SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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QAZIM B. KRASNIQI,

Plaintiff,

-against- Index No.: 158520/2013

KORPENN LLC, SEARS HOLDINGS CORPORATION, SEARS, ROEBUCK AND CO., KMART CORPORATION, KMART HOLDING CORPORATION, SCHINDLER ELEVATOR CORPORATION, ONE PENN PLAZA LLC,

Defendants.

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KALISH, J.:

Motion sequence numbers 002, 003, and 004 are consolidated for disposition.

In motion sequence 002, defendant Schindler Elevator Company (Schindler) moves pursuant to 22 NYCRR § 202.21 (e) to vacate the note of issue which was filed on August 30, 2017. Schindler also moves pursuant to CPLR 3124 to compel plaintiff Qazim B. Krasniqi to comply with discovery orders which directed him to provide information regarding the existence of Medicare and Medicaid liens, proof of plaintiff's claim for lost wages in the form of IRS tax returns, and authorizations for plaintiff's ophthalmologic records.

In motion sequence 003, Korpenn LLC (Korpenn), Sears Holdings Corporation (Sears Holdings), Sears, Roebuck and Co. (Sears Roebuck), Kmart Corporation, Kmart Holding Corporation (Kmart Holding), and One Penn Plaza LLC (One Penn Plaza), move pursuant to CPLR 3212 for an order granting movants summary judgment and dismissing plaintiff's complaint and all cross claims.

In motion sequence 004, Schindler cross-moves pursuant to CPLR 3211 (a) (7) and 3212 for an order granting movant summary judgment and dismissing plaintiff's complaint and all cross claims.

FACTUAL ALLEGATIONS

Deposition of plaintiff Qazim B. Krasniqi

Plaintiff was deposed on May 3, 2016. Plaintiff testified that he suffered personal injuries on January 10, 2011, while visiting a Kmart located at 34th Street between 7th Avenue and 8th Avenue in Manhattan.

Plaintiff maintains that, upon entering the store, he asked a worker where he could find shirts. The worker directed him to take the escalator to a lower level. After proceeding to the lower level and locating the merchandise, plaintiff walked back to the escalator area as he was going to descend to another level in order to find shoes and shaving cream. When he arrived at the set of escalators, he noticed that both escalators were not working. The escalator to his right had two or three workers working inside of it, while the escalator to his left was stopped with patrons walking up and down the stairs.

Plaintiff indicated that he did not observe any signs in the area warning of the work taking place. Plaintiff testified that before descending, he complained to a worker and asked why no signs were present and why people were ascending and descending the escalator by walking. He maintains that he received no response. Plaintiff recalled seeing two or three people in front of him walk down the stopped escalator, but did not recall the amount of people ascending. Plaintiff testified that because the escalator was narrow, he decided to wait for it to become clear before descending. Plaintiff held onto the rail with one hand while he had shirts in his other

hand. He maintained that his eyes were focused on the steps.

Plaintiff testified that when he reached the tenth step, he felt the handrail and the steps shake. He maintains that the steps were shaking up and down, and that he felt the escalator move. Plaintiff testified that the impact from the shaking was so strong that he could not grasp onto the handrail. As a result of the shaking, plaintiff proceeded to fall down to the bottom of the escalator. Plaintiff maintained that he fell face down onto the left side of his body. Plaintiff testified that he was wearing glasses before the accident. He did not recall speaking to anyone at Kmart following his accident. Plaintiff testified that, as a result of his fall, he was in a coma for five days. Plaintiff maintains that he was not under the influence of alcohol or medication at the time of his accident.

Deposition of Francis Junior

Francis Junior (Junior) testified on March 17, 2017. Junior testified that he works for Schindler as an escalator mechanic. Junior maintained that he has not previously viewed any inspection reports for escalator 4, the escalator involved in the accident. He was unsure if there were any violations issued for the escalator from 2009 through January of 2011. Junior was also not certain if the subject escalator was inspected by the Department of Buildings.

At his deposition, Junior reviewed plaintiff's accident report and testified that he did not recall providing a written statement of the incident. Junior did not remember hearing a loud bang or seeing a Kmart associate attend to anyone. Junior testified that he did not recall working on any of the escalators on the date of the accident, did not know anything about the accident, and did not remember how the escalator was working on that day.

Junior reviewed work records for the subject escalator. He testified that the records for

work on the escalator include a record dated December 14, 2010, for a switch contact failure; a record dated January 4, 2011, for an intermittent shutdown; a record dated January 5, 2011, for troubleshooting of an intermittent problem; a record dated January 6, 2011, for handrail drive work; a record dated January 7, 2011, for an escalator problem; a record dated January 8, 2011, for step chain work; and a record dated January 10, 2011, for a routine visual inspection of the maintenance taking place.

Deposition of Kenneth Moroney

Kenneth Moroney (Moroney) was deposed on May 24, 2017. Moroney testified that he works for Schindler as a service troubleshooter. Moroney maintains that he was at the subject Kmart on the date of plaintiff's accident and was assisting the work crew who were replacing an escalator step chain. He testified that an escalator step chain is a chain which carries all of the steps on an escalator. Moroney maintains that the escalators, which were next to one another, each worked independently of the other.

Moroney testified that, in order to work on the subject escalator safely, the adjacent escalator was shut off. When Moroney arrived to assist with the work at the Kmart, both escalators had been shut down. At the time of plaintiff's accident, Moroney was working at the bottom of the escalator. Moroney recalled hearing a "thump, thump, thump" noise on the next escalator. When he looked to see what caused the noise, he observed plaintiff on the floor. He did not see what caused plaintiff to fall and did not see or hear the adjacent escalator move.

Moroney told one of his co-workers to call security. He did not recall the specific type of work which he was conducting at that time of plaintiff's accident and did not remember performing any type of preventative maintenance on that day. He was also not aware of any

inspectors that visited the subject escalator within the time period in which he worked. He maintains that it was Kmart's decision to determine when the adjacent escalator was to be placed back into service.

Deposition of Kevin McCarthy

Kevin McCarthy (McCarthy) was deposed on June 27, 2016. McCarthy testified that he was formerly employed at the subject Kmart as a loss prevention agent. McCarthy would conduct safety walks in which he would ensure that the displays were proper, check for spills, and monitor overall safety. He maintains that monthly safety meetings would be held which were run by the loss prevention manager. During his safety walks, McCarthy would ascend and descend the escalators to ensure that they were safe to utilize and free from debris. He was aware that Schindler was the only elevator and escalator company which worked at the subject location. McCarthy maintains that there were also elevators which traveled to every floor.

McCarthy maintains that on the day of plaintiff's accident, one side of the escalator between the intermediate and concourse levels was not working and was barricaded off at the top and bottom. He testified that the other side was stopped to allow customers to walk up and down. McCarthy maintains that the barricades were stored in the elevator room in the Kmart. He believes that he saw two workers from Schindler at the location.

McCarthy testified that he was not responsible for making determinations as to how patrons were going to utilize the escalator and did not place any signs or ask that signs be installed. He testified that from the time he did his initial safety walk until the time of plaintiff's alleged incident, McCarthy was not told that anyone was having problems walking up or down the escalator. McCarthy recalled walking by the subject escalator at least twice before plaintiff's

accident and witnessing people ascending and descending.

After being told that an incident had occurred at the subject escalator, McCarthy testified that he walked to the site with an incident report form and a camera. When he arrived, he observed workers from Schindler and someone located on the floor near the escalator. He recalled that plaintiff explained that he fell down the escalator and was in pain. He did not recall if plaintiff told him what caused his fall.

After speaking with plaintiff, McCarthy proceeded to take pictures of the site. McCarthy maintains that plaintiff was conscious from the time he arrived at the scene until the time the ambulance took him away. He maintains that he got a statement from a worker from Schindler and walked up and down the stairs of the escalator to check for debris. McCarthy did not recall anyone from Schindler telling him how the accident occurred. McCarthy maintains that he did not know from his own observation whether or not the escalator had moved or what caused plaintiff to fall.

McCarthy reported the accident to his store manager and a call center. He told the center that plaintiff said that he fell off the escalator and that he noticed that he had a strong odor of alcohol. McCarthy testified that an EMT that arrived at the location also asked McCarthy if he smelled an odor coming from plaintiff. McCarthy believes that plaintiff was slurring some words.

At his deposition, McCarthy reviewed the incident report, but stated that he was not sure if it was written in his own handwriting. He maintains that someone named "Jose" also smelled alcohol but that he did not write it on the incident report. McCarthy testified that he recalled speaking with the loss prevention manager about plaintiff's accident. McCarthy maintains that

the subject escalator was not turned on until the escalator to its side was repaired.

Deposition of Patricia Greene

Patricia Greene (Greene) was deposed on February 28, 2017. Greene testified that she is an assistant property manager at Vornado Realty Trust (Vornado). In 2005, she became assistant property manager at One Penn Plaza. Greene testified that Korpenn owns the land on which One Penn Plaza is located. She maintains that Kmart was already a tenant of One Penn Plaza when she took over as the assistant property manager. Greene was not aware of any provision of a lease agreement with Kmart in which Vornado would be given a contract for escalator services.

Greene states that escalators were inspected at Kmart by an independent inspector or an inspector working for New York City. She did not remember in January of 2011 how many of the escalators were inspected. Greene maintains that if she received a violation from the New York City Department of Buildings, she would notify Kmart's general store manager and send him/her a copy of the violation. If an escalator received a violation, she would be copied on the correspondence.

Greene testified that she made periodic visits to the store and maintains that Vornado conducted inspections outside of the store. She maintains that Vornado was not responsible for anything inside the store and that Vornado would not be apprised of escalators breaking down. She testified that in 2011, if Greene saw that the escalators were not running, she would contact the property manager. Greene was aware that Schindler was the company that maintained the elevators and escalators. Vornado did not have to approve the company which did work on the escalators.

Greene testified that she did not have any interactions with workers from Schindler. She

did not know the particulars of plaintiff's accident and did not recall seeing an accident report for this incident. Greene maintains that if escalators at the Kmart location were pulled out of service, this would not be reported to Vornado. Greene testified that Schindler did not bill Vornado and Vornado would not see the bills from Schindler for maintenance of the escalators.

Greene testified that she was not aware of any practice or procedure which Kmart utilized regarding allowing people to use an escalator as a staircase when another escalator was not working.

Affidavit of Patrick A. Carrajat

Patrick A. Carrajat (Carrajat), an elevator and escalator consultant, submitted an expert affidavit dated December 19, 2017. Carrajat reviewed documents including the complaint, deposition testimony of various witnesses, the accident report, records pertaining to the inspection and violation history of the subject escalator, post-incident photographs of the subject escalator, the affidavit of Jon B. Halpern, the accident report, and the motion for summary judgment.

Carrajat maintains that the records produced by Schindler insufficiently detail the maintenance performed. He states that the American Society of Mechanical Engineers, which is the national code-making authority and publishes the code for escalators and elevators, requires that a log pertaining to all maintenance activities be maintained on-site by the maintenance contractor. He maintains that the log must contain detailed records of all inspections; examinations; tests at required intervals; the cleaning, lubricating, and adjustment of components at regular intervals; and the repair or replacement of worn or defective components and damaged or broken parts. He maintains that no such log has been produced. Carrajat states that the

accident was not reported to the New York City Department of Buildings as required by the Building Laws of the City of New York.

Carrajat states that there are only a limited number of issues which can result in the jerking or shaking of the escalator as described by plaintiff. He states that it is more probable that Schindler's mechanics improperly restarted the escalator or "jogged the escalator," a common occurrence when work is being performed on a stopped escalator which causes the escalator to shake. Carrajat states that the means of attempting to restart the escalator or "jogging the escalator" were exclusively under the control of Schindler's mechanics at the time of the occurrence, and that no action on the part of the plaintiff could have caused the escalator to shake in this manner. He states that Schindler's mechanics were working on the adjacent escalator and that their actions are the most probable cause of the accident.

Carrajat maintains that the repeated problems with the handrail drive suggest that it is the cause for the escalator jerking in the manner described by plaintiff. He also maintains that the documents produced by Schindler confirm near constant problems with the brake. Carrajat states that a temporary disengagement of the brake will result in the jerking movement reported by plaintiff.

Carrajat concludes that the injuries involved in plaintiff's accident were caused by the unexpected movement of the escalator handrail or steps and that the failure of defendants to properly inspect, maintain, and repair the escalator was a proximate cause of the accident. Carrajat states that Schindler's maintenance of the escalator, as reflected by their records and deposition testimony, failed to meet industry standards.

Affidavit of Jon B. Halpern

Jon B. Halpern (Halpern), a licensed professional engineer, submits an affidavit dated October 26, 2017. Halpern is a licensed professional engineer and has been in the elevator and escalator industry for over 38 years. Halpern maintains that he reviewed the plaintiff's complaint, bills of particulars, deposition transcripts, the incident report, photographs, security video, and discovery demands and responses.

Halpern states that, other than plaintiff's testimony, there is nothing in any of the written materials which he reviewed that supports plaintiff's claims. Halpern maintains that, once an escalator is shut down, it is highly unlikely for it to start because it requires the insertion of a key in the start station located at the top and bottom the escalator and that the key be turned and held to the "UP" or "DN" position while the start button is activated simultaneously. Halpern states that, if the key or start button is released by the operator, they will return to the neutral position, which prevents the escalator from starting. Halpern states that, in order for the escalator to start on its own, it would require the failure of two key switches and a separate start button. He maintains that there is no evidence that this occurred and no evidence that there was any problem with these safety features of the escalator.

Halpern states that because no one else was on the escalator at the time in which he was descending, there was essentially no weight to provide a force that could cause the escalator to move or shake. He maintains that the escalator adjacent to the subject escalator functions independently, was shut down, and in no way could have caused the subject escalator to move or shake. He maintains that there is nothing in the records to indicate that Schindler's maintenance of the escalator could have caused the escalator to start by itself or move or shake in the fashion

indicated by plaintiff.

Halpern concludes that the subject escalator was maintained on a regular and systematic basis, that it was shut down at the time of the incident, that the subject escalator could not have started itself or moved while plaintiff was on it, and could not have shaken in the fashion indicated by plaintiff. Halpern states that Schindler had no notice of any problem which could have caused the escalator to move or shake when it was not operating, did not have notice of any problem which could have caused the escalator to spontaneously start, was not working on the subject escalator at the time of the incident, and had no duty to barricade the escalator. He also concludes that nothing Schindler did or failed to do while performing any maintenance caused or contributed to the subject incident.

ANALYSIS

Motion sequence 002: Schindler's motion to vacate plaintiff's note of issue

In motion sequence 002, Schindler moves to vacate plaintiff's note of issue and certificate of readiness. Schindler also moves to compel plaintiff to comply with orders dated December 19, 2016, March 27, 2017, and May 30, 2017, which directed plaintiff to comply with defendant's post-deposition demand dated June 24, 2016. The demand requested IRS tax returns, information regarding the existence of Medicare and Medicaid liens, and authorizations for plaintiff's ophthalmologic records.

Schindler argues that while plaintiff has provided an authorization for IRS records, the IRS rejected the authorization on August 28, 2017. Schindler maintains that the IRS records are vital for its determination of plaintiff's lost wages. Schindler argues that Medicaid records disclosed that plaintiff was treated at "86th Street Optical and Cohen's Fashion Optical" and that

such records have not been provided despite several requests. Schindler contends that the records are relevant because plaintiff is alleging that he lost vision in his left eye as a result of the accident. Schindler also contends that lien documentation has recently been provided for Medicare, but that plaintiff has failed to produce such information for Medicaid, despite plaintiff allegedly being a Medicaid recipient since October 1, 2013.

In opposition, plaintiff argues that he has responded to Schindler's demands. Plaintiff's counsel maintains that, as of January 24, 2018, he was not aware that plaintiff received any notification from the IRS regarding the rejected IRS authorizations. Plaintiff's counsel also maintains that Schindler already has records from eye doctors and eye surgeons who treated plaintiff in relation to injuries sustained in this accident and that "Cohen's Fashion Optical" is an eyeglass store which plaintiff does not recall visiting.

Pursuant to 22 NYCRR § 206.12 (d), a party may move to strike a note of issue within 20 days after service of the note of issue and certificate of readiness and must demonstrate why the case is not ready for trial. "A note of issue should be vacated where . . . it is based upon a certificate of readiness that incorrectly states that all discovery has been completed." *Nielsen v New York State Dormitory Auth.*, 84 AD3d 519, 520 (1st Dept 2011).

Here, the court notes that on July 18, 2017, this court signed a "So Ordered" stipulation. In the stipulation, defendants were to respond to post-EBT demands within 30 days and plaintiff was to respond to Schindler's letters dated June 20, 2017 and July 13, 2017 within 30 days. The stipulation further states that "[a]ll other discovery is complete. No further request will be entertained." On August 22, 2017, an order of this court states "[a]ll discovery is complete. Plaintiff to file NOI by Sept. 1, 2017." The court notes that the Request for Judicial Intervention

was filed in this action on April 16, 2014, and that a total of nine discovery conferences have been held in this matter.

While the motion to vacate the note of issue was filed in a timely manner, the court declines to grant Schindler's motion for such a limited amount of remaining discovery. Therefore, this case will remain on the trial calendar. As discussed at the oral argument which took place on September 12, 2018, to the extent that the IRS has not provided plaintiff's records or given an explanation as to why they will not provide such records, plaintiff is to provide a new IRS records authorization to the defendants. Furthermore, while plaintiff provided defendants with a response to their request for information regarding a Medicare lien, counsel for Schindler maintains that the response fails to indicate whether there was also a Medicaid lien. To the extent that the plaintiff still has not provided complete information as to whether a Medicaid lien exists, plaintiff is to provide defendants with such information within 14 days from service of a copy of this order with notice of entry upon him.

Finally, counsel for Schindler affirms that plaintiff's Medicaid records disclosed that he visited "86th Street Optical and Cohen's Fashion Optical" and requests authorizations for these locations. At his deposition, plaintiff testified that he was wearing glasses in a surveillance video taken prior to the incident and testified that he presently wears glasses because three doctors observed that his left eye was damaged due to the accident (Plaintiff's EBT, at 41-44). As plaintiff testified that he was wearing glasses on the surveillance video before his accident and that he needs to utilize glasses as a result of the accident, and because Schindler's counsel affirms that Medicaid records indicated that he visited "86th Street Optical and Cohen's Fashion Optical", such records may be relevant. Therefore, plaintiff must provide an authorization for

such location within 14 days from notice of entry of this order.

Motion sequence 003: Korpenn, Sears Holdings, Sears Roebuck, Kmart Corporation, Kmart Holding, and One Penn Plaza's motion for summary judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). The court "is solely to determine if any triable issues exist, not to determine the merits of any such issues." *Sheehan v Gong*, 2 AD3d 166, 168 (1st Dept 2003). Furthermore, it "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

Korpenn and One Penn Plaza argue that summary judgment must be granted in their favor as they cannot be held liable for the alleged injuries which plaintiff sustained at the Kmart. These defendants contend that Korpenn is as an out-of-possession fee owner and ground lessor, and One Penn Plaza is as an out-of-possession landlord of the building in which the subject Kmart is located. They maintain that they are not liable for injuries which occur at the subject premises because they did not retain control of the premises and are not contractually obligated to repair an unsafe condition. Korpenn and One Penn Plaza contend that their argument is supported by the affidavit of James Korein, a member of Korpenn, the language of section 7.01 and 7.04 of the "Agreement Restating Indenture of Lease," and the deposition testimony of

Greene, the assistant property manager for One Penn Plaza.

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition. That duty is premised on the landowner's exercise of control over the property, as the person in possession and control of property is best able to identify and prevent any harm to others." *Gronski v County of Monroe*, 18 NY3d 374, 379 (2011) (citations and quotations omitted).

"[A] landlord who has surrendered possession and control over premises leased [] to a tenant will not be liable for the tenant's negligent failure to maintain the premises in a reasonably safe condition." *Mehl v Fleisher*, 234 AD2d 274, 274 (2d Dept 1996). However, an out-of-possession landlord may be liable for the condition of a leased premises if it is "contractually obligated to make repairs or maintain the premises or . . . has a contractual right to reenter, inspect and make needed repairs, and liability is based on a significant structural or design defect that is contrary to a specific statutory provision." *DeJesus v Tavares*, 140 AD3d 433, 433 (1st Dept 2016) (quotations omitted); *see also Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 (1st Dept 2012) (holding "[a]lthough landlord retained the right of reentry pursuant to the lease, plaintiff identified the defective condition as snow or ice on the ramp . . . [h]owever, snow or ice is not a significant structural or design defect").

An out-of-possession landlord can also be liable for defective conditions on its property where through a course of conduct, the out of possession landlord has "become obligated to maintain or repair the property or a portion of the property which contains the defective condition." *Melendez v American Airlines, Inc.*, 290 AD2d 241, 242 (1st Dept 2002).

In opposition, plaintiff argues that when members of the general public are invited to

places of public assembly, out-of-possession owners and tenants have a nondelegable duty to provide a safe premises. Plaintiff contends that Korpenn and One Penn Plaza have such a duty to the public.

The Court of Appeals has held that "[w]henever the general public is invited into stores, office buildings and other places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress. In general, his duty is to use reasonable care at all times and in all circumstances." *Gallagher v St. Raymond's Roman Catholic Church*, 21 NY2d 554, 556 (1968).

Furthermore, it has been held that:

> "certain duties have been imposed upon an owner or hirer which cannot be delegated to another so as to relieve it from liability . . . One such duty arises whenever the general public is invited into stores, office buildings and other places of public assembly. The owner of such premises is charged with the duty to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress. That duty may not be delegated by the property owner to his agents or employees."

Thomassen v. J & K Diner, Inc., 152 AD2d 421, 424-425 (2d Dept 1989). *See also Blatt v L'Pogee, Inc.*, 112 AD3d 869, 869 (2d Dept 2013) (holding that as plaintiff, who allegedly tripped and fell near the entrance of the defendants' showroom was a member of the general public,"[w]henever the general public is invited into stores, office buildings, and other places of public assembly, the owner of such premises is charged with the duty to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress" [citation omitted]); *Grizzell v JQ Assoc., LLC*, 110 AD3d 762, 763 (2d Dept 2013) (holding that the owners and operators of an office complex, which was open to the public, had a nondelegable duty to provide the public with a reasonably safe premises); *Podlaski v Long Is. Paneling Ctr. of*

Centereach, Inc., 58 AD3d 825, 836 (2d Dept 2009) (holding that the owner of commercial property onto which the public was invited has a nondelegable duty to provide the public with a reasonably safe premises); *Salzberg v Futernick*, 281 AD2d 467, 467 (2d Dept 2001) (holding that a landlord has a non-delegable duty to members of the general public to keep their premises safe).

The Appellate Division, First Department, has held that in some circumstances, even if an owner and management company of a building does not have notice of a defect, summary judgment must be denied as a nondelegable duty exists for buildings which are open to the public. *See LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 286-287 (1st Dept 2008) (holding "[s]ummary judgment dismissing the complaint is not warranted even assuming, in favor of defendants building owner and management company, that they did not have notice of any defect in the allegedly 'curled-up' rain mat over which plaintiff, an employee of third-party defendant building maintenance contractor, tripped upon . . .").

Pursuant to the above case law, the public-use exception requires that premises owners provide members of the general public with a reasonably safe premises. This nondelegable duty to keep a premises safe when the subject premises is open to the public should apply to owners that are in possession of a premises, as well as to out-of-possession landlords and owners. Here, Korpenn and One Penn Plaza's duty to keep the premises safe for members of the public should exist even if they are considered to be out-of-possession owners or landlords. Therefore, the public-use exception would apply, requiring Korpenn and One Penn Plaza to maintain public areas within the subject Kmart. Plaintiff allegedly fell in such an area - the subject escalator. As such, the motion for summary judgment is denied as to Korpenn and One Penn Plaza.

Kmart Corporation's argument that there is no evidence that they created the alleged defective condition, or had actual or constructive notice of the condition

Kmart Corporation argues that summary judgment must be granted in its favor as it did not have actual or constructive notice of the condition which caused plaintiff's accident.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 137 (2002). Owners and lessees generally have a duty to maintain their property in a reasonably safe condition, and in order to recover damages for a breach of this duty, a plaintiff must establish that the defendant created, or had actual or constructive notice of the dangerous condition which caused the injury. *See Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326 (1st Dept 2006).

Furthermore, a lessee of property and operator of a store with escalators or elevators in its premises has been held to have a duty to maintain and repair those escalators. *See Roberts v Old Navy*, 134 AD3d 1088, 1088 (2d Dept 2015) (holding "[a]s a lessee of the property and operator of the store, the defendant had a duty to maintain and repair the escalators on the premises"); *see also Green v City of New York*, 76 AD3d 508, 508 (2d Dept 2010) ("[i]t is undisputed that as the lessee and operator of the mall, the Gallery had a duty to maintain and repair the elevators in the premises").

Here, Kmart had a contract with Schindler to repair the subject escalator. Junior testified that the subject Kmart was a client of Schindler and that he serviced Kmart's escalators. According to the records which were reviewed by Junior at his deposition, the subject escalator had an abundance of problems. On December 13, 2010, the escalator was not working; on

December 24, 2010, the escalator was not working and would not start; on January 4, 2011, the handrail drive had to be worked on due to a shut down; on January 5, 2011, a mechanic troubleshooted the escalator but "pulled out"; on January 6, 2011, the mechanics worked on controller problems; on January 7, 2011, mechanics worked on undisclosed escalator problems; on January 8, 2011, mechanics worked on a handrail step chain problem; and on January 11, 2011, the mechanics worked on issues regarding visual inspections of the equipment.

It is unclear to the court if Kmart Corporation was properly maintaining the subject escalator prior to, and at the time, of plaintiff's accident. There is no indication who from Kmart Corporation was responsible for monitoring and alerting escalator problems to Schindler and what practices were in place by Kmart Corporation to check and inspect the escalators to determine if the escalators were functioning in a safe manner. McCarthy, the only witness that Kmart Corporation produced, testified that he was not the employee that contacted Schindler.

Furthermore, some of the escalator records failed to elaborate as to what specific work was being conducted. For example, a record lists the work performed on the escalator as "undisclosed" with no explanation. Arguably, as the work was "undisclosed" Kmart Corporation may have had constructive notice of the problem which may have caused or contributed to plaintiff's accident.

Therefore, because issues of fact exist as to whether the escalator was properly maintained and whether Kmart Corporation may have had constructive notice of the issues with the subject escalator, the part of defendants' motion seeking summary judgment as to Kmart Corporation must be denied.

Sears Holdings, Sears Roebuck, and Kmart Holding's argument that they are improper parties in this action

Defendants argue that summary judgment must be granted as to Sears Holdings, Sears Roebuck, and Kmart Holding, as they are improper parties and cannot be held liable for any injuries alleged by plaintiff. They maintain that, as Sears Holdings, Sears Roebuck, and Kmart Holding do not own, directly lease, or operate the Kmart store at issue in this action; have no relationship to the subject property; and are merely affiliated corporations of defendant Kmart Corporation, they lack dominion and control, and are improper parties to this action.

Plaintiff failed to specifically address Sears Holdings, Sears Roebuck, and Kmart Holding's argument regarding their lack of liability for plaintiff's accident, and at the oral argument on this motion, which took place on September 12, 2018, plaintiff's counsel consented to discontinue plaintiff's claims as against these defendants. Tr at 8, lines 11-26; at 9, lines 2-22. Therefore, the part of this motion seeking summary judgment as to Sears Holdings, Sears Roebuck, and Kmart Holding Corporation must be granted.

Motion sequence 004: Schindler's cross-motion to dismiss and for summary judgment

In motion sequence 004, Schindler cross-moves, pursuant to CPLR 3211 (a) (7) and 3212, for an order granting summary judgment and dismissing plaintiff's complaint and all cross claims against Schindler.

In the first instance, as the parties have charted a summary judgment course, and based upon the papers and the statements by the parties and the Court at oral argument, the Court is treating Schindler's cross-motion as a motion for summary judgment, only. *See* CPLR 3211 (c).

Schindler argues that plaintiff has failed to demonstrate the existence of a dangerous

condition which proximately caused plaintiff's fall, that Schindler was negligent, or that the subject escalator was in a dangerous or defective condition at the time of plaintiff's fall. Schindler contends that the subject escalator had been shut down at the time of the incident, that it had not been restarted, and that it did not move.

Schindler maintains, based upon the expert affidavit of Halpern and the witnesses' testimony, that there is no evidence that Schindler's maintenance workers caused or had notice that the subject escalator spontaneously started, moved, shook, etc. Schindler also argues that it had no duty to barricade the subject escalator because it was not working on that side at the time of the incident.

Plaintiff argues that triable issues of fact preclude Schindler's motion for summary judgment including whether Schindler was responsible for, and had control of the stopping and starting of, the escalator at the time of the accident. Plaintiff contends that the escalator, which was over 40 years old at the time of the accident, was continuously experiencing regular breakdowns for the two years prior to plaintiff's accident. He maintains that the escalator had been out of service and under active repair for six days prior to the accident and had breakdowns included stopping, the inability to restart, and "jumping" while in motion. Plaintiff also argues that the doctrine of res ipsa loquitur is applicable, as his accident would not have occurred in the absence of negligence.

The Appellate Division, First Department, has held that, when expert affidavits conflict, issues of fact and credibility cannot be resolved on a motion for summary judgment. *Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 (1st Dept 2004); *see also Hernandez v 21 Realty Co.*, 113 AD3d 503, 503 (1st Dept 2014) (holding "the conflicting expert affidavits, as well as

plaintiff's deposition testimony as to the manner in which she fell, raise issues that are inappropriate for summary judgment"). Here, both Halpern and Carrajat's expert reports conflict as to whether Schindler's work may have caused or contributed to plaintiff's accident.

In his expert affidavit, Halpern states that the escalator being worked on adjacent to the escalator on which plaintiff fell functions independently, was shut down, and could not have caused the subject escalator to move or shake. Halpern concludes that there is nothing in the escalator's records which indicates that Schindler's maintenance could have caused the escalator to start by itself or move or shake in the fashion indicated by plaintiff.

Conversely, Carrajat states in his expert affidavit that it is more probable that Schindler escalator mechanics improperly restarted the escalator or "jogged the escalator," a common occurrence when work is being performed on a stopped escalator which causes the escalator to shake. Carrajat states that the means of attempting to restart the escalator or jogging the escalator were exclusively under the control of the Schindler mechanics at the time of the occurrence and that no action by plaintiff could have caused the escalator to shake in the manner alleged.

A clear dispute exists between the expert affidavits of Halpern and Carrajat as to whether the work of Schindler caused or contributed to plaintiff's accident. Furthermore, both affidavits include nonconclusory language in their findings. For example, while Halpern states that it is "highly unlikely for the escalator to start without the insertion of a key," his use of the phrase "highly unlikely" fails to eliminate the possibility that the escalator could have started or moved. With regard to Carrajat's affidavit, Carrajat utilizes the inconclusive phrase "more probable."

Furthermore, while Halpern states that Schindler had no notice of any problem which could have caused the escalator to move or shake when it was not operating, several of the

records fail to specify what work Schindler was conducting on the escalator, making it impossible for the court to determine what type of notice Schindler may have had.

Therefore, as Schindler fails to meet its burden and make a prima facie showing of entitlement to judgment as a matter of law, Schindler's cross-motion for summary judgment must be denied, "regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

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CONCLUSION

Accordingly, it is

ORDERED that the branch of the motion by defendant Schindler Elevator Company (Schindler) to vacate plaintiff Qazim B. Krasniqi's note of issue is denied; and it is further

ORDERED that the branch of Schindler's motion seeking to compel discovery is granted to the extent that plaintiff is to provide a new authorization for IRS records, is to respond as to whether a Medicaid lien exists, and is to provide authorizations for "86th Street Optical and Cohen's Fashion Optical" to all parties within 14 days from service of a copy of this order with notice of entry upon him; and it is further

ORDERED that the branch of defendants Korpenn LLC; Sears Holdings Corporation; Sears, Roebuck and Co.; Kmart Corporation; Kmart Holding Corporation; and One Penn Plaza LLC's motion seeking summary judgment, is granted only as to Sears Holdings Corporation; Sears, Roebuck and Co.; and Kmart Holding Corporation; and the complaint and all cross-claims are dismissed as against them, with costs and disbursements to these defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Schindler's cross-motion for summary judgment is denied.

Dated: Oct 24, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.