

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15  
Justice

	x	Index Number <u>11235</u> 2001
FLORENCE REIFF,		
Plaintiff,		Motion Date <u>May 25,</u> 2004
-against-		
P.S. MARCATO ELEVATOR CO., INC., SOUTHBRIDGE TOWERS, INC.,		Motion Cal. Number <u>18</u>
Defendants.		
	x	

The following papers numbered 1 to 18 were read on this: (1) motion by the defendant Southbridge Towers, Inc., pursuant to CPLR 3212, for summary judgment dismissing the complaint or, in the alternative, for conditional, partial summary judgment on the issue of the liability of P.S. Marcato Elevator Co., Inc. for common-law indemnification; and, (2) cross motion by the defendant P.S. Marcato Elevator Company, Inc., pursuant to CPLR 3126 and 3212, for summary judgment dismissing the complaint or for an order precluding the plaintiff from offering certain testimony and evidence at trial.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits .....	9-11
Reply Affidavits .....	12-18

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

## I. The Relevant Facts

The plaintiff Florence Reiff (Reiff) commenced this action against the defendants P.S. Marcato Elevator Co., Inc. (Marcato) and Southbridge Towers, Inc. (Southbridge), seeking damages for personal injuries she sustained on August 14, 1998, as a result of the misleveling of an elevator. The elevator, located in the building where Reiff resided, was owned by Southbridge and maintained by Marcato.

Marcato and Southbridge generally denied the allegations of the complaint and Southbridge cross-claimed against Marcato seeking, inter alia, common-law indemnification.

Pursuant to month-to-month elevator maintenance contract between Southbridge and Marcato, which commenced on June 29, 1998, Marcato agreed to, inter alia, inspect the elevator at least once a month, and make all necessary repairs. That contract incorporates by reference an indemnification provision whereby Marcato agreed to indemnify Southbridge for liability for personal injuries arising out of or in connection with the performance of the contract.

During her examination before trial (EBT), Reiff stated that the accident occurred when the elevator stopped about three or four inches higher than her floor. She fell because she was carrying a grocery bag and did not see the misleveling. About two weeks prior to her accident, she reported the same misleveling condition in the same elevator to the superintendent. On that occasion, she was not injured as she was not carrying anything.

During his EBT, a Southbridge representative stated that if a complaint about the elevator was made to Southbridge's handymen or maintenance office, it was relayed immediately to Marcato's on-site mechanic. In a separate affidavit, the Director of Maintenance for Southbridge stated that during the six (6) month period prior to August 14, 1998, he was unaware of and did not receive any misleveling complaints.

During his EBT, a Marcato representative stated that he was unaware of any complaints from June 29, 1998, the commencement date of the Southbridge/Marcato contract, to the date of the accident on August 14, 1998. On August 11, 1998, Marcato inspected the elevator at issue and found it was operating in a satisfactory condition. That visual inspection was of, inter alia, the leveling of the elevator.

## II. Motion and Cross Motion

Southbridge contends that it is entitled to summary judgment as it did not create or have actual or constructive notice of any dangerous condition, Marcato was responsible for maintaining the elevator, and Marcato inspected the elevator three days prior to the accident and found it was in satisfactory condition. In the alternative, it contends that it is entitled to summary judgment on the issue of Marcato's liability for common-law indemnification.

Marcato cross-moves for summary judgment asserting that there is no evidence that it created or had actual or constructive notice of a dangerous condition. In addition, it contends that indemnification is not warranted until its negligence is proven, Southbridge has not demonstrated its freedom from fault, and Reiff should be precluded from offering evidence of her injuries based upon her failure to appear for a previously ordered independent medical examination (IME).

Reiff opposes the motion and cross motion, contending, inter alia, that Southbridge and Marcato were aware of a similar complaint two weeks prior to the accident, the doctrine of *res ipsa loquitur* applies, and she submitted to an IME on April 20, 2004. In support, she annexes the affidavit of an elevator expert who contends that the elevator probably mis-leveled due to the malfunctioning of a floor positioning sensor or machine breaking mechanism.

Southbridge and Marcato reply that: (1) the doctrine of *res ipsa loquitur* does not apply; (2) the expert affidavit is inadmissible and speculative as the expert did not annex his curriculum vitae and did not inspect the elevator; and, (3) even assuming that Reiff complained two weeks before the accident, any defective condition was remedied, as evidenced by the elevator inspection conducted days before the accident.

## III. Decision

An owner of property has a non-delegable duty to maintain a building elevator in a reasonably safe condition (see Ortiz v Fifth Ave. Bldg. Assocs., 251 AD2d 200 [1998]). An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for its failure to correct conditions of which it has knowledge or for its failure to use reasonable care to discover and correct a condition which it ought to have found (see Gleeson-Casey v Otis Elevator Co., 268 AD2d 406 [2000]; Farmer v Central Elevator, Inc., 255 AD2d 289 [1998]).

Although Reiff asserted that she gave notice to Southbridge and Marcato of a misleveling condition some two weeks prior to the accident at issue, Southbridge and Marcato demonstrated that the elevator passed an inspection just days prior to the misleveling at issue. In response to this evidence, Reiff failed to raise any issue of fact as to whether Southbridge and Marcato had actual or constructive notice of any defective condition concerning misleveling during the days after the inspection, but before the accident (see Carrasco v Millar Elevator Indus., Inc., 305 AD2d 353 [2003]).

Nonetheless, Reiff has raised a triable issue of fact as to the applicability of the doctrine of *res ipsa loquitur* (see Carrasco v Millar Elevator Indus., Inc., *supra*; Dickman v Stewart Tenants Corp., 221 AD2d 158 [1995]; Bigio v Otis Elevator Co., 175 AD2d 823 [1991]; Burgess v Otis Elevator Co., 114 AD2d 784 [1985], *affd* 69 NY2d 623 [1986]). Where, as here, the elevator was in the defendants' possession and control and the plaintiff did not contribute to the malfunction complained of, there is an issue of fact as to whether the misleveling is an event that would not ordinarily occur were due care exercised in the elevator's maintenance (see Carrasco v Millar Elevator Indus., Inc., *supra*).

Although Reiff's expert failed to submit his curriculum vitae and his conclusions were not supported by any facts in the record, the circumstances of the incident alone afford a sufficient basis for an inference of negligence under the doctrine of *res ipsa loquitur* (see Morris by Morris v Lenox Hill Hosp., 90 NY2d 953 [1997]; Rogers v Dorchester Assocs., 32 NY2d 553, 560-561 [1973]; Miller v Schindler Elevator Corp., 308 AD2d 312 [2003]; Williams v Swissotel N.Y., Inc., 152 AD2d 457 [1989]).

Finally, in the absence of any evidence of negligence by Southbridge, and in view of the Southbridge/Marcato full service inspection, maintenance and repair contract, any finding of negligence on the part of Southbridge would be based solely on the acts or omissions of Marcato (see Ortiz v Fifth Ave. Bldg. Assocs., *supra*). As a result, Southbridge is entitled to conditional partial summary judgment on the issue of the liability of Marcato for common-law indemnification.

As Marcato has not disputed that Reiff attended the IME, that branch of its cross motion seeking to preclude Reiff from submitting evidence at trial on the issue of her injuries is denied as academic.

**Conclusion**

Based upon the papers submitted to this court and the determinations set forth above it is

ORDERED that the motion by the defendant Southbridge Towers, Inc. for summary judgment dismissing the complaint or, in the alternative, for summary judgment on the issue of the liability of P.S. Marcato Elevator Co., Inc. for common-law indemnification is granted to the extent that the defendant Southbridge Towers, Inc. is granted conditional partial summary judgment on the issue of the liability of P.S. Marcato Elevator Co., Inc. for common-law indemnification and, otherwise, the motion is denied; and it is further

ORDERED that the cross motion by the defendant P.S. Marcato Elevator Company, Inc. for summary judgment dismissing the complaint or for an order precluding the plaintiff from offering certain testimony and evidence at trial is denied.

Dated: Sept 7, 2004

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J.S.C.