Narainasami v City of New York
2018 NY Slip Op 32164(U)
August 21, 2018
Supreme Court, Queens County
Docket Number: 15788/09
Judge: Darrell L. Gavrin

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

AMBEEKA NARAINASAMI, as administratrix of the Estate of ANTONIO NARAINASAMI, Deceased and AMBEEKA RARAINASAMI, Individually,	Index No. 15788/09
Plaintiffs,	Motion Date January 10, 2018
- against-	Motion Cal. No. 127, 128, 194 & 129
CITY OF NEW YORK, QUEENS BALLPARK COMPANY, L.L.C., STERLING METS, L.P., STERLING METS, L.P. d/b/a NEW YORK METS, STERLING EQUITIES LLC, BRINK ELEVATOR CORP., HERK ELEVATOR CO., INC., BRING ELEVATOR CORP d/b/a HERK ELEVATOR CO., INC. and OTIS ELEVATOR COMPANY,	Motion Seq. No. 13, 14, 15 & 16
Defendants.	
CITY OF NEW YORK, QUEENS BALLPARK COMPANY, L.L.C., STERLING METS, L.P. and STERLING EQUITIES, L.L.C.,	
Third-Party Plaintiffs,	
- against -	
ARAMARK SPORTS AND ENTERTAINMENT GROUP, LLC,	
Third-Party Defendant.	

The following papers numbered 1 to 82 read on these separate motions by third-party defendant, Aramark Sports and Entertainment Services, LLC, improperly pled herein as Aramark Sports and Entertainment Group, LLC (Aramark), pursuant to CPLR 3212, for summary judgment in its favor dismissing the third-party complaint of defendants/third-party plaintiffs, City of New York, Queens Ballpark Company, L.L.C., Sterling Mets, L.P. and Sterling Equities, LLC, the cross claims of defendants, Brink Elevator Corp., Herk Elevator Co., Inc. and Brink Elevator Corp. d/b/a Herk Elevator Co., Inc. (collectively the Brink defendants), against it and the cross claims of defendant, Otis Elevator Company (Otis), against it; by the Brink defendants, pursuant

to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against them; by defendant, Otis, for summary judgment in its favor, pursuant to CPLR 3212, dismissing and severing plaintiff's complaint in all respects, and dismissing and severing all cross claims made against it inasmuch as there are no questions of law or fact in this matter, or, alternatively, pursuant to CPLR 3212 (e) and (g), to dismiss and sever plaintiff's claim for punitive damages; and by defendants/third party plaintiffs, The City of New York (City), Queens Ballpark Company, L.L.C. (QBC), Sterling Mets, L.P., I/s/h/a Sterling Mets, L.P. d/b/a New York Mets (Sterling Mets) and Sterling Equities, L.L.C. i/s/h/a Sterling Equities, LLC (Equities), pursuant to CPLR 3212, for summary judgment in their favor dismissing all claims and cross claims against them; for summary judgment dismissing all claims and cross claims against defendants/third-party plaintiffs, QBC and Equities; pursuant to CPLR 3212 and General Municipal Law §50-e, for summary judgment in defendant/third-party plaintiff, City's favor dismissing all claims against defendant/third-party plaintiff, City, which plaintiff failed to allege in her notice of claim in violation of the condition precedent to filing suit against the City; and for summary judgment in defendant/third-party plaintiff, City's favor on its cross claims (including but not limited to contractual indemnification) against the Brink defendants.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-37
Affirmation in Opposition - Exhibits.....	38-65
Reply Affirmation.....	66-82

Upon the foregoing papers, it is ordered that the motions are consolidated and determined as follows:

This action arose from an accident that occurred on April 15, 2008, at Shea Stadium in Flushing, New York. Plaintiff, Ambeeka Narainasami, individually and as administratrix of the estate of her deceased husband, Antonio Narainasami (the decedent), alleges that while the decedent was descending a stationary escalator, which connected the upper deck to the mezzanine level of the stadium, the escalator suddenly jolted, causing him to fall over the right-side handrail, to the bottom of another escalator two levels below, and to sustain fatal injuries.

Defendant/third-party plaintiff, City, was the owner of the now demolished Shea Stadium, which was built in the early 1960's and home of the Mets through the end of the 2008 baseball season. Defendant/third-party plaintiff, City, leased the stadium to defendant/third-party plaintiff, Sterling Mets, and its predecessors in interest through a series of lease agreements. The operative version of the lease at the time of the subject accident was the Restated Agreement, dated January 1, 1985, as amended, including the Eleventh Amendment of Lease. Defendants/third-party plaintiffs, QBC and Equities, are entities affiliated with defendant/third-party plaintiff, Sterling Mets.

Pursuant to the terms of the subject lease, defendant/third-party plaintiff, City, was responsible for the structural and design elements of the property, including the escalators. When the stadium was originally constructed, the escalators were manufactured and installed by defendant, Otis, pursuant to an agreement with defendant/third-party plaintiff, City. Defendant/third-party plaintiff, City, thereafter entered into a contract with the Brink defendants to be the exclusive inspection, maintenance and repair contractor for the escalators and elevators at the stadium. Third-party defendant, Aramark, was the souvenir, food and beverage concessionaire at the stadium pursuant to a concession agreement with defendant/third-party plaintiff, Sterling Mets.

It is undisputed that the decedent and seven other immediate and extended family members, including his two minor daughters, attended the Mets game on the subject date, sat in the upper level and left in the eighth inning, prior to the game ending. Two of their party, Sean Soman and Fidel Nagamuthu, left the stadium via a series of exit ramps from the upper level down to the ground level, and the others stopped to use the rest rooms before walking down a nearby stationary escalator. The decedent led the way onto the escalator, followed by his cousin, Ravin Prashad, then Ravin's brother, Kevin Prashad, then his uncle, Paul Yenkiah, along with Paul's daughter and the decedent's daughters.

Ravin Prashad testified as follows:

> After stopping on the way down to light cigarettes for the decedent and himself, he continued walking down the escalator behind the decedent and was about halfway down when he turned to look at the game playing on a television monitor over his left shoulder. While watching that television monitor, he felt the escalator jerk a little, and heard the decedent say "no." He looked back to his right in the direction of the decedent, where he saw only the decedent's hands holding onto the handrail of the escalator for about three seconds before letting go. He described the escalator jerk as a little jolt, like a gentle nudge, which caused his body to move just a little, and stated that he did not lose his balance, fall or grab onto either of the handrails as a result of that jolt. After the decedent fell, he and his brother Kevin, who was behind him, immediately ran down the escalators two levels and found the decedent, who moaned for about two to three minutes before becoming silent.

According to the testimony of Kevin Prashad, while walking down the escalator, he saw the decedent, who was walking ahead, first look to his left and then back to his right, but as the decedent did so, Kevin looked away for a second and when he looked back, he saw the decedent's legs as he was going over the escalator handrail.

Paul Yenkiah testified that when the decedent got on the escalator, he was still waiting for his daughter and the decedent's daughters to exit the restroom. He also testified that when the girls came out two or three minutes later, the four of them headed to the escalator where they heard screams, and when he looked down, he saw that the decedent had fallen.

According to a police report, the decedent's fall occurred at approximately 9:55 P.M., and according to the ambulance report, the emergency medical technicians and paramedics arrived at about 10:10 P.M. Upon arrival, they found the decedent at the bottom of an escalator in traumatic cardiac arrest, unconscious and without vital signs. They administered CPR and oxygen on site before placing him in the ambulance for transport to New York Hospital/Booth Memorial. They arrived at the hospital at 10:21 P.M., and he was pronounced dead at 10:28 P.M. The Forensic Toxicology Laboratory Report indicates that the decedent had a blood alcohol content (BAC) of 0.16%.

Detective Hector Rivera testified regarding his police report of the subject accident and statement therein that upon interviewing Paul Yenkiah at the hospital, Paul Yenkiah told him that he saw the decedent jump on the railing and fall to the next level. Police Officer Michael Ciota testified about his police report of the subject accident and statement therein that upon interview, Ravin Prashad told him that at the time of the accident, the decedent was sliding down the handrail and fell off the side. At their examinations before trial, both Paul Yenkiah and Ravin Prashad denied making these statements.

According to the testimony of defendant/third-party plaintiff, Sterling Mets' witnesses, which included security personnel working on the subject night, it was Sterling Mets' policy to turn off the escalators in the seventh inning of a game and to barricade them so that the patrons exited the stadium using the ramps; the purpose of this policy was for an orderly and efficient exit of the stadium by its patrons; there were exit signs on those ramps; announcements would be made directing patrons to exit using the ramps; the subject escalator was shut down and barricaded in the seventh inning that night; they did not witness the decedent's fall, but upon being informed of it, emergency services were called; some went to the site and saw the barricade at the top of the subject escalator was open about a foot wide; members of the decedent's family told security personnel that the decedent fell while sliding down the escalator handrail.

Plaintiff commenced this action against the City, QBC, Sterling Mets, Equities, Brink and Otis, alleging claims of negligence, personal injury and wrongful death relating to the security, maintenance, design, manufacture, inspection and repair of the escalators at the stadium, as well as, additional claims of strict products liability and breach of warranty as to defendant, Otis and the Brink defendants. Defendants/third-party plaintiffs, City, QBC Sterling Mets and Equities, commenced a third-party action against third-party defendant, Aramark, asserting claims of contribution, common-law and contractual indemnification and failure to procure insurance.

Defendant, Otis, defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, the Brink defendants and third-party defendant, Aramark, now separately move for summary judgment.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the

absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), or credibility assessment. (*See Ferrante v American Lung Association*, 90 NY2d 623 [1997].) Once the requisite showing has been made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003].)

Defendant, Otis, seeks summary judgment dismissing plaintiff's complaint which contains negligence and strict products liability claims based on defendant Otis's alleged defective design, defective manufacture and defective installation of the subject escalator, and all cross claims against it.

Manufacturers may be held strictly liable for injuries caused by their products "because of a mistake in the manufacturing process, because of defective design or because of inadequate warnings regarding use of the product." (*Sprung v MTR Ravensburg*, 99 NY2d 468, 472 [2003]; *see Liriano v Hobart Corp.*, 92 NY2d 232 [1998]; *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102 [1983].)

"'[A] defectively designed product is one which, at the time it leaves the sellers hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use'" and "'whose utility does not outweigh the danger inherent in its introduction into the stream of commerce'." (*Hoover v New Holland North America, Inc.*, 23 NY3d 41, 53-54 [2014], quoting *Voss v Black & Decker Mfg. Co.*, 59 NY2d at 107; *see Gorbatov v Matfer Group*, 136 AD3d 745 [2016].)

In a products liability case, "if a defendant comes forward with any evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect" in order to defeat the motion. (*Schneidman v Whitaker Co.*, 304 AD2d 642, 643 [2003] [internal quotation marks omitted]; *see Galletta v Snapple Beverage Corp.*, 17 AD3d 530 [2005]; *Sideris v Simon A. Rented Servs.*, 254 AD2d 408 [1998].) In order "[to] establish a *prima facie* case in strict products liability for design defects, a plaintiff must show that the manufacturer marketed a product that was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury." (*Guzzi v City of New* York, 84 AD3d 871, 872-873 [2011].) The standard for determining when a product is not reasonably safe for its intended use requires an assessment of whether, "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." (*Voss v Black & Decker Mfg. Co.,* 59 NY2d at 108.)

In this case, defendant, Otis, met its initial burden of establishing its entitlement to summary judgment as a matter of law. Defendant, Otis, demonstrated through competent proof, including its examination before trial testimony and expert evidence, that defendant, Otis, did not breach any duty to the decedent; that the escalator was not unreasonably dangerous for its intended use or otherwise defectively designed (*see Moseley v Philip Howard Apts. Tenants Corp.*, 134 AD3d 785 [2015]); that the escalator was properly manufactured and installed, and was not defective when it left defendant, Otis's hands more than 40 years before the subject accident; that the escalator complied with all applicable and relevant codes and industry standards, that is, the ASME A17.1 Code and the NYC Building Code, in effect at the time of manufacture and installation, as well as, at the time of the subject accident; that defendant, Otis, had no involvement in servicing or maintaining the escalator for more than twenty years before the date of the accident; that the Brink defendants were responsible for servicing and maintaining the escalator at the time of the subject accident; that the subject escalator underwent periodic New York City inspections from the time of installation; that the escalator passed its annual Department of Buildings (DOB) inspection one month prior to the date of the subject accident and also was deemed code compliant by a DOB inspector the day after the accident. Thus, the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact as to defendant, Otis's liability.

Plaintiff, in opposition, has failed to meet this burden. Plaintiff's claim that a triable issue of fact exists as to whether the subject escalator was defectively designed by defendant, Otis, is without merit. Although plaintiff contends that defendant, Otis, failed to install a protective barrier above or to the side of the escalator handrail, the escalator was not for that reason defectively designed. There was no law, code, rule, or regulation in effect at the time of design, manufacture or installation of the escalator in the 1960's or even at the time of the subject accident in 2008, mandating that protective barriers be installed above or to the side of escalator handrails. (*See Geddes v Crown Equipment Corp.*, 273 AD2d 904 [2000].) While plaintiff also claims that the subject escalator was defectively designed because of an insufficient handrail height, there were no minimum handrail height requirements in either the ASME A17.1 Code or the NYC Building Code in effect at the time of the escalator's design, manufacture and installation, or at the time of the subject accident. The year 2000 edition of the ASME A17.1 Code was the first code to specify minimum height requirements for escalator handrails. Moreover, defendant, Otis's experts showed that the subject escalator would have met this 2000 ASME A17.1 Code requirement of a minimum handrail height of 35 inches. Plaintiff contends that the subject escalator also was in violation of other sections of the NYC Building Code. The sections on which she relies, however, pertain to stairways and other openings, and are inapplicable to escalators. While plaintiff further contends that the subject escalator was too steep, the escalator's 30 degree angle of inclination met the applicable ASME A17.1 Code and the NYC Building Code in effect at the time. Plaintiff's remaining claims that triable issues exist concerning the existence of manufacturing defects in the subject escalator and whether the escalator was improperly or defectively installed by defendant, Otis are also without merit.

Accordingly, defendant, Otis's motion for summary judgment is granted and plaintiff's complaint and all cross claims against defendant, Otis, are dismissed.

Defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, presented competent evidence, including affidavits of QBC's vice president of ballpark operations and Equities' general counsel, demonstrating that defendants/third-party plaintiffs, QBC and Equities, are entitled to summary judgment since they established, as a matter of law, that they did not own, occupy, possess, control, or put to a special use the subject property and that they did not have any right or obligation to maintain that property or the subject escalator. (*See Morgan v Chong Kwan Jun*, 30 AD3d 386 [2006]; *see also Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619 [2005]; *DePompo v Waldbaums Supermarket, Inc.*, 291 AD2d 528 [2002].)

Plaintiffs, defendant, Otis, the Brink defendants and third-party defendant, Aramark, in opposition, failed to present competent evidence raising a triable issue of fact.

Accordingly, the branch of the motion of defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, seeking summary judgment in favor of defendants/third-party plaintiffs, QBC and Equities, is granted and plaintiff's complaint and all cross claims against defendants/third-party plaintiffs, QBC and Equities, are dismissed.

Defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, also seek summary judgment in favor of owner, defendant/third-party plaintiff, City, and tenant, defendant/third-party plaintiff, Sterling Mets.

In order to establish that a building owner or tenant is liable for an escalator-related injury, a plaintiff must establish that there was a defect in the escalator and that the building owner or tenant had actual or constructive notice of the defect. (*See Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864 [2011]; *see also Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2010]) Where the owner or tenant hires an escalator maintenance company to maintain the escalator, liability can be found against the owner or tenant if they received notice of a defect and failed to notify the escalator maintenance company about it. (*See id.*)

Defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, presented competent evidence, including the parties' examinations before trial testimony and expert affidavits, demonstrating the entitlement of defendants/third-party plaintiffs, City and Sterling Mets, to summary judgment as a matter of law. This evidence showed that the escalator was functioning properly before and after the subject incident; that the escalator was in compliance with the applicable codes and regulations; that the escalator was regularly maintained by the Brink defendants; that no problems were indicated in the maintenance records; that there were no prior complaints about the subject escalator jerking; that the escalator was duly inspected prior to and after the subject accident and passed both of these inspections (*see Tashjian v Strong & Assocs.*, 225 AD2d 907 [1996]); that warning signs were posted on the escalator including to face forward, to hold the handrails and to avoid the sides; that announcements were

made advising patrons to use the pedestrian ramps to exit the stadium; that these ramps were marked as exits; that the subject escalator was stopped and barricaded in the seventh inning, and that even if the barricade had been moved, the stopped escalator, itself, did not constitute a dangerous condition (*see Adamo v National R.R. Passenger Corp.*, 71 AD3d 557 [2010]; *see also Schurr v Port Auth. of N.Y. & N.J.*, 307 AD2d 837 [2003]); that the accident could not have happened as plaintiff alleges, that is, the "little jerk" of the escalator, as described by witness Ravin Prashad, could not have caused the decedent to move up and over the right side of the escalator as alleged (*see Torres-Martinez v Macy's, Inc.*, 146 AD3d 638 [2017]; *see also Forde v Vornado Realty Trust*, 89 AD3d 678 [2011]; and that they did not create or have actual or constructive notice of this alleged hazardous condition of the subject escalator jerking or jolting while stopped.

Since defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, demonstrated the *prima facie* entitlement of defendants/third-party plaintiffs, City and Sterling Mets, to summary judgment as a matter of law (*see Parris v Port of New York Auth.*, 47 AD3d 460 [2008]), the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact to defeat summary judgment.

Plaintiff has failed to meet this burden. In opposition, plaintiff contends that an issue of fact exists as to whether defendants/third-party plaintiffs, City and Sterling Mets, created the alleged defective condition. In support thereof, plaintiff relies on her expert who opines that the escalator could have jerked due to the improper torquing of the escalator brake by the City's escalator maintenance/repair contractor, the Brink defendants. This expert affidavit, however, is not probative since it is not based upon any competent evidence of the brake's setting at the time of the accident, and instead is based on speculation and conjecture. (*See Bazne v Port Auth. of N.Y. & N.J.*, 61 AD3d 583 [2009].) It is also undisputed that the subject escalator had been regularly maintained and inspected, and that the inspections, including the one the month before and the one the day after the subject accident, both of which the escalator passed, would have included measurement of brake torque. Plaintiff's expert also opines that the escalator jerk may have been caused by the decedent and his family members walking on the escalator. That opinion is also speculative in light of the escalator's 13,000 lb. capacity. Plaintiff's expert further opines that there is risk in descending a stationary escalator and that defendants/third-party plaintiffs, City and Sterling Mets, were negligent in not providing signs to warn people and preventing such use. New York case law, however, is consistent in holding that an escalator that is temporarily stopped, alone, is not, as a matter of law, a dangerous condition or a reasonably foreseeable hazard.

To the extent that plaintiff contends that triable issues of fact exist as to whether defendants/third-party plaintiffs, City and Sterling Mets, had any actual or constructive notice of the escalator jerking or jolting, such contention is unsupported and without merit. Moreover, plaintiff has failed to rebut movants' showing that the subject accident could not have occurred from a "little" jerk or jolt, as alleged. (*See Lopez v Retail Prop. Trust & Kone, Inc.*, 35 Misc. 3d 1234 [A] [2012].) In addition, contrary to plaintiff's assertion, the Noseworthy doctrine (*see Noseworthy v City of New York*, 298 NY 76 [1948]) does not apply to this case, since the

defendants' and third-party defendant's knowledge as to the cause of the decedent's accident is no greater than that of plaintiff. (*See Gagliardi v State of New York*, 148 AD3d 868 [2017]; *see also Knudsen v Mamaroneck Post No. 90, Dept. of N.Y.-Am. Legion, Inc.*, 94 AD3d 1058 [2012]; *Yefet v Shalmoni*, 81 AD3d 637 [2011].)

Plaintiff further claims that defendant/third-party plaintiff, Sterling Mets' failure to enforce its policy of barricading escalators in the seventh inning so that patrons leave the stadium via the ramps constitutes independent evidence of negligence. The "[v]iolation of a company's internal rules, however, is not negligence in and of itself" (*Sherman v Robinson*, 80 NY2d 483, 489 n 3 [1992]), and where, as here, an internal policy exceeds the standard of reasonable care, that policy cannot serve as a basis for imposing liability. (*See Gilson v Metropolitan Opera*, 5 NY3d 574 [2005].)

Accordingly, the branch of the motion of defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, seeking summary judgment in favor of defendants/third-party plaintiffs, City and Sterling Mets, is also granted and plaintiff's complaint and all cross claims against defendants/third-party plaintiffs, City and Sterling Mets, are dismissed.

Defendant, City's escalator/elevator maintenance contractors for the subject premises, the Brink defendants, also seek summary judgment.

"[A]n [escalator] company which agrees to maintain an [escalator] in safe operating condition 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 [citations omitted]." (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *see Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2017]; *Little v Kone, Inc.*, 139 AD3d 678 [2016].)

The Brink defendants established their *prima facie* entitlement to judgment as a matter of law by demonstrating through competent evidence, including their examination before trial testimony and expert affidavits, that the subject escalator was regularly inspected and maintained; that they did not have actual or constructive notice of a prior similar incident or an ongoing condition that would have caused the stopped escalator to jerk or jolt while passengers were walking on it (*see Ramjohn v Port Auth. of N.Y. & N.J.*, 151 AD3d 1090 [2017]; *see also Vilardi v Jones Lang LaSalle, Inc.*, 145 AD3d 711 [2016]; that they did not create or have actual or constructive notice of the escalator jerking or jolting while stopped; and that a "little jerk" of the escalator, as described by witness, Ravin Prashad, could not have caused the decedent to fall over the handrail. Thus, the burden shifts to the parties opposing the motion to raise a triable issue of fact.

Plaintiff and defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, have failed to meet this burden. Although defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, in opposition, claim that the Brink defendants are not entitled to summary judgment because if there was a defect in the escalator, the Brink defendants would be

responsible therefor, defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, did not demonstrate the existence of any defect which allegedly caused the escalator to jerk or jolt, or that the Brink defendants created or had actual or constructive notice thereof. Plaintiff, in her opposition, contends that a triable issue of fact exists as to whether the Brink defendants created the alleged defective condition of the sudden escalator jerk through their improper torquing of the escalator brake. In support thereof, plaintiff relies on her expert's opinion. As noted, the affidavit of plaintiff's expert is not probative since it is not based upon any competent evidence of the brake's setting at the time of the accident, and instead is based on speculation and conjecture. In addition, it is undisputed that the escalator was regularly inspected and had passed the inspections held one month before and the day after the subject accident. Plaintiff further failed to rebut the Brink defendants' showing that the subject accident could not have occurred from a "little jerk," of the escalator, as alleged. (*See Lopez v Retail Prop. Trust & Kone, Inc.*, 35 Misc. 3d 1234 [A] [2012].)

Accordingly, the Brink defendants' motion for summary judgment is granted and plaintiff's complaint and all cross claims against the Brink defendants are dismissed.

Finally, third-party defendant, Aramark, moves for summary judgment dismissing the third-party complaint, which asserts claims for contribution and indemnification based on violation of the Dram Shop Act, and failure to procure insurance, as well as, all related cross claims against it. In order to establish a cause of action under the Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages. (*See* General Obligations Law § 11-101 [1]; *see also* Alcoholic Beverage Control Law § 65 [2]; *Pinilla v City of New York*, 136 AD3d 774 [2016]; *Dugan v Olson*, 74 AD3d 1131 [2010].)

To meet its burden on the motion for summary judgment, third-party defendant, Aramark, has the initial burden of negating the possibility that it served alcohol to a visibly intoxicated person. (*See Cohen v Bread & Butter Entertainment LLC*, 73 AD3d 600 [2010]; *see also Darwish v City of New York*, 287 AD2d 407 [2001]; *Kelly v Fleet Bank*, 271 AD2d 654 [2000].) Once this burden is met, the burden shifts to the opposing parties to adduce evidence that third-party defendant, Aramark served alcohol to the decedent despite visible signs of intoxication.

Third-party defendant, Aramark, here, met its initial burden by submitting the testimony of the decedent's family members who were with him at the stadium on the subject evening. The testimony of these nonparty witnesses indicates that the decedent consumed three to four beers in their presence while at the game. None testified that the decedent himself purchased beer directly from any of third-party defendant, Aramark's concession stands at the stadium. All testified that no one from their party purchased beer from third-party defendant, Aramark's roving beer vendors. They also testified that the decedent was not intoxicated and did not appear intoxicated while at the stadium on the subject date. Since third-party defendant, Aramark, met its burden by establishing, *prima facie*, that it did not sell alcohol to a visibly

intoxicated person and that there was no causal connection between its sale of alcohol at the game and the decedent's fall from the escalator, the burden shifts to the opposing parties to raise a triable issue of fact.

Defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, defendant Otis, and the Brink defendants, in opposition, have failed to meet this burden. Initially, contrary to their contention, this court properly considered affidavits submitted by third-party defendant, Aramark, in support of its motion, which were subscribed and sworn to out of state, but not accompanied by a certificate of conformity as required by CPLR 2309(c), because such a defect is not fatal and no substantial right of defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, defendant, Otis, or the Brink defendants was prejudiced by disregarding it. (*See Seiden v Sonstein*, 127 AD3d 1158 [2015]; *see also Todd v Green*, 122 AD3d 831 [2014]; *Matos v Salem Truck Leasing*, 105 AD3d 916 [2013].) Next, defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, defendant Otis, and the Brink defendants contend that an issue of fact exists as to whether the decedent exhibited signs of visible intoxication while he was present at the stadium which should have alerted third-party defendant, Aramark's employees to his intoxication. In support thereof, they rely on an expert affidavit pointing to the decedent's high blood alcohol content. "[P]roof of a high blood alcohol content does not, without more, provide a sound basis for drawing inferences about a person's appearance or demeanor." (*Sullivan v Mulinos of Westchester, Inc.,* 73 AD3d 1018, 1020 [2010]; *see Romano v Stanley*, 90 NY2d 444 [1997].)

Third-party defendant, Aramark, also established that it obtained the required insurance coverage as per the terms of its concession agreement with defendant/third-party plaintiff, Sterling Mets.

Defendants/third-party plaintiffs, City, QBC, Sterling Mets and Equities, in their opposition, failed to raise a triable question of fact on the third-party claim of failure to procure insurance.

In light of the foregoing, third-party defendant, Aramark's motion for summary judgment is granted and the third-party complaint and all cross claims against third-party defendant, Aramark, are dismissed.

Dated: August 21, 2018

DARRELL L. GAVRIN, J.S.C.