

**Rivera v Merrill Lynch/WFC/L Inc.**

2009 NY Slip Op 32477(U)

October 22, 2009

Supreme Court, New York County

Docket Number: 115385/05

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 115385/2005  
RIVERA, CLORINDA  
VS.  
MERRILL LYNCH  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 8/24/09  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

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

Motion sequences 003 and 004 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that defendants Fujitech America, Inc.'s and Fujitech Serge of New York's motion for summary judgment dismissing the complaint as against them is granted with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED and ADJUDGED that defendants/third-party plaintiffs Merrill Lynch/WFC/L, Inc., Merrill Lynch WFC/D Properties, Inc., Merrill Lynch & Co., Inc., Olympia & York Tower B Company, Brookfield Financial Properties, L.P., and WFP Tower B. Co., L.P.'s motion for summary judgment dismissing the complaint and all cross claims as against them is granted with costs and disbursements to said defendants/third-party plaintiffs as taxed by the Clerk of the Court; and it is further

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

ORDERED that counsel for defendants Fukitech America, Inc., shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that third-party defendant American Building Maintenance Co.'s cross motion is granted as moot; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

Dated 10/22/09

ENTER:  J.S.C.  
**HON. CAROL EDM EAD**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check If appropriate:     DO NOT POST             REFERENCE

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

-----x

CLORINDA RIVERA,

Plaintiff,

Index No.: 115385/05

-against-

DECISION AND ORDER

MERRILL LYNCH/WFC/L INC., MERRILL LYNCH  
WFC/D PROPERTIES, INC., MERRILL LYNCH  
& CO., INC., OLYMPIA & YORK TOWER B  
COMPANY, FUJITECH AMERICA, INC.,  
FUJITECH SERGE OF NEW YORK, BROOKFIELD  
FINANCIAL PROPERTIES L.P., and WFC  
TOWER B. CO. L.P.,

Defendants.

-----x

MERRILL LYNCH/WFC/L INC., MERRILL LYNCH  
WFC/D PROPERTIES, INC., MERRILL LYNCH  
& CO., INC., OLYMPIA & YORK TOWER B  
COMPANY, BROOKFIELD FINANCIAL  
PROPERTIES L.P., and WFC TOWER B  
CO. L.P.,

Third-Party Plaintiff,

-against-

AMERICAN BUILDING MAINTENANCE CO.,

Third-Party Defendant.

-----x

CAROL ROBINSON EDMEAD, J.:

**FACTUAL BACKGROUND**

Motion sequence numbers 003 and 004 are consolidated for  
disposition.

In motion sequence number 003, defendants Fujitech America,  
Inc. and Fujitech Serge of New York (together, Fujitech) move,  
pursuant to CPLR 3212, for summary judgment dismissing the

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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1418).*

complaint as against them.

In motion sequence number 004, defendants/third-party plaintiffs Merrill Lynch/WFC/L, Inc., Merrill Lynch WFC/D Properties, Inc., Merrill Lynch & Co., Inc. (collectively, Merrill Lynch), Olympia & York Tower B Company, Brookfield Financial Properties, L.P. (Brookfield), and WFP Tower B. Co., L.P., the owners and managers of the premises at which the alleged accident occurred, move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims imposed as against them.

The third-party action seeks contractual indemnification from third-party defendant American Building Maintenance Co. (ABM). ABM cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims asserted against it.

Plaintiff Clorinda Rivera (Rivera), as of the date of the accident, December 2, 2002, was employed by third-party defendant ABM to perform janitorial services at the World Financial Center (WFC), assigned to clean the American Express office building. Rivera initially testified that she was working at the American Express building on the night of the occurrence, but later indicated that she was confused and unsure as to whether she was working at the American Express building or at Merrill Lynch. Rivera EBT, at 38. Rivera is no longer employed by ABM.

According to her EBT, Rivera allegedly fell when the down escalator she was riding vibrated, causing her to fall on her right side. Rivera testified that she had ridden this escalator many times, had never noticed any problems with it, and was unaware of anyone having any problems with that escalator. EBT, at 52, 89. Rivera further stated that she was alone at the time of the accident, that she was looking forward, and that she did not hear any noises. *Id.* at 123. Rivera also said that the last time that she used the subject escalator was probably earlier in the day when she arrived for work. *Id.*, at 110.

Rivera asserts that, as a result of her fall, she sustained a traumatic brain injury, an assertion which ABM alleges, in its cross motion, is refuted by Rivera's MRI.

The escalators were installed in the building in 1986, and are serviced by Fujitech. At the time of the accident, Christopher Randazzo (Randazzo) was the onsite mechanic, whose duties included monthly maintenance and troubleshooting. Randazzo EBT, at 7. Two months prior to the accident, the steps were replaced on the subject escalator at the request of Merrill Lynch, for cosmetic purposes, and Randazzo had used the escalator himself many times, and was unaware of any complaints with regard to the subject escalator. *Id.* at 110-111. According to the Elevator Inspection/Test Report, dated September 13, 2002, all of the escalators at the premises were it satisfactory working

condition.

In her opposition, Rivera states that, according to Randazzo, the handrails on all of the other escalators in the subject building had been replaced during the six-month period immediately preceding the date of the accident. Rivera EBT, at 21-32. The day after the occurrence, December 3, 2002, a handrail chain was replaced and the handrail drive was shortened on one of the escalators, but the maintenance record fails to reflect which escalator required this work. *Id.* at 15. Rivera opines that this repair work performed on December 3, 2003, must have been on the escalator that she had been riding.

Nicole Acosta (Acosta) is employed by defendant Brookfield, the manager of the premises. Acosta, at the time of the incident, was an assistant property manager at the WFC. Acosta testified that she was unaware of any complaints concerning the escalator at issue. Acosta EBT, at 66. Acosta further stated that she had no notice of any shaking with respect to the subject escalator, and that she, herself, had ridden that escalator hundreds of times without incident. *Id.* at 90.

ABM is contracted by Merrill Lynch to perform cleaning services at the subject premises, but those services do not include any cleaning or maintenance of the escalators. *Id.* at 88. The responsibility for cleaning the escalators was contracted to Shepard Industries, a non-party to the instant

action. *Id.* at 87-89. According to Brendan Carr (Carr), a regional director of risk management for ABM, in addition to its contract with Merrill Lynch, ABM has a separate contract with American Express to provide janitorial services at the American Express building. Carr EBT, at 8-9. At the time of Rivera's accident, Rivera was allegedly performing work pursuant to ABM's contract with American Express, not pursuant to ABM's contract with Merrill Lynch. *Id.* at 23-24; Cross motion Ex. E.

### **DISCUSSION**

"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 from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). 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 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

"It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under

the existing circumstances." *Walters v Northern Trust Co. of New York*, 29 AD3d 325, 326 (1<sup>st</sup> Dept 2006). However, in order to maintain an action alleging negligence against such owners and lessees, the proponent must submit evidence that the owner or lessee had actual or constructive knowledge of the dangerous condition that caused the accident, or that the owner or lessee caused or contributed to the dangerous condition. *McKain v Metropolitan Transportation Authority*, 274 AD2d 504 (2d Dept 2000); *Birdsall v Montgomery Ward & Co.*, 109 AD2d 969 (3d Dept), *affd* 65 NY2d 913 (1985). It must be demonstrated, by admissible evidence, that the accident occurred because of the negligence of the party being charged; the fact of an accident alone is insufficient to maintain a cause of action for negligence. *Sheikh v New York City Transit Authority*, 258 AD2d 347 (1<sup>st</sup> Dept 1999).

Defendants have established *prima facie* that they had no actual or constructive notice of a defective condition on the subject escalator. They have done so by evidencing that there was no record of the escalator vibrating or shifting prior to the date of the occurrence, and that they exercised reasonable care to discover and correct any such conditions by contracting to service the escalator on a regular basis, and have a mechanic on-site five days per week. *Bazne v Port Authority of New York and New Jersey*, 61 AD3d 583 (1<sup>st</sup> Dept 2009); *Marszalkiewicz v*

*Waterside Plaza, LLC*, 35 AD3d 176 (1<sup>st</sup> Dept 2006); *Kelly v Old Navy*, 11 AD3d 345 (1<sup>st</sup> Dept 2004).

Rivera has failed to raise a triable issue of fact as to whether defendants had actual or constructive notice of any defective condition, or that they caused any dangerous condition, so as to make the escalator prone to vibrate, and testified herself that she used the escalator at issue regularly without any problem. *Tashjian v Strong & Associates*, 225 AD2d 907 (3d Dept 1996). Rivera's conclusory assertion, without any substantiation, that the repair work performed on an escalator the day after her accident must have been performed on the escalator that she had been riding, hence rendering defendants negligent in not making such repairs earlier, is insufficient to defeat a motion for summary judgment. *Parris v Port of New York Authority*, 47 AD3d 460 (1<sup>st</sup> Dept 2008). "[T]he shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment [citation omitted]." *Orange County-Poughkeepsie Limited Partnership v Bonte*, 37 AD3d 684, 687 (2d Dept 2007).

As a consequence of the foregoing, Rivera's first cause of action for negligence is dismissed.

Rivera's second cause of action is based on a theory of strict liability.

"The doctrine of strict products liability grew out of a public policy judgment that, with increasingly

sophisticated, mass-marketed technologies, consumers hurt by defective products needed greater protection than that afforded by the law of warranty."

*Bellevue South Associates v HRH Construction Corp.*, 78 NY2d 282, 290 (1991).

Distributors of defective products, as well as retailers and manufacturers of such products, may all be subject to strict products liability. However, liability may not be imposed for strict products liability upon a party that is outside the manufacturing, selling or distribution chain. *Spallholtz v Hampton C.F. Corp.*, 294 AD2d 424 (2d Dept 2002); *Joseph v Yenkin Majestic Paint Corp.*, 261 AD2d 512 (2d Dept 1999). Since none of the defendants in this action is the manufacturer, seller or distributor of the escalator, a cause of action for strict products liability may not be maintained against them.

However, although a cause of action based on strict product liability may also be maintained for injuries resulting from inherently dangerous instrumentalities, the court has been unable to discover any judicial decision that holds that an escalator is an inherently dangerous instrumentality. Further, courts have held that an escalator does not pose a reasonably foreseeable hazard (*Schurr v Port Authority of New York and New Jersey*, 307 AD2d 837 [1<sup>st</sup> Dept 2003]), which would tend to obviate Rivera's theory of strict liability. Therefore, Rivera's cause of action based on strict product liability must also be dismissed.

Based on the foregoing, Rivera's complaint is dismissed, which renders ABM's motion for summary judgment moot.

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that defendants Fujitech America, Inc.'s and Fujitech Serge of New York's motion for summary judgment dismissing the complaint as against them is granted with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

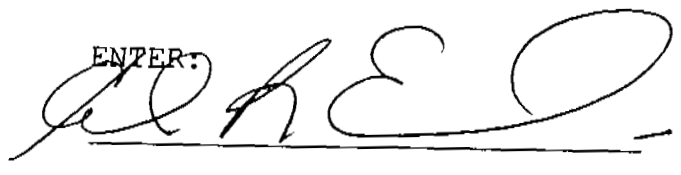
ORDERED and ADJUDGED that defendants/third-party plaintiffs Merrill Lynch/WFC/L, Inc., Merrill Lynch WFC/D Properties, Inc., Merrill Lynch & Co., Inc., Olympia & York Tower B Company, Brookfield Financial Properties, L.P., and WFP Tower B. Co., L.P.'s motion for summary judgment dismissing the complaint and all cross claims as against them is granted with costs and disbursements to said defendants/third-party plaintiffs as taxed by the Clerk of the Court; and it is further

ORDERED that counsel for defendants Fujitech America, Inc., shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that third-party defendant American Building Maintenance Co.'s cross motion is granted as moot; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: October 22, 2009

ENTER:  


Carol Robinson Edmead J.S.C.  
**HON. CAROL EDMED**

**UNFILED JUDGMENT**  
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