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SCANNED ON 4/21/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 101342/2003

MILLER, DONALD

VS

METROPOLITAN 810 7TH AVE

Sequence Number : 005

SUMMARY JUDGMENT

X NO.

ION DATE

ION SEQ. NO.

ION CAL. NO.

The following papers, numbered 1 to _____ were read on this ...on to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per decision attached to motion seq

FILED

APR 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/10/08

J.S.C.

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DONALD MILLER and ELIZABETH MILLER,

Plaintiffs,

-against-

METROPOLITAN 810 7TH AVE, LLC, 810 7TH AVE GP, LLC, 810 7TH AVE L.P., METROPOLITAN OPERATING PARTNERSHIP, L.P., METROPOLITAN PARTNERS, LLC, RECKSON ASSOCIATES REALTY CORP., OTIS ELEVATOR CO. and OTIS ELEVATOR CORP.,

Index No. 101342/03

Defendants.

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METROPOLITAN 810 7TH AVE, LLC, 810 7TH AVE GP, LLC., 810 7TH AVE L.P., METROPOLITAN OPERATING PARTNERSHIP, L.P., METROPOLITAN PARTNERSHIP LLC and RECKSON ASSOCIATES REALTY CORP.,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 591001/03

JOSEPH NETO & ASSOCIATES, INC., NEW YORK ELEVATOR COMPANY and NEW YORK ELEVATOR AND ELECTRICAL CORPORATION,

Third-Party Defendants.

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EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 005, 006, 007, 008, and 009 are consolidated herein for disposition.

In this personal injury action, plaintiffs Donald and Elizabeth Miller seek to recover damages for injuries that he sustained on May 19, 2000, when his left arm was crushed in an

elevator machine component known as a "selector." At the time of his injury, plaintiff was working in the elevator machine room of the premises located at 810 Seventh Avenue, New York, New York.

Before the court are four summary judgment motions and a motion to amend the bill of particulars. Third-party defendant New York Elevator and Electrical Corp. moves (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint. Defendant Otis Elevator Company, sued herein as Otis Elevator Co. and Otis Elevator Corp., also moves (motion sequence number 006) for summary judgment dismissing plaintiffs' complaint and all cross claims asserted against it. Defendants/third-party plaintiffs Metropolitan 810 7th Avenue, LLC, 810 7th Ave GP, LLC, 810 7th Ave L.P., Metropolitan Operating Partnership, L.P., Metropolitan Partners, LLC, and Reckson Associates Realty Corp. move (motion sequence number 007) for an order: (1) granting summary judgment dismissing plaintiff's claims and all cross claims as against them; and (2) granting summary judgment on their third-party claim against New York Elevator and Electrical Corp. for contractual indemnification, including reimbursement of attorneys' fees and other costs incurred in defending this action. Third-party defendant Joseph Neto & Associates, Inc. moves (motion sequence number 008) for summary judgment dismissing the third-party complaint as against it. Plaintiffs move (motion sequence number 009), pursuant to CPLR 3025 (b) and 3043 (c), to amend the bill of particulars to allege violations of ASME/ANSI standards, the National Electrical Code, and the New York City Building and Electrical Codes.

BACKGROUND

The Parties

On the date of his accident, plaintiff was employed as a modernization supervisor with third-party defendant New York Elevator and Electrical Corp. (NYE). Defendants/third-party plaintiffs Metropolitan 810 7th Avenue, 810 7th Ave GP, LLC, 810 7th Ave L.P., Metropolitan Operating Partnership L.P., Metropolitan Partnership LLC and Reckson Associates Realty Corp. (collectively, Metropolitan and Reckson) owned and managed the premises, a 42-story commercial building. On or about October 24, 1999, Reckson entered into a contract with NYE to modernize the building's elevators. Reckson also hired a consultant, third-party defendant Joseph Neto & Associates, Inc. (Neto), which drafted the specifications for the modernization of the building's elevators.

Defendant Otis Elevator Company (Otis) manufactured the selector involved in the accident. The parties agree that the selector was installed at the premises in 1969 or 1970. The selector is no longer present in the building, as it was removed as part of the modernization.

The Selector

The following description of the elevator selector is undisputed, unless otherwise noted. The subject selector (an Otis model # 6104AY selector) was part of the equipment for the building's elevator # 9. The selector had a central, vertical shaft onto which leveling cams, also known as "pie plates," were bolted at specific distances from each other. The leveling cams were called pie plates because they looked like a pie, out of which two separate, alternating slices were removed from half of the pie. There was one pie plate for each floor that the elevator served. Thus, the subject selector had 26 pie plates stacked on top of each other. Because of the shape of

each pie plate, the stacked pie plates looked like a spiraling, helical tower around the vertical shaft. There were floor bars mounted on the side of the selector frame, which made contact with the pie plates when the selector was operating. The selector was designed for use in high-rise buildings with high-speed elevators.

The selector can be described as an "elevator in miniature" since its movement mirrored the movement of the elevator cab in the shaftway. The selector operated in the following manner: it was mechanically linked to the elevator cab by a steel tape that ran from the top of the cab to the machine room and around a sheave beside the selector. As the elevator traveled up or down in the shaftway, the tape turned the sheave. This movement, in turn, caused the vertical shaft with the attached pie plates to rotate or spin in unison. When a passenger in the elevator pushed a button for a particular floor, relays on the floor bar for the requested floor energized, causing carbon contacts to make contact with the pie plate for that floor. This movement regulated slowing and stopping of the elevator and caused the elevator doors to open.

There is no dispute that the selector (or other nearby components) did not display any written warnings about accidental contact with its moving parts. There is also no dispute that Otis designed and manufactured the selector without any guards or covers for the rotating pie plates. Otis did not offer any separate optional safety equipment for this model selector.

The Accident

Plaintiff testified at his examination before trial that, shortly before his accident, he was in the high-rise machine room, speaking to one of NYE's modernization mechanics about the work that the mechanic had performed there. Plaintiff had never been in the high-rise machine room before (Plaintiff EBT, at 82). On the date of his injury, plaintiff was wearing a snugly-

fitting short-sleeved polo shirt, which was provided to him by his employer (*id.* at 84, 90). Plaintiff was aware that elevator # 9 had not been shut down (*id.* at 63). He walked to the back of the machine room to examine the wiring that the mechanic had installed in the new hall button panels, which had been installed as part of the project (*id.* at 85, 217). After turning right at the subject selector, he then proceeded to walk straight ahead a number of steps and turned to the left (*id.* at 87). Plaintiff stood facing the hall button panel, about a foot away, with the selector behind him (*id.* at 88). According to plaintiff, the high-rise motor room had "tight clearances" between each part of the equipment for each car (*id.* at 52). He did not recall whether the pie plates of the selector were spinning at that point (*id.* at 89).

According to plaintiff, he did not recall making any physical movements, but after about five seconds, he felt a "tug" on his left shoulder (*id.* at 91, 92). His shirt and left arm were then pulled into the selector (*id.*). When plaintiff was pulled into the selector, he was also electrocuted (*id.* at 174-175). He testified that he was unable to remove himself from the selector (*id.* at 95). However, at some point thereafter, plaintiff's shirt ripped loose from the selector, causing him to fall to the floor (*id.* at 96-97). Plaintiff's co-worker came to his aid, and placed a makeshift tourniquet on his arm out of his own shirt (*id.* at 98). Plaintiff observed that his left biceps and triceps muscles were "torn off," and that his forearm had lacerations (*id.* at 113). After he was taken to the hospital, the doctors told him that they wanted to amputate his arm (*id.* at 119).

Plaintiff testified that elevator # 7 was out of service at the time of his accident (*id.* at 67). The building did not let him take another car out of service; only one elevator in each bank could be taken out of service at one time (*id.* at 102, 103).

The Pleadings

The complaint contains eight causes of action against Metropolitan, Reckson, and Otis. The fifth, sixth, and seventh causes of action state claims against Otis sounding in strict products liability, breach of express and implied warranty, and negligence. Specifically, plaintiffs allege in their bill of particulars that the selector was "unreasonably dangerous" in that it: (1) was "unguarded and unprotected and allowed for incidental contact by persons in the area"; (2) lacked warnings; and (3) lacked a readily-accessible emergency shut-off switch or button (Verified Bill of Particulars, ¶¶ 20-21, 23, 25). The first, second, third, and fourth causes of action charge Metropolitan and Reckson with negligence and violations of Labor Law §§ 200 and 241 (6). In plaintiffs' amended/supplemental bill of particulars, plaintiffs allege that Metropolitan and Reckson were "negligent in creating dangerous conditions, failing to remedy dangerous conditions despite both actual and constructive notice thereof; in failing to cover [the] selector device; in creating inadequate work space; in providing inadequate work space; in failing to take elevator(s) out of service; in providing inadequate lighting; in lacking requisite caution/warning signs/lines; [and] in otherwise being negligent." The eighth cause of action is for loss of services by the injured plaintiff's wife, Elizabeth Miller.

Otis cross-claimed against Metropolitan and Reckson for contribution and indemnification. In their answer, Metropolitan and Reckson also asserted cross claims against Otis for contribution and indemnification. By service of a third-party complaint, Metropolitan and Reckson impleaded NYE and Neto, alleging causes of action for contribution, indemnification, and failure to procure insurance. In their respective answers to the third-party complaint, Neto and NYE asserted cross claims against each other for contribution and

indemnification.

DISCUSSION

The standards for summary judgment are well established. The movant on a motion for summary judgment must make a prima facie showing of entitlement thereto, by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (CPLR 3212 [b]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If the movant fails to make such a showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Ayotte*, 81 NY2d at 1063). However, if the movant meets this burden, then the burden shifts to the nonmovant to show, also through admissible evidence, that there is a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's role in resolving motions for summary judgment is issue finding, not issue determination (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]).

Design Defect Claims Against Otis

Otis contends that the selector was reasonably safe for its intended use when it was marketed. Guards were never required by industry custom or any applicable code, statute, or regulation, and would, in fact, limit or prevent routine maintenance, inspection, and repair of the selector. In any case, Otis argues, plaintiff was not using the product at all. Rather, plaintiff somehow backed into a moving piece of elevator equipment. The selector also contains a toggle-type emergency shut-off switch.

In response, plaintiff counters that the selector was defective and dangerous in that its exposed components rotated at high rates of speed when elevators were in use. There was a

feasible alternative design that would have prevented plaintiff's injury – Otis simply had to place a removable cover over the exposed, spinning parts of the selector. In fact, the only other company to design the selector with spinning pie plates covered these moving parts. And, Otis's own maintenance manual for the 6104AY model instructed mechanics to remove selector covers before performing maintenance.[1] Furthermore, American Society of Mechanical Engineers (ASME) A17.1, Rule 104.1, required guarding of exposed elevator equipment, including selector components. There was no continual necessity of open access to the selector, because lubrication of the selector was performed at most on a monthly basis.

A plaintiff injured by an allegedly defective product may proceed on one of four theories: (1) negligence; (2) breach of express warranty; (3) breach of implied warranty; and (4) strict products liability (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]).

In strict products liability, a "defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980], citing Restatement of Torts 2d § 402A). The plaintiff may assert that the manufacturer made a mistake in the manufacturing process, improperly designed the product, or failed to provide adequate warnings regarding the use of the product (*Voss*, 59 NY2d at 107). In this case, plaintiff alleges that the selector was defectively designed because it lacked a guard or other protective covering, lacked an emergency shut-off

[1]It is unclear why Otis's own maintenance manual would reference the removal of selector covers if the selector at issue was made without a cover, unless the manual was only referring to the predecessor model.

switch, and failed to provide adequate warnings about accidental contact.

To establish a prima facie case in strict products liability, the plaintiff must establish that "the product 'was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury'" (*Anaya v Town Sports Intl., Inc.*, 44 AD3d 485, 486 [1st Dept 2007], quoting *Voss*, 59 NY2d at 107). The standard for determining the existence of a design defect 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" (*Denny v Ford Motor Co.*, 87 NY2d 248, 257 [1995], *rearg denied* 87 NY2d 969 [1996] [internal quotation marks and citation omitted]). This standard demands an inquiry into the following risk/utility factors:

> (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product -- that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design.

(*Voss*, 59 NY2d at 109; *see also Denny*, 87 NY2d at 257). The plaintiff is required to show that there was a feasible alternative design for the product (*Voss*, 59 NY2d at 108).

A cause of action for negligent design requires proof that the manufacturer acted unreasonably in designing the product (*id.* at 107; *see also Blandin v Marathon Equip. Co.*, 9 AD3d 574, 576 [3d Dept 2004]). "[I]n design defect cases very little difference exists between prima facie cases in negligence and strict liability, and a finding of questions of fact with regard to one 'inevitably raises material questions of fact' as to the other" (*Blandin*, 9 AD3d at 576,

quoting *Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 263 AD2d 335, 337-338 [3d Dept 2000]; *see also Denny*, 87 NY2d at 258 ["the reality is that the risk/utility balancing test is a 'negligence-inspired' approach, since it invites the parties to adduce proof about the manufacturer's choices and ultimately requires the fact finder to make 'a judgment about (the manufacturer's) judgment'"]).

Contrary to Otis's contention, a non-user of a product, such as plaintiff, may recover in strict products liability. In *Codling v Paglia* (32 NY2d 330 [1973]), the Court of Appeals held that "the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages" (*id.* at 342; *see also Singer v Walker*, 39 AD2d 90, 95 [1st Dept 1972], *affd* 32 NY2d 786 [1973]). Thus, the court turns to whether the selector was reasonably safe.

In this case, Otis submits evidence, consisting of an affidavit from Gregory Decola, a licensed QEI inspector qualified to perform annual inspections, which indicates that the selector was not required to be guarded or covered by any American National Standards Institute (ANSI) Code or other applicable code, statute or regulation when the selector was installed in the building, or at the time of plaintiff's accident (Decola Aff., at 5). This alone is insufficient to establish that the selector was reasonably safe (*see Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 337 [1986]; *Liquore v Tri-Arc Mfg. Co.*, 32 AD3d 905, 906 [2d Dept 2006]). But Decola also states that guards or covers would not be feasible because they would limit or prevent routine maintenance, inspection, and repair[2], and because there are limitations on where selectors

[2]According to Decola, mechanics must observe the selector in operation in order to determine whether any components arc or spark (Decola Aff., at 6). Mechanics must also inspect the overall condition of the components from all sides (*id.*). If any parts need to be lubricated,

can be placed in relation to other machinery and equipment (*id.* at 5-7).

Nonetheless, in opposition, plaintiffs provide an affidavit from Patrick McPartland, an engineer, in which he opines that the unguarded selector was unreasonably dangerous because it permitted accidental contact with the selector's moving parts (McPartland Aff., ¶ 7).[3] McPartland further states that guards were feasible at the time that the selector was manufactured, and that manufacturing selectors with covers would be inexpensive (*id.*, ¶¶ 9-12).[4] Where, as here, a qualified expert has opined that the defect is dangerous, describes why it is dangerous, explains how it can be made safer and concludes that it is feasible to do so, it is for the jury to make the risk/utility analysis (*see Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680 [2d Dept 2004]; *Milazzo v Premium Tech. Servs. Corp.*, 7 AD3d 586, 588 [2d Dept 2004]; *Garrison v Clark Mun. Equip.*, 241 AD2d 872, 873-874 [3d Dept 1997]).

The following evidence also presents questions of fact as to the feasability of guarding the selector. First, plaintiffs' expert and Otis's expert disagree over whether the 1965 version of

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replaced, or adjusted, they are readily accessible (*id.*). Decola further notes that machine rooms are non-public areas accessible only to mechanics and authorized visitors (*id.* at 7).

[3]According to McPartland, the pie plates, which he also refers to as flywheels, rotate within a range of 50 to 100 revolutions per minute, depending on the number of floors that the elevator is ascending or descending at the time (McPartland Aff., ¶ 6). Guarding the pie plates would protect not just workers working in the vicinity of the machine but also elevator passengers (*id.*, ¶ 11; Decola Aff., at 9).

[4]Specifically, McPartland states that covers were feasible because: (1) there are covers on the controllers, which protect against moving parts, on the same equipment; (2) a guard or cover would not affect the basic dimensions of the selector; (3) a guard or cover could easily be removed for maintenance or inspection like the guards for the controllers; and (4) a guard or cover would have no effect on the selector's utility (McPartland Aff., ¶ 8). In addition, McPartland states that the cost of manufacturing a guard would have been approximately $500 to $1,000 in 2007 dollars (or an additional 1 to 2% of the overall cost of the selector) (*id.*, ¶ 9).

ASME A17.1, Rule 104.1,[5] was violated (McPartland Aff., ¶ 20; Decola Reply Aff., at 4). Second, Otis's own repair supervisor testified, in contrast to Decola, that he was unaware why the selector was designed without a cover (Menville EBT, at 20). In light of the divergence of these opinions, there are issues of fact as to the availability of a safer design for the selector (*see Vincenty v Cincinnati Inc.*, 25 AD3d 463, 464 [1st Dept 2006]). Third, plaintiffs also provide Otis's maintenance manual for the 6104AY model and its predecessor model, the 140-M, which instructs mechanics to remove "selector covers" prior to performing preventive maintenance (Shapiro Affirm., Exh. G, at 4). Fourth, there is a dispute as to whether another elevator company, Dover Elevators, designed a similar selector device with guards around the same time when the subject selector was installed at the building (McPartland Aff., ¶ 10; Decola Reply Aff., at 3). Thus, the court concludes that plaintiffs have shown that triable issues of fact exist on their defective design claims as to the lack of a guard.

In its reply, Otis contends that this case should be more accurately conceptualized as a post-accident change or modification to the "original equipment." There is no merit to this argument. Although there were subsequent modifications to the high-rise machine room, Otis does not dispute that the selector itself was not changed (*see Fernandez v Mark Andy, Inc.*, 7 AD3d 484, 485 [2d Dept 2004] [manufacturer not liable where, after the product leaves the possession and control of the manufacturer, there is a substantial modification which substantially alters the *product*]).

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[5]The 1965 version of Rule 104.1 provided that "[e]xposed gears, sprockets, tape or rope sheaves or drums of selectors, floor controllers or signal machines, and the ropes, chains or tapes for driving same, in machine rooms and secondary machinery spaces, shall be guarded to protect against accidental contact."

Nevertheless, as to plaintiffs' claim that the selector lacked an emergency shut-off switch, defendants submit evidence establishing that the selector contained a standard emergency shut-off switch (Decola Aff., at 7). Plaintiffs have not disputed this point. Therefore, these claims are dismissed to the extent that they are based on the lack of an emergency shut-off switch.

Failure to Warn Claims Against Otis

Otis contends that the selector's rotating pie plates were an "open and obvious" condition, and thus, it did not have any duty to warn plaintiff of any dangers involving their rotation. According to Otis, plaintiff was an experienced elevator mechanic, who should have appreciated the dangers of working in proximity to rotating and electrified equipment. Plaintiffs, however, take the position that there are issues of fact as to whether a written warning on the selector would have prevented his accident under the circumstances, such as a warning not to turn one's back to the selector.

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). Conversely, there is no duty to warn of an open and obvious danger of which the product user is actually aware or should be aware as a result of ordinary observation or as a matter of common sense (*O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 514 [2d Dept 2007]). Failure to warn claims sounding in negligence or strict products liability are equivalent (*Martin v Hacker*, 83 NY2d 1, 8 n 1 [1993]).

Courts have dismissed failure to warn claims where the plaintiff had prior experience in using the product, and thus knew of its dangers. For example, in *Felle v W.W. Grainger, Inc.*

(302 AD2d 971 [4th Dept 2003]), the plaintiff was injured while using a grinder (*id.* at 972). There, the Court dismissed plaintiff's failure to warn claims, because he had seven years of experience using a grinder and should have appreciated the dangers of placing his face in proximity to a rapidly rotating and completely unguarded split or hinged sanding wheel (*id.*). Further, in *DePasquale v Morbark Indus., Inc.* (221 AD2d 409 [2d Dept 1995]), the manufacturer was not liable on a failure to warn theory where the plaintiff was injured when his left leg was caught in the feed wheels of a chipping machine (*id.* at 409-10). The Court found that the danger of injury if one's leg were to come in contact with feed wheels was obvious and plaintiff knew that he could be injured if his limbs were caught in the wheels (*id.*). Where however the user is young or inexperienced with a machine, the issue of whether the danger is obvious cannot be decided as a matter of law (*Doty v Navistar Intern. Transp. Corp*, 219 AD2d 32 [4th Dept 1996] [danger that slowly revolving auger with protruding screws would ensnare nine year old plaintiff's clothing and tear off his arm was not readily discernible to plaintiff who could not be classified as a knowledgeable user]).

Here, it is undisputed that the selector did not contain any written warnings about accidental contact with its moving parts, such as the pie plates. According to plaintiff's testimony, his left arm was pulled into the selector while he was inspecting the newly-installed hall button panel, with his back to the selector (Plaintiff EBT, at 91, 92). Plaintiff testified that he had been a elevator mechanic for approximately 20 years prior to his accident (*id.* at 10-15). He further testified that he had worked on less than 10 or approximately 10 or more prior jobs involving the same Otis selector (*id.* at 48-49, 196). He knew that the selector was designed by Otis, that Otis made many selectors and that, in his experience, these selectors were never

covered (*id.* at 48, 53). Plaintiff also knew that depending on the speed of the elevator, the selector spins at a slower or faster speed (*id.* at 94). In view of this evidence, and the photographs depicting the selector which is visible to the eye, the Court must conclude that the danger of the selector was open and obvious, and therefore, Otis owed no duty to warn plaintiff of the danger (*see Felle*, 302 AD2d at 972). Accordingly, the failure to warn claim against Otis is dismissed.

Breach of Warranty Claims Against Otis

Otis argues that plaintiff's breach of warranty claims are time-barred, inasmuch as there is no dispute that the subject selector was installed at the premises in either 1969 or 1970. In opposition to Otis's motion, plaintiffs concede that they do not have viable breach of warranty claims (Shapiro Affirm. in Opp. to Otis's Motion for Summary Judgment, at 4). Therefore, these claims are dismissed.

Labor Law § 200 (1) and Negligence Claims Against Metropolitan and Reckson

Labor Law § 200 (1) requires that all workplaces be so equipped, operated, and conducted so as to provide "reasonable and adequate protection" to the persons employed therein.[6] This statute is a codification of the common-law duty imposed upon owners and contractors to provide a safe work site (*Perrino v Entergy Nuclear Indian Point 3, LLC*, – AD3d – , 850 NYS2d 428, 429 [1st Dept 2008], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d

[6]In particular, section 200 states that "[a]ll machinery, equipment, and devices in such places shall be so placed, operated, *guarded*, and lighted as to provide reasonable and adequate protection to all such persons" (Labor Law § 200 [1]).

876, 877 [1993]).

Metropolitan and Reckson contend that they owed no duty to plaintiff under Labor Law § 200 or in negligence, since he was injured while attempting to remedy the very condition that he was hired to fix. It is true that an owner of real property owes no duty to a worker injured by a dangerous condition which the worker has undertaken to fix (*Kowalsky v Conreco Co.*, 264 NY 125, 128, *rearg denied* 264 NY 674 [1934] ["[a]n employee cannot recover for injuries received while doing an act to eliminate the cause of the injury"]; *Skinner v G & T Realty Corp. of N.Y.*, 232 AD2d 627 [2d Dept 1996] [worker injured while replacing defective window could not recover under section 200]; *McCullum v Barrington Co. & 309 56th St. Co.*, 192 AD2d 489 [1st Dept 1993] [worker injured because of defect in elevator he was to repair]). Here, however, plaintiff was not injured while remedying a defective or dangerous condition. When plaintiff was injured, he was inspecting the hall button panel that had been installed by one of NYE's modernization employees.

The court also rejects NYE's contention there is no liability in negligence if the condition is open and obvious. "[W]hen a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning" (*Liriano*, 92 NY2d at 242). However, an "open and obvious" condition would only negate any duty to warn of the condition (*Garrido v City of New York*, 9 AD3d 267, 268 [1st Dept 2004]). As stated by the Appellate Division, First Department:

> The duty to maintain premises in a reasonably safe condition is analytically distinct from the duty to warn, and that liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn.

(*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 73 [1st Dept 2004], quoting *Cohen v Shopwell, Inc.*, 309 AD2d 560, 562 [1st Dept 2003] [internal quotation marks and citation omitted]). NYE's reliance on *Rose v A. Servidone, Inc.* (268 AD2d 516 [2d Dept 2000]), which states that "[l]iability will not attach where, as here, the dangerous condition complained of was open and obvious" (*id.* at 517), is misplaced as *Rose* was subsequently repudiated by the Second Department (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

Although Metropolitan, Reckson, and NYE discuss supervision and control, or lack thereof, over plaintiff's work, that standard applies in cases where the injury flows from the means and methods of the work (*see McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005]). In contrast, plaintiffs allege here that the unsafe condition was the unguarded, rotating pie plates in the building's machine room. Where a hazardous condition is a defective or dangerous condition on the premises, the plaintiff must show that the defendant either created or had actual or constructive notice of the condition (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 340 [1st Dept 2005]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

In opposition to these motions, plaintiffs come forward with an affidavit from their expert, opining that Metropolitan and Reckson violated the 1965 and 1996 versions of ASME Safety Standard A17.1, Rule 104.1,[7] and section 27-983 of the New York City Building Code[8]

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[7]*See supra* for 1965 version of ASME A17.1, Rule 104.1. The parties are in agreement that the 1996 version of ASME A17.1, Rule 104.1 states that:

In machine rooms and secondary machinery spaces, the following shall be guarded to protect against accidental contact:
(a) driving machine sheaves and ropes whose vertical projection upon a horizontal plane extends beyond the base of the machine;
(b) overhead sheaves;
(c) exposed gears, sprockets, tape or rope sheaves or drums of selectors, floor controllers or

because the selector's moving parts were unguarded (McPartland Aff., ¶ 20). Their expert further states that Metropolitan and Reckson violated section 70-1996, Rule 110-16 (a), of the National Electrical Code (NFPA), and section 27-3195 (c) of the New York City Electrical Code, which required a minimum clearance space of 36 inches between the hall button panel and the selector, since the clearance was only 33 ¼ inches (*id.*, ¶ 22). Plaintiffs also move to amend the bill of particulars to allege violations of these statutes and standards.

Once a note of issue has been filed, a plaintiff may not serve an amended bill of particulars without obtaining leave of court (CPLR 3042 [b]). Leave to amend the bill of particulars, pursuant to CPLR 3025 (b), should ordinarily be freely granted, provided that there is no prejudice or surprise to the non-moving party resulting from the delay, and amendment is not plainly lacking in merit (*see Verizon N.Y. Inc. v Consolidated Edison, Inc.*, 38 AD3d 391 [1st Dept 2007]; *Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516 [1st Dept 2007]). Prejudice requires "'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801 [1981]).

In this case, the proposed amendments are not substantial departures from the original bill of particulars, inasmuch as they raise no new factual allegations or theories of liability. Indeed, these alleged violations merely repeat what was previously pleaded in the complaint and bill of

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signal machines and their driving ropes, chains or tapes.

[8]Section 27-983 provides that "[t]he provisions of reference standard RS-18 shall be a part of this subchapter" (Administrative Code of City of N.Y. § 27-983).

particulars, i.e., that the selector should have been guarded and that defendants failed to provide plaintiff with adequate work space. Because the court cannot discern any prejudice to defendants, leave to amend the bill of particulars is granted.

In reply, Metropolitan, Reckson, and NYE submit affidavits from their experts, which disagree with plaintiffs' expert's position that these codes and standards were violated. They opine, like Otis's expert, that ASME A17.1-1965 (which they concede was adopted by Building Code § 27-983) does not apply to the leveling cams or pie plates of a selector since they are not specifically enumerated therein (Schloss Reply Aff., ¶ 4; Murray Supp. Aff., ¶¶ 12-13). Further, Metropolitan and Reckson's expert maintains that National Electrical Code § 110-16 (a) and New York City Electrical Code § 27-3195 (c) only apply to "finished installations" (Schloss Reply Aff., ¶ 5). The dispute among the experts as to the applicability of these standards is sufficient to raise a triable issue of fact on these claims. Violations of the Building Code or of an ASME/ANSI standard constitute some evidence of negligence (*see Elliott v City of New York*, 95 NY2d 730, 734-735 [2001]; *Love v New York City Hous. Auth.*, 251 AD2d 553, 554 [2d Dept 1998]).

In any event, there are issues of fact as to whether Metropolitan and Reckson created, knew or should have known of the dangerous condition. Plaintiff testified that the building's starters allowed only one elevator per bank to be taken out of service during the project (Plaintiff EBT, at 107). Reckson ultimately decided when and which elevators were to be taken out of service and in what sequence (*id.* at 77). Plaintiff's co-worker who witnessed the accident, Jorge Cardona, avers that on three or four occasions prior to plaintiff's accident, he asked Reckson's building manager to take an elevator out of service, other than the elevator being modernized, for

safety reasons (Cardona Aff., ¶ 6).[9] However, according to Cardona, the building's manager did not allow another elevator to be taken out of service because it would slow down service and inconvenience many people (*id.*). Furthermore, Cardona asserts that the building starters and freight elevator operator were on strict orders from the building manager not to allow any elevator to be taken out of service, other than the one being modernized (*id.*, ¶¶ 7, 8). It further cannot be concluded, as a matter of law, that the unguarded selector was not an unreasonably dangerous condition (*see e.g. Adams v Hilton Hotels*, 4 AD3d 232, 233 [1st Dept 2004]).

Next, Metropolitan, Reckson and NYE contend that plaintiff cannot recover because he was the sole proximate cause of his injuries. Proximate cause or legal causation requires that a defendant's act or failure to act "'was a substantial cause of the events which produced the injury'" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). Ordinarily, proximate cause is a factual issue to be decided by a jury (*White v Diaz*, – AD3d –, 2008 WL 192137, *4, 2008 N.Y. App. Div. LEXIS 419, ** 10 [1st Dept 2008] [internal citation omitted]). Proximate cause may be decided as a matter of law "'where only one conclusion may be drawn from the established facts'" (*id.*, quoting *Derdiarian*, 51 NY2d at 315).

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[9]The court rejects defendants' assertions that this affidavit should not be considered. Metropolitan, Reckson, and NYE argue in their replies that Cardona's affidavit is clearly tailored to create an issue of fact, and contradicts plaintiff's own pre-trial testimony. However, Cardona's affidavit does not clearly contradict plaintiff's testimony (*see Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]), simply because plaintiff did not recall whether he asked to take an additional elevator out of service. Contrary to NYE's contention, Cardona's affidavit should not be disregarded because it contains hearsay. Hearsay may be used to defeat a motion for summary judgment as long as it is not the only evidence offered in opposition (*Candela v City of New York*, 8 AD3d 45, 47 [1st Dept 2004]). Here, Cardona states, based upon personal knowledge, that he asked for permission to take another elevator out of service (Cardona Aff., ¶ 6).

Where plaintiffs have acted in an unforeseeable, reckless, unnecessary or intentional manner, they have been found to be the sole proximate cause of their injuries. In *Weingarten v Windsor Owners Corp.* (5 AD3d 674 [2d Dept 2004]), the plaintiff, a handyman, stood on a folding chair and attempted to pull himself up to an unoccupied freight elevator that was stuck between floors (*id.* at 676). The plaintiff subsequently lost his balance and fell into the elevator shaft (*id.*). There, the Appellate Division, Second Department, held that the "plaintiff's unforeseeable act of standing on a folding chair while trying to climb into an unoccupied freight elevator was the sole and superseding cause of his injuries" (*id.* at 677).

In *Capellan v King Wire Co.* (19 AD3d 530 [2d Dept 2005]), the plaintiff forced open a secured door by throwing his body against it. Subsequently, the plaintiff was injured after he fell six feet to the ground. As in *Weingarten*, the Court held that the plaintiff's unforeseeable acts were the sole proximate cause of his injuries. Thus, he could not recover under Labor Law §§ 200 or 240 (1) or in common-law negligence (*id.* at 532).

Plaintiff was not the sole proximate cause of his injuries in this case. Although plaintiff testified that he was aware of the location of the selector and believed that he was a sufficient and safe distance away from the selector, his actions were not so irrational, unreasonable, or unnecessary so as to constitute the sole cause of his injuries as a matter of law. Plaintiff's conduct, at most, constituted negligence.

However, with respect to plaintiffs' failure to warn claims, these claims are dismissed, given plaintiff's experience as a mechanic and supervisor, and removing the same selector equipment at issue in this case (*see Liriano*, 92 NY2d at 241).

To the extent that plaintiffs allege that Metropolitan and Reckson failed to provide

adequate lighting, lighting was not a proximate cause of his injuries (*see Sarmiento v C & E Assoc.*, 40 AD3d 524, 526 [1st Dept 2007]), considering plaintiff's testimony that he stood facing the hall button panel when he was pulled into the selector (Plaintiff EBT, at 88, 91, 92).

Therefore, these claims are only dismissed to the extent that plaintiffs seek to impose liability based upon a failure to warn and inadequate lighting.

Labor Law § 241 (6) Claim Against Metropolitan and Reckson

NYE, Metropolitan, and Reckson contend that plaintiffs have failed to identify a specific or applicable provision of the New York State Industrial Code sufficient to support a claim under Labor Law § 241 (6).

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors, and their agents to ensure that construction, demolition, and excavation operations at construction sites are conducted so as to provide for the "reasonable and adequate" protection of construction workers (*see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). The statute is not self-executing, and the plaintiff must plead and prove the violation of an applicable Industrial Code provision (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160, *rearg denied* 56 NY2d 805 [1982]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]), which constitutes "some evidence of negligence" (*Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]). The Industrial Code regulation must constitute a specific, positive command, rather than a reiteration of common-law safety standards, and must proximately cause the accident (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Buckley*, 44 AD3d at 271). Further, the interpretation of an Industrial Code provision and determination as to

whether a particular condition falls within its scope are issues of law for the court (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

In the verified complaint, plaintiffs allege that Metropolitan and Reckson violated the following provisions of the Industrial Code: 8-1.7, 8-1.29, 8-1.58, 23-1.12, 23-1.13, 19.6, and 19.7. Plaintiffs submit an affidavit from McPartland, in which he states that Metropolitan and Reckson violated Industrial Code sections 23-1.12 (b), 23-1.12 (d), 23-1.12 (e), 23-1.12 (f), 23-1.13, and 8-1.29 (b). As a result, plaintiffs have apparently abandoned reliance on sections 8-1.7, 8-1.58, 19.6, and 19.7. In any event, plaintiff's reliance on sections 19.6 and 19.7 is misplaced, since Part 19 was repealed prior to plaintiff's accident (*see Hassett v Celtic Holdings*, 7 AD3d 364, 365 [1st Dept 2004]).

The court will discuss the disputed code provisions seriatim.

12 NYCRR 8-1.29

Part 8 of the Industrial Code is entitled "Construction, Guarding, Equipment, Maintenance and Operation of Elevators, Dumbwaiters, Escalators, Hoists, and Hoistways in Factories and Mercantile Establishments." While a "mercantile establishment" is not defined in this Part, it is defined elsewhere in the Industrial Code as "[a] place where one or more persons are employed in which goods, wares or merchandise are offered for sale and includes a building, shed or structure, or any part thereof, occupied in connection with such establishment" (12 NYCRR 47.5 [d]). Here, plaintiff was injured in a high-rise commercial office building, not a factory or mercantile establishment. Thus, this regulation is inapplicable.

12 NYCRR 23-1.12

Section 23-1.12 pertains to guarding of power-driven machinery. As noted above,

plaintiffs contend that Metropolitan and Reckson violated four subdivisions of this Industrial Code provision: (b), (d), (e), and (f). This section provides as follows:

> (a) General. Power-driven machines not specifically considered in this Part (rule) shall be guarded in accordance with the requirements of Industrial Code Part (Rule No.) 19 relating to "Guarding of Dangerous Machinery, Vats and Pans."
>
> (b) Keys, set screws and similar projections. *All keys, set screws, bolts and similar projections* on shafts, pulleys, gears, collars and couplings and other revolving members, where such projections are not countersunk or protected by location from accidental contact by persons, shall be guarded by smooth, cylindrical safety sleeves constructed of wood or metal which completely surrounds each such projection, or each such projection shall be guarded by a stationary enclosure of sheet metal, wire mesh, expanded metal or other suitable material. Any openings in such enclosures shall reject a ball one-half inch in diameter.
>
> ***
>
> (d) Sprockets and gears. *Sprockets and gears which are not protected by location or design from accidental contact* by persons shall be completely enclosed or shall be provided with band guards which cover the periphery and which have side flanges which extend below the roots of the teeth.
>
> (e) Belts, pulleys and flywheels. All belts except conveyor belts and all pulleys and *flywheels* which are less than seven feet above the ground, floor, working platform, runway or equivalent surface where persons work or pass and which are not protected by location from accidental contact by persons, *shall have all moving parts guarded by substantial enclosures or by safety railings constructed and installed in compliance with this Part (rule) which will prevent persons from approaching within a horizontal distance of 18 inches.* Enclosures required by this Part (rule) may be temporarily removed when starting a machine or for machine adjustment or maintenance, but shall be replaced immediately thereafter.
>
> (f) Friction-disc drives. Friction-disc drives which are not guarded by design or location from accidental contact with any person shall be completely enclosed or shall be provided with band guards with side flanges.

(12 NYCRR 23-1.12 [emphases supplied]).

As relevant here, subdivision (e) states that "flywheels which are less than seven feet

above the . . . floor . . . where persons work or pass and which are not protected by location from accidental contact by persons, shall have all moving parts guarded by substantial enclosures or safety railings." The court notes that a "flywheel" is defined as "a heavy-rimmed rotating wheel used to minimize variations in angular velocity and revolutions per minute, as in a machine subject to fluctuation in drive and load" (American Heritage Dictionary of the English Language [4th ed 2000]). Plaintiffs' expert, an engineer, refers to the pie plates as "flywheels" (McPartland Aff., ¶ 14). Their expert also states, based upon his review of the record, that the "flywheels" were about five feet above the ground, and were located in a machine room where persons work (*id.*). Nevertheless, in reply, Metropolitan, Reckson, and NYE submit affidavits from Ronald Schloss and George Murray, both engineers, who state that the leveling cams were not "flywheels," since they did not serve the same function as flywheels, and are not referred to as such in the elevator industry (Schloss Reply Aff., ¶ 9; Murray Supp. Aff., ¶ 7). Thus, a jury must decide whether the selector's leveling cams constitute "flywheels," and whether this provision was violated (*see McCormack v Helmsley Spear, Inc.*, 233 AD2d 203, 204 [1st Dept 1996]; *see also Welsh v Cranesville Block Co.*, 258 AD2d 759, 760 [3d Dept 1999] [plaintiff raised issue of fact as to Labor Law § 241 (6) claim by submitting expert affidavit opining that wet concrete was a corrosive substance]).

Next, subdivision (b) essentially requires that "[a]ll keys, set screws, bolts and similar projections on shafts . . . and other revolving members . . . not countersunk or protected by location from accidental contact" shall be guarded with safety sleeves or metal. Plaintiffs' expert opines that this provision was violated because the pie plates were not flush with the surface of the selector, and thus should have been guarded (McPartland Aff., ¶ 15). Nonetheless, the court

concludes that this provision does not apply because the pie plates were not "keys, set screws, bolts [or] similar projections."

As noted above, subdivision (d) requires that "[s]prockets and gears which are not protected by location or design from accidental contact by persons shall be completely enclosed or shall be provided with band guards which cover the periphery." A "gear" is defined as either: "(1) a toothed machine part, such as a wheel or cylinder, that meshes with another toothed part to transmit motion or to change speed or direction; or (2) a complete assembly that performs a specific function in a larger machine" (American Heritage Dictionary of the English Language [4th ed 2000]). And a "sprocket" has been defined as "any of various toothlike projections arranged on a wheel rim to engage the links of a chain" (*id.*). NYE submits an affidavit from Murray, in which he indicates that the selector tape rotates the "selector sprocket," causing the pie plates to spin (Murray Aff., ¶ 6). According to plaintiffs' expert, a steel selector tape attached to the elevator cab travels over the selector sprocket, which, acting through gears, causes the selector's flywheels to rotate (McPartland Aff., ¶ 17). There is no evidence that any sprocket or gear had anything to do with plaintiff's accident. Thus, this subdivision is inapplicable.

Subdivision (f) requires "friction-disc drives which are not guarded by design or location from accidental contact" to be "completely enclosed." Plaintiffs' expert states that electrical contact is made as a result of friction between the flywheels and carriage which travels along the selector's shaft (*id.*, ¶ 16). Significantly, plaintiffs' expert does not state that any component of the selector is, in fact, a friction disc drive. Thus, this subdivision does not apply to these facts.

12 NYCRR 23-1.13

Section 23-1.13 provides rules for electrical hazards. In pertinent part, this section states

as follows:

(b) (2) Determination of voltages. Before work is begun at any construction, demolition or excavation site, the employer shall determine the voltage levels of all energized power lines and power facilities around or near such site. Where two or more voltages are available at a job site, all electrical equipment and circuits shall be appropriately identified. Such identification shall include voltage level and phase.

(b) (3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.

(b) (4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear.

This section has been held to be sufficiently specific in order to support a section 241 (6) claim (*Hernandez v Ten Ten Co.*, 31 AD3d 333, 333-334 [1st Dept 2006]; *Rice v City of Cortland*, 262 AD2d 770, 773 [3d Dept 1999]; *Snowden v New York City Tr. Auth.*, 248 AD2d 235, 236 [1st Dept 1998]). The courts have held that provisions of the Industrial Code which refer only to the duty of employers, such as section 23-1.13, also impose a duty on owners (*Rice*, 262 AD2d at 773; *Halftown v Triple D Leasing Corp.*, 89 AD2d 794, 794-795 [4th Dept 1982]).

Here, plaintiffs' expert states that the unguarded selector's contacts and brushes were electrically "hot" with varying voltages from ground to 120 volts (McPartland Aff., ¶ 19).

Plaintiff testified at his examination before trial that he was electrocuted when he was pulled into the unguarded selector (Plaintiff EBT, at 174-175). Significantly, subdivision (b) (4) is not limited to incidents concerning actual contact with energized circuits (*Bardouille v Structure-Tone, Inc.*, 282 AD2d 635, 636 [2d Dept 2001]). The court finds that these subdivisions are applicable, since electric power circuits are required to be guarded by effective insulation or other means.

NYE's remaining contention that this claim should be dismissed, because plaintiff was the sole proximate cause of his injuries, is without merit, as previously discussed.

In sum, this claim is dismissed insofar as it is based upon 12 NYCRR 8-1.7, 8-1.29, 8-1.58, 19.6, 19.7, and 23-1.12 (b), (d), and (f). This claim is adequate to the extent that it is predicated upon 12 NYCRR 23-1.12 (e) and 23-1.13 (b) (2)- (b) (4).

Third-Party Claims for Indemnification, Contribution, and Failure to Procure Insurance

In motion sequence number 003, Metropolitan and Reckson previously moved for summary judgment granting contractual indemnification against NYE. The court denied the motion, since no determination had yet been made as to whether NYE was at fault with respect to plaintiff's accident. Metropolitan and Reckson have not offered any reason for seeking this relief again, and thus, this part of their motion is an improper second summary judgment motion (*see generally Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349, 350 [1st Dept 2005]). In any event, in view of the factual issues as to Metropolitan and Reckson's negligence, contractual indemnification is still premature (*see Cuevas v City of New York*, 32 AD3d 372, 374 [1st Dept

2006]). Therefore, the part of Metropolitan and Reckson's motion seeking indemnity is denied.

Neto moves for summary judgment dismissing Metropolitan and Reckson's third-party complaint against it, which, as previously noted, contains the following claims: contribution, indemnification, and failure to procure insurance.

Common-law indemnification is predicated on vicarious liability without actual fault by the party seeking indemnity (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept], *lv dismissed* 7 NY3d 864 [2006]). "[To establish a claim for] common-law indemnification, the one seeking indemnity must prove not only that it was guilty of negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). "The 'critical requirement' of a valid third-party claim for contribution is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840 [2d Dept 2005], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Neto presents evidence that NYE was solely responsible for the means and methods of the work[10], and that NYE chose the location for the installation of the hall button panel (Neto

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[10]Pursuant to the contract between Reckson and NYE, NYE was to be "solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract" (Tatman Affirm., Exh. 8, § 9.1). Under the contract's specifications, NYE was responsible for designing all plans for the project, including "copies of layouts, shop drawings and standard cuts . . . [including] a plan view of the hoistway and machine room, cab drawings and all accessories and fixtures" (Tatman Affirm. Exh. C, Specifications for the Modernization of the Vertical Transportation System, ¶ 14). Neto also offers evidence that it designed the specifications for the project, occasionally visited the job site to inspect NYE's work, but never directed NYE employees how to perform

EBT, at 31-32; Williams EBT, at 34; Neto Aff., ¶ 6). However, Metropolitan and Reckson point to plaintiff's testimony that Neto selected the location for the hall button panel (Plaintiff EBT, at 217), which, in proximity to the selector, could indicate that Neto created a dangerous condition which either caused or contributed to plaintiff's accident. Thus, there is an issue of fact as to whether Neto may be held liable for common-law indemnification and contribution.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). The agreement between Neto and Reckson provided that:

> Contractor shall fully protect, indemnify and save harmless and defend Manager and Owner, . . . from and against any and all loss, cost, damage, injury, liability claims, liens, demands, taxes, penalties, interest or causes of action of every nature whatsoever . . . arising out of or incident to or in connection with the performance of said work and resulting from: (1) *any negligent act or omission or willful misconduct of Contractor or its subcontractors or their officers, agents or employees*. . . .

(Tatman Affirm., Exh. B, Service Contract Between Reckson and Joseph Neto & Associates, Inc., ¶ 9 [emphasis supplied]). In light of the above evidence, Neto is also not entitled to dismissal of this claim (*see Kelly v City of New York*, 32 AD3d 901, 902 [2d Dept 2006] [third-party defendant not entitled to summary judgment dismissing third-party claim for contractual indemnification in view of factual issues as to its negligence]).

Neto also agreed to procure a commercial general liability insurance policy naming Reckson as an additional insured (Tatman Affirm., Exh. B, ¶ 10). Neto has not met its burden of

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their work (Neto Aff., ¶ 7; Neto EBT, at 35; Duggan EBT, at 30; Duthie EBT, at 23-24).

establishing that this claim should be dismissed, since it has provided no evidence that it did obtain a policy naming Reckson as an insured.

CONCLUSION AND ORDER

Based upon the foregoing, it is

ORDERED that the motion by third-party defendant New York Elevator and Electrical Corp. (motion sequence number 005) for summary judgment dismissing the complaint is granted to the extent that:

(1) the Labor Law § 200/negligence claims against Metropolitan and Reckson (the first, second, and third causes of action) are dismissed only as to failure to warn and inadequate lighting; and

(2) the Labor Law § 241 (6) claim against Metropolitan and Reckson (the fourth cause of action) is dismissed to the extent that it is based upon 12 NYCRR 8-1.7, 8-1.29, 8-1.58, 19.6, 19.7, 23-1.12 (b), (d) and (f), and is otherwise denied.

And it is further

ORDERED that the motion by defendant Otis Elevator Company, sued herein as Otis Elevator Co. and Otis Elevator Corp. (motion sequence number 006), for summary judgment dismissing plaintiffs' complaint and all cross claims asserted against it is granted to the extent that the breach of warranty claim (the sixth cause of action) against it is severed and dismissed, and to the extent that the negligence and strict products liability claims (the fifth and seventh causes of action) are based on a failure to warn and the lack of an emergency shut-off switch, and is otherwise denied; and it is further

ORDERED that the motion by defendants/third-party plaintiffs Metropolitan 810 7th

Avenue, LLC, 810 7th Ave GP, LLC, 810 7th Ave L.P., Metropolitan Operating Partnership, L.P., Metropolitan Partners, LLC, and Reckson Associates Realty Corp. (motion sequence number 007) for summary judgment is granted to the extent that:

(1) the Labor Law § 200/negligence claims against Metropolitan and Reckson (the first, second, and third causes of action) are dismissed only as to failure to warn and inadequate lighting; and

(2) the Labor Law § 241 (6) claim against Metropolitan and Reckson (the fourth cause of action) is dismissed to the extent that it is based upon 12 NYCRR 8-1.7, 8-1.29, 8-1.58, 19.6, 19.7, 23-1.12 (b), (d) and (f), and is otherwise denied.

And it is further

ORDERED that the motion by third-party defendant Joseph Neto & Associates, Inc. (motion sequence number 008) for summary judgment dismissing the third-party complaint as against it is denied; and it is further

ORDERED that the motion by plaintiffs Donald and Elizabeth Miller (motion sequence number 009), pursuant to CPLR 3025 (b) and 3043 (c), to amend the bill of particulars to allege violations of ASME/ANSI standards, the National Electrical Code, and the New York City Building and Electrical Codes is granted; and it is further

ORDERED that the remainder of the action shall continue.

Dated: April 10, 2008

FILED

APR 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.
EMILY JANE GOODMAN