

Wettreich-Atlas v Shoprite of Commack, LLC

2021 NY Slip Op 33474(U)

December 17, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 603785/2019

Judge: Carmen Victoria St. George

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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

ROSE WETTREICH-ATLAS,

**Index No.
603785/2019**

Plaintiff,

**Motion Seq:
005 MG
006 MG
007 MD
Decision/Order**

-against-

**SHOPRITE OF COMMACK, LLC, STANLEY
SECURITY SOLUTIONS, INC., STANLEY
ACCESS TECHNOLOGIES, LLC, MACKENZIE
AUTOMATIC DOORS, INC., CHASE
INDUSTRIES, INC., MELITO CONSTRUCTION
CORP., OVERHEAD COMMERCIAL DOOR CO.,
INC. and OVERHEAD COMMERCIAL DOOR &
SON, INC.,**

Defendants.

x

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	123-133; 134-158; 161-200
Answering Papers.....	209-210; 203-205, 211; 221- 230; 206-208, 212
Reply.....	233-235; 238; 240

On January 22, 2019, at approximately 4:30 p.m., the plaintiff was injured when the automatic sliding doors in the vestibule of Shoprite of Commack, LLC (Shoprite) closed on her as she was exiting the supermarket using an assistive device, namely a walker. Plaintiff was knocked down and sustained a fractured hip that required surgical repair. The plaintiff has been granted a trial preference, and she has discontinued her claims against defendants Chase Industries, Inc. and Overhead Commercial Door & Son, Inc. Defendant Overhead Commercial

Door Co., Inc. has not appeared in this action.¹ By Decision and Order of this Court dated September 13, 2021, defendant Melito Construction Corp.'s summary judgment motion was granted, and plaintiff's claims and any and all cross-claims were dismissed as against Melito. Accordingly, the only actual parties in interest remaining in this matter are Shoprite of Commack, LLC, Stanley Security Solutions, Inc., Stanley Access Technologies, LLC, and Mackenzie Automatic Doors, Inc. Plaintiff's claims against the defendants appear to rest upon the theory that the defendants failed to properly maintain, control, and inspect the operation of the subject sliding glass doors.²

Stanley Security Solutions (SSS) and Stanley Access Technologies (SAT), alternately "the Stanley defendants," move for summary judgment dismissal of all claims and cross-claims (Motion Sequence 005); Mackenzie Automatic Doors (Mackenzie) moves for the same relief (Motion Sequence 006), as does Shoprite of Commack (Shoprite) via Motion Sequence 007.

With regard to the Stanley defendants' motion for summary judgment (Motion Sequence 005), the plaintiff previously attempted to discontinue this action against these defendants; however, the co-defendants would not execute the stipulation. Shoprite is the only co-defendant opposing the Stanley defendants' motion.

Shoprite and plaintiff oppose Mackenzie's motion (Motion Sequence 006), and plaintiff opposes Shoprite's motion (Motion Sequence 007).

The Technical Aspects of the Automatic Doors

The consideration of the pending motions requires a basic understanding of the subject doors' components, and how they are designed to work. The components of the doors, their nomenclature, the functioning of their various parts as designed, plus the methods of testing the doors as set forth in particular manuals referred to by the witnesses, are undisputed. Accordingly, it is the Court's understanding that the automatic doors involved in plaintiff's accident are sliding, glass exit doors. These doors open onto the outdoors from the vestibule areas of the subject Shoprite.

Aside from the door panels themselves, the automatic door system is comprised of a number of different types of sensors. According to the testimony of the Stanley defendants' witness, safety assurance manager David Sitter, SAT manufactured and sold the subject door to Melito in 2010, more than nine and one-half years prior to the date of plaintiff's accident.³ Mr. Sitter testified that he was able to identify the particular doors involved in plaintiff's accident,

¹ By Decision and Order dated February 3, 2020, this Court denied plaintiff's motion for a default motion against Overhead Commercial Door Co., Inc., without prejudice to renewal upon the submission of proper papers; however, the motion has not been renewed.

² There are no claims made in this action sounding in products liability, i.e., defective design or manufacture of the door and its components.

³ Mr. Sitter testified that he holds a Master of Science degree in electrical engineering from Johns Hopkins University, and that he has been employed as in his position as safety assurance manager for almost all of the twenty-five years he has been employed by Stanley Black and Decker.

and that the subject doors were installed along with a sensor package that was also installed, both by Mackenzie.

According to Mr. Sitter, the doors were equipped with two motion sensors, a presence sensor called a Stan-Guard, and two holding beams. The two motion sensors are attached to the header above the door, with one on the inside of the door and the other on the outside of the door. The holding beams are located in the side panels of the door, with one at a height of approximately two feet and the other at a height of approximately four feet. The Stan-Guard is mounted underneath the header of the door "so it looks down into the threshold area." SAT does not manufacture any of the sensors; rather, it purchases them from other companies and are included with the door sent to the installation contractor, in this case Mackenzie.

The motion sensors detect motion coming to or going away from the door, from about four to five feet away from the door. If the door is closed, those sensors will cause the door to open, and if the door is already open, the sensors will keep the door open.

The holding beams are described by Mr. Sitter "like an electronic eye on a garage door." If anything crosses the beam, it is classified as a "detect," and that "detect" signals the controller to either open the door or keep it open.

The Stan-Guard, as described by Mr. Sitter, "looks for objects or persons in the threshold area within its coverage. If it detects presence, it will keep the door open for a minimum standard of thirty seconds." When no one or nothing is in the threshold area, the red light on the Stan-Guard remains lit, but when there is something in the threshold area, the light goes out. The threshold area is generally agreed upon by all of the defense witnesses as consisting of an area approximately ten inches from the door panels, with a minimum of five inches from the door panels, across the whole opening.

Monitoring all of these types of sensors is what is called the controller. According to Mr. Sitter, "[t]he controller is always looking for detects. It's not distinguishing between one type or another, it's just looking for detects. [The controller] can only allow a closure of a door after a hold up period and an expiration of all of the sensor detects[,] which is motion sensors, the presence sensor Stan-Guard and then the holding beams." The controller is a single unit that "takes detects or signals from any of the sensors and then logic dictates signals to the motor whether to close or open the door."

Mr. Sitter also explained that any detects from the Stan-Guard presence sensor are not triggered until motion is first detected. In essence, the motion sensor triggers the presence sensor: "At any time after the motion sensor detects something, if there is something, the presence sensor detect, then that will be sent to the controller." According to Mr. Sitter, "[i]t makes sense because you can't get into the presence zone without going through the activation zone first."

Shoprite's Motion (Sequence 007)

Shoprite contends that it is entitled to summary judgment dismissal of the complaint and all cross-claims because it did not create any defective condition, that it did not have actual or

constructive notice of any such condition, that it did not control over the doors and sensors that were installed in 2010, nor could Shoprite itself service those doors/sensors, that Shoprite contracted with Mackenzie for periodic maintenance of the doors, and that the video of the incident shows that the doors were operating properly. Shoprite further asserts that the testimony of Mackenzie's witness demonstrates that the plaintiff walked so slowly toward the subject doors that she did not activate any sensors triggering the doors to remain open.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]). "The Supreme Court's function on a motion for summary judgment is issue finding, not issue determination" (*Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Public Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018]).

A property owner is charged with the duty to maintain the premises in a reasonably safe condition (*Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713 [2d Dept 2011]). Of course, a property owner may be held liable for damages resulting from a hazardous condition on its premises if it created the hazardous condition or had either actual or constructive notice of the condition in sufficient time to remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (*Borenkoff v Old Navy*, 37 AD3d 749, 750 [2d Dept 2007]).

To be entitled to summary judgment in a case such as this, a defendant is required to show, *prima facie*, that it maintained the premises in a reasonably safe condition and that it did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (*Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061 [2d Dept 2010]). Specifically with respect to constructive notice, a defendant must tender some evidence establishing when the area in question was last cleaned or inspected prior to the plaintiff's fall (*Zambri v. Madison Square Garden*, 73 AD3d 1035, [2d Dept 2010]; *Birnbaum v. New York Racing Association, Inc.*, 57 AD3d 598 [2d Dept 2008]). Reference to general cleaning or inspection practices is insufficient to establish a lack of constructive notice in the absence of evidence concerning specific cleaning or inspection of the area in question (*Rong Wen Wu v. Arniotes*, 149 AD3d 786, 787 [2d Dept 2017]).

Shoprite's ability to make a *prima facie* showing in this regard is defeated by the proof submitted upon its own motion papers. The deposition testimony of David Sitter not only describes the components of the sliding glass, but he specified the testing procedure for each of the different types of sensors on the subject doors.

Donald Mattson, Mackenzie's vice president of outside sales and a fifty-year employee of Mackenzie, also testified as to the three types of sensors on the doors: a motion sensor, the active

presence sensor (the Stan-Guard), and the holding beams. Like Mr. Sitter, Mr. Mattson testified as to the same steps to be performed as part of the daily safety check of the doors and the sensors. Moreover, Mr. Mattson testified to the same dimensions of the “threshold zone” for the Stan-Guard/presence sensor, and that if there is someone or something in that zone, the red light on the Stan-Guard will turn off “when the control sensor senses you.”

Mr. Mattson also testified about the terms of the service contract between Mackenzie and Shoprite stating that it was Shoprite’s responsibility to inspect the automatic door equipment daily, documenting the check, and notifying Mackenzie if the equipment is malfunctioning. In fact, according to Mr. Mattson, the daily safety check documents were included with the service contract packets sent to Shoprite every year since on or about 2013. Further, in case of an incident, the service contract provides that the door must be turned off and Mackenzie notified.

It is evident from the testimony of Shoprite’s manager, John Budd, that none of that safety testing described by Sitter and Mattson was done by Shoprite on any basis, let alone on a daily basis. Mr. Budd testified that he did not even know that there was a “Daily Safety Check” document, and he did not know what types of sensors were on the subject doors, or the different functions of the three types of sensors. According to Mr. Budd, the daily check of the doors consisted of himself and all of the employees walking through the door as they exited and entered the store, but no records of even this activity were made/kept.

Mr. Sitter testified that simply walking through the doors was an insufficient safety check, and that with respect to the Stan-Guard sensor, someone has to stand in the threshold area, as part of the daily safety check. As noted, there is no evidence that Shoprite performed any of the daily safety check steps on any of the sensors as testified to by Messrs. Sitter and Mattson.⁴

Accordingly, and despite the video of the incident, Shoprite cannot establish *prima facie* that it did not have constructive notice of the alleged defective condition that cause the doors to close on the plaintiff, knocking her down.

Also fatal to Shoprite’s ability to demonstrate its *prima facie* entitlement to summary judgment is the fact that Mackenzie’s witness (Mr. Mattson) and the Stanley defendants’ witness (Mr. Sitter) have differing opinions as to why the doors closed on the plaintiff. Based upon their demonstrated familiarity with the subject door model, plus their background, education and experience, Messrs. Mattson and Sitter are the closest approximations of expert testimony offered by Shoprite, although this Court recognizes that Shoprite has not submitted any evidence from an independent expert in connection with this matter. It is beyond cavil that counsel’s opinion that the video shows that the doors were working properly on the date of plaintiff’s accident is unavailing.

⁴ The submitted evidence also establishes that Shoprite never called Mackenzie to notify it of the incident involving the plaintiff.

Mr. Sitter testified that after reviewing the video of the incident, it was his opinion that the plaintiff was within five inches of the panels, and he stated that he “kn[ew] that Stan-Guard is perfectly capable of picking her up and getting a detect where she is located,” but the Stan-Guard “did not get a detect off of her. It should have. At this point I would say that it most likely was an adjustment issue with the Stan-Guard.” Mr. Sitter explained that the sensor did not appear to fail outright, but that “[o]ver time the sensitivity sometimes will need to be increased in order to maintain detection per the standard,” which is “to be able to detect an individual of minimal height of twenty-eight inches within five inches of the panels.” According to Mr. Sitter, a change in sensitivity of the Stan-Guard would be detected by performing daily safety checks.

Mr. Mattson, on the other hand, testified that because the plaintiff was not moving at more than four inches or six inches per second in order to activate the door, the Stan-Guard did not sense that there was anything there. In addition, the holding beams did not activate to stop the doors from closing because the video shows that the legs of plaintiff’s walker were beyond the holding beams, but the plaintiff’s legs had not yet reached the holding beams. In other words, although the plaintiff was holding onto the walker, the walker was across the threshold while the plaintiff was still in the vestibule, thereby forming a bridge over the holding beams rather than obstructing them, which would have kept the doors open. Mr. Mattson explained that the holding beams are a momentary sensor so in case there is something in the way of the doors, the doors will stay open. The timing on the holding beams is different than the timing on the motion sensor, which will open the doors to a full open position upon detecting motion within four or five feet of the door. Further according to Mr. Mattson, “[i]f you stop short of the safety sensing area and you stand there, and you don’t move faster than six inches, there is no sensor that is picking you up.” With respect to the plaintiff depicted in the video, Mr. Mattson was “not moving four inches per second. The holding beam reactivates the door; however, it does not go to a full open position. Therefore, the Stan-Guard does not come on because the Stan-Guard is only on when the door is in a full open position. Then the woman stops at that point again not activating the door or any of the sensors.” When asked if that was a flaw in the system, Mr. Mattson answered that, “the code says that someone has to be moving six inches per second. . . [i]f it’s a flaw, it’s a flaw in the code.”

As outlined, Mr. Sitter is of the opinion that the plaintiff’s presence should have been detected by the Stan-Guard because she was in the threshold area, but Mr. Mattson, in effect, blames the plaintiff and perhaps the “code” setting a standard of movement as four or six inches per second. Accordingly, there exists a “battle of the experts” that requires denial of the motion for this reason as well ((*see generally Hayden v. Gordon*, 91 AD3d 819 [2d Dept 2012]; *Bennett v. Knipfing*, 262 AD2d 260 [2d Dept 1999]; *Weissman v. Wider*, 235 AD2d 474 [2d Dept 1997]; *Viti v. Franklin General Hospital*, 190 AD2d 790 [2d Dept 1993]; *PG & D Realty Corp. v. Commonwealth Land Title Insurance Company*, 25 Misc3d 1239 [A] [Sup Ct Nassau County 2009]).

Shoprite’s motion for summary judgment is denied based upon its failure to sustain its *prima facie* burden as outlined herein. In view of this determination, it is unnecessary to determine whether the plaintiff’s papers submitted in opposition are sufficient to raise a triable issue of fact (*see Levin v Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581 [2d Dept 2010]).

Mackenzie's Motion (Sequence 006)

Mackenzie seeks summary judgment dismissal on the basis that it has no duty to the plaintiff due to the limited contract for services at Shoprite and because Mackenzie was not on notice of any alleged defective condition.

As noted, Mackenzie installed the subject doors and entered into a service contract with Shoprite on or about 2013/2014, which, as Mr. Mattson testified, included the yearly service contract and the daily safety check documents that were part of the contract package, all of which was sent to Shoprite every year. The last time that Mackenzie was present at Shoprite prior to plaintiff's accident was in August 2018 when it performed a service call due to a problem with the door's bottom track assembly. Mackenzie did not return to Shoprite until April 2019. Mr. Mattson testified that the reason for the service call in August 2018 was because the door's track assembly was problematic; the bottom track was "in bad shape and had to be replaced." Although this issue would not affect the functioning of the sensors or Shoprite's ability to inspect the various sensors as recommended, the track assembly is responsible for the smooth opening and closing of the doors. In August 2018 Mackenzie provided Shoprite a quotation to fix the track assembly, but according to Mr. Mattson, Shoprite never responded or otherwise approved that the work be done.

The yearly service contract submitted by Mackenzie dated August 5, 2018 and executed by Donald Mattson on behalf of Mackenzie and by Stephen Simonetti on behalf of ShopRite specifies that it is Shoprite's "responsibility to inspect the automatic door equipment daily documenting the check. . ." Included with the contract and authenticated by Mr. Mattson is the document entitled "Daily Safety Check For Your Customers' Safety and Your Own Protection." As outlined by Mr. Mattson in his testimony, the steps to check each of the separate sensors is stated in plain language, and the steps to check systems with overhead threshold safety systems (Stan-Guards) appears on that document. Diagrams appear alongside the written instructions. The effective term of the service contract is August 16, 2018 to August 15, 2019, thereby covering the date of plaintiff's accident with the door. Thus, this Court agrees with Mackenzie's contention that the contract called for Shoprite "to act as its 'eyes and ears' to detect if the door was not operating properly or in a manner that could injure someone."

The mere fact that Shoprite's store manager, John Budd, never before saw the daily inspection documents is unavailing. Mackenzie has established that those documents were sent to Shoprite, the named defendant in this action. What Shoprite did with those documents for this particular store (referenced in the contract as "Shoprite 806"), or failed to do, is of no moment to Mackenzie's position upon the instant motion.

As discussed in connection with Shoprite's motion, there is overwhelming proof that Shoprite utterly failed to conduct any safety checks of the subject doors aside from walking through them on a daily basis, which as Mr. Sitter testified, does not constitute a safety check at all.

Mackenzie contends that it is entitled to summary judgment because it did not owe a duty to plaintiff, pursuant to *Espinal v. Melville Snow Contractors* (283 AD2d 546 [2d Dept 2001]),

aff'd 98 NY2d 136 [2002]). As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties; however, in *Espinal, supra*, the Court of Appeals identified three situations where a party who enters into a contract to render services may be said to have assumed a duty of care and thus be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches an instrument of harm or creates or exacerbates a hazardous condition, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Id.* at 140)" (*Gushin v. Whispering Hills Condominium I*, 96 AD3d 721, 722 [2d Dept 2012]; see also *Koslosky v. Malmut*, 149 AD3d 925 [2d Dept 2017]).

There is no evidence in the record tending to demonstrate that Mackenzie launched a force or instrument of harm, thereby creating a hazardous condition. Mackenzie was at the premises five months earlier, for a service call regarding the bottom track of the door. Likewise, there is no evidence that plaintiff detrimentally relied upon Mackenzie's continued performance of its contractual obligations or that she even knew that an agreement existed between Mackenzie and Shoprite. Furthermore, the submitted record demonstrates that Mackenzie did not entirely displaced Shoprite's duty to maintain the premises safely. Instead, the evidence shows that Shoprite entirely abdicated its duty to maintain the premises safely when it comes to the subject doors by failing to conduct the daily safety checks. Thus, none of the *Espinal* exceptions apply.⁵

Accordingly, Mackenzie has established its *prima facie* entitlement to summary judgment dismissal of the complaint and all cross-claims as a matter of law.

In opposition, Shoprite offers no evidence to contradict its failure to perform the daily safety checks. As already noted, the testimony by the store manager that he never saw the daily safety check documents is unavailing since those documents were not sent to him personally. Shoprite also offers no evidence that raises any question of fact as to whether Mackenzie created a dangerous condition. In fact, Shoprite concedes that the August 2018 service call "had nothing

⁵ "As part of its *prima facie* showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in plaintiff's bill of particulars" (*Glover v. John Tyler Enterprises, Inc.*, 123 AD3d 882, 882 [2d Dept 2014]). Where a plaintiff does not plead any of the *Espinal* exceptions, and the contractor offers sufficient proof that the plaintiff was not a party to the contract, the contractor has shown that it does not owe a duty of care to the plaintiff, thereby establishing its *prima facie* entitlement to summary judgment as a matter of law. Moreover, having established its *prima facie* entitlement on this basis, the defendant contractor is not required to affirmatively demonstrate that the *Espinal* exceptions do not apply (*Turner v. Birchwood on the Green Owners Corp.*, 171 AD3d 1119, 1121 [2d Dept 2019]; *Glover, supra* at 882-883; *Rudloff v. Woodland Pond Condominium Association*, 109 AD3d 810, 811 [2d Dept 2013]; *Knox v. Sodexo America, LLC*, 93 AD3d 642, 642 [2d Dept 2012]; *Henriquez v. Inserra Supermarkets, Inc.*, 89 AD3d 899, 901 [2d Dept 2011]). Although not raised upon the instant motion, or in opposition thereto, this Court has reviewed the plaintiff's Bill of Particulars against Mackenzie and it does not appear that any *Espinal* exceptions were expressly pled.

to do with the sensors;" accordingly, Mackenzie could not have created any condition with respect to the sensors on that date.

Plaintiff's opposition is likewise unavailing with respect to the issues raised by Mackenzie's motion. As noted in footnote 5 herein, the plaintiff never expressly pled any *Espinal* exceptions, but even if she had, the Court has addressed the fact that there is no evidence that Mackenzie launched an instrument of harm, or that the plaintiff even knew of Mackenzie's contract with Shoprite, or that Mackenzie entirely displaced Shoprite's duty to maintain safe premises for its customers.

Moreover, plaintiff's expert, Thomas Pienciak, has submitted an affidavit opining that the Stan-Guard sensor was not functioning properly and "either Shoprite and/or Mackenzie would have realized that" "[h]ad the doors been inspected and maintained properly." Although the lion's share of the affidavit consists of lengthy quotations of the various witnesses' deposition testimony, the expert fails to address the alternate theory advanced by Mr. Mattson as to why the door closed on plaintiff (which is that she was moving less than four or six inches per second), which is not necessarily germane to Mackenzie's issues, but indicates that the expert either did not consider all of the available evidence, or chose to ignore it, thereby rendering his opinion unpersuasive.

As to the Mackenzie's duty to inspect the doors, plaintiff's expert is outside his area of expertise since the duty to inspect is dictated by the terms of the contract between Mackenzie and Shoprite that covers the date of plaintiff's accident. Interpretation of the service contract is reserved to the Court based upon a plain reading thereof. The terms of the relevant contract provide that, "Mackenzie will perform inspections to adjust, repair or replace worn components on equipment covered under this agreement on each service call, and will perform special service call inspections when no service has been required for a period of six months." Accordingly, when measured either from the date that Mackenzie was last at Shoprite on August 7, 2018, or from the effective date of the contract, which was August 16, 2018, Mackenzie had no duty to inspect the doors, *sua sponte*, until February 2019, unless Shoprite contacted Mackenzie prior to that time requesting a service call, which Shoprite did not do. Thus, Mr. Pienciak's statement that Mackenzie had a duty to inspect the doors by January 7, 2019 is a miscalculation, it being only five months after August 7, 2018, not to mention that it is the effective date of the relevant contract that controls the periodic inspections, not a date prior to the commencement of that contract.

This Court has already noted that the terms of the service contract place responsibility upon Shoprite to inspect the automatic door equipment daily and document the check, which duty is found in paragraph 4 entitled "Owner Responsibility," and which is underlined in its entirety. The Daily Safety Check documents setting forth the steps to be followed by Shoprite are designated as being "For Your Customers' Safety and Your Own Protection." Thus, the terms of the service contract are eminently clear that it was Shoprite's duty to inspect the doors on a daily basis and if a problem were detected by an actual inspection, rather than merely walking through the doors, then Shoprite was to contact Mackenzie for a service call, thereby triggering Mackenzie's duty to respond to the subject premises. Outside of the six-month

inspections, Mackenzie could not know if Shoprite was experiencing an issue with the doors unless Shoprite notified Mackenzie. The duty spelled out in the service contract thereby renders plaintiff's expert's opinion that Mackenzie failed to properly inspect the doors is unpersuasive and insufficient to raise a triable issue of fact as to Mackenzie's motion.

Mr. Pienciak does not opine as to when he believes the Stan-Guard sensor malfunctioned, which theoretically would have resulted in a call from Shoprite to Mackenzie, thereby triggering Mackenzie's duty to respond to the premises and address the problem.

Plaintiff's additional claim that Mackenzie has failed to meet its burden of proof as to actual and/or constructive notice regarding the door and its safety sensors because the Mackenzie technician who serviced the bottom track of the door on August 7, 2018 did not specifically note on the service record that the Stan-Guard was tested is inapposite since the reason that the technician was there had nothing to do with the sensors, and because the only duties that Mackenzie had with respect to the doors was governed by the contract whose term ran from August 16, 2018 to August 15, 2019.

For all these reasons, the defendants opposing Mackenzie's summary judgment motion have failed to raise a triable issue of fact; therefore, Mackenzie's motion is granted, and the complaint and all cross-claims are hereby dismissed as to Mackenzie.

The Stanley Defendants' Motion (Sequence 005)

Plaintiff does not oppose the Stanley defendants' motion for summary judgment dismissal of her claims against them, but requests that those defendants not be awarded costs or disbursements. Only Shoprite opposes this motion.

The claims against the Stanley defendants sound in common law negligence, without any causes of action sounding in products liability. The submitted evidence, including the deposition testimony of David Sitter, establishes without contradiction that defendant Stanley Security Solutions (SSS) provides security system for doors but had nothing to do with the design or installation of the subject doors. Accordingly, plaintiff's claims and all cross-claims are dismissed as against SSS.

According to Mr. Sitter, defendant Stanley Access Technologies (SAT) designed the subject door. SAT did not manufacture the sensors, but purchased them from their original manufacturers and then included those sensors with the doors that it sold to former defendant Melito as per the specifications requested by Mackenzie. Mackenzie then installed the doors and sensors in 2010, at the subject Shoprite store where plaintiff's accident took place in 2019. There is no evidence that SAT entered into any contract with any entity involved in this matter, other than the sale to Melito, requiring SAT to service, inspect, or maintain the subject doors. Essentially, SAT had no involvement with the doors for nine years before plaintiff's accident aside from the one-year warranty regarding operation of the door. This Court has repeatedly noted that the service agreement concerning the doors was executed between Shoprite and Mackenzie.

“Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property” (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710 [2d Dept 2012]). Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to plaintiff. Whether a defendant owes a duty to a plaintiff is a question of law to be determined by the court (*Purdy v Public Administrator of the County of Westchester*, 127 AD2d 285, 288 [2d Dept 1987]). Here, since there was no service contract or contract of any kind obligating SAT to maintain the doors, there is no duty of care owed either to the plaintiff, or to any other party, including Shoprite. Accordingly, SAT has established its *prima facie* entitlement to summary judgment as a matter of law.

In opposition, Shoprite’s response to SAT’s statement of material facts affirms all statements made therein to be true and accurate, including that the subject doors were manufactured by SAT and sold to Melito; that Mackenzie installed the doors on October 10, 2010; that neither SSS nor SAT installed the doors or performed any inspection, maintenance, repair or any other service on the doors; that the door package provided by SAT included presence and motion sensors; that none of the sensors were designed or manufactured by SSS or by SAT, and that all sensors were installed and tuned by Mackenzie.

Shoprite’s claim in opposition that there were no end user serviceable parts that Shoprite could adjust is spurious. As has been established without controversy, Shoprite was not required to adjust or service any parts at all; rather, they were required to inspect the doors and determine if there was a problem, and if a problem was detected, Shoprite was to call Mackenzie to make any necessary adjustments.

Shoprite’s attempt to relieve itself of liability by claiming that “a material [issue] of fact exists with respect to the allegations set forth in the motion filed by Stanley. To wit, if a defective condition existed, it was solely within the design, manufacture and implementation of sensors that were provided by the moving defendant Stanley” is utterly inapposite because there are no product liability claims asserted by the plaintiff.

The remainder of Shoprite’s opposition completely misses the mark that the contract between it and Mackenzie controlled the duty of inspection and service of the doors that has absolutely nothing to do with either SAT or SSS. Furthermore, Shoprite’s continued argument that it was not aware of the instructions pertaining to the daily safety checks is belied by the service contract discussed herein above, and again, has nothing to do with SAT or SSS. Whether or not the now-dismissed defendant Melito could recall receiving materials from Stanley to pass on to Shoprite nine years before plaintiff’s accident is utterly irrelevant in light of the relevant service contract between Shoprite and Mackenzie.

Shoprite has failed to raise a triable issue of fact sufficient to defeat the Stanley defendants’ summary judgment motion. Accordingly, the Stanley defendants’ motion is granted, and all claims and cross-claims alleged against SSS and SAT are dismissed.

This Court determines that Motion Sequences 005 and 006 are granted in their entirety, and that Motion Sequence 007 is denied, leaving Shoprite of Commack, LLC as the remaining defendant, aside from Overhead Commercial Door, Co., Inc.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 17, 2021
Riverhead, NY



CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]