At an IAS Term, Part 21 of the Supreme Court
of the State of New York, County of Kings
located at 360 Adams Street, Brooklyn
New York on the 26th day of September 2007

PRESENT:

HON. LAURA L. JACOBSON
Justice

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**Decision/Order**

DOROTHY SINCLAIR,

Plaintiffs, Index No.:33679/02

-against-

267 W. 89 Owners Corp., The Argo Corp. and P.S.
Marcato Elevator Company,

Defendants.

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The following papers 1 to 6 read on this motion:

| **Papers** | **Numbered** |
|---|---|
| Notice of Motion and Affirmation Annexed | 1-2 |
| Notice of Cross-Motion and Affirmation Annexed | 3-4 |
| Affirmation in Opposition | 5 |
| Reply | 6 |

Defendants 267 W. 89 Owners Corp. (hereinafter "Owner's Corp.") and the

Argo Group (hereinafter "Argo") move for an order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint, on the ground that plaintiff has failed to establish a prima facie case of negligence against the moving defendants as a matter of law; and for an order granting summary judgment against co-defendant P.S. Marcato Elevator Company (hereinafter "Marcato") for common law indemnity. Defendant Marcato cross moves for summary judgment in its favor dismissing the complaint and any and all cross-claims insofar as asserted against it.

Plaintiff commenced this action for personal injuries allegedly sustained on September 20, 1999, at approximately 11:30 a.m. on the premises known as 267 W. 89th Street, New York, New York, when an elevator dropped rapidly and came to an abrupt stop at the basement level.

Defendants Owners Corp. and Argo are the owners and property managers respectively, for the subject premises. Defendants Owners Corp. and Argo entered into an inspection contract with defendant Marcato for maintenance of the elevator at the subject premises.

Defendants Owners Corp. and Argo contend that plaintiff cannot establish that they either caused or created the defective condition or that they had actual or constructive knowledge of it.

At her deposition, plaintiff testified that on several occasions prior to her accident, she has experienced the elevator dropping lower than the level of the floor. However, when questioned plaintiff acknowledged that she never reported the incidents to the management company.

Peter Nikac, superintendent of the subject, premises alleges that prior to plaintiff's accident, he received no complaints about the operation of the elevator and he was unaware of any problems involving the operation of the elevator. According to Mr. Nikac, if he had received a complaint regarding the elevator, he would have notified defendants Marcato and defendant Argo about the problem.

He stated that after plaintiff notified him of the alleged incident, he took plaintiff back up to the second floor in the elevator without any problem in its operation.

Defendant Argo produced Alan Pearlstein for examination before trial. Although Mr. Pearlstein was not the property manager at the time of the incident, he had been employed by Argo in that capacity for three years. He testified that defendant Marcato performed all maintenance and inspection of the subject elevator before plaintiff's accident beginning in 1996. He asserted that defendant Marcato inspected the elevator and performed regular maintenance once a month. Mr. Pearlstein stated that the City inspected the elevator yearly and that there were

no violations issued by the City.

Lawrence Betz, Executive Vice President for the defendant Marcato testified that a service mechanic inspected the subject elevator once a month to perform regular maintenance. He stated that during its inspections defendant Marcato found no evidence of the elevator misleveling and defendant Marcato received no complaints of elevator misleveling. On October 23, 1998, defendant Marcato issued a proposal for performing certain repair and up grade work on the subject elevator.

Defendant Marcato contends that defendants Owners Corp. and Argo are not entitled to summary judgment because pursuant to the New York City Building Code §§27-127 and 27-128, owners of buildings have a non-delegable duty to maintain all equipment situated within buildings located in the City in a safe operating condition. Defendant Marcato further argues that Defendants Owners Corp. and Argo are not entitled to common law indemnification because the contract in this action is not a full service contract. Defendant Marcato contends that pursuant to the inspection contract, it was obligated to repair and replace some of the elevator parts but not all of them. Defendant Marcato further asserts that defendant's Owners Corp. and Argo's claims for indemnification are premature since there has been no proof that the elevator malfunction was the

result of any negligence on the part of defendant Marcato. Defendant Marcato argues that there is no evidence that it failed to repair any prior problems or that they created any condition that caused any problem on the day of the plaintiff's accident. Defendant Marcato points to the testimony of Mr. Belz, a licensed inspector with 43 years in the elevator business who stated that the only things that could cause the elevator to drop, as alleged by plaintiff, would be if the cable broke, if the braking mechanism failed or if the car was overloaded. Defendants Marcato alleges that it is obvious that the cables did not break because the elevator was able to be operated normally immediately after the incident and the elevator was not overloaded because plaintiff was the only person on the elevator at the time of the incident. Defendant Marcato also states that Mr. Belz testified that if there was any defect with the various components of the elevator and there was only one person in the cab, the elevator car could not drop because the elevator was counter weighted and the counterweights would be heavier than the car and one passenger. Mr. Belz also testified that if there had been one electrical problem, the elevator would contact the "final" which shuts off the elevator. He stated that in that case, the mechanic would have to physically come in and reset the elevator to make it run again. Defendant Marcato alleges that it is clear that the elevator worked properly on the day of the accident and before and immediately after the

incident.

Defendant Marcato argues that as such, there is no evidence that any condition existed that would be related to any defect with the equipment or that was related to defendant Marcato's work.

Plaintiff submitted an affidavit in opposition in which she alleges that she was taking the elevator to take the garbage to the basement when the accident occurred. She asserted that once the elevator moved she heard the chains tearing apart, things crumbling and the elevator dropped rapidly and landed with a heavy jolt and a sudden impact. She asserts that the elevator came to stop below the level of the basement and then refused to open. Plaintiff alleges that she screamed for help and when no one came to her aid she "jumped up to the basement level and forced the door to the basement open". Plaintiff stated that she was familiar with the elevator and she knew the elevator to mis-level on numerous occasions. Plaintiff contends that neither defendant Argo or defendant Owner's Corp. had any mechanism in place to check or verify defendant Marcato's work. Further, despite the fact that the elevator is more then 70 years old, the weekly inspections of the premises did not include inspections of the elevator. Plaintiff alleges that pursuant to a proposal prepared by defendant Maracato, a 20% overhaul performed on the elevator was completed by August 8, 1999. Plaintiff alleges that

service records indicate that from the date of completion of the overhaul to the date of plaintiff's accident, there were four service calls recorded for the elevator in question compared with nine service calls made one year and ten months prior to the overhaul. Plaintiff alleges that based on the proposal defendant Maracato knew that the elevator had problems slowing down. Plaintiff contends that defendant Marcato has no procedure to ensure that their mechanics performed inspections or repaired the elevator in question or to ascertain whether the work was properly done. Plaintiff contends that defendants created the condition that caused plaintiff injuries by failing to ensure that work performed on the elevator was properly done and that the service that was to be provided by defendant Marcato was actually provided. Plaintiff further claims that triable issues of fact exists as to whether the doctrine of res ipsa loquitur applies in this situation which precludes granting summary judgment.

Summary Judgment is a chastic remedy which should not be granted if there is any doubt as to the existence of a triable issue of fact. (see *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]).

On a motion for summary judgment the Court's function is issue finding not issue determination (see *Sillman v. Twentieth Century - Fox Film Corp.*, 3 NY 2d, 395[ 1957] ). Moreover, the facts must be viewed in a light most favorable to the

moving party (see *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004] ). Here questions of fact exist as to whether defendants Owner's Corp. and Argo violated their non delegable duty to maintain the elevator in the building in a safe condition. Furthermore, an elevator company which agrees to maintain an elevator in a safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or for failure to use reasonable care to discover and correct the condition which it ought to have found *(Rogers v. Dorchester Assoc.*, 32 NY 2d 553 [1973]). Although defendant Marcato has established prima facie that it did not have actual or constructive notice of the alleged defective condition, plaintiff has raised a triable issue of fact as to whether defendant Marcato is liable based upon the doctrine of res ipsa loquitur. Here, where maintenance and repair records of the elevator were in the exclusive control of defendant Marcato, and no acts of plaintiff contributed to the happening of the event, there is a question of fact as to whether the sudden dropping and misleveling of the elevator is an event that could not ordinarily occur were due care exercised in the maintenance of the elevator (see *Fyall v. Centennial Elevator Industries, Inc.*, 2007 WL 2782995 [N.Y.A.D. 2 Dept.]). Moreover, since issues of fact remain as to whether defendant Marcato was negligent, defendants Owner's Corp. and Argo's application for common law indemnification is premature (see

*White v. 92nd Realty Co.*, 285 AD 2d 642 [2001])

Accordingly, defendants Owner's Corp. and Argo's motion for summary judgment and defendant Marcato's cross-motion for summary judgment are both denied.

This constitutes the decision and Order of the court.

Enter:

LAURA L. JACOBSON, JSC.

HON. LAURA JACOBSON