

<b>Jackson v AMC Entertainment Inc.</b>
2021 NY Slip Op 31212(U)
March 12, 2021
Supreme Court, New York County
Docket Number: 156025/2016
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32**  
*Acting Justice*

-----X  
TASHAUNA JACKSON, INDEX NO. 156025/2016  
Plaintiff, MOTION DATE N/A  
MOTION SEQ. NO. 005, 006

- v -

AMC ENTERTAINMENT INC, SLG 315 WEST, LLC, SL  
GREEN REALTY CORP, STONEHENGE MANAGEMENT, **DECISION + ORDER ON**  
LLC, EXCEL ELEVATOR & ESCALATOR CORP. **MOTION**  
Defendants.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90,  
91, 92, 93, 94, 95, 96, 97, 98, 100, 110, 113, 116, 119, 120  
were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 77, 78, 79, 80, 81,  
82, 83, 84, 85, 101, 102, 103, 104, 105, 106, 107, 108, 109, 114, 117, 118  
were read on this motion to/for DISMISS

Upon the foregoing documents, Defendants' motions for summary judgment are decided as follows:

This action arises out of an accident that occurred on November 30, 2015 in an AMC Loews 34<sup>th</sup> Street movie theatre located at 312 West 34<sup>th</sup> Street New York, New York, operated by Defendant AMC Entertainment Inc ("AMC"), owned by Defendants SLG 315 West LLC, SL Green Realty Corp and Stonehenge Management LLC. AMC contract with Defendant Excel Elevator and Escalator Corp. ("Excel") to conduct monthly repairs, maintenance inspections and operations for the escalators on the premises. In this case, Plaintiff Tashauna Jackson asserts that she fell on the escalator identified as number three when it allegedly abruptly stopped and caused her injuries. Plaintiff commenced this action alleging one cause of action in negligence against Defendants.

Now, Defendants AMC, SLG 315 West LLC, SL Green Realty Corp and Stonehenge Management LLC move collectively for summary judgment (Motion Sequence No.5). AMC asserts that it breached no duty owed to Plaintiff as it did not cause or create the alleged dangerous condition and did not have actual or constructive notice of it. Defendants SLG 315 West LLC, SL Green Realty Corp and Stonehenge Management LLC argue that they are out-of-possession landlords who maintained no control over the premises and therefore are not liable to Plaintiff. AMC further moves for summary judgment against Excel on its cross-claim for contractual indemnification and for dismissal of Defendant Excel's cross-claim for contractual indemnification.

Defendant Excel also moves for summary judgment (Motion Sequence No. 6) asserting that it did not create or receive notice of the allegedly defective condition of the escalator. Moreover, it claims that it did not fail to discovery and correct any defective condition.

While it is ultimately the Plaintiff's burden at trial to establish a *prima facie* case of negligence against the Defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557). In support of its motion, Defendants are required to demonstrate *prima facie*, that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (see eg *Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see *Alvarez v Prospect Hospital*, 68 NY2d at 324; see also *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For AMC, "as a lessee of the property and operator of the [premises], the defendant had a duty to maintain and repair the escalators on the premises" (*Roberts v Old Navy*, 134 AD3d 1088 [2d Dept 2015]). In addition, a lessee can be held liable "despite having an exclusive maintenance and repair contract with an [escalator] company, [if] it fails to notify the [escalator] company about a known defect" (*Isaac v 1515 Macombs, LLC*, 84 AD3d 457 [1<sup>st</sup> Dept 2011]). Therefore, AMC's *prima facie* burden on its motion was to establish "it did not create the subject defective condition that caused the subject escalator to suddenly [stop] . . . , or have actual or constructive notice of that condition" (*Roberts v Old Navy*, supra; see also *Isaacs v Federated Dept. Stores, Inc.*, 146 AD3d 762 [2d Dept 2017]).

In support of its motion, AMC submitted, *inter alia*, the deposition testimony of Brandon McLellan ("McLellan"), a senior manager for AMC, who testified that he was made aware of the incident that occurred on November 30, 2015 by Plaintiff that she fell on the escalator going from the second floor to the third floor. McLellan further testified that he generated an incident report with the details of the incident wherein he wrote concerning an inspection after the incident as follows: "Escalator was checked as soon as the report was made. Escalator was in fact off. Escalator is known to shut off randomly during the day. (Guest was not disclosed this information)." While McLellan attempted to clarify the portion of incident report "[e]scalator is known to shut off randomly during the day" by stating that he was referring to all the escalators in the premises not just escalator three, that testimony is unavailing as the evidence must be viewed in a light most favorable to Plaintiff (see *Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]).

In his testimony, McLellan averred that escalators in the premises had randomly shut off prior to the accident and that Excel were in the premises multiple times per week to service the escalators. He also admitted that he personally saw the escalator at issue stop moving with someone on it "[m]ore times than I can remember, but not many". McLellan testified that Excel conducted a routine maintenance service eighteen days prior on the escalator and it did not reveal the presence of a defective condition and that some previous shutdowns were caused by foreign objects getting stuck in the escalators. However, he also acknowledged did not know what caused the shutdown at issue and he was not aware whether or not any previous shutdowns were due to improper maintenance.

This evidence is plainly insufficient to establish that AMC lacked notice as a matter of law (*see Dzikowska v Related Cos., LP*, 157 AD3d 447 [1<sup>st</sup> Dept 2018]; *Roberts v Old Navy*, *supra*; *Dykes v Starrett City, Inc.*, 74 AD3d 1015 [2d Dept 2010]; *see also Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391 [2d Dept 2006]; *Vaughan v. 1720 Unico, Inc.*, 30 AD3d 315 [1<sup>st</sup> Dept 2006]; *Paz v Trump Plaza Hotel & Casino*, 28 AD3d 212 [1<sup>st</sup> Dept 2006]; *cf Bazne v Port Auth. of N.Y. & N.J.*, 61 AD3d 583 [1<sup>st</sup> Dept 2009]).

Issues of fact also exist as to whether AMC fulfilled its obligation to report a known defect, the random stopping of the escalator, to Excel since James Farmer (“Farmer”), a witness and mechanic employed by of Excel which was responsible for routinely maintaining, inspecting, and servicing the escalators on the premises, testified that AMC never informed him or Excel of the stopping problem with the escalator.

As to the branch of Defendants SLG 315 West LLC, SL Green Realty Corp., and Stonehenge Management LLC motion to dismiss, it is settled that an out-of-possession landlord is not liable for injuries that occur on its premises unless it retains control over the premises or is contractually bound to repair unsafe conditions (*see Lawrence v Celtic Holdings LLC*, 85 AD3d 874 [2d Dept 2011]; *see also Taylor v Lastres*, 45 AD3d 835 [2d Dept 2007]). Here, although the lease agreement explicitly states that the landlord shall have a right . . . to enter upon and/or pass through the premises. . . to make repairs in or to the premises, the evidence proffered established that under lease, AMC were contractually bound to perform maintenance and repairs to the escalators. AMC, not Defendants SLG 315 West LLC, SL Green Realty Corp., and Stonehenge Management LLC, entered into the Master Services Agreement with Excel to provide maintenance services and repairs on the premises. In opposition, Plaintiff failed to raise a triable issue of fact.

As to Defendant Excel’s motion for 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]” (*see Narainasami v City of New York*, *supra*, *see also Nunez v Chase Manhattan Bank*, 155 AD3d 641[2017], *Rogers v Dorchester Assoc.*, 32 NY2d 553 [1973]). Excel established its *prima facie* entitlement to judgment as a matter of law by demonstrating through the deposition testimony of Farmer that the subject escalator was regularly inspected and maintained and that it did not have actual or constructive notice of a prior similar incident or an ongoing condition that would have caused the escalator to stop (*see Ramjohn v Port Auth. of N.Y. & N.J.*, 151 AD3d 1090 [2d Dept 2017]; *see also Vilaridi v Jones Land LaSalle, Inc.*, 145 AD3d 711 [2d Dept 2016]). In opposition, Plaintiff did not raise a triable issue of fact. In fact, Plaintiff affirmatively stated in her opposition that she did not have any position on the motion made by Excel.

Lastly, as to the branch of AMC cross-motion for summary judgment on its contractual indemnification claim against Excel “a party seeking full contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*see eg Cava Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 AD3D 660, 662 [2d Dept 2009]). Nevertheless, the right to contractual indemnification is dependent “upon a specific language of the contract” (*see eg Trawally v City of New York*, 137 AD3d 492, 492 [1<sup>st</sup> Dept 2016]).

Paragraph 7 of the agreement between AMC and Excel provides that Excel “agrees to defend, indemnify, and hold harmless [a] AMC . . . in connection with [Excel’s] . . . performance of the Services, from and against all claims, demands, suits, losses, damages, costs, expenses, including, but

not limited to, reasonable attorneys' fees and disbursements, that arise out of, result from or are in connection with the Services, or [Excel's], or any person or entity acting for or under [Excel] in, performance of the Services".

Given the Court's dismissal of Plaintiff's claim against Excel and AMC's failure to demonstrate that it is free from negligence, AMC failed to establish prima face entitlement to summary judgment on its claim for contractual indemnification (see Kogan v North St. Community, LLC, 81 AD3d 429 [1st Dept 2011]; Perales v First Columbia 1200 Nsr, LLC, 88 AD3d 1213 [3rd Dept 2011]; Baratta v Home Depot USA, Inc., 303 AD2d 434 [2d Dept 2003]).

Any cross-claim by Excel against AMC for contractual indemnification is dismissed as there is no proof such an agreement existed between the parties (see Reimold v Walden Terrace, Inc., 85 AD3d 1144 [2d Dept 2011]).

Accordingly, the motions by Defendants SLG 315 West LLC, SL Green Realty Corp., and Stonehenge Management LLC's as well as Defendant Excel Elevator & Escalator Corp. for summary judgment is granted and Plaintiff's complaint is dismissed as against these entities. The branch of Defendant AMC's motion for summary judgment dismissing Plaintiff's complaint and on its cross claim against Excel for contractual indemnification is denied.

3/12/2021

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER J.S.C.

REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.

**HON. FRANCIS A. KAHN III**  
J.S.C.