MAY 24 2018

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

NORMAN CABAN, JR., and ROSEMARY CABAN,

Plaintiff,

-against-

ROCKEFELLER CENTER NORTH, INC., TIME INC., THYSSENKRUPP ELEVATOR CORPORATION and MAINCO ELEVATOR & ELECTRICAL CORP.,

Defendants

X

Index No: **301266/2011**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **5** read on this **motion for summary judgment**

No On Calendar of **April 9, 2018**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 4**
Answering Affidavit and Exhibits	**2, 5**
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

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

Defendant, Rockefeller Center North, Inc., (North), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims as against North. Co-defendants, Thyssenkrupp Elevator Corporation and Mainco Elevator & Electrical Corp., (collectively, Mainco), move pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims as against Mainco. The motions are consolidated for purposes of decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff when he fell on an escalator on September 2, 2008, in premises owned by North and maintained by Mainco. After plaintiff's fall, the escalator was shut down and the Department of Buildings, (DOB), was contacted to perform an inspection of the

escalator pursuant to DOB regulations. The DOB inspector, Warren M. Smith, (Smith), found no violating conditions, and concluded that plaintiff's fall was the result of human error. (p. 71-72).

> There was no evidence that the escalator at issue was in a defective condition at the time of plaintiff's fall (*see Cortes v Central El., Inc.*, 45 AD3d 323, 324 [2007]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). Moreover, with respect to the Fujitec defendants, charged with maintaining the escalator in a safe operating condition, the record demonstrates that there was no defective condition that Fujitec could have discovered through the exercise of reasonable care (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]).
>
> *Rivera v. Merrill Lynch/WFC/L/Inc.*, 84 A.D.3d 524, 525 [1st Dept 2011]).

Plaintiff testified that four or five steps from the bottom of the escalator, the step he stood on became wobbly and pivoted back and forth with a grinding sound, causing plaintiff to lunge forward and hit the floor hard. (p. 86-87). Plaintiff confirmed that he was the second of two people seen alighting from the subject elevator in the video shot from a building security camera. The Director of Security averred to the accuracy and completeness of the video.

While plaintiff claims that the escalator step pivoted back and forth, the video shows that there was no movement of plaintiff's body until he began his fall at the very bottom of the escalator. Notably, plaintiff's co-worker, Phil Sclafani, avers that he turned his body once he alighted from the escalator and saw plaintiff's body shake. Sclafani further avers that plaintiff was only 2/3 of the way down the escalator when he fell down the steps. The video does not reflect any of Sclafani's above referenced averments. While the credibility of evidence from a

deposition and an affidavit may not ordinarily be determined on a motion for summary judgment, when the averments are tailored to avoid summary dismissal, such evidence cannot be used to defeat summary judgment. *Phillips v. Bronx Lebanon Hosp.,* 268 A.D.2d 318, 320 [1st Dept 2000]).

Plaintiff's expert opined that the failure to properly maintain the subject escalator caused the alleged instability in the step plaintiff stood upon.

> Without even conducting an on-scene inspection, this expert asserted that the escalator could have jerked due to deterioration or wearing of various parts, and inferred that Otis had not performed necessary maintenance by replacing certain parts. These suggestions were speculative and unsupported by any evidentiary foundation, thus rendering the expert's opinion of no probative force and insufficient to withstand summary judgment (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *see Vale v Poughkeepsie Galleria Co.*, 297 AD2d 800, 801 [2002]).
> Plaintiff's reliance on the doctrine of res ipsa loquitur is unavailing because he failed to demonstrate that the escalator, which was subject to extensive public contact on a daily basis, was in defendant's exclusive control (*see Ebanks v New York City Tr. Auth.*, 70 NY2d 621 [1987]).

Parris v. Port of New York Auth., 47 A.D.3d 460, 461 [1st Dept 2008]).

In the case at bar, plaintiff's expert inspected the elevator September 19, 2014, more than six years after plaintiff's fall.

Defendants' motions for summary judgment are hereby granted and the

complaint and all cross-claims are dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: 5/22/2018

KENNETH L. THOMPSON JR. J.S.C.