

Barnes v Metropolitan Transp. Auth.

2013 NY Slip Op 31531(U)

July 12, 2013

Sup Ct, New York County

Docket Number: 109485/09

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 21

Justice

Index Number : 109485/2009
BARNES, ELEISE JOY
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 109485/09
MOTION DATE 2/14/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 11 were read on this motion for summary judgment

- Notice of Motion—Affidavit of Service; Affirmation — Exhibits A-O—Affidavit No(s). 1-2; 3-4
- Affirmation in Partial Opposition —Affidavit of Service No(s). 5-6; 7-9
- Affirmation in Opposition—Affidavit—Exhibit A—Affidavit of Service _____
- Reply Affirmation —Affidavit of Service _____ No(s). 10-11

Upon the foregoing papers, this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

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

HON. MICHAEL D. STALLMAN

Dated: 7/12/13
New York, New York

[Signature], J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 21

ELEISE JOY BARNES,
Plaintiff,

INDEX NO. 109485/09

MOTION SEQ. NOS.
004, 005

-against-

DECISION AND
JUDGMENT

METROPOLITAN TRANSPORTATION AUTHORITY,
METRO-NORTH RAILROAD, MAINCO ELEVATOR
AND ELECTRICAL CORP. and THYSSENKRUPP
ELEVATOR CORPORATION, individually and as a
successor in interest to MAINCO ELEVATOR AND
ELECTRICAL CORP.,

Defendants.

METROPOLITAN TRANSPORTATION AUTHORITY,
and METRO-NORTH RAILROAD,

THIRD PARTY INDEX
NO. 590976/09

Third-Party Plaintiffs,

-against-

MAINCO ELEVATOR AND ELECTRICAL CORP., and
THYSSENKRUPP ELEVATOR CORPORATION,
individually and as a successor in interest to MAINCO
ELEVATOR AND ELECTRICAL CORP.,

Third-Party Defendants.

Hon. Michael D. Stallman, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, defendants Metropolitan Transportation Authority (MTA) and Metro-North Railroad (Metro-North) (together, MTA Defendants) move, pursuant to CPLR 3212, for: (1) summary judgment dismissing the amended complaint of plaintiff Eleise

Joy Barnes (plaintiff), as well as any and all claims asserted against the MTA Defendants, and (2) summary judgment on MTA Defendants' claims for defense and indemnity asserted against co-defendants/third-party defendants Mainco Elevator and Electrical Corp. (Mainco) and ThyssenKrupp Elevator Corporation (ThyssenKrupp), individually and as successor in interest to Mainco Elevator and Electrical Corp (together, Mainco Defendants).

In motion sequence number 005, Mainco Defendants move, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiff's amended complaint and all cross claims and counter claims against Mainco Defendants, and (2) summary judgment on Mainco Defendants' claims for indemnification and contribution against MTA Defendants.

BACKGROUND

In this action, plaintiff alleges that, on December 29, 2008, at approximately 2:40 p.m., she tripped and fell (the incident) while descending a stationary escalator leading to the dining concourse within Grand Central Terminal (Grand Central) (10/10/12 Wu affirmation, exhibit B, plaintiff's verified bill of particulars, ¶¶ 1-2).

MTA Defendants have denied knowledge or information sufficient to form a belief as to the truth of plaintiff's allegation that they own Grand Central (*id.*, exhibit F, amended complaint, ¶¶ 20, 28; exhibit G, MTA Defendants' verified answer to the amended complaint, ¶ 3).

It appears that, subsequent to the incident, Mainco merged with and into ThyssenKrupp (*see e.g.* Geraci dep tr at 8-9).

Metro-North and Mainco executed purchase order MNCRR-0000046736, dated May 21, 2008 (the Contract), pursuant to which Mainco agreed to provide ongoing preventative

maintenance and service on eleven escalators located in the building.¹ It is undisputed that the Contract applied to the escalator where plaintiff tripped and fell, escalator number 5 (the subject escalator).²

Plaintiff's Testimonies

At her statutory hearing, held on April 9, 2009, plaintiff testified, in relevant part, that she saw that the subject escalator was not moving; there were no workers around it, nor any warning signs (10/10/12 Wu affirmation, exhibit I, plaintiff's statutory hearing tr at 30-31); she started going down the subject escalator, and as she was about to go from the third to top step to the fourth, her right heel hit the edge of the third step and she fell (*id.* at 29, 35-36). When asked whether there was anything irregular about the third to top step, plaintiff stated that "it was a little steeper than the first three" (*id.* at 36-37). After the fall, plaintiff was assisted by MTA personnel, who called EMS (*id.* at 39-41, 46-47).

At her deposition, taken on February 25, 2011, plaintiff, in relevant part, testified that, on the day of the incident, after she got off the Metro North train at Grand Central, she had to use the ladies room located at the dining concourse, which was one level below the main level where she was (10/10/12 Wu affirmation, exhibit J, plaintiff dep tr at 52-54). In order to get to the dining concourse, plaintiff used the subject escalator which, at that time, was stationary (*id.* at 54-55). She was carrying a handbag and a weekender bag (*id.* at 46-47, 71-72). From the time

¹ Mainco Defendants admitted that, as of the date of the incident, the Contract was in force and effect between MTA Defendants, on one side, and Mainco Defendants, on the other (10/10/12 Wu affirmation, exhibit L, response to notice to admit).

² It appears that plaintiff had to take two separate escalators separated by a landing in order to go from the main concourse to the dining concourse (*see e.g.* Stroh dep tr at 35).

she stepped onto the subject escalator until she started falling, plaintiff was holding onto the handrails with her left hand (*id.* at 79). She described the incident as follows: “I was descending the escalator and the steps were not even[,] I started going down[,] and by the time I got to the fourth step I misstepped and started toppling over” (*id.* at 75). “I slipped. I just felt my [right] leg sliding on the step[,] and I started tumbling over” (*id.* at 83).

On the steps of the subject escalator, plaintiff did not observe any foreign substances or objects, nor anything that she perceived to be dangerous or defective (*id.* at 81, 90-91, 148). When asked what caused her to fall, plaintiff stated that “the steps were not even, [that she] underestimated the depth of the steps” (*id.* at 83, 84), and that the risers of the steps were of different dimensions (*id.* at 85).

As a result of the incident, plaintiff broke her left middle finger (*id.* at 112-113) and left hand (bill of particulars, ¶ 8).

Mainco Defendants’ Witnesses Testimonies

At their depositions, witnesses for Mainco Defendants, Anthony Kloepping (Kloepping), an escalator technician, Andrew Geraci (Geraci), an elevator mechanic, and Antony Carpentiere (Carpentiere), Geraci’s helper, testified that: (1) on the day of the incident, from 7 a.m. to 9 a.m., Geraci and Carpentiere measured one of the subject escalator’s handrails so that it could be replaced;³ (2) they shut down the subject escalator, barricaded it at the top and at the bottom with Mainco’s barricades, and took measurements; (3) at approximately 9 a.m., they finished taking

³ Mainco’s prior work ticket a/k/a time ticket, dated December 23, 2008, states that the left handrails of the subject escalator had “bad splits” and that the handrail had to be “re-spliced” (10/10/12 Weisburd affirmation, exhibit B, time ticket E461589, dated December 23, 2008; *see also* Sroh dep tr at 79-80).

measurements, removed the barricades, left the subject escalator shut down, advised the station master's office at Grand Central that the subject escalator was out of service; and (4) left the premises (10/10/12 Weisburd affirmation, exhibit L, Klopping dep tr at 42-47, 51; exhibit N, Geraci dep tr at 9, 33-37, 39-49, 51, 55, 63; exhibit O, Carpentiere dep tr at 25-34, 46; exhibit B, time tickets E369811 and E309874).

Geraci testified that he could not recall why the subject escalator was left out of service. In general, he did not need to get either verbal or written permission from anyone at Grand Central in order to leave an escalator out of service (Geraci dep tr at 49, 50, 56-57).

Klopping testified that (1) it would be his and his co-workers' decision whether and when to shut down, or to restart, an escalator; (2) it would be their determination whether an escalator was safe for the public before they turned it back on; and (3) it would be their decision whether to replace a handrail on an escalator and it did not require Metro-North's approval (Klopping dep tr at 30, 138, 141-143, 149-150). When they arrived to do work at Grand Central, Mainco employees had to check in with the station master's office/fire command, and they had to coordinate with the station master's office a date and time for anticipated repair work (*see e.g.* Klopping dep tr at 25-26, 95-96, 134-137, 141), but they did not need to get approval to perform work which was part of routine maintenance (*see e.g. id.* at 140-143).

MTA Defendants' Witness's Testimony

MTA Defendants' witness, Steven Stroh (Stroh), MTA's superintendent of electrical and mechanical maintenance at Grand Central, testified that, in December 2008, Mainco, not MTA, was responsible for maintaining all of the escalators at Grand Central (10/10/12 Weisburd affirmation, exhibit K, Stroh dep tr at 13, 17-18, 58). Under the Contract, Mainco was

responsible to provide two hours of maintenance per escalator per month, which it did on its own schedule (*id.* at 14-16). An MTA employee had to sign a work ticket generated by Mainco (*id.* at 60-61), but MTA did not perform any evaluation or investigation of Mainco's work prior to signing off on the work ticket (*id.* at 111-112).

Stroh testified that the handrail of the subject escalator had to be repaired “[b]ecause Mainco deemed it defective” as part of “normal maintenance” (*id.* at 61-62). He was not present while Mainco was replacing the handrail (*id.* at 64), but, according to him, a logbook on escalator maintenance and repair that is kept at the station master's office reveals that, on December 29, 2008, the subject escalator was shut down, and that Mainco determined that the subject escalator needed a handrail repair or replacement (*id.* at 67-70).

He further testified that, on a daily basis, the staff of the station master's office visually inspect the escalators to determine if there are any safety defects (*id.* at 58-59, 97-99). An unsafe condition on an escalator is “something that can cause an injury to a customer, maybe a piece of metal sticking out of the side of the escalator, a broken step,” something that “you could visually see” (*id.* at 48). MTA has its own stanchions to block off escalators that would be used if “there was an unsafe condition on the escalator” (*id.* at 47). If an escalator stopped working, an MTA employee would inspect it, and, if no visual defects were present, the escalator would be left unblocked, so that people could walk up or down it (*id.* at 49-52).

Affidavit of Brian Connolly

MTA Defendants provide an affidavit of Brian Connolly (Connolly), a fire safety director for Metro-North at Grand Central, who states that: he was on duty on the day of the incident, Mainco “was on the premises to measure the handrail on the escalator identified as Escalator No.

4;” “[i]n connection with the repair work, [he] was informed by Mainco that [escalators 4 and 5] would remain shut down ... until the handrails were replaced; and these two escalators remained shut down until December 30, 2008, when Mainco replaced the handrails and returned these escalators back in service (10/07/12 Connolly aff).

Connolly also provides a copy of the Fire Command Log (Log) (*id.*, exhibit A). For December 29, 2008, the Log, in relevant part, states: “06:59 Mainco contacted for status update on esc 4. The hand rail needs to be replaced and they will call back with a date for the replacement,” “07:22 Mainco here for handrail measuring and will restart any units that are turned off,” “8:15 Mainco complete with esc 4 and 5. Both units will remain down until the hand rails are fixed or replaced.” For December 30, 2008, the Log, in relevant part, states: “06:30 Mainco here to work on the escalator hand rails;” “15:56 Mainco advises, handrails replaced on Esc. #4 & #5 and back in service” (*id.*, exhibit A).

Causes of Action, Cross Claims, and Counterclaims

Plaintiff asserts a cause of action for negligence against MTA Defendants and Metro-North Defendants. Specifically, she claims that she was caused to fall, and sustain personal injuries and monetary damages, by reason of a dangerous and defective condition, as a result of defendants’ negligence in the ownership, maintenance, and repair of the subject escalator (amended complaint ¶¶ 53-54).

In their respective answers to the amended complaint, MTA Defendants and Mainco Defendants asserted cross claims for indemnification and contribution against each other.

In the third-party complaint, MTA and Metro-North asserted claims against Mainco and ThyssenKrupp for: contribution, common-law indemnification, contractual indemnification

(including a demand to assume the defense of this action), and failure to include MTA and Metro-North as additional insureds on Mainco's insurance policy. Mainco and ThyssenKrupp counterclaimed against MTA and Metro-North for indemnification and contribution.

DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]).

Defendants' Motion to Dismiss Plaintiff's Complaint

"In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury" (*Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *affd* 89 NY2d 824 [1996]).

Regardless of whether MTA Defendants are property owners or tenants of the Grand Central, they have a duty to the public to maintain the Grand Central in a reasonably safe condition (*see e.g. Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [1st Dept 2006], *affd* 8 NY3d 931 [2007]) ["a duty to maintain [a] property in a reasonably safe condition in view of all the circumstances ... applies with equal force to landowners and tenants who operate

places of public assembly”]). However, MTA Defendants’ duty arises only “when the risk of harm is reasonably foreseeable” (*Pinero v Rite Aid of N.Y.*, 294 AD2d 251, 252 [1st Dept 2002], *affd* 99 NY2d 541 [2002]). “[T]he risk of injury as a result of defendant’s conduct must not be merely possible, it must be natural or probable” (*id.*; *see also Rubsam v Alexander*, 177 AD2d 484, 484 [2d Dept 1991] [“where injuries are sustained as a result of an alleged failure to maintain property in a reasonably safe condition, liability is governed by the ‘standard of reasonable care under the circumstances whereby foreseeability shall be a measure of liability’” (quoting *Basso v Miller*, 40 NY2d 233, 241 [1976])]).

In *Adamo v National R.R. Passenger Corp* (71 AD3d 557 [1st Dept 2010]), the plaintiff “tripped and fell as she was ascending the stairs of a stopped escalator at Manhattan’s Penn Station; she attributed the accident to the uneven spacing of the escalator’s risers or steps” (*id.* at 557). The plaintiff’s “trip and fall was not caused by any defect in either the handrail or the step over which she tripped” (*id.* at 558). The plaintiff argued “that defendants’ failure to barricade the escalator violated industry safety standards and/or specific building and fire code rules and regulations, as well as LIRR internal operating rules” (*id.*). The *Adamo* court rejected this argument, stating that “none of the provisions set forth in the[] expert’s affidavit or other submitted material suggest that the mere act of walking up and down a stopped escalator is unsafe or that the uneven spacing of risers or steps near the top or bottom somehow creates a dangerous condition. The temporarily stationary stairway did not present a reasonably foreseeable hazard” (*id.*). The *Adamo* court affirmed the summary judgment in favor of the owners and the escalator maintenance company.

Similarly, in *Schurr v Port Auth. of N.Y. & N.J.* (307 AD2d 837 [1st Dept 2003]), the

plaintiff “tripped and fell while descending the stairs of a stopped escalator. She attribute[d] the loss of her footing to the uneven spacing of the stopped escalator’s risers” (*id.* at 838). The *Schurr* court noted that “[t]he spacing of the stationary escalator risers was open and obvious to any observer reasonably using his or her senses and there is thus no ground to conclude that the risers were not safely traversable in the exercise of ordinary care” (*id.* [internal quotation marks and citation omitted]). “[T]here was no showing that the escalator was defective or that its use by pedestrians while stopped violated applicable safety codes or specific code provisions” (*id.*). Hence, the *Schurr* court held that “[owner and escalator maintenance company d]efendants were under no duty to warn of or otherwise protect plaintiff from a condition that posed no reasonably foreseeable hazard” (*id.*).

Similarly, here, plaintiff testified that the only cause for her fall was that the risers of the steps of the stationary subject escalator were uneven, namely of different dimensions, that she “underestimated the depth of the steps” (plaintiff’s dep tr, at 83-85), and that the step over which she tripped/slipped “was a little steeper than the [prior] first three” (plaintiff’s statutory hearing tr at 36-37). Plaintiff does not allege, nor has she testified, that the incident was caused by a defect in the handrail.

In opposition, plaintiff offers an affidavit of Stanley H. Fein (Fein), a licensed professional engineer, who states that the use of a stationary escalator violates the Building Code of the City of New York (the Building Code), §§ 27-375 (e) (2) (*see* Fein aff, ¶¶ 11-15).⁴ This

⁴ Mainco Defendants’ argument, that the court should not consider Fein’s affidavit, because plaintiff had not disclosed Mr. Fein’s identity prior to the filing of the note of issue, is without merit (*see Downes v American Monument Co.*, 283 AD2d 256, 256 [1st Dept 2001] “[t]he motion court properly considered the affidavit of plaintiff’s expert witness in opposition to summary judgment, notwithstanding plaintiff’s failure to disclose the expert’s identity previously

section of the Building Code provides that: “[i]nterior stairs shall comply with the following requirements: ... (e) ... (2) [r]iser height and tread width shall be constant in any flight of stairs from story to story” (Administrative Code of City of NY § 27-375)

“[T]he applicability of the Building Code [is] a purely legal question for the court to determine” (*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [1st Dept 2008]). Administrative Code of City of NY § 27-232 defines interior stair as “(a) stair within a building, that serves as a required exit.” The subject escalator does not fall into the category of “interior stairs” since it did not serve as a required exit from Grand Central (*see Stroh dep tr at 20-22, 24; plaintiff dep tr at 52-55; see also Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 600 [1st Dept 2012] [a step in question, located on the second floor and “separated by a common hallway and a flight of stairs from an exit door on the first floor,” “does not fit within the definition of ‘interior stairs’”]; *Cusumano v City of New York*, 15 NY3d 319, 324 [2010] [“the stairs from where plaintiff fell did not serve as an ‘exit’ as defined by the Administrative Code, but rather as a means of walking from the first floor to the basement”]). Hence, this argument is unavailing.

Plaintiff also argues that, unlike in *Adamo* and *Schurr*, where passengers had a choice to take either a regular staircase or a motionless escalator, she did not have a choice but to use the subject escalator, and that, at the time of the accident, she may not have been cognizant of the height differential among stairs of a stationary escalator. However, these alleged differences

pursuant to CPLR 3101 (d) (1) (i), there being no showing of willfulness in or prejudice caused by the failure to disclose earlier”]).

from the facts in *Adamo* and *Schurr* do not change the fact that the only alleged defect, namely a stationary escalator, was a condition that was “in plain view, open, obvious, and readily observable by those employing the reasonable use of their senses” (*Pinero*, 294 AD2d at 252 [internal quotation marks and citation omitted]), and did not present a reasonably foreseeable hazard (*Schurr*, 307 AD2d at 838).

Hence, MTA Defendants and Mainco Defendants have met their burden that as a matter of law they had no duty to warn or protect plaintiff from this condition (*id.*; *see also Adamo*, 71 AD3d at 558). Plaintiff has failed to raise a triable issue of fact, and, therefore, plaintiff’s complaint as to all of the defendants is dismissed.

In light of this determination, all claims for contribution and common-law indemnification, that MTA Defendants and Mainco Defendants asserted against each other in the first-party action and in the third-party action, are dismissed.

MTA Defendants’ Motion for Contractual Indemnification

MTA Defendants move for summary judgment on their claims for contractual indemnification against Mainco Defendants.

“[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]; *see also Masciotta v Morse*

Diesel Intl., 303 AD2d 309, 310 [1st Dept 2003]).

MTA Defendants argue that, pursuant to the Contract, Mainco Defendants were obligated to defend and indemnify MTA Defendants. Section 19 of the Contract, in its relevant part, provides:

“In the event that installation or any other work in connection with the goods or services purchased hereunder is to be performed on Buyer’s premises, by Seller,⁵ his employees or agent, the following terms and conditions shall apply:

A. Seller, his employees or agents shall take, use, provide and make all necessary and proper precaution against the occurrence of any accident or injury to any person or property during the progress of the installation or other work herein covered *and shall be responsible for and shall indemnify and save harmless Buyer from the payment of all sums of money and costs and expenses incurred by reason of all, or any such accident or injury that may happen or occur upon or about such work, howsoever caused*, and all fines, penalties and loss incurred for or by reason of the violation of any state, county, municipal or local ordinance or regulation or the law of any state or the United States while the said work is in progress.

* * *

D. Seller agrees to comply with all rules and regulations established by Buyer including but not limited to general rules and regulations, electric regulations, smoking restrictions and safety requirements”⁶

(Contract § 19 [A, D] [emphasis added] [Indemnification Clause]).⁷

⁵ “Buyer” is Metro-North, and “Seller” is Mainco. However, Mainco Defendants admitted that, on the day of the incident, the Contract was in force and effect as between MTA Defendants and Mainco Defendants (10/10/12 Wu affirmation, exhibit L, Mainco Defendants’ response to notice to admit).

⁶ The record before the Court does not reveal the existence of any rule or regulation established by MTA Defendants that may be relevant to this action.

⁷ MTA Defendants’ argument that they are entitled to indemnification pursuant to section 11 of the Contract is meritless. Section 11 pertains only to claims and losses stemming “from

Mainco Defendants argue that the Indemnification Clause purports to indemnify MTA Defendants for their own negligent conduct and is, therefore, void and unenforceable pursuant to General Obligations Law (GOL) § 5-322.1. GOL, in relevant part, provides:

“A[n] ... agreement ... in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons ... contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable”

(GOL, § 5-322.1 [1]). “The section was enacted ... to prevent a practice prevalent in the construction industry of requiring contractors and subcontractors to assume liability by contract for the negligence of others” (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179-180 [1990]).

The Court disagrees with the Mainco Defendants’ argument. First, the Indemnification Clause pertains only to “accident or injury that may happen or occur upon or about such (i.e., Mainco’s) work, howsoever caused” (Contract, § 19 [A]). This language pertains only to Mainco’s work, and does not permit indemnification of MTA Defendants for their own negligent conduct (*cf. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795-796 [1997] [both indemnification provisions in questions provided for indemnification of promisees]).

Second, an indemnification “clause may nevertheless be enforced where the party to be indemnified is found to be free of any negligence” (*Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508, 508 [2d Dept 2005]; *see also Brown*, 76 NY2d at 180-181). As

material or design defects” (Contract, § 11 [B]), which have not been alleged in this action.

previously discussed, MTA Defendants are free of any negligence. Hence, the Indemnification Clause is enforceable.

Mainco Defendants further argue that the Indemnification Clause has not been triggered, because the incident did not “happen or occur upon or about such work,” nor “during the progress of the installation or other work herein covered,” as required by the Indemnification Clause (Contract, § 19 [A]).

The Contract provides that the scope of Mainco’s work is “to provide on going [sic] preventative maintenance and service on eleven” escalators at Grand Central (Contract at 1). Additionally, “Mainco shall provide all labor, equipment, materials and supervision necessary for escalator maintenance in” Grand Central (*id.*).⁸

It is undisputed that: Mainco was responsible for maintenance of the subject escalator; it was Mainco’s decision to replace the handrail on the subject escalator; on the day of the incident, after they finished taking measurements of the handrail of the subject escalator, Mainco employees decided to leave the subject escalator stationary; and the following day, after the handrail was replaced, Mainco employees re-started the subject escalator (*see e.g.* Geraci dep tr at 33-37, 39-51, 55-57, 63; Kloepping dep tr at 30, 138, 141-143, 149-150; Stroh dep tr at 13-18, 61-62, 67-70; Connolly aff). It is also undisputed that MTA Defendants had no contractual nor actual responsibility to oversee and control the work of Mainco’s employees at Grand Central, including the particular work of measuring and replacing the handrail of the subject escalator on

⁸ The Contract also provides that “[a]ll services shall be rendered in accordance with the terms and conditions of Mainco’s bid response dated March 20, 2008 and MNR IFB no. 46736 all of which are incorporated herein by reference” (Contract at 1). These terms and conditions are not part of the record before the court and are not mentioned by the parties in their motion papers.

the day, and the day after, the incident (*see e.g.* Stroh dep tr at 111-112; Kloepping dep tr at 141-143; Geraci dep tr at 50, 56-57).

The subject escalator was left stationary until the handrail was replaced (*see e.g.* Connolly aff; Stroh dep tr at 67-70). Mainco's work on the subject escalator was not complete until the day after the incident, when the handrail was replaced and the subject escalator was put back in service by Mainco's employee (*see e.g.* Connolly aff).

Therefore, the incident occurred "upon or about such work" and "during the progress of the installation or other work herein covered" as provided in the Indemnification Clause (Contract, § 19 [A]; *see also e.g. Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d 228, 229 [1st Dept 2002] ["[t]he site owner was properly granted summary judgment on its claim for contractual indemnification against the contractor upon a showing that in accordance with their contract, the contractor in fact provided the ladders and otherwise controlled plaintiff's work, and that the site owner at most had only a general supervisory role at the work site"]; *Cacciolo v Port Auth. of N.Y. & N.J.*, 186 AD2d 528, 530 [2d Dept 1992] [holding that, in a personal injury action, a property owner was entitled to indemnification from an elevator maintenance company, where the company was contractually obligated "to inspect, maintain, and repair all the elevators and escalators" in the subject building, and the fact that owner's "personnel may have also made periodic inspections of the elevators and notified [the company] of the results thereof does not alter that [the company] was exclusively responsible for servicing the elevators under the contract"]).

The Indemnification Clause permits indemnification without a finding of negligence by Mainco Defendants (*cf. Rivera v Urban Health Plan, Inc.*, 9 AD3d 322, 323 [1st Dept 2004]

[holding that a property owner was “entitled to summary judgment on the issue of contractual indemnification, conditioned on a finding of negligence on the part of [a general contractor]”).

The explicit and clear meaning of the Indemnification Clause – “[s]eller ... shall be responsible for and shall indemnify and save harmless Buyer from the payment of all sums of money and costs and expenses incurred” (Contract, § 19 [A]) – obligates Mainco Defendants to reimburse MTA Defendants for legal fees incurred in defending this action (*see Drzewinski*, 70 NY2d at 777; *Masciotta*, 303 AD2d at 310; *see also Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 40 AD3d 415, 417-418 [1st Dept 2007] [“[t]he term ‘indemnify means: [t]o restore the victim of a loss, in whole or in part, by payment, repair, or replacement ... [t]o make good; to compensate; to make reimbursement to one of a loss already incurred by him” (quoting Black’s Law Dictionary 769 [6th ed 1990]))]).

Mainco Defendants are not contractually obligated to assume the defense of this action, since this obligation is not “clearly implied from the language and purposes of” the Contract (*Drzewinski*, 70 NY2d at 777 [internal quotation marks and citation omitted]).

MTA Defendants have not moved on the fourth cause of action of their third-party complaint, which alleges that the Mainco was obligated to procure and provide comprehensive general liability insurance and umbrella insurance naming MTA Defendants as additional insureds, but that Mainco allegedly failed and refused to provide such coverage to MTA defendants.⁹

⁹ In light of the Court’s determination that MTA Defendants are entitled to contractual indemnification from Mainco, the parties to this third-party claim/cross claim may wish to assess whether any damages attributable to Mainco’s alleged failure to procure insurance are provable, whether it is effectively academic, and thus whether it should be pursued.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment by defendants Metropolitan Transportation Authority and Metro-North Railroad (Motion Seq. No. 004) is granted, and the motion for summary judgment by defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation is granted in part, as follows:

- (1) the complaint is severed and dismissed, with costs and disbursements to all defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk shall enter judgment in defendants' favor accordingly;
- (2) the first cross claim by defendants Metropolitan Transportation Authority and Metro-North Railroad against defendants/third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation, for common-law indemnification and contribution, is dismissed;
- (3) all cross claims and counterclaims by defendants/third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation against defendants/third-party plaintiffs Metropolitan Transportation Authority and Metro-North Railroad are dismissed;
- (4) the first and second causes of action of the third-party complaint against third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation are dismissed;
- (5) defendants/third-party plaintiffs Metropolitan Transportation Authority and Metro-North Railroad are granted partial summary judgment as to liability in their favor on their

second cross-claim and on the third cause of action of the third-party complaint, for contractual indemnification, against defendants/third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation;

(6) the second cross-claim by defendants/third-party plaintiffs Metropolitan Transportation Authority and Metro-North Railroad against defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation, and the third cause of action of the third-party complaint, for contractual indemnification, against defendants/third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation, are hereby severed and referred to a Special Referee or a Judicial Hearing Officer to hear and determine the amount of damages;

(7) counsel for defendants/third-party plaintiffs Metropolitan Transportation Authority and Metro-North Railroad shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹⁰ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date;

and the motion for summary judgment by defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation is otherwise denied; and it is further

¹⁰ Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

ORDERED that the remainder of this action shall continue as to the fourth cause of action of the third-party complaint.

Dated: July 12, 2013
New York, NY

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK