

**Muniz v H&M Hennes & Mauritz, L.P.**

2016 NY Slip Op 33165(U)

September 23, 2016

Supreme Court, Bronx County

Docket Number: Index No. 21887/2012E

Judge: Lizbeth González

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CLAUDIA MUNIZ,

Plaintiff,

DECISION and ORDER

- against -

Index No. 21887/2012E

H&M HENNES & MAURITZ, L.P.,

Defendant.

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Recitation pursuant to CPLR §2219(a) of the papers considered in reviewing the underlying motion:

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits and Affidavits.....	1
Reply Affirmation.....	1

Plaintiff Claudia Muniz claims that on 10/20/10 she sustained injuries when she fell on an escalator on premises owned by defendant H&M Hennes & Mauritz, L.P. (“H&M”) premises and located at 435 Seventh Avenue, County of New York. The defendant now moves for summary judgment, dismissing plaintiff’s complaint pursuant to CPLR 3212.

**DISCUSSION**

Since summary judgment is the equivalent of a trial, if any doubt exists as to the existence of a triable issue or where the material issue is “arguable,” summary judgment must be denied. In addition, the proof of the opposing party must be accepted as true and considered in a light most favorable to that party. (*Pirelli v Long Island R.R. Co.*, 226 AD2d 166 [1<sup>st</sup> Dept 1996].)

In support of its motion, defendant proffers an incident report, escalator repair records, photographs, deposition testimony of plaintiff, non-party Maria Evangelista and Delvy Quezada and the affidavits of Charles Mair and Jon P. Halpern.

The incident report, illustrating the date and location of plaintiff’s accident, states “customer fell on the escalator.” She complained of back and leg pain and an ambulance and police were contacted.

Defendant’s escalator repair records depict its preventive maintenance from 4/2010 through 10/2010 including a “clean down”<sup>1</sup> between on 10/4/10 and 10/7/10. The records reflect that routine escalator maintenance and inspections were done, the necessary repairs were made

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<sup>1</sup>Mr. Halpern explains “a clean down includes the removal and cleaning of all steps and examination for any loose or damaged components.”

and there was no indication of any faulty condition during those periods.

Plaintiff Muniz states in her 9/25/13 deposition transcript that as she stepped onto the escalator to go upward to the next level, her shoe became stuck on a sticky substance causing her to fall, dragging her face up on the escalator causing her foot to come out of her sneaker. Her testimony is that she was knocked down onto the escalator and her sneaker “stayed stuck;” she could not get it to move. There was also a piece of rubber attached to the step of the escalator that was part of the step’s construction. Ms. Muniz contends that she was wearing white sneakers and laces were tied up at the time of the accident.

Maria Evangelista, plaintiff’s daughter, testified on 2/20/14 that she was on the escalator with her daughter and plaintiff going from the basement to the main floor. She was a few steps behind her mother on the escalator but did not see what caused her to fall. Ms. Evangelista stated that she came back to the store “some months, maybe years” later to take pictures of the subject escalator and realized that the escalator was “new.”<sup>2</sup> The defendant proffers these photographs.

Mr. Quezada, H&M store manager, stated during his deposition that plaintiff told him that she fell as soon as she stepped on the escalator. When he asked Ms. Muniz what caused her to fall, plaintiff said that she tripped. When Mr. Quezada asked her how she tripped, plaintiff responded that she fell from her feet as she was going up. Mr. Quezada also testified that the escalators is inspected three times per day at 8:00 a.m., 12 noon and 3:00 p.m. During these inspections, the escalator is turned off for thirty minutes to ensure that it is running properly and to clean refuse on the steps. Mr. Quezada contends that if plaintiff fell at approximately 12:30 p.m, then the escalator would have been inspected less than a half hour before plaintiff fell.

H&M’s Risk Manager, Mr. Maier, states in his affidavit dated 9/16/15 that he is familiar with the escalators at the subject premises on the date of the accident and reviewed the H&M incident report and the escalator maintenance and repair records disclosed in connection with this action. He asserts that on 10/20/10 there was only one escalator that moved in an upward direction from the basement to the first floor and that the replacement of the escalators in March 2011 during a remodeling project had nothing to do with this proceeding.

Mr. Halpern, defendant’s professional engineer, asserts in his affidavit dated 9/14/15 that the Schindler 9300 escalator could be purchased with either silver cast or black anodized aluminum steps and with or without yellow demarcations. Mr. Halpern contends the

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<sup>2</sup>“Ms. Evangelista stated at deposition: On the date that these photographs were taken, all of the escalators at the subject premises were different from the escalators present in October 2010. Specifically, all of the escalators were replaced in March 2011 in connection with a remodeling project at the store.”

demarcations are made from aluminum, not rubber; the escalator was maintained on a regular and systematic basis; the escalator was inspected in accordance with the NYC Building Code; the escalator steps were cleaned by H&M on a daily basis and also inspected for safe operation, cleanliness and debris every day prior to the store opening; and H&M had no notice of any prior problems with the escalator. After the incident, the escalator continued to operate normally and no repairs or adjustments were made to the escalator. The incident was not caused by any failure to maintain or inspect the escalator and the accident could not have occurred in the manner described by the plaintiff because the escalator had no rubber strips affixed to the front of the steps and no components of the steps are affixed by glue or any other sticky substance.

In opposition to defendant's motion, plaintiff proffers her own affidavit and the affidavits of her daughter, Maria Evangelista, and Patrick A. Carrajat.

Both Ms. Muniz and Ms. Evangelista reiterate their deposition testimony in their respective affidavits.

Mr. Carrajat, plaintiff's elevator and escalator consultant, asserts in his affidavit dated 1/7/16 that the subject escalator failed periodic inspections; no inspections are recorded for 2006 through 2008; the escalator was found to be unsatisfactory as a result of the annual local law 10/81 safety inspections in 2007, 2008, 2009 and 8/26/10; the entrapment of plaintiff's foot occurred between the moving step and the stationary adjacent skirt panel, an accident that would not have occurred if the escalator was properly maintained. Significantly, Mr. Carrajat asserts that the claim of defendant's engineer that the escalator had aluminum inserts is incorrect and that Mr. Halpern is mistaken regarding the process of an escalator clean down. Mr. Carrajat maintains that he has performed many clean downs and the normal procedure involves removing one-half of the steps and the balustrade panels and cleaning the interior of the escalator. It does not include cleaning of the escalator steps as stated by defendant's expert, Mr. Halpern. Moreover, Mr. Carrajat declares that in reviewing the records of the New York City Department of Buildings, Elevator Division, it was never notified of the accident as required by the Administrative Code of the City of New York §[C26-1804.2] 27-1006 and that the failure of defendant to notify the building department deprived the plaintiff of an impartial inspection of the escalator by a neutral examiner.

### CONCLUSION

Defendant H&M moves for summary judgment. When deciding a motion for summary judgment, the Court's function is issue finding rather than issue determination. (*Sanchez v National Railroad Passenger Corp.*, 92 AD23d 600 [1<sup>st</sup> Dept 2012].)

It is the jury's function to assess conflicting evidence and determine the credibility of the witnesses and the weight to be accorded expert testimony. Moreover, the issue of proximate

cause is a matter to be decided by the jury. (*Windisch v Weiman*, 161 AD2d 433 [1<sup>st</sup> Dept 1990].)

Here, the parties' respective experts have conflicting opinions regarding the escalator. Resolving issues of fact is exclusively within the province of the fact finder. Thus, where there appears to be a dispute as to an issue of material fact, summary judgment is not granted and a plenary trial is ordered. (*Kapchan v 31 Mt. Hope, LLC*, 975 NYS2d 44 [1<sup>st</sup> Dept 2013].) The defendant's motion is accordingly denied.

A copy of this Decision and Order with Notice of Entry shall be served within 30 days.

This is the Decision and Order of the Court.

Dated: September 23, 2016

So ordered,



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Hon. Lizbeth González, JSC