To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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EDNA DIAZ,

Plaintiff,

Index No. 57406/2011

-against-

Decision & Order
Seq. 1 & 2

THE CITY OF WHITE PLAINS and
SCHINDLER ELEVATOR CORPORATION,

Defendants.

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The following papers were read on Defendants separate motions for an order of summary judgment of dismissal:

PAPERS	**NUMBERED**
Defendant City of White Plains Notice of Motion/ Affirmation/Exhibits A-H	1-10
Defendant Schindler Elevator Corp. Notice of Motion Affirmation in Support/Exhibits A-M	11-25
Plaintiff's Affirmation in Opposition to Seq. 1/Exhibits A-D	26-30
Plaintiff's Affirmation in Opposition to Seq. 2/Exhibits A-D	31-35
Schindler Reply Affirmation	36
City of White Plains Reply Affirmation	37

On November 22, 2009, plaintiff lost her balance and fell on an escalator in the White Plains City Center Garage (the "Garage"). The City of White Plains (the "City") owns, operates and controls the escalators at the Garage and Schindler Elevator Corporation

("Schindler") has a contract with the City of White Plains to maintain and repair the escalators at the Garage. Plaintiff and her daughter were using the escalator in order to descend from the floor where plaintiff had parked her car, to the Target Department store. The escalator was stationary as it had been shut down, but was open to use by the public. Plaintiff had descended two or three steps, when she fell and rolled down to the bottom of the escalator steps.

Plaintiff commenced separate actions against each defendant on November 12, 2010 and October 19, 2011. Plaintiff moved to consolidate the actions and by Amended Short Form Order dated April 25, 2012, the actions were consolidated. The defendants answered the complaints and issue was joined.

Each defendant now moves for summary judgment of dismissal. The City argues that dismissal is appropriate, as they did not have prior notice of any hazardous condition and that plaintiff's claim does not rise to the inference that the City was negligent. Schindler argues that there is no evidence that Schindler breached its duty to properly maintain the escalator. Plaintiff opposes both motions.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement judgment as a matter of law. *Weingrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Furthermore, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). To demonstrate its entitlement to relief the moving party must come forward with evidentiary proof that establishes the absence of any material issues

of fact. *McDonald v. Mauss*, 38 AD3d 727, 728 (2nd Dept. 2007). Defendants here assert that the evidence presented rebuts Plaintiff's claims of negligence on the part of the City and Schinder, and entitles Defendants to judgment as a matter of law.

To establish a prima facie case of negligence the plaintiff must prove that the defendant either (1) created, or (2) had actual or constructive notice of the allegedly dangerous condition. *Gaeta v. City of New York*, 213 AD2d 509, 510 (2nd Dept 1995). In the instant case, plaintiff has provided no evidence that the defendant created or had notice of a dangerous condition. In fact, defendant presents evidence that during plaintiff's deposition, she testified that she was not aware of any defects in the escalator and that nothing in particular caused her to lose her balance. (Diaz Dep. 59:9-61:11, June 16, 2011).

The City and Schindler have met their burden of proof. The City offers specific evidence by way of New York case law, stating that the heights of risers on a stationary escalator do not rise to the inference that the defendants were negligent. *Morrissey v. New York City Transit* Authority, 100 A.D.3d 464 (1 Dept., 2012); *Adamo v. National Railroad Passenger Corp.*, 71 A.D.3d 557 (1 Dept., 2010) *Schurr v. Port Auth. of N.Y. & N.J.*, 307 A.D.2d 837 (1 Dept., 2003). Plaintiff did not claim that the stairs on the escalator were structurally defective, nor that there was debris on the escalator, causing her fall. She merely states that she lost her balance and fell (Diaz Dep. 59:9-61:11, June 16, 2011). There was no evidence to show that other than the fact that the escalator was stationary, there was any condition that defendants created or should have been aware of and plaintiff testified that she observed a man and his daughter at the bottom of the escalator, who had

apparently just walked down the same stationary escalator (Diaz Dep. 57:18-57:25, June 16, 2011).

Plaintiff's expert states in his affidavit that there is a large difference in risk, between ascending a stationary escalator and as in this case, descending a stationary escalator and that the defendants were negligent in not providing signs to warn people. However, New York cases are consistent in finding no negligence in both types of cases. In *Schurr* 307 A.D.3d 837, the plaintiff was descending the escalator and the Appellate Division held that there was "no evidence warranting an inference that the stopped escalator posed a reasonably foreseeable hazard." *Id.* Additionally, in *Adamo v. National R.R.Passenger Corp.,* the Court held that nothing in the expert's evidence stating that defendants' failure to barricade the escalator violated industry safety standards...suggests that "the mere act of walking up and down a stopped escalator is unsafe or that the uneven spacing of riser or steps near the top or bottom somehow creates a dangerous condition." *Adamo,* 71 A.D.3d 557 (1 Dept., 2010). Similarly, this Court finds that nothing in plaintiff's expert's affidavit infers negligence upon defendants.

Furthermore, the defendant's motion offers evidence of the general practices with respect to maintaining the garage area and reporting any problems with the escalator to Schindler. Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v. Dix McBride, LLC,* 63 A.D.3d 895, 895 [2nd Dept., 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v. Lincoln Diner Corp.*, 215 A.D.2d 546, 546 [2nd Dept., 1995]), the Court finds that there are no material issues of fact that preclude summary judgment and defendants are entitled to a summary judgment.

Accordingly, for the reasons stated herein, it is

ORDERED that the motion for summary judgment is GRANTED; and it is further

ORDERED that plaintiff's action against the City and Schindler is dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
March 11, 2014

HON. SAM D. WALKER J.S.C.