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

Hon. Doris Ling-Cohan

0105782/2001

PART 62

PENN, SAMANTHA
VS
JAROS, BAUM, & BOLLES

INDEX NO. _____

MOTION DATE _____

SEQ 9

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion Summary judgment by defendant Kidde PLC Inc + Kidde-Fenwal Inc is decided in accordance with the attached memorandum decision. (consolidated for disposition w/motion Seq. Nos 10, 11, 12, 13, 14).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 1/6/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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SAMANTHA PENN, as Administratrix of the ESTATE OF ESTHER PENN,

Plaintiff,

-against-

JAROS, BAUM & BOLLES, KIDDE PLC INC., KIDDE-FENWAL INC., SKIDMORE, OWINGS & MERRILL LLP, S&S FIRE SUPPRESSION SYSTEMS, NEW WATER STREET CORPORATION, THE CITY OF NEW YORK, JOHN and JANE DOES # 1-10 (NYFD PERSONNEL), JOHN and JANE DOES # 11-20 (OTHER CITY PERSONNEL), NORCON ELECTRONICS, INC. and URIS BUILDING CORPORATION (a/k/a KINNEMET CORPORATION),

Defendants,

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THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

THE DEPOSITORY TRUST & CLEARING CORPORATION, THE DEPOSITORY TRUST COMPANY and NATIONAL SECURITIES CLEARING CORPORATION,

Third-Party Defendants,

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NEW WATER STREET CORPORATION,

Second Third-Party Plaintiff,

-against-

THE DEPOSITORY TRUST COMPANY ,

Second Third-Party Defendant.

----------X

JAROS, BAUM & BOLLES,

Third Third-Party Plaintiff,

-against-

THE DEPOSITORY TRUST COMPANY ,

Third Third-Party Defendant.

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DECISION/ORDER

Index No.: 105782/01

Third-Party Action
Index No.: 590592/01

Second Third-Party Action
Index No.: 590159/02

Third Third-Party Action
Index No.: 590961/03

----------X

S&S FIRE SUPPRESSION SYSTEMS, INC., Fourth Third-Party Plaintiff, — Fourth Third-Party Action Index No.: 591015/03

-against-

TYCO INTERNATIONAL d/b/a FIREMASTER and MASTER PROTECTION CORPORATION d/b/a FIREMASTER, Fourth Third-Party Defendants.

----------X

SKIDMORE, OWINGS & MERRILL LLP, Fifth Third-Party Plaintiff, — Fifth Third-Party Action Index No.: 591461/03

-against-

THE DEPOSITORY TRUST COMPANY , Fifth Third-Party Defendant.

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S&S FIRE SUPPRESSION SYSTEMS, INC., Sixth Third-Party Plaintiff, — Sixth Third-Party Action Index No.: 590056/04

-against-

THE DEPOSITORY TRUST COMPANY, Sixth Third-Party Defendant.

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HON. DORIS LING-COHAN, JSC:

In the instant wrongful death action, and the five subsidiary actions which it gave rise to, the court hereby consolidates the summary judgment motions which bear sequence numbers 009, 010, 011, 012, 013, and 014 for disposition, and decides them as follows.

BACKGROUND

The court's decision of June 26, 2003 contained a detailed recitation of the facts underlying the six instant consolidated actions. It is, therefore, only necessary to briefly restate certain relevant facts here.

The Parties

On July 27, 2000, plaintiff's decedent, Esther Penn (Penn), died in an accident while she

was working overtime. Penn had been employed as a clerk for second third-party defendant Depository Trust Company (DTC). DTC's place of business consists of several floors of commercial office space, located at 55 Water Street, which DTC leases from the premises' owner, co-defendant New Water Street Corporation (NWS). DTC's leasehold covers a sub-basement vault, which is where Penn was engaged in copying stock certificates as part of her job. Penn inadvertently became locked in that vault, and no one responded when she telephoned from inside to request that it be opened. When Penn thereafter pulled the fire alarm to draw attention to her presence, she was asphyxiated by the vault's carbon dioxide fire suppression system. She was dead by the time the Fire Department opened the vault.

Co-defendant Kidde-Fenwal Inc. (Kidde) is an out-of-state corporation engaged in the business of manufacturing component parts for fire suppression systems. Kidde states, and has submitted an expert's report which confirms that it manufactured three components of the instant fire suppression system: 1) two electrical remote pull boxes (which were placed inside the vault); 2) an electronic control panel (which received signals from the pull boxes and sent signals to the discharge devices); and 3) four master cylinder discharge assemblies. See Notice of Motion (motion sequence number 009), Exhibit L (Willms Affidavit), ¶¶ 9-11. Kidde's expert also stated that none of these three components was designed to be used solely in a carbon dioxide fire suppression system, but that they were generic, and could be used in any type of fire suppression system. Id., ¶ 12. Co-defendant Kidde PLC Inc. (Kidde PLC) is a separate, non-subsidiary corporation, which performs administrative and support functions for Kidde, such as legal, benefits, and tax services. Id., Exhibit J (DeMeo Affidavit), ¶ 2.

Co-defendant Jaros, Baum & Bolles (JB&B) is a New York engineering firm. See Notice

of Motion (motion sequence number 010), Feurth Affirmation, ¶ 6. In 1972, the New York Stock Exchange, which was then a tenant of the 55 Water Street building, hired JB&B to design the vault's carbon dioxide fire suppression system. Id. JB&B states that both the design and the installation of that fire suppression system were approved as complying with the New York City Building Code, the New York City Fire Department Regulations, the regulations of the National Fire Protection Association, and the regulations of the Bureau of Standards and Appeals. Id., ¶ 5. However, JB&B has not presented any documentation in support of this statement.

Co-defendant S&S Fire Suppression Systems, Inc. (S&S) is a New York corporation which DTC hired to perform semi-annual inspections of the vault's carbon dioxide fire suppression system. See Notice of Motion (motion sequence number 011), Hirsch Affirmation, ¶ 14. Evidently, DTC hired S&S in April of 2000, and S&S produced its first inspection report in June of 2000. Id., Exhibits C, D.

Co-defendant Skidmore, Owings & Merrill LLP (Skidmore), a New York State limited partnership, was the architectural firm which the New York Stock Exchange hired, in 1971, to design the vault in the basement of the 55 Water Street building. See Notice of Motion (motion sequence number 012), Kanter Affirmation, ¶ 2. Skidmore asserts that it had nothing to do with the design, installation, or maintenance of the vault's fire suppression system. Id., ¶¶ 4-7, 46-56. Skidmore also asserts that the New York Stock Exchange only added the carbon dioxide fire suppression system to the vault after Skidmore had concluded its own work, and without Skidmore's knowledge or participation. Id., ¶¶ 57-71.

Co-defendant Uris Building Corporation, a/k/a Kinnemet Corporation (Uris) is a Delaware corporation doing business in New York, which plaintiff alleges actually constructed

the vault and installed the fire suppression system. See Notice of Motion (motion sequence number 009), Exhibit A, ¶ 7. Uris has not submitted a summary judgment motion to date.

Co-defendant Norcon Electronics, Inc. (Norcon) is a New York corporation which DTC hired to design and service the closed-circuit television monitoring system in the vault at 55 Water Street. See Notice of Motion (motion sequence number 013), Cordrey Affirmation, ¶ 8. Norcon states, however, that it did not install that system. Id., ¶ 13. Plaintiff has not submitted any opposition to Norcon's motion for summary judgment to dismiss.

Finally, co-defendant City of New York (the City) is sued herein as the municipality with control over both the Fire Department and Emergency Services personnel who responded to Penn's fire alarm (collectively, the Doe defendants).

Prior Proceedings

The amended complaint asserts causes of action for: 1) products liability based upon a defective product (against Kidde, JB&B, Skidmore, and Uris); 2) products liability based upon the failure to warn (against Kidde, JB&B, Skidmore, and Uris); 3) negligence (against S&S); 4) products liability (against Norcon); 5) negligence (against all defendants except the City and the Doe defendants); 6) negligence based on premises liability (against NWS); 7) negligence (against the City and the Doe defendants); and 8) wrongful death (against all defendants). See Notice of Motion (motion sequence number 009), Exhibit A, ¶¶ 95-151.

As mentioned above, by decision dated June 26, 2003, the court denied NWS's motion for summary judgment to dismiss both the complaint and all of the cross claims asserted against it (motion sequence number 005). The balance of the other motion practice herein, both before this court and before the other Justices to whom the instant actions were previously assigned, has

largely been procedural in nature.[1]

The Instant Motions

Now the court is presented with separate summary judgment motions by: Kidde/Kidde PLC; JB&B; S&S; DTC; Skidmore; Norcon; and the City. All of these motions seek dismissal of the respective causes of action asserted against the movants in plaintiff's amended complaint, as well as dismissal of any cross claims asserted in the subsidiary actions herein. The following decision addresses each motion in turn.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Trans. Auth., 304 AD2d 340 (1st Dept 2003). Conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment. See e.g. Mason v Dupont Direct Financial Holdings, Inc., 302 AD2d 260 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only

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[1] Most recently, by decision dated July 27, 2004, this court granted plaintiff's motion to strike (motion sequence number 016) to the extent of permitting plaintiff to file a sur-reply brief in opposition to JB&B's motion for summary judgment (motion sequence number 010).

be employed when there is no doubt as to the absence of such triable issues. See e.g. Andre v Pomeroy, 35 NY2d 361 (1974); Pirrelli v Long Island R.R., 226 AD2d 166 (1st Dept 1996).

The Kidde Motion

As previously mentioned, the amended complaint sets forth causes of action against Kidde and Kidde PLC for: products liability based on a defective product and failure to warn, negligence, and wrongful death. See Notice of Motion (motion sequence number 009), Exhibit A, ¶¶ 95-111, 127-131, 148-151. However, plaintiff does not oppose Kidde PLC's motion for summary judgment. See Memorandum of Law in Opposition to Motion (motion sequence number 009), at 19-20. The available evidence indeed indicates that Kidde PLC is not a subsidiary of Kidde, but is rather a separate entity which performs administrative and support functions for Kidde, such as legal, benefits, and tax services. Id., Exhibit J (DeMeo Affidavit), ¶ 2. Because these functions are clearly unconnected to plaintiff's causes of action against Kidde, Kidde PLC is entitled to summary judgment dismissing said causes of action as a matter of law. Accordingly, the court grants motion sequence number 009, on consent, solely with respect to Kidde PLC.

Plaintiff's first cause of action alleges that Kidde "designed, engineered, manufactured, installed and/or sold the fire system in such a manner as to render the system defective and unsafe for its intended use." See Notice of Motion (motion sequence number 009), Exhibit A, ¶ 96. According to the Court of Appeals, "[a] defectively designed product 'is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not

outweigh the danger inherent in its introduction into the stream of commerce.'" Scarangella v Thomas Built Buses, Inc., 93 NY2d 655, 659 (1999), quoting Voss v Black & Decker Mfg. Co., 59 NY2d 102, 107 (1983). Here, the amended complaint states that "[a]s to the design defects in the fire system, a reasonable person would conclude that the risks inherent in the fire system outweighed the utility of the fire system." See Notice of Motion (motion sequence number 009), Exhibit A, ¶ 98. The amended complaint does not allege, nor has plaintiff produced any evidence to demonstrate, that any of the component parts which Kidde manufactured either failed to operate or operated incorrectly, as the result of a defect in their design or manufacture. Rather, the amended complaint alleges only that "[o]n July 27, 2000, the fire system was being used and handled in a manner for which it was designed, manufactured, installed, and sold, and in a manner reasonable foreseeable by Kidde". Because plaintiff has offered no proof that any of the parts that Kidde manufactured were "in a condition not reasonably contemplated by the ultimate consumer at the time they left the seller's hands," or that said parts were "unreasonably dangerous for their intended use," plaintiff' cannot sustain her cause of action for products liability based upon a design defect. Accordingly, the court grants that portion of Kidde's motion which seeks summary judgment dismissing the first cause of action herein as against it.

Plaintiff's remaining causes of action against Kidde seek to impose liability for the failure to warn pursuant to three different legal theories. Plaintiff's second cause of action specifically alleges that Kidde "had a duty to potential users of the fire system to warn them of the extreme dangers inherent in the system," but that Kidde "failed to warn Ms. Penn ... of the dangers inherent in the fire system." See Notice of Motion (motion sequence number 009), Exhibit A, ¶¶ 106, 109. As applied to Kidde, plaintiff's fifth cause of action alleges that "by [its] manufacture

... of the fire ... system[], [Kidde] owed Ms. Penn a duty of care," which Kidde breached by failing to adequately label the fire system, and by failing to warn Penn of its dangers. See Notice of Motion (motion sequence number 009), Exhibit A, ¶¶ 128-129. Finally, plaintiff's eighth cause of action as to Kiddie alleges that "by reason of the foregoing torts ..., Ms. Penn died," and her children were deprived of her future earnings and services, and suffered both pecuniary and non-pecuniary losses. See Notice of Motion (motion sequence number 009), Exhibit A, ¶ 151. Kidde does not contest the issue of proximate cause. Instead, it denies that it owed Penn any duty to warn. The Court of Appeals has noted that "[f]ailure-to-warn liability is intensely fact-specific, including but not limited to such issues as feasibility and difficulty of issuing warnings in the circumstances [citations omitted]; obviousness of the risk from actual use of the product; knowledge of the particular product user; and proximate cause." Liriano v Hobart Corp., 92 NY2d 232, 243 (1998). Here, the court finds that plaintiff's claims survive summary judgment.

In its initial memorandum of law, Kidde asserted that it did not owe Penn a duty to warn because it was merely the manufacturer of some of the component parts of the fire suppression system, and not of the system as a whole. See Memorandum of Law in Support of Motion (motion sequence number 009), at 2-9. Plaintiff responded that Kidde did indeed have a duty to warn against any dangers resulting from the foreseeable uses of its component parts in a fire suppression system, including the possibility that triggering the pull box could result in the release of potentially lethal carbon dioxide gas. See Memorandum of Law in Opposition to Motion (motion sequence number 009), at 14-15. In reply, Kidde cites the Court of Appeals' decision in Rastelli v Goodyear Tire & Rubber Co. (79 NY2d 289 [1992]) for the proposition that the use of its components in a potentially deadly fire suppression system should not be

deemed foreseeable. Kidde's reading of Rastelli, however, is incorrect. In Rastelli, the court held that the duty to warn is only abrogated where "the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer," but recognized a distinction where "the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn [emphasis added]." Id. at 298. As discussed above, there is no evidence here that the fire suppression system malfunctioned; indeed, it worked all too well. Instead, the only "defect" whose existence might be inferred from the available evidence is that the fire suppression system lacked adequate warnings and instructions to safeguard Penn's life. Rastelli stands for the proposition that the duty to warn against this type of defect falls upon "each" of the manufacturers of the system's component parts, where all of the individual components are "sound." Because the evidence disclosed that all three of Kidde's components were "sound," the court cannot find that Kidde owed Penn no duty to warn. Accordingly, the court denies that portion of Kidde's motion which seeks dismissal of plaintiff's second, fifth, and eighth causes of action against it.

The JB&B Motion

The amended complaint names JB&B as a defendant on the causes of action for products liability based upon design defect and failure to warn, for negligence, and wrongful death. See Notice of Motion (motion sequence number 009), ¶¶ 95-111, 127-131, 148-151. JB&B's first argument in seeking summary judgment is that plaintiff has failed to establish a prima facie case that JB&B committed engineering malpractice. See Affirmation in Opposition to Motion

(motion sequence number 010), at 7-9. However, the court discounts this argument because plaintiff has not asserted a cause of action for engineering malpractice.

JB&B's second argument is that Penn's death resulted from "a confluence of intervening and superceding actions by third-parties" that "entitle JB&B to a finding as a matter of law that its design was not the proximate cause of decedent's death." Id. at 4-8. However, the Appellate Division, First Department, has long held that "[p]roximate cause is typically a question best left for the finder of fact," and that "[t]he intervening act of a party other than defendant will not break the causal chain where the intervening act was a natural and foreseeable consequence of defendant's negligence." McKinnon v Bell Sec., 268 AD2d 220, 221 (1st Dept 2000). Rather, "[o]nly an extraordinary and unanticipated act may serve as a basis for ruling as a matter of law that the chain [of proximate cause] has been broken." Id. at 221. Here, JB&B has identified three such acts, none of which the court deems so unforeseeable as to have broken said chain, as a matter of law.

The first of these was "a failure in the DTC lockup procedure resulting in the vault door being closed while the plaintiff was still inside." See Memorandum of Law in Support of Motion (motion sequence number 010), at 7. However, plaintiff has presented both expert testimony and portions of the National Fire Protection Act which indicate that a reasonable vault designer should foresee the possibility that someone might inadvertently become locked inside a vault and, thus, include some plan in the vault's design for that person to get out safely. See Maazel Affirmation in Opposition, Exhibit L (Alderman Affidavit); Exhibit 3 (1973 National Fire Protection Act standards). The subject vault had no alternative means of egress, and although the vault's carbon dioxide fire suppression system could be activated manually by a person who was

locked inside, it could not be turned off manually by such a person. The court cannot, therefore, find as a matter of law that the alleged failures of DTC's lockup procedure was an intervening cause which broke the causal chain. See McKinnon, supra at 221. Accordingly, the court rejects JB&B's first contention. In its reply papers, JB&B raised the additional contention that its original client, the New York Stock Exchange, did not inform it that the vault would be an occupied space. See Greenhut Reply Affirmation, ¶ 5. However, as plaintiff's counsel points out, this argument is belied by the deposition testimony of JB&B's designer. See Maazel Sur-Reply Affirmation, ¶ 5; Maazel Affirmation in Opposition, Exhibit A, at 94. Thus, the court accords JB&B's contention no weight.

The second allegedly unforeseeable act which JB&B identifies is the fact that "plaintiff received no training alerting her to the dangers of carbon dioxide although working in a vault where such a system had been installed 27 years before her incident." See Memorandum of Law in Support of Motion (motion sequence number 010), at 8. However, plaintiff has presented the testimony of JB&B's own designer that, pursuant to the prevailing regulations, JB&B was responsible for placing warning signs in the vault. See Maazel Affirmation in Opposition, Exhibit L (Greenhut Deposition), at 145-146. It is undisputed that there were no such warning signs in the vault at the time of Penn's death. The court cannot, therefore, find as a matter of law that DTC's alleged failure to train its employees regarding vault safety was an intervening cause which broke the causal chain. Accordingly, the court rejects JB&B's second contention.

The final allegedly unforeseeable act which JB&B identifies is the claim that "plaintiff [decided] to forego the use of the telephone and trigger the fire suppression system in the absence of a fire." See Memorandum of Law in Support of Motion (motion sequence number 010), at 8.

However, this claim is inaccurate. The evidence clearly indicates that Penn made two phone calls while locked inside the vault. See Maazel Affirmation in Opposition, Exhibit D (Joyce Deposition), at 100-104. Accordingly, the court rejects JB&B's third contention, and denies JB&B's motion in its entirety.

The S&S Motion

The amended complaint names S&S as a defendant in the third and fifth causes of action, for negligence, and the eighth, for wrongful death. See Notice of Motion (motion sequence number 009, ¶¶ 112-119, 127-131, 148-151. S&S argues that it cannot be held liable in any of these causes of action because it did not owe any legal duty of care to Penn. See Hirsch Affirmation in Support of Motion (motion sequence number 011), ¶ 18. This Court disagrees. Plaintiff correctly cites the Court of Appeals decision in Palka v Servicemaster Management Services Corp. (83 NY2d 579 [1994]), wherein a company that had contracted with a hospital to perform safety inspections and repairs on certain equipment located on the hospital's premises was found to owe a duty of care not only to the hospital, but also to "all users of the premises who are entitled to rely on the nonnegligent maintenance services and repair responsibilities imposed by the contract," including the hospital's employees. Palka v Servicemaster Management Services Corp., 83 NY2d at 586; see also Tushaj v 322 Elm Management Associates, Inc., 293 AD2d 44 (1st Dept 2002). Here, plaintiff has demonstrated that S&S contracted with DTC to perform safety inspections on the vault in April of 2000, that S&S carried out its first inspection in June of 2000, and that S&S's inspection report failed to note the lack of safety signs in the vault. See Notice of Motion (motion sequence number 011), Hirsch

Affirmation, Exhibits C, D. This evidence clearly raises a factual issue as to whether S&S owed Penn a duty of care. S&S's attempt to interpret Palka v Servicemaster Management Services Corp. as mandating a different result is unconvincing. Accordingly, the court denies S&S's motion for summary judgment.

DTC's Cross Motion

In its answers to the second, third, and fifth third-party complaints herein,[2] DTC cross-claimed against S&S for contractual and/or common-law indemnification. See Notice of Motion (motion sequence number 011), Exhibit A. In its answer to S&S's sixth third-party complaint,[3] DTC also counterclaimed against S&S for contribution. Id. Now, in response to S&S's summary judgment motion (i.e., motion sequence number 011), DTC cross-moves against S&S for summary judgment on its cross claims and its counterclaim. However, the court finds that DTC's application lacks merit.

DTC bases its cross claim for contractual indemnification on paragraph 11 of the "Preventive Maintenance Agreement" which it executed with S&S on June 22, 1998. See Notice of Cross Motion (motion sequence number 011), Exhibit C. However, S&S correctly points out that the scope of its contractual obligation was expressly limited to the inspection and maintenance of such of DTC's property as was specified in certain supplements to the Preventive

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[2] The second, third, and fifth third-party complaints herein were filed by NWS, JB&B, and Skidmore, respectively, and bear Index Numbers 590159/2002, 590961/2003, and 591461/2003, respectively.

[3] The sixth third-party complaint filed by S&S against DTC bears Index Number 590056/2004.

Maintenance Agreement. See Hirsch Affirmation in Opposition to Cross Motion, ¶ 5. S&S further points out that the vault and its fire suppression system were not listed in any of the supplements to the Preventive Maintenance Agreement. Id., ¶ 4. Rather, those items were the subject of a separate "Inspection and Service Proposal," dated April 26, 2000, which was not annexed to the Preventive Maintenance Agreement, and which does not contain an indemnification clause. Id. ¶ 6-8; Notice of Motion (motion sequence number 011), Exhibit C. As DTC has not established as a matter of law that this Inspection and Service Proposal was governed by the Preventive Maintenance Agreement, DTC's application for summary judgment on its cross claim for contractual indemnification is denied. Accordingly, the portion of DTC's cross motion which seeks such relief is denied.

A party seeking common-law indemnification "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 Management, Inc., 259 AD2d 60, 65 (1st Dept 1999), citing McDermott v City of New York, 50 NY2d 211 (1980). Here, the court finds that DTC has failed to present sufficient evidence that it "was not guilty of any negligence." Instead, it is clear both that the inspection report which DTC presented to S&S contained no mention of the absence of warning signs in the vault, and that there were no such signs in the vault on the day that Penn died. See Notice of Motion (motion sequence number 011), Exhibit D; Notice of Cross Motion (motion sequence number 011), Exhibit K. A reasonable jury could certainly construe the foregoing facts as evidence of negligence on DTC's part. It has been held that, "'[t]he adequacy

of the instruction or warning is generally a question of fact to be determined at trial and is not ordinarily susceptible to the drastic remedy of summary judgment.'" Harrigan v Super Products Corp., 237 AD2d 882, 883 (4th Dept 1997) (internal citations omitted). Thus, there is a further factual issue regarding possible negligence by DTC which would also make it improper to grant DTC's application for summary judgment on its cross claim for common-law indemnification.

With respect to DTC's counterclaim, it has been recognized that contribution is generally available as a remedy "when 'two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe...to the injured person.'" Trump Village Section 3, Inc. v New York State Housing Finance Agency, 307 AD2d 891, 896 (1st Dept 2003), quoting Garrett v Holiday Inns, 58 NY2d 253, 258 (1983). However, as discussed above, the court reserves to the jury the task of making factual findings regarding the extent of S&S's and DTC's responsibility for Penn's death, if any. Therefore, it would be premature to grant DTC's application for summary judgment on its counterclaim for contribution at this juncture, and the court must deny DTC's cross motion in its entirety.

The Skidmore Motion

The amended complaint names Skidmore as a co-defendant in the causes of action for products liability, negligence, and wrongful death. See Notice of Motion (motion sequence number 009), ¶¶ 95-111, 127-131, 148-151. Skidmore notes that these causes of action all allege that the co-defendants "designed, engineered, recommended, and installed, or oversaw the installation of" the fire suppression system, while Skidmore was actually the architect that designed the vault. Id., ¶¶ 75-78. Skidmore argues that, because it had no involvement with the

fire suppression system, it cannot be held liable for any of plaintiff's causes of action. See Memorandum of Law in Support of Motion (motion sequence number 012), at 7. However, plaintiff correctly points out that Skidmore's argument is belied by the fact that, as the architect, Skidmore bore primary responsibility for all of the installation work at the 55 Water Street building, and, further, plaintiff has presented testimony that JB&B specifically consulted with Skidmore about the vault's carbon dioxide fire suppression system. See Memorandum of Law in Opposition to Motion (motion sequence number 012), at 19-23; Maazel Affirmation in Opposition to Motion (motion sequence number 012), Exhibit A, at 111-112. The court, therefore, finds that there is clearly an issue of fact as to the extent of Skidmore's participation in the design of the fire suppression system, as well as the vault, and rejects Skidmore's blanket contention that it was not involved with the former.

Skidmore next argues that its design of the vault was not negligent. See Memorandum of Law in Support of Motion (motion sequence number 012), at 8-9. However, plaintiff correctly notes that Skidmore's argument is "purely factual," and does not set forth any legal argument. The law is clear that, in order to maintain a cause of action for malpractice or negligence against an architect, the proponent must present expert testimony in support of his or her claims. Sheehan v Pantelidis, 6 AD3d 251 (1st Dept 2004). Plaintiff has clearly done so. See Maazel Affirmation in Opposition to Motion (motion sequence number 012), Exhibit L. Skidmore opposes the conclusions of plaintiff's expert, but, once again, that opposition consists almost entirely of factual argument. See Reply Memorandum of Law in Support of Motion (motion sequence number 012), at 17-20. The court concludes that the evidence is sufficient to raise an issue of fact as to whether Skidmore's vault design was negligent.

Skidmore finally argues that there were intervening, superceding events which operated to relieve it of legal responsibility to Penn. See Memorandum of Law in Support of Motion (motion sequence number 012), at 9-10. However, as is the case with resolution of issues surrounding the alleged failure to warn, "questions concerning what is foreseeable and what is normal [i.e., questions regarding proximate cause] ... generally are for the fact finder to resolve." Derdiarian v Felix Contracting Corp., 51 NY2d 308, 315 (1980); see also Equitable Life Assur. Soc. of U.S. v Nico Cons. Co., Inc., 245 AD2d 194, 196 (1st Dept 1997) ("As a general rule, the question of proximate cause is to be decided by the finder of fact, once negligence has been shown"). As such, whether Skidmore was negligent and whether such negligence was a proximate cause of Penn's death, are questions of fact for a jury to decide. Accordingly, Skidmore's motion is denied in its entirety.

The Norcon Motion

The fourth cause of action in the amended complaint sounds in products liability, and alleges that Norcon installed a defective video monitoring system in the vault of the 55 Water Street building. See Notice of Motion (motion sequence number 009, Exhibit A, ¶¶ 120-126. Norcom is also named as a defendant in the fifth and eighth causes of action, for negligence and wrongful death, respectively. Id., ¶¶ 127-131, 148-151. However, as previously noted, plaintiff has not submitted any opposition to Norcon's motion for summary judgment (motion sequence number 013). Accordingly, because the requisite time to respond has now elapsed, the court grants Norcon's motion on default.

The City Motion

The amended complaint names the City and the Doe defendants in the seventh and eighth causes of action, which allege negligence and wrongful death, respectively. See Notice of Motion (motion sequence number 009), Exhibit A, ¶¶ 143-151. The former cause of action asserts first that the co-defendants owed Penn a duty of care because they "induced her to believe" that the Fire Department would respond to a fire call, and also asserts that the co-defendants breached that duty of care by failing to respond in a timely manner, failing to check the vault in a timely manner, and failing to give Penn adequate treatment. Id., ¶¶ 144-145. The latter alleges that Penn's death resulted from the former. Id., ¶¶ 148-151. "It is well settled that public entities cannot be held liable for negligence claims arising out of the performance of their governmental functions, including police and fire protection, unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect that individual." Hambel v Bohemia Fire Dept., 210 AD2d 379 (2nd Dept 1994) citing Miller v State of New York, 62 NY2d 506 (1984). Further,

> When the liability of a governmental entity is at issue, "[i]t is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred."

Id. at 379, quoting Weiner v Metropolitan Transp. Auth., 55 NY2d 175, 182 (1982). Plaintiff argues that "[t]he entire purpose of a fire alarm, like a 911 system, is to get help from the Fire Department." See Memorandum of Law in Opposition to Motion (motion sequence number 014). However, this argument merely underscores the fact that fighting fires is activity "engaged in generally" by the Fire Department. It does not demonstrate the existence of any special relationship between the Fire Department (or the City or EMS) and Penn. In the absence of any

& Merrill LLP (motion sequence number 012) is in all respects, denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of co-defendant Norcon Electronics, Inc. (motion sequence number 013) is granted on default, and the amended complaint is hereby severed and dismissed as against co-defendant Norcon Electronics, Inc.,

and the Clerk is directed to enter judgment in favor of said co-defendant; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the co-defendant City of New York, of John and Jane Does # 1-10 (New York City Fire Department Personnel), and of John and Jane Does # 11-20 (Other City Personnel) (motion sequence number 014) is granted and the amended complaint is hereby severed and dismissed as against these co-defendants, and the Clerk is directed to enter judgment in favor of said co-defendants; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York
January 6, 2005

ENTER

Hon. Doris Ling-Cohan, JSC

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HON. DORIS LING-COHAN

FILED
JAN 19 2005
NEW YORK
COUNTY CLERK'S OFFICE