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

PRESENT: HON Joan A. Madden Justice PART 11

Index Number : 101072/2004

MUHAMMAD, FAIZ

vs

ARCHDIOCESE OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10-25-07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion 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 in accordance with the annexed Memorandum Decision + Order.

FILED

JUL 22 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7-17-08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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FAIZ MUHAMMAD,

Plaintiff,

-against- Index No. 101072/04

ARCHDIOCESE OF NEW YORK, TERRENCE CARDINAL COOKE HEALTH CARE CENTER, NEW YORK MEDICAL COLLEGE, MAINCO ELEVATOR COMPANY AND SCHINDLER ELEVATOR CORPORATION, CROTHALL FACILITIES MANAGEMENT, INC., CROTHALL EDUCATION SERVICES, INC., CROTHALL HEALTH CARE INC.,

Defendants.

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Joan A. Madden, J.:

Defendants Crothall Facilities Management, Inc., Crothall Education Services, Inc., and Crothall Health Care Inc. (collectively, the Crothall defendants) move for an order granting summary judgment in their favor and dismissing all claims asserted against them (motion seq. no 005). Defendant Terrence Cardinal Cooke Health Care Center (TCCHCC) cross-moves for summary judgment dismissing all claims asserted against it and for summary judgment as to liability on its cross claims for indemnification asserted against defendants Schindler Elevator Corp. ("Schindler") and Mainco Elevator Company ("Mainco"). Schindler moves for summary judgment dismissing all claims and cross claims against it. (motion seq. no 006). Mainco moves for summary judgment in its favor and dismissal with prejudice of all claims asserted against it (motion seq. no 007). Plaintiff Faiz Muhammad cross-moves for

summary judgment as liability on his claims against the moving defendants.[1]

Plaintiff, a double amputee, alleges that he sustained a fractured left hip at 10:00 p.m. on July 21, 2003, while in his motorized wheel chair and exiting elevator No. 3 (the elevator) at the fifth floor of the TCCHCC facility located at 1249 Fifth Avenue in Manhattan. Plaintiff, a resident at the facility, alleges that the elevator mis-leveled, causing him to fall and his wheelchair to overturn on top of him.

In this action, plaintiff has sued TCCHCC, the owner of the facility where the accident occurred; the Crothall defendants, TCCHCC's managing agent at the facility; Mainco, TCCHCC's exclusive elevator maintenance and repair company from July 2002 until July 15, 2003, six days prior to the accident; and Schindler, TCCHCC's exclusive elevator maintenance and repair company on the date of the accident.

In the amended complaint, plaintiff asserts a single negligence cause of action based on allegations that the moving defendants were negligent in owning, repairing, inspecting, servicing, maintaining, controlling, and operating the elevator and that their negligence proximately caused his injuries.

Discovery has been completed and the Crothall defendants, TCCHCC, Schindler, Mainco now move for summary judgment dismissing the claims against them and TCCHCC also seeks summary judgment as to liability on its cross claims for indemnification against Schindler and Mainco. Plaintiff opposes the motions and seeks summary judgment as to liability on its negligence claim.

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[1]Motion sequence numbers 005, 006, and 007 are consolidated herein for disposition.

On a motion for summary judgment, the proponent must "make a prima facie showing of entitlement to judgment as a matter of law" by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any triable issues of material fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the proponent has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that triable issues of fact exist (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

The Crothall Defendants' Motion

The Crothall defendants seek summary judgment in their favor on grounds that they had no contractual duty with respect to inspection or maintenance of the elevator after April 30, 2003, almost three months prior to the accident, and that plaintiff has failed to demonstrate with admissible evidence that they had actual or constructive notice of the alleged defective condition prior to that date.

In opposition, plaintiff contends that the Crothall defendants were in sole charge and control of the premises, including the elevator, by virtue of their contract with TCCHCC and negligently operated, managed, and maintained the elevator, causing it to malfunction on July 21, 2003, and had notice of the mis-leveling incidents occurring prior the accident.

"[I]t is well established that 'liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition' " (Hennessy v Palmer Video, 237 AD2d 571, 571 [2d Dept 1997], quoting Minott v City of New York, 230 AD2d 719, 720 [2d Dept 1996]).

Here, the Crothall defendants have made a prima facie showing entitling them to summary judgment. Specifically, these defendants point to evidence showing that any control they might otherwise have exerted over the elevator was terminated by TCCHCC when it cancelled their plant operations contract almost three months prior to the accident. Pursuant to this contract, the Crothall defendants were obligated to perform certain plant operations and maintenance management services, including liaison services and coordination with the elevator maintenance companies hired directly by TCCHCC. The Crothall defendants never had a contract with TCCHCC to perform elevator maintenance (see Crothall defendants by Jeff Bahar, Crothall Servs. Group Proj. Mgr., May 24, 2007 Dep Tr, at 10:3-8).

During the term of the Crothall defendants' contract in 2002 and 2003, a full-service elevator maintenance contract between TCCHCC and Mainco was in effect (see TCCHCC/Mainco Contract, May 9, 2002; accord Karen Idyahia, Mainco Office Mgr., Sept. 11, 2007 Aff., ¶ 5). Moreover, TCCHCC terminated the Crothall defendants' contract, effective April 30, 2003, almost three months prior to the accident (see TCCHCC March 25, 2003 letter to Crothall defendants; Crothall defendants by Bahar Dep Tr, at 12:2-9).

Next, plaintiff has not met its burden of controverting the Crothall defendants' showing of their entitlement to summary judgment with admissible evidence that the Crothall defendants had actual or constructive notice of a mis-leveling defect with respect to the elevator prior to the termination of their contract. In order to be liable for a failure to maintain an elevator in a safe condition, a managing agent of a property must have actual or constructive knowledge of a defect. (Lapin v. Atlantic Realty Apts., Co., 48 AD3d 337 [1st Dept 2008]; Scheifla v. Benchmark Management Corp., 270 AD2d 815 [4th Dept 1999]]).

Contrary to plaintiff's contention, there is no admissible evidence that the Crothall defendants were notified of the instances of elevator's repeated mis-leveling during the time period at issue.[2] Moreover, the affidavit of plaintiff's notice witness Eduardo Standard ("Standard") does not raise a triable issue fact regarding the Crothall defendants' notice of the alleged defect.[3] While Standard attests that certain individuals, including employees of TCCHCC were present at residents' council monthly meetings, he does not identify any of these individuals as employees of the Crothall defendants nor does he specify that an employee of the Crothall defendants was present during the April 2003 meeting, or that the April 2003 meeting occurred after the alleged mis-leveling on April 15, 20, 27 or 29.

Next, it cannot be said that the evidence of mis-leveling contained within the Mainco records for April 2003 gave the Crothall defendants constructive notice of a mis-leveling defect since there was never a contract between the Crothall defendants and Mainco, and there is no evidence of an agency relationship between the companies.

Therefore, and in the absence of any contractual duty to plaintiff to maintain the elevator in a safe condition or evidence that the Crothall defendants had actual or constructive notice of

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[2]There is evidence in the record that on April 15, 20, 27, and 29, 2003, that Mainco received complaints about the elevator mis-leveling.

[3] As defendants argue, plaintiff's failure to disclose Standard as a witness until after the instant summary judgment motion violated discovery orders and is in non-compliance with defendants' discovery demands and indicates that the affidavit should not be considered. (see Rodriguez v Sung Hi Kim, 42 AD3d 442 [2d Dept 2007]; Concetto v Pedalino, 308 AD2d 470 [2d Dept 2003]). This is supported by plaintiff's failure to provide a reasonable excuse for the non-disclosure.(see Spitzer v 2166 Bronx Park E. Corps., 284 AD2d 177 [1st Dept 2001]; Hanson v City of New York, 227 AD2d 217 [1st Dept 1996]). However, the court need not reach this issue since as indicated above, Standard's affidavit is insufficient to raise a triable issue of fact as to whether Crothall defendants had notice of mis-leveling defect.

the alleged defect, summary judgment is appropriately granted in their favor.

TCCHCC's Motion

TCCHCC seeks summary judgment on the negligence claim on grounds that it had a full service elevator maintenance contract with Mainco and Schindler in effect at all relevant times; and that plaintiff cannot prove the existence of the alleged defect, that TCCHCC caused or created the alleged defective condition, or that TCCHCC had actual or constructive notice of the defect.

In opposition, plaintiff contends that TCCHCC is liable as the elevator's owner and that it received actual and constructive notice of the alleged defect during the monthly residents' council meetings and from the maintenance and repair records prepared by Mainco and Schindler.

TCCHCC had a full-service elevator maintenance contract with Schindler in effect at the time of the accident. Schindler admits that, pursuant to the terms of the contract, it was exclusively responsible for elevator maintenance and repair at the TCCHCC facility on the date of the accident (see Schindler by Michael C. Landis, Schindler Vice Pres. of Bus. Dev., May 21, 2007 Dep Tr, at 32:5-18). In relevant part, the contract required that, effective July 15, 2003, Schindler was to provide regular and systematic maintenance, periodic performance evaluations, including car-leveling performance, and safety testing, and for all repair and maintenance to be performed exclusively by Schindler. For the year prior to the effective date of the Schindler contract, TCCHCC had retained Mainco pursuant to a similar full-service elevator maintenance and repair contract.

When an owner or possessor of property has an exclusive maintenance and repair contract with an elevator company, it may nonetheless be held liable to a plaintiff for injuries

resulting from an elevator malfunction when such owner or possessor of property had actual or constructive notice of the alleged defect causing injury. (Camaj v East 52nd Partners, 215 AD2d 150 [1st Dept 1995]; Browning v Meadowlands Professional Park, Inc., 254 AD2d 725 [4th Dept 1998]). To demonstrate constructive notice, it must be shown that the hazard was visible and apparent and had existed for a length of time prior to the accident sufficient to permit the defendant to discover and remedy it (Plantamura v Penske Truck Leasing, 246 AD2d 347 [1st Dept 1998]).

Here, even assuming arguendo that TCCHCC has met its burden of showing that it lacked notice of the elevator defect, plaintiff has controverted this showing. In his affidavit, plaintiff attests that, on five separate occasions in March, April, May, June, and July 2003, he saw the elevator mis-level at the lobby level and reported the hazard to the TCCHCC security guard on duty (see Faiz Muhammad, Aug. 10, 2007 Aff., ¶ 7). He further attests that, on each occasion, the security guard cut the elevator off and power would not be turned on until the next morning, when an engineer arrived (see id., ¶ 8). In addition, Mainco's maintenance and repair records demonstrate that, on April 15, 20, 27, and 29, 2003, complaints of the elevator mis-leveling were received by Mainco. These incidents occurred approximately three months prior to the accident. Evidence of repeated elevator malfunctioning during the six months preceding an accident may constitute circumstantial evidence of notice of the alleged defect and of negligent repair (Rogers v Dorchester Assocs., 32 NY2d 553 [1973]).

Contrary to TCCHCC's contention, plaintiff has adequately identified the condition that allegedly caused him to fall. To sustain liability against a defendant, "the cause of the fall must be specific and definite, speculation and conjecture being simply insufficient" (Williams v

Hannaford Bros. Co., 274 AD2d 649, 650 [3d Dept 2000]). The plaintiff must demonstrate that the defendant's conduct was the proximate cause of the accident; the mere fact that an accident occurred and speculation as to the cause of the accident are not sufficient to sustain a claim for personal injuries (Oettinger v Amerada Hess Corp., 15 AD3d 638 [2d Dept 2005]).

Here, plaintiff alleges in the complaint, amended complaints, and two bills of particulars that he fell on the fifth floor while exiting elevator No. 3 as the result of the mis-leveling of the elevator (see Complaint Jan. 3, 2004 ¶ 13; Supplemental/Amended Complaint Feb. 23, 2004 ¶ 21; Amended Complaint Jul. 6, 2006 ¶¶ 22; Bill of Particulars to Mainco May 16, 2004 ¶ 5; Bill of Particulars to Schindler Jul. 12, 2004 ¶ 5). In addition, in his affidavit, plaintiff attests that, in March, April, May, June, and July 2003, he personally witnessed the elevator mis-leveling, and saw a 12-inch mis-leveling at the lobby level (see Muhammad Aff., ¶ 7). He also attests that, on the date of the accident, the elevator aligned properly with the lobby floor, so he entered the elevator cab and did not look down as he turned and exited the elevator cab on the fifth floor (see id., ¶ 8). He further attests that, while lying on the fifth floor in front of the elevator with the wheelchair overturned on top of him, he observed that the elevator had mis-leveled 12 inches above the fifth floor (see id., ¶¶ 9, 10).

Contrary to the moving defendants' contentions, plaintiff's attestations do not contradict his deposition testimony. When asked at his deposition whether he ever looked down while he was wheeling himself out and whether he ever saw a mis-leveling, he testified in response to both questions that he did not (see Plaintiff Oct. 13, 2004 Dep Tr at 181:10-17). Significantly, however, at no time during the deposition was plaintiff asked whether he saw the alleged defect immediately after his fall. In addition, and contrary to the moving defendants' summaries of

plaintiff's deposition testimony, plaintiff did not testify that he never "noticed" or "experienced" any elevator defects while residing at the facility. Instead, plaintiff was asked whether he ever "rode" an elevator with an operating problem while residing at the facility and prior to the accident, and plaintiff responded, "no" (id. at 56:8-13).

The testimony of non-party Julita Bocado, a TCCHCC nurse assigned to the fifth floor, is not to the contrary. Bocado merely testified that, while she did not witness the accident, she was the first person to reach plaintiff, and that, when the elevator came into her field of vision, she observed that the doors were closed and never saw a mis-leveled condition (see TCCHCC by Julita Bocado Apr. 20, 2005 Dep Tr, at 29:12-16). Moreover, to the extent her testimony contradicts plaintiff's version of the incident, such testimony is not sufficient to resolve the issue of whether the elevator mis-leveled as a matter of law.

For these reasons, TCCHCC's motion for summary judgment is denied.

TCCHCC also seeks partial summary judgment as to liability on its cross claims for indemnification asserted against Schindler and Mainco.

As between a property owner and the one hired to maintain the property, the party assuming the contractual duty to maintain is liable to the owner for the damages, if any, that the owner is required to pay the injured party (Camaj v. East 52nd Partners, 215 AD2d at 152). An owner is entitled to rely on the maintenance company's voluntary promise to maintain, inspect, and repair an elevator and to recover under settled rules of indemnity (id.). In such situation, the owner's actual or constructive notice of an elevator defect is irrelevant in determining whether the maintenance company must indemnify the owner. Mas v Two Bridge Assocs., 75 NY2d 680 (1990); Rogers v Dorchester Assocs., 32 NY2d 553, supra. An owner is entitled "to recover

entirely by way of indemnification for breaches of duty by a service company to which it had delegated fully its responsibilities for the maintenance of the elevators" (Rogers v Dorchester Assocs., 32 NY2d at 562-563.

In this case, TCCHCC had a full-service elevator maintenance contract with Schindler in effect at the time of the accident. In relevant part, the contract required Schindler to provide regular and systematic maintenance, periodic performance evaluations, including car-leveling performance, and safety testing, and for all repair and maintenance to be performed exclusively by Schindler. TCCHCC also had a full-service elevator maintenance contract with Mainco in effect until six days prior to the accident.

However, as triable issues exist regarding whether Schindler or Mainco were negligent, and whether this negligence was a substantial factor in causing plaintiff's injuries, summary judgment on the indemnification cross claims is properly denied at this juncture (see Donnelly v Trecline Cos., 13 AD3d 143 [1st Dept 2004]).

Motions by Schindler and Mainco

Schindler and Mainco separately seek summary judgment dismissing plaintiff's claims against them on the ground that they lacked actual or constructive notice of the alleged defect. Mainco also contends that it cannot be held liable because its maintenance contract was terminated six days prior to the accident. Mainco also relies on the affidavit of its expert, Patrick McPartland, P.E.

In opposition, plaintiff contends that the elevator maintenance companies are each bound by their own separate contracts to maintain the elevator in a safe condition, that each, therefore, owed plaintiff a duty to do so, and that each had notice of the alleged defect, as demonstrated by

the records of Mainco, the prior elevator maintenance company, and plaintiff's affidavit.

Plaintiff also submits the affidavit of his expert witness, Patrick A. Carrajat ("Carrajat"). Defendants argue that Carrajat does not provide sufficient basis to qualify him as an expert, and that the court should therefore disregard his affidavit. While the court does not condone plaintiff's failure to produce a copy of Carrajat's curriculum vitae, which is referenced in the affidavit (see Patrick Carrajat Aug. 6, 2007 Aff., ¶ 1), Carrajat has sufficiently attested to his credentials based on his position as a Senior Consultant to a company employing elevator and escalator experts, and his statement that he has been qualified as an elevator expert by various State and Federal courts throughout the country (id).

An elevator maintenance company which has agreed to maintain an elevator in safe operating condition may be liable to an injured passenger for failure to correct conditions of which it has knowledge or for failure to use reasonable care to discover and correct a condition which it ought to have found (Rogers v Dorchester Assocs., 32 NY2d 553, supra; Elphage v New York City Health & Hosps. Corp., 185 AD2d 295 [2d Dept 1992]). "[C]ircumstantial evidence will suffice to support an inference of negligence where the defendant company has 'exclusive control' of elevator maintenance" (Rogers v Dorchester Assocs., 32 NY2d at 561). As noted above, evidence of repeated elevator malfunction during the six months preceding the accident may constitute circumstantial evidence of notice of the alleged defect and negligent operation, maintenance, or repair (id.). Moreover, evidence that an elevator was repaired or was otherwise defective after the accident date is relevant to the condition of the elevator at the time of the accident (Francklin v. New York Elevator Co., Inc., 38 AD3d 329 [1st Dept 2007]; Kaplan v. Einy, 209 AD2d 248 [1st Dept 1994]).

Here, there is no dispute that Schindler bore exclusive responsibility for the maintenance, inspection, and repair of the elevator on the date of the accident and for six days prior, pursuant to the express terms of its contract with TCCHCC, effective July 15, 2003. Schindler's repair and maintenance logs and records do not demonstrate that Schindler received complaints about a mis-leveling defect, or observed such defect, prior to the accident. However, triable issues exist regarding whether Schindler properly inspected the elevator for mis-leveling during what was described by its service mechanic, Michael McCarthy, as a "walk-through" inspection in early July 2003, prior to the effective date of its contract. According to plaintiff's expert, Carrajat, a "'walk through' inspection is a term of art in the elevator business and means you simply go to the building to see what is there, it is distinct and vastly different from a thorough inspection."

Furthermore, since Schindler conducted preventive maintenance on the elevators on July 18, 2003, three days before the July 21 accident, there is an issue of fact as to whether Schindler negligently repaired or failed to repair the elevator at issue especially given the previous repeated mis-leveling incidents in April 2003. Finally, there are triable issues of fact as to whether Schindler knew or should have known about the mis-leveling problems with the elevator based on Mainco's records, which it arguably should have reviewed before taking over exclusive maintenance of the elevators.

Despite the expiration of its exclusive elevator maintenance contract, Mainco may be held liable to plaintiff if there exists evidence from which it may reasonably be inferred that Mainco, while its contract was in effect, was negligent in the discharge of its duties, and that such negligence was causally related to the plaintiff's accident occurring after the maintenance contract's expiration (Macon v. Amlie Realty, 190 AD2d 642 [1st Dept 1993]; compare Karian v.

G & L Realty, LLC, 32 AD3d 261 [1st Dept 2006][granting summary judgment to elevator company under a service contract until a month prior to plaintiff's fall from a mis-leveled elevator where there was no evidence that elevator company was ever notified that any of the building's elevators were mis-leveling).

Contrary to Mainco's contention, its employee' deposition testimony that they could not recall receiving mis-leveling complaints is not dispositive. Mainco's own maintenance and dispatch records evidence that on October 8, 2002, and on April 15, 20, 27, and 29, 2003, Mainco received complaints that the elevator had repeatedly mis-leveled. The majority of these complaints were made merely three months prior to the accident. Further, Basil Williams, a Mainco route mechanic, testified that, on April 29, 2003, he inspected elevator Nos. 1, 2, and 3 in response to an unspecified complaint made one day earlier that the elevators were mis-leveling, but was unable to find a mis-leveling problem and returned the elevators to service (see Mainco by Basil Williams Aug. 5, 2005 Dep Tr, at 89:2 to 91:12). In addition, plaintiff's expert, Carrajat stated that the annual inspection of the elevator performed by the New York City Department of Buildings in August 2003, resulted in the issuance of a violation for leveling on August 12, 2003, which is less than a month after the accident and is relevant to the condition of the elevator at the time of the accident (Francklin v. New York Elevator Co., Inc., 38 AD3d 329).

Furthermore, the affidavit by Mainco's expert witness, Patrick McPartland, P.E., does not conclusively demonstrate that Mainco did not have notice or properly performed its contractual repair and maintenance obligations. McPartland, a professional engineer and elevator consultant, attests that his review of Mainco's relevant records confirms that Mainco performed the industry standard required maintenance on the elevator during the year prior to the termination of its

elevator maintenance contract with TCCHCC (see Patrick McPartland, P.E., Aug. 9, 2007 Aff., ¶ 4). McPartland also attests that the repairs and maintenance performed by Mainco from April 29, 2003, the date of a customer complaint about a mis-leveling that occurred on either elevator No. 1, 2, or 3, through the contract termination date did not include repairs to remedy a leveling defect or evidence that such a defect was found by a Mainco technician (see id., ¶¶ 4-5, 9).

However, McPartland's affidavit does not establish as a matter of law the absence of negligence on the part of Mainco, since there is evidence in the record from which Mainco's negligence can be inferred, including repeated reported instances of mis-leveling in April 2003, and the violation relating to leveling issued with respect to the elevator less than a month after the accident (Rogers v Dorchester Assocs., 32 NY2d 553).

For these reasons, Schindler's and Mainco's motions for summary judgment are denied.

Plaintiff's Cross-Motion

Plaintiff cross-moves for summary judgment in his favor, contending that negligence may be inferred against the Crothall defendants, TCCHCC, Schindler, and Mainco under the doctrine of res ipsa loquitur on grounds that each of these defendants had exclusive control over the elevator and that plaintiff is not an elevator expert and, therefore, cannot know how the accident happened.

In opposition, these defendants contend that the doctrine does not apply to the circumstances presented here.

The facts and circumstances underlying this action do not warrant application of the doctrine. "The doctrine of res ipsa loquitur represents an application of the ordinary rules pertaining to circumstantial evidence in negligence cases stemming from accidents having

particular characteristics. When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident" (Dermatossian v New York City Trans. Auth., 67 NY2d 219, 226 [1986]; Kambat v St. Francis Hosp., 89 NY2d 489 [1997]).

To invoke the doctrine, the plaintiff must demonstrate that (1) the event does not usually occur in the absence of negligence, (2) the instrumentality that caused the event was within the exclusive control of the defendant, and (3) the plaintiff did not contribute to the cause of the accident (De Sanctis v Montgomery Elev. Co., Inc., 304 AD2d 936 [3d Dept 2003]). Plaintiff has failed to demonstrate the existence of these elements.

While the doctrine has been applied to accidents involving elevators and escalators (see e.g. Weeden v Armor Elev. Co., Inc., 97 AD2d 197 [2d Dept 1983]), it is not applicable to prove liability against the Crothall defendants or TCCHCC (see Hodges v Royal Realty Corp., 42 AD3d 350 [1st Dept 2007] [defendant building managing agent did not exercise degree of control over building elevators to allow for application of res ipsa loquitur doctrine where defendant elevator company had exclusive control over elevator maintenance and repair]). As indicated above, the record shows that Crothall never had control over the elevator machinery and TCCHCC had hired two different companies, at different times, pursuant to full-service elevator maintenance and repair contracts.

The doctrine also cannot be used to prove liability against Schindler or Mainco, two different elevator repair companies having exclusive access to the elevator and its machinery at different, yet relevant, times. Where individuals other than the defendant's employees had access to the alleged defective instrumentality, the plaintiff cannot establish that the defendant had exclusive control over the instrumentality (Dermatossian v New York City Trans. Auth., 67

NY2d 219, supra [defendant's exclusive control over bus metal grab handle not established where bus customers invited to use, and did use, handle]; Imhotep v State of New York, 298 AD2d 558 [2d Dept 2002] [defendant's exclusive control over bulletin board in jail cell not established where cell occupied by another inmate two to three weeks prior to accident]; Patrick v Bally's Total Fitness, 292 AD2d 433 [2d Dept], lv denied 98 NY2d 605 [2002] [defendant's exclusive control over collapsed metal grate covering drainage pit inside closet not established where plaintiff janitor not employed by defendant]).

Accordingly, it is

ORDERED that motion sequence number 005 is granted and summary judgment in favor of defendants Crothall Facilities Management, Inc., Crothall Education Services, Inc., and Crothall Health Care Inc. is granted and all claims asserted against them are severed and dismissed; and it is further

ORDERED that defendant Terrence Cardinal Cooke Health Care Center's cross motion is denied without prejudice to move again for summary judgment on its indemnification cross claims; and it is further

ORDERED that defendant Schindler Elevator Corp.'s motion sequence number 006 is denied; and it is further

ORDERED that defendant Mainco Elevator Company's motion sequence number 007 is denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants Crothall Facilities Management, Inc., Crothall Education Services, Inc., and Crothall Health Care Inc.,

with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 17, 2008

ENTER:

J.S.C.