9, 2017 ENTER:

DEBRA A. JAMES J.S.C.