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

PRESENT: Edmead Justice

PART 35

Espinoza

- v -

Federated

INDEX NO. 107747/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of defendants Mainco Services Company, Mainco Elevator & Electrical Corp., and Mainco Elevator Co. for an order, pursuant to CPLR §3212, for summary judgment, dismissing the Complaint of plaintiffs Sandra Espinoza, as Mother and Natural Guardian of Caly Espinoza, an Infant, and Sandra Espinoza, Individually, and all cross-claims in their entirety is denied; and it is further

ORDERED that the branch of Mainco's motion for an order compelling co-defendants Federated Department Stores, Inc. and Macy's East, Inc. to defend and indemnify Mainco is denied; and it is further

ORDERED that Mainco serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 9/28/09

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SANDRA ESPINOZA, as Mother and Natural Guardian of CALY ESPINOZA, an Infant, and SANDRA ESPINOZA, Individually,

Plaintiffs,

-against-

FEDERATED DEPARTMENT STORES, INC., MACY'S EAST, INC., MAINCO SERVICES COMPANY, MAINCO ELEVATOR & ELECTRICAL CORP., and MAINCO ELEVATOR CO.,

Defendants.

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Index No. 107747/07

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiffs Sandra Espinoza ("Ms. Espinoza"), as Mother and Natural Guardian of Caly Espinoza ("Caly"), an Infant, and Sandra Espinoza, Individually (collectively "plaintiffs") seek to recover against defendants Federated Department Stores, Inc., Macy's East, Inc., Mainco Services Company, Mainco Elevator & Electrical Corp., and Mainco Elevator Co. (collectively "defendants") for negligence.

Defendants Mainco Services Company, Mainco Elevator & Electrical Corp., and Mainco Elevator Co. (collectively "Mainco") now move for an order, pursuant to CPLR §3212, for summary judgment, dismissing plaintiffs' Complaint and all cross-claims against Mainco, and for an order compelling Federated Department Stores, Inc. and Macy's East, Inc.(collectively "Macy's") to defend and indemnify Mainco.

Background[1]

On May 28, 2006, Caly, then a 6-year-old minor, was injured when his arm became caught in the handrail of an upward escalator at a Macy's store in Bay Shore, New York. As a result of Caly's injuries, plaintiffs commenced the instant action for negligence and loss of consortium against Macy's and Mainco, the contractor responsible for the maintenance, repair and upkeep of the subject escalator (see "the Contract").

According to photographs taken of the subject escalator ("the Photographs"), this escalator contains two handrails. The handrails, upon reaching the top of the escalator, travel over the top of the balustrade, and return into the machinery *via* the handrail return. The handrail return guard ("the handrail guard"), which is composed of a piece of rubber affixed *via* screws to the bottom area of the handrail return, sits on top of a piece of jagged metal, travels over and around escalator balustrade. The area where the handrail re-enters the escalator is approximately 8 inches above the floor and is guarded by the handrail guard.

Mainco's Motion

Mainco argues that its motion should be granted because (a) it did not create or in any way cause the defective condition complained of, and there is no evidence demonstrating, and plaintiffs cannot demonstrate, that Mainco had any actual or constructive notice of any claimed defect or condition, *to wit*: that the handrail return guard was not in its proper place or failed to cure such defect; (b) Macy's had a non-delegable duty to maintain the escalator and keep it safe for customers and Macy's employees were responsible for conducting daily inspections of the escalator, which included ascertaining whether the handrail guard was in place; (c) Macy's

[1]Information is taken from Mainco's motion and defendants' opposition.

escalator maintenance logs clearly demonstrate that Macy's employees were responsible for conducting daily inspections of the escalator, including ascertaining whether the handrail guard was in place; and (d) in the 3½ weeks between Mainco's last appearance at the location and the date of loss, Macy's never contacted Mainco to advise Mainco that the subject handrail guard was not in its proper place. Mainco also points out that while it is responsible for providing maintenance and repair, pursuant to the Contract, Mainco had no obligation to make upgrades to the machinery and, in fact, was prohibited from doing so without the express authorization of Macy's. Furthermore, Mainco did not design, construct or install the escalator, and it was only retained via the Contract to perform maintenance and repair work on the escalator.

Mainco contends that plaintiffs' claim is based on the premise that the handrail guard was not in place when Caly's hand was caught in the escalator. While acknowledging that there is conflicting testimony on this issue, Mainco argues that whether or not the handrail guard was in place at the time of the incident has no bearing on the instant motion. The documentary and testimonial evidence supports Mainco's argument that the handrail guard was in place when Mainco last serviced the subject escalator, and Mainco had no notice of any change in condition nor any obligation to inspect the equipment between its last maintenance and the date of loss herein.

Mainco argues that no party has or can establish that Mainco had any notice, actual or constructive, that the handrail guard was not in place on May 3, 2006, when Rob Sparacino ("Mr. Sparacino"), Mainco's mechanic, last serviced the location; nor can any party establish that Mainco was notified that the handrail guard was not affixed to the escalator at any time between May 3, 2006 and the May 28, 2006 date of Caly's accident.

Mainco contends that it provided plaintiffs with its maintenance and repair records for the subject escalator for the year prior to the alleged incident (see "Mainco's Maintenance Records"). According to Mainco's Maintenance Records, when Mr. Sparacino performed preventive maintenance on the escalator on May 3, 2006, the handrail return guard was in place. In addition, Macy's security inspected the escalator every day between May 3, 2006 and the date of Caly's incident (see "Macy's Daily Inspection Log"). Macy's records demonstrate that Macy's never made a notation of a call made to Mainco that the handrail guard was missing. Indeed, there appears to have been no problem with the escalator or handrail guard prior to the incident.

Mainco also contends that the testimony regarding the handrail guard is conflicting. Steven Santiago ("Mr. Santiago"), Macy's Head Security Officer, testified that he removed the handrail return guard in order to release plaintiff from the escalator (see the "Santiago EBT"). Junior Cordero ("Junior"), Caly's uncle, who was 10 years old and with plaintiffs at the time of the accident, testified that the handrail return guard was not in place (see "the Cordero EBT"). However, Mainco argues that whether this Court believes the testimony of Mr. Santiago or that of Junior is of no moment; the evidence demonstrates that the handrail return guard was in place on May 3, 2006, and there is no evidence that Mainco was ever aware that the handrail return guard was missing subsequent to that day. Further, the testimony in this matter, if the Court is to view it in a light most favorable to plaintiffs, still requires summary judgment in Mainco's favor.

Mainco also argues that plaintiffs cannot demonstrate that any act of Mainco was a proximate cause of Caly's injury. Mainco contends that in order to set forth a *prima facie* case, plaintiffs must establish that its acts were a substantial cause of the events that produced the injury. Although proximate cause is ordinarily a question of fact, it may be decided as a matter

of law where the evidence conclusively establishes that there was an intervening act that was so extraordinary and far removed from the defendant's conduct as to be unforeseeable. The Court determines whether there is a sufficient showing of causation in the first instance. Mainco cites Mr. Sparacino's "uncontradicted testimony" that the handrail guard was in place on May 3, 2006 when Mainco last performed routine maintenance at the location, and "documentary evidence" that, between May 3, 2006 and the date of accident, Macy's never notified Mainco that the handrail guard was not in place. Even assuming, *arguendo*, that the handrail guard was, in fact, missing at the time of the incident, the proximate cause of the injury would have to fall upon Macy's, as it was the only entity that inspected the escalator between May 3, 2006 and the date of loss, Mainco contends. As such, summary judgment must be granted to Mainco.

Finally, Mainco argues that it is entitled to contractual and common law indemnification from Macy's. Mainco contends that the indemnification clause in the Contract obligates each party to indemnify the other for its own negligence (Section 24, "Indemnification"). Under the terms of the indemnification clause, each party may seek indemnification from the other when an incident clearly arises out of the acts or omissions of the indemnitor. Mainco is entitled to indemnification from Macy's, because if the handrail guard was missing at the time of Caly's accident, it could only have been missing due to the fault of Macy's.

Mainco is also entitled to common law indemnification, in that Mainco has established that it was free from negligence and that Macy's is guilty of negligence that caused the damage. Whether Macy's was negligent is a non-issue. The obligation to indemnify is triggered by the mere fact that the claim arises out of Macy's work. Here, the record establishes that (a) Macy's was the owner of the subject location and the subject escalator; (b) despite having entered into a

maintenance contract with Mainco, Macy's had a non-delegable duty to provide a safe premises for the general public, which extends to elevator and escalator inspection and repair, and ensuring that the subject handrail guard was in its proper position; (c) Macy's performed daily inspections of the escalators to ascertain whether the escalators were safe for public use in accordance with its duty to ensure that the subject escalator was safe for public use; (d) Macy's never advised Mainco as to any problems regarding the subject escalator and, specifically, the handrail return guard, for 3½ weeks prior to the incident herein. Therefore, any liability in this matter is attributable to Macy's.

Mr. Santiago, Macy's own witness, testified that his security personnel was responsible for inspecting the escalators on a daily basis and that any problems would be phoned into the Macy's call center, which would then contact Mainco. Macy's Daily Escalator Inspection Log for the period of May 1, 2006 through the date of the incident (see "Macy's Daily Inspection Log"), combined with the Maintenance Records, clearly demonstrate that there were no reports of any problems with the subject escalator between May 3, 2006 and May 28, 2006, and Macy's neither noted nor reported any problems with the handrail guard. Because a missing handrail guard was not noted during Mainco's routine maintenance on May 3, 2006, the only party that could be responsible for a missing handrail guard would be Macy's. Thus, Mainco would not bear any liability.

Since Macy's is liable, Mainco is entititled to contractual and common law indemnification, including costs and fees (more than $32,000) accrued in defending this action.

Macy's Opposition

Macy's argues that Mainco has failed to demonstrate an entitlement to summary judgment because it has failed to demonstrate the absence of material issues of fact regarding its notice of the allegedly defective condition that caused Caly's injury. Additionally, Mainco has failed to demonstrate an entitlement to summary judgment for contractual and common law indemnification from Macy's, as Mainco has failed to demonstrate that it is free from negligence and that Macy's was negligent as a matter of law.

Macy's contends that the deposition testimonies of Caly, Mr. Santiago, and Mr. Sparacino establish that the handrail guard was present at the time of Caly's accident. Further, Macy's Daily Inspection Log for the month of May, 2006 does not indicate that there was any problem with the escalator.

However, Macy's argues, the fact that the handrail guard was present at the time of the accident does not mean that Mainco was not negligent. Mainco had a duty under the Contract to competently inspect the escalator on a monthly basis. The Contract is a full-service contract that places the responsibility of properly maintaining all operating components of the escalator with Mainco, and includes the following obligations: (a) monthly systematic examinations (Contract, p. 2, ¶ 6); (b) minimum of one hour per month per unit dedicated to preventative maintenance (repair time is not counted as preventative maintenance time) (*id.*, p. 2, ¶ 6); (c) inspections and tests pursuant to the American Society of Mechanical Engineers ("ASME") Code A17.2 (*id.*, p. 4, ¶ 3); (d) quarterly visual examinations of safety devices, annual escalator test, compliance with all federal, state and local municipal inspections, and confirmation of all tests provided to owner; (*id.*, p. 4, ¶ 3); (e) efficiency and maintenance survey audits annually with report (*id.*, p. 4, ¶ 4);

(f) maintenance and repair records kept at each site (*id.*, p. 8, ¶ 13); (g) mechanics sign-in /sign-out log (*id.*, p. 8, ¶ 13); and (h) repair, renewal and replacement of parts (*id.*, p. 9, ¶ 18). According to the expert opinion of George Murray ("Mr. Murray"), the handrail guard that was in place at the time of the accident was not properly installed (see "the Murray Aff."). Had Mainco conducted its inspections in a reasonable and prudent manner, it should have discovered the defectively installed handrail guard long before Caly's accident, Macy's argues.

By its own admission and as documented in Mainco's Maintenance Records, in the year prior to Caly's accident, Mainco inspected the escalator on a monthly basis, and had multiple opportunities to discover that the handrail guard was improperly installed and that it had been dangerously altered. In light of its many opportunities to observe the handrail and to replace or repair it prior to the accident, Mainco cannot establish that it did not have notice of the defective condition of the handrail guard. Consequently, Mainco's motion should be denied in its entirety.

Macy's further contends that Mainco's attempt to argue that it cannot be held liable if the handrail guard was not present is unavailing and erroneous; there are conflicting deposition testimonies as to whether the subject handrail guard was in place. Thus, Mainco cannot establish with any certainty the necessary fact that the handrail guard was not present. Both Caly and Mr. Santiago testified that the handrail guard was present at the time of the accident. Additionally, Mainco's attempt to even raise this point is futile, given that Mainco's Maintenance Records do not show the handrail guard was missing.

Finally, Macy's argues that Mainco's inaction in failing to observe the defective handrail guard was a proximate cause of Caly's injuries.

Moreover, Macy argues, any determination of attorneys' fees would be the subject of a

separate hearing after determination of the instant motion and would require an evidentiary showing in the form of the detailed invoices submitted by counsel for Mainco, as well as documentation of the amounts paid by Mainco. Therefore, the affidavit of Mainco's counsel should be disregarded as unnecessary, inadmissible and defective in its contents.

Plaintiffs' Opposition

Plaintiffs also argue that Mainco has not demonstrated the absence of material issues of fact regarding its notice of the allegedly defective condition such as to warrant dismissal from the case, and that Mainco has failed to demonstrate an entitlement to summary judgment for contractual and common law indemnification from Macy's. Citing the Photographs and witness testimony, plaintiffs argue that it is clear that the handrail guard was not affixed at the time of the incident. As set forth in the affidavit of Patrick Carrajat ("Mr. Carrajat"), an escalator expert (see "the Carrajat Aff.") as well as the exhibits annexed to the moving papers, questions of fact exist as to Mainco's responsibility.

There is an issue as to whether the handrail guard was attached at the time of the accident, plaintiffs argue. Caly's family, particularly Junior, Caly's uncle, and Marcia Lara ("Ms. Lara"), Caly's grandmother, testified that the handrail guard was not attached (see the Cordero EBT and "the Lara EBT"). Mr. Santiago testified that the handrail guard was attached. If the handrail guard was not attached, the jury could rightfully conclude that Mainco was the entity responsible for creating that admittedly dangerous and hazardous condition, or that Mainco was responsible for not observing or rectifying such a condition, given its obligation to maintain the escalator, especially the integrity of its safety devices.

A jury need not accept as credible Mr. Sparacino's testimony that the guard was attached

on the date of the accident. Macy's had no reason to detach or remove the guard. Mainco was responsible for all maintenance and inspections of the escalator. Thus, a jury could circumstantially conclude that if the guard was not attached, then Mainco caused or allowed the escalator to be in such a dangerous condition.

There is also an issue as to whether the handrail guard was affixed properly, if it was attached at all, plaintiffs argue. As shown in Photographs B and C, the handrail guard on the side where Caly was injured is attached backward. This not only provides a larger opening for something to enter, it also defeats the purpose of the guard as a safety device "as admitted by" Kenneth Fowler ("Mr. Fowler"), a Mainco employee (see "the Fowler EBT"). Thus, even if the handrail guard was attached, Mainco should have seen that it was installed backward and re-installed it properly. Whether Mainco incorrectly installed the handrail guard or just observed it is irrelevant, plaintiffs argue. Mainco was charged with ensuring that all safety devices were correctly attached and functional.

Plaintiffs also contend that in the event Mainco argues that one cannot prove that the handrail guard was on backward at the time of the incident (Mr. Santiago testified that he removed and re-attached it *after* the incident) a jury could conclude that the only possible way Caly's arm could have been drawn into the return is for the handrail guard to be attached backward – if the jury believes that it was attached at all – since a backward handrail guard creates a larger opening between the guard and handrail.

There is also an issue as to whether Mainco was performing its contractual and common law duties correctly. According to Macy's response to plaintiffs' Notice for Discovery and Inspection, there were nine other escalator incidents since 1996 (the earliest date that such reports

exist), many of which involved handrail returns and children getting their hands and fingers caught in escalators, and many since Mainco started maintaining the escalators (see "Macy's Response to Discovery Order"). The jury should hear and consider whether so many children could have been similarly injured if the handrail guards were attached and functioning properly.

Lastly, Mainco has not submitted an affidavit from an expert, and the affirmation from its counsel is clearly not based on personal knowledge. As such, the motion should denied on this ground alone, plaintiffs argue.

Mainco's Reply

Mainco argues that the issue of whether the handrail guard was present at the time of the incident is meaningless. Mainco also contends that Macy's and plaintiffs' arguments that the handrail guard was altered and improperly positioned, and that Mainco's failure to observe this condition was a proximate cause of Caly's accident are flawed and baseless. These arguments are based on the Photographs taken after the handrail guard had been removed and placed back onto the escalator by Mr. Santiago. There is no evidence in the Photographs that the handrail guard was damaged, or that the handrail guard was reversed prior to the incident.

Plaintiffs' opposition fails to raise any issue as to whether Mainco knew or should have known that the handrail guard was missing, Mainco contends. Instead, plaintiffs conclude that if the handrail guard was missing, a jury could find that Mainco was responsible for it being so. However, Macy's security performs daily inspections of the escalators and Macy's Daily Inspection Log specifically mentions the handrail guard as an item to be inspected. Plaintiffs focus on the premise that Mr. Sparacino's credibility must be determined at trial. Just as the credibility of an impressionable boy (Caly) and his equally impressionable uncle (Junior) cannot

serve as the basis for a summary judgment motion, the credibility of a witness for Mainco cannot be used as the basis for an opposition, Mainco argues.

Mainco's motion is not based on the credibility of any witness, as demonstrated by its acknowledgment that plaintiffs' testimony – and the testimony of Junior and Ms. Lara – was to be accepted as true for the purposes of a dispositive motion. Instead, Mainco's motion is based on documented evidence in admissible form: (1) the handrail guard was in place when Mainco last performed its contractually required maintenance; and (2) Macy's performed its daily inspections of the escalators and did not find any defect prior to the incident. There is no evidence that the handrail guard was missing at the time Mainco last serviced the escalator, no evidence that Macy's ever advised Mainco that the handrail guard was missing, and no evidence that the handrail guard was defective and placed on the escalator in reverse position at the time of the incident. Neither plaintiffs nor Macy's have established actual or constructive notice, thus requiring the granting of Mainco's motion.

Mainco further argues that neither plaintiffs nor Macy's can rely on the post-accident photographs to support their arguments that the handrail guard was backward or "shaved" (*i.e.*, modified) at the time of the accident. Plaintiffs, by way of their expert, Mr. Carrajat, argue that "a jury could conclude" that the only way Caly's arm could be drawn into the handrail return with the guard in place is if the guard itself was installed backward. Plaintiffs further contend that the handrail guard was "cut." Mr. Carrajat opines that if the handrail return guard was in place at the time of the incident, it was (I) an Otis handrail guard, and not a Peelle handrail guard meant for the subject escalator; (ii) placed on the escalator in a reversed position at the time of the incident; and (iii) cut and modified to fit the subject escalator. Macy's, relying on the

affidavit of Mr. Murray, argues that the handrail return guard was "shaved," thus creating a larger opening through which Caly's arm could enter the handrail return. Both of these arguments are based on two sets of photographs, one set taken after Mr. Santiago removed and then placed the handrail guard back on the escalator, and the second set taken at a site inspection on October 8, 2008, more than two years after the accident. Neither plaintiffs nor Macy's demonstrate that these photographs accurately represent the accident scene at the time of the incident. Thus, the photographs are inadmissible on the issue of notice, Mainco argues.

Mr. Santiago testified that he (a) removed the handrail guard; (b) freed Caly's arm from the escalator, and (c) placed the handrail guard back onto the escalator. The photographs taken immediately after the accident depict the handrail guard after Mr. Santiago, who is a security guard and not an escalator mechanic, removed and re-attached it to the escalator. There is no evidence *via* testimony, photographs, documentation or an affidavit standing for the premise that Mr. Santiago placed the handrail guard back onto the escalator in the same position that he originally found it. Furthermore, according to Jon Halpern ("Mr. Halpern"), Mainco's liability expert, the three additional handrail return guards on the subject escalator were properly situated when he conducted his site inspection on October 8, 2008 (see "the Halpern Aff."). Notably, neither Mr. Murray nor Mr. Carrajat commented on this anomaly, Mainco argues.

Finally, Mainco argues that the affidavits of Messrs. Carrajat and Murray are speculative and not based upon the factual record.[2] While Messrs. Carrajat and Murray never provide their explanation as to how they reached their conclusions regarding the cause of Caly's accident.

[2] Mainco notes that while it addresses the content of the Murray and Carrajat affidavits, the affidavits are unnecessary to the determination of the issues at hand.

Neither expert explains the basis for his belief that the handrail guard was in a reversed position at the time of the incident, or explains why he believes that the handrail guard was "cut" or "shaved" prior to the accident. Additionally, Mr. Carrajat never explains why utilizing an Otis handrail guard as opposed to a Peelle handrail guard somehow makes Mainco negligent. According to Mr. Halpern, the handrail guard in place at the time of the site inspection provided no indication as to the manufacturer or model (see the Halpern Aff.). Mr. Carrajat's opinion that the maintenance records were not properly completed is wholly unsupported by reference to any standard or an explanation as to how Mainco deviated from same. Thus, the respective opinions of Messrs. Carrajat and Murray setting forth such speculation are insufficient to defeat a motion for summary judgment and requires that they be disregarded.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d

10, 11 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

In a case alleging injuries arising from a defective condition, "[w]here a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition" (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006], citing *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). "To constitute constructive notice, a defect must be visible and apparent and it must exist

for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Mitchell v City of New York* at 374, citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, while Mainco met its burden of demonstrating that it did not create or have actual or constructive notice of any dangerous or defective condition of the escalator's handrail guard prior to Caly's accident, Macy's and plaintiffs demonstrated the existence of a factual issue requiring a trial of the action.

As a threshold issue, plaintiffs' argument challenging the sufficiency of Mainco's motion papers lacks merit. It is well settled that an attorney's affirmation not made on the basis of personal knowledge of the facts *nor supported by evidence in admissible form* is insufficient to defeat a motion for summary judgment (*Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006], citing *Diaz v New York City Tr. Auth.*, 12 AD3d 316 [1st Dept 2004] and *Ramos v New York City Hous. Auth.*, 264 AD2d 568 [1st Dept 1999]; *see also Zuckerman* at 563). Here, contrary to plaintiffs' arguments, Mainco's motion comprises an attorney's affirmation that is supported by evidence in admissible form.

It is undisputed that Mainco did not install the escalator at the subject location. Further, Mainco provides documentary evidence that the escalator handrail was in place and neither defective nor dangerous when Mr. Sparacino, Mainco's mechanic, last performed monthly maintenance on May 3, 2006, just three weeks prior to Caly's accident on May 28, 2006 (see Mainco's Maintenance Records, entry for May 3, 2006). Even assuming that the handrail guard was not in its proper place, defendants' submissions indicate that Mainco did not cause this alleged condition. Thus, Mainco established that it did not cause or create the alleged dangerous

condition prior to the accident

In addition, Macy's Daily Escalator Inspection Log for the month of May does not indicate any problems with the escalator handrail. Macy's records are significant because according to the testimony of Macy's head security officer Mr. Santiago, Macy's security department is responsible for conducting daily inspections of the store's escalators, including the handrails (Santiago EBT, p. 70, lines 16-25), and notifying Macy's "operational manager" if he noticed that the handrail was missing or out of place (*id.*, p. 76, lines 17-25). According to the Contract, under the title "Repairs, Renewals and Replacements": "Repairs, renewals, and replacements shall be made by Contractor [Mainco] whenever needed, whether such necessity is the result of examinations or an Owner request" (Contract, p. 9, §18). Here, the evidence in the record establishes that Mainco did not see a need to make any repairs on May 3, 2006 and that Macy's never requested any repairs to the handrail any time after May 3, 2006 and before the accident.

Further, it is undisputed that Macy's did not notify Mainco of any problem with the handrail guard at any time between May 3, 2006, when it last inspected the location, and the date of Caly's accident. And, there is no indication in defendants' submissions that Mainco had notice, actual or constructive, of the alleged dangerous condition of the handrail guard.

However, Macy's and plaintiffs raised an issue of fact as to whether Mainco conducted its inspections in a reasonable and prudent manner so as to discover any defects with the handrail prior to the accident. It is well settled that a company that agrees to maintain equipment such as an elevator or escalator "may be liable to a passenger for failure to correct conditions of which it has knowledge *or failure to use reasonable care to discover and correct a condition which it*

ought to have found" (*Rogers v Dorchester Assocs.*, 32 NY2d 553, 559 [1973] [emphasis added]). It must be shown that defendant either had prior knowledge of the condition which caused the malfunction "and failed to act with reasonable care to correct it; *or that it failed to use reasonable care to discover, and then to correct, a condition which ought to have been found*" (*Koch v Otis Elevator Co.*, 10 AD2d 464, 467 [1st Dept 1960], *appeal denied* 13 AD2d 735 [1st Dept 1961] [*emphasis added*]).

In *Rogers*, the Court of Appeals reinstated the judgment against the defendant elevator maintenance company, and granted judgment in favor of the owner and manager of an apartment building on their cross claim against the elevator company, observing that there was "evidence that the door had malfunctioned during the six months preceding the accident from which the jury might infer that the elevator company negligently performed its undertaking to repair and maintain the elevator. Since the elevator company had agreed to perform all required maintenance, negligence by the owner and manager in the performance of their nondelegable duties to maintain the elevator arose solely through the acts or omissions of the elevator company (*id.* at 557).

In *Banks v Odd Job Trading Corp.* (299 AD2d 248 [1st Dept 2002]), the First Department denied a motion for summary judgment seeking dismissal of the plaintiff's complaint as well as indemnification from the co-defendant premises owner on the ground that the plaintiff's expert affidavit raised a triable issue of fact as to whether the defendant escalator maintenance company had "constructive notice of the deteriorating condition of the escalator, which ultimately led to a complete mechanical failure of its handrail mechanism" (*id.* at 248). The Court explained:

> Plaintiff's expert opined that a complete handrail mechanism failure caused plaintiff to fall, a condition which does not occur spontaneously, and which is always preceded by signs of handrail deterioration, including "multiple instances of handrail slowing and/or stopping" prior to an accident. These expert assertions constituted a sufficient basis for the motion court to find the existence of triable issues regarding constructive notice of the escalator's deteriorating condition.
> (*Id.* at 249)

Similarly, in *Solowii v Otis Elevator Co.* (295 AD2d 145 [1st Dept 2002]), the First Department upheld the Supreme Court's denial of a motion for summary judgment by a defendant escalator maintenance company on the following ground:

> [P]laintiff, through his expert's affidavit, did raise a factual issue as to whether defendant Otis Elevator had actual or constructive notice of said defect. Otis was under a contractual obligation to inspect and maintain the elevators in the subject building and the expert's affidavit, based on the expert's review of the deposition testimony and documentary evidence, by lending support to the inference that Otis Elevator did not conduct reasonably prudent inspections of, or competently maintain, the elevator in question, raised a triable issue as to whether Otis Elevator either created or should have known of the defective condition that allegedly caused plaintiffs injury.
> (*Id.* at 145)

Here, Mr. Murray attests that "the type of handrail guard that was in place at the time of the accident was not properly installed and was therefore unsafe" (Murray Aff., ¶ 8). Mr. Murray continues:

> As a certified and experienced escalator maintenance and repair company, during Mainco's monthly inspection and service of this escalator prior to plaintiff's accident, Mainco's mechanic should have observed that the handrail guard in place was missing the front plate and that there was excessive space between the handrail and the handrail guard. Mainco's mechanic also should have observed prior to plaintiff's accident that a portion of the handrail guard was shaved away allowing for more space between the handrail and the handrail guard. Accordingly, Mainco was negligent as a certified and experienced commercial escalator maintenance company, in failing to observe the incomplete and defective handrail guard affixed to the subject escalator.
> (Murray Aff., ¶¶ 21-23)

Mr. Murray also observed that "normal wear and tear would likely not result in the handrail guard simply falling off or the screws becoming dislodged. Normal wear and tear would also not

explain the alteration to the handrail guard that was in place at the time of the accident" (*id.* at ¶ 26).

Mr. Carrajat attests that upon a review of the records of previous accidents at the subject Macy's, there have been eight (8) accidents involving entrapments in the handrail or handrail guards on the store's four escalators during the past 10 years prior to Caly's accident (Carrajat Aff., p. 5). "At least five (5) of these accidents occurred while Defendant Mainco was the contractor of record responsible for the care of the subject escalators," Mr. Carrajat states. Upon a review of Mainco's Maintenance Records, Mr. Carrajat said that he believes that Mainco failed to properly maintain the escalator:

> It is my opinion, to a reasonable degree of mechanical certainty, that the proximate cause of the accident and injuries to Caly Espinosa was the failure of Mainco to properly maintain, examine and inspect the subject escalator and specifically the handrail guard where the accident occurred. The basis for this opinion is the failure of Mainco to perform monthly maintenance. Mainco has acknowledged in the deposition of Mr. Sparacino, page 16, line 2 that performing maintenance takes about one hour per unit. On page 26, line 4, Mr. Sparacino states that maintenance is performed monthly. A review of the Mainco time tickets for the year prior to the date of the accident reveals no maintenance was performed during the months of August, September and October 2005 and none in January or April 2006.
> (Carrajat Aff., p. 6)

Mr. Carrajat further attests:

> It is my opinion, to a reasonable degree of mechanical certainty, that the handrail guard, if attached, was installed in a reverse direction. The basis for this opinion is that during my examination of the escalator handrail guard it was indeed reversed and presented a larger opening than had it been properly attached, thus presenting the possibility of a child's hand being drawn into that opening. It is my opinion that Mainco should have seen and corrected this hazardous condition and its failure to so was a proximate cause of the accident and Caly's injuries.
> (*Id.* at 8)

Mr. Carrajat concludes:

> Based on the above presentment of facts, I conclude to a reasonable degree of mechanical

> certainty within my field of expertise, that this accident occurred due to a lack of proper maintenance, inspection and repair by Mainco and Macy's. It is my further opinion that Mainco and Macy's failed to maintain adequate records and that their level of maintenance, as reflected by their records and deposition testimony failed to meet prevailing industry standards. It is my opinion, to a reasonable degree of certainty within my field of expertise that Mainco and Macy's knew or should have known through diligent maintenance and inspection of the conditions and defects that led to the accident and took no action to correct the defective condition. This failure to correct said conditions was in violation of both their contractual obligations and prevailing industry standards and was the proximate cause of this accident.
> (*Id.* at 7-8)

Therefore, the affidavits of Messrs. Murray and Carrajat raise issues of material fact as to whether Mainco was negligent in failing to observe the defective handrail guard affixed to the escalator.

Mainco's argues that the affidavits are based upon speculation and conjecture, without evidentiary basis; thus, they are inadequate to create an issue of fact. However, the case Mainco cites, *Timmins v Tishman Construction Corp* (9 AD3d 62 [1st Dept 2004]), is distinguishable. In *Timmins*, the plaintiff sued for personal injuries sustained when he was pushing open a rolling gate that was missing a wheel. The issue in the case was whether the Tishman defendants owed a duty to plaintiff, a non-contracting third party, to maintain the gate (*id.* at 65). The Court pointed out that there is no basis for imposing such liability unless the defendants "negligently created or exacerbated the dangerous condition that caused plaintiff's injury" (*id.* at 68-69). In rejecting the plaintiff's theory, the Court observed:

> Plaintiff's claim that the Tishman defendants negligently created or exacerbated a dangerous condition is based entirely upon the affidavit of his expert, Edward Brunjes, whose opinions, *lacking an adequate foundation or evidentiary basis*, are legally insufficient to create an issue of fact . . . . *Significantly, the expert did not claim any specific expertise or experience with regard to the engineering, procurement, installation, maintenance or repair of gates of any kind, much less a cantilever gate such as is involved herein.*
>
> * * *

> *Significantly, plaintiff's expert did not offer an opinion that the modification of the gate by the addition of a tail and a wheel did not conform to accepted industry standards, or that the gate, as so modified, was not in good working order.*
> (*Id.* at 69) (emphasis added)

Here, by contrast, neither the Murray Aff. nor the Carrajat Aff. suffers from such shortcomings. Mr. Murray attests to his credentials as a licensed elevator inspector, who has been "in the business of elevator and escalator consulting" for more than 45 years (Murray Aff., ¶¶ 1, 27). Mr. Carrajat attests to his credentials as an escalator consultant who served on the ASME A17.1 Code subcommittee for Escalators and Moving Walks for 12 years (Carrajat Aff., p. 1). Second, as demonstrated above, both experts offer their opinion on the relevant issue before the Court: whether Mainco should have detected problems with the handrail guard before the date of the accident.

Mainco also argues that the basis of the experts' opinions – the photographs taken after the accident and an inspection of the escalator on October 8, 2008, more than two years after the accident – render the opinions unreliable. The First Department has found expert affidavits to be insufficient to raise issues of material fact, under certain circumstances. For example, in reversing the Supreme Court's denial of the defendant's motion for summary judgment, the First Department held in *Budd v Gotham House Owners Corp.*, 17 AD3d 122 [1st Dept 2005]: "The expert affidavit was prepared more than a year after the accident and is devoid of any evidence that the rug was in the same condition when examined as it was on the night plaintiff was injured" (*id.* at 123; *see also Haynes v Estate of Sol Goldman, Newmark & Co. Real Estate, Inc.*, 62 AD3d 519, 521 [1st Dept 2009] [holding that the expert's opinion "consisted of unfounded speculation, insufficient to raise a triable issue of fact as to the condition of the fourth floor hoistway door *at the time of the accident*"(emphasis added); *Di Sanza v City of New York*, 47

AD3d 535, 536 [1st Dept 2008], *affd* 11 NY3d 766 [holding that the expert's "speculation as to the cause of the defect and the adequacy of Con Ed's inspection schedule is insufficient to raise a triable issue of fact, because there is no evidence that Con Ed returned to work at the site after October 29, 2002 or that anyone ever reported or noticed a condition before the accident"]; *Santiago v United Artists Communications, Inc.*, 263 AD 2d 407, 408 [1st Dept 1999] [holding that the motion court improperly found that the plaintiff's expert's affidavit raised a triable issue of fact because the expert "never stated when he conducted his on-site inspection of the step, never compared the results of his on-site inspection with any of the photographs of the step, and never stated that the condition of the step at the time of his inspection was the same as that at the time of the accident"]).

In the instant case, however, the experts do not base their opinions solely on the October 8, 2008 inspection or the Photographs. Messrs. Murray and Carajat also rely on, *inter alia*, the deposition transcripts, Macy's Response to Discovery Order, the Contract, Mainco's Maintenance Records and Macy's Daily Inspection Log (see the Murray Aff., ¶ 3 and the Carrajat Aff., p. 2). Therefore, the Murray and Carrajat affidavits may be considered by the Court.

Finally, Mr. Halpern, Mainco's escalator engineering expert, disputes the opinions of Messrs. Murray and Carrajat, further raising an issue of fact as to whether Mainco properly performed its duty to inspect the escalator. Mr. Halpern concludes that his review of the parties' submissions indicates that the handrail was properly in place at the time of the accident, that the handrail guard was code compliant and that Mainco had performed its maintenance duties properly (Halpern Aff., ¶ 21). Such conflicting affidavits raise an issue of fact as to Mainco's liability, defeating Mainco's motion for summary judgment.

Proximate Cause

The expert affidavits also raise an issue of material fact as to whether Mainco's failure to properly perform maintenance on the escalator was a proximate cause of Caly's injury. In *Derdiarian v Felix Contracting Corp.* (51 NY2d 308, 315 [1980]), the Court of Appeals explained when a Court may determine proximate cause as a matter of law:

> Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus. Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, *these issues generally are for the fact finder to resolve.* There are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law. Those cases generally involve independent intervening acts *which operate upon but do not flow from the original negligence.*
> (*Id.* at 315) (citations omitted) (emphasis added)

Contrary to Mainco's arguments, the evidence in the record does not establish, as a matter of law, that Macy's alleged failure to observe the condition of the handrail guard constitutes an extraordinary, unforeseeable intervening act that absolves Mainco from liability.

As Macy's and plaintiffs have met their burden of raising issues of material fact as to whether Mainco had notice of a defective condition, Mainco's motion for summary judgment is denied.

Common Law and Contractual Indemnification

At this juncture, Mainco is not entitled to common law or contractual indemnification, as issues of material fact exist as to whether Mainco is in any way liable for Caly's injury (*see Edge Management Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], citing *Trump Vil.*

Section 3 v New York State Hous. Fin. Agency, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). "Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Edge* at 367). The record fails to demonstrate that Mainco is free from negligence for Caly's injuries.

In addition, the Contract only obligates each party to indemnify the other for its own negligence. Under the section "Indemnification," the 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 Idemnitee *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.
> (Contract, Section 24) (emphasis added)

The terms of the indemnification clause demonstrate that each party may seek indemnification from the other only when an incident clearly arises out of the acts or omissions of the indemnitor. At this juncture, the Court cannot determine whether Mainco, as indemnitee, is entitled to indemnification from Macy's, as indemnitor, because the evidence in the record does not establish that Macy's alone is at fault in Caly's accident.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of defendants Mainco Services Company, Mainco Elevator & Electrical Corp., and Mainco Elevator Co. for an order, pursuant to CPLR §3212, for summary judgment, dismissing the Complaint of plaintiffs Sandra Espinoza, as

Mother and Natural Guardian of Caly Espinoza, an Infant, and Sandra Espinoza, Individually, and all cross-claims in their entirety is denied; and it is further

ORDERED that the branch of Mainco's motion for an order compelling co-defendants Federated Department Stores, Inc. and Macy's East, Inc. to defend and indemnify Mainco is denied; and it is further

ORDERED that Mainco serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 28, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD