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

PRESENT: LOUIS B. YORK J.S.C.

PART 2

Index Number : 105905/2006

SANTIAGO, DULCE

VS.

583 RIVERSIDE DRIVE

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

Motion is decided in accordance with ~~the decision/order on the record.~~ accompanying decision

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/8/09

LOUIS B. YORK J.S.C.

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 2

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DULCE SANTIAGO,

Plaintiff,

-against-

Index No.: 105905/06

583 RIVERSIDE DRIVE, L.P., BROADWAY HOUSING COMMUNITIES, INC., BROADWAY HOUSING DEVELOPMENT FUND COMPANY, INC. and THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

----------X

583 RIVERSIDE DRIVE, L.P., BROADWAY HOUSING COMMUNITIES, INC., BROADWAY HOUSING DEVELOPMENT FUND COMPANY, INC.,

Third-Party Plaintiffs,

-against-

Third-Party
Index No.: 590176/07

THYSSENKRUPP ELEVATOR CORPORATION, and LEXINGTON INSURANCE COMPANY,

Third-Party Defendants.

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LOUIS B. YORK, J.:

Plaintiff seeks to recover for injuries she alleges she incurred, on December 14, 2003, as a result of a fall in an elevator that traveled up and down, uncontrollably, about five times. The owner of the premises at 583 Riverside Drive, New York (583), and its managing agent (together, Building Defendants) move, pursuant to CPLR 3212, for summary judgment in their favor, dismissing plaintiff's claims. Alternatively, they move for summary judgment granting contractual

defense and indemnification as against defendant and third-party defendant, Thyssenkrupp Elevator Corporation (Elevator Corp.), which installed the alleged runaway elevator, and held the maintenance contract for it at the time of the incident.

Building Defendants contend that they delegated elevator maintenance to Elevator Corp., did not maintain control over the elevator, had no notice of any defect or complaints about the elevator, and that plaintiff cannot establish that the accident was caused by their negligence. In support of their argument concerning notice, Building Defendants provide the testimony of the building's desk manager, Marilyn Denis, who, in response to queries about prior elevator complaints, testified that she did not recall that there were any, and that generally elevator service then was good (Def. Mov. Aff., Exh. F [Denis Tr., at 31-32, 57, 73-74]). Building Defendants also submit Elevator Corp. service records. It is undisputed that they do not demonstrate elevator problems or complaints prior to the incident. In addition, Building Defendants provide the testimony of Elevator Corp.'s employee, Ralph Gadino, who responded to complaints and problems about and regularly serviced the elevators, that he was not aware of any elevator complaints.

In opposition, plaintiff provides the affidavit of engineer Ronald D. Schloss, who opines that electrical interruptions in the building were not the cause of the elevator malfunction, but that its sole proximate cause was defendants' inadequate maintenance of the elevator's speed control system, including its landing and leveling mechanism, all of which, he states, are in the defendants' exclusive control. Schloss further opines that the work tickets produced show that Elevator Corp.'s maintenance time was less than would be required to perform complete required maintenance, with

12.5 hours spent in the 11 months preceding the accident, when 22 hours would have been required, and that this shortcoming was a proximate cause of plaintiff's accident.

Plaintiff argues that Building Defendants have a non-delegable duty to maintain the elevator in good repair, and have not met their burden to show lack of notice because they have not submitted expert opinion about the cause of accident, and the desk manager did not keep a log or complaint book, and does not recall whether she received complaints. Plaintiff also argues that the doctrine of res ipsa loquitur is applicable here.

The owner of a building has a non-delegable duty to maintain and repair an elevator on its premises, and may be liable for elevator malfunctioning or defects causing injury to a plaintiff about which it has constructive or actual notice, or where, despite having an exclusive maintenance and repair contract with an elevator company, the owner fails to notify the elevator company about a known defect (*Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2d Dept 2006]). To demonstrate constructive notice, it must be shown that the hazard was visible and apparent, and 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]).

The record contains no evidence from which may be drawn the inference that the Building Defendants had notice, or should have known, of an elevator defect. Denis's testimony does not support plaintiff's assertion that Denis does not remember whether or not there were complaints about the elevator. While plaintiff accuses defendants of failing to keep a log or complaint book, Denis testified that the building's procedure was to provide tenants with forms for making written complaints, which were kept at the front desk (Denis Tr., at 16-17). The only evidence in the record shows that there were no prior complaints about the elevator, or dropping problems indicated

in Elevator Corp.'s records, and there is no suggestion that Building Defendant created the condition. As plaintiff has not produced evidence of elevator malfunction prior to the incident, Building Defendants prevail on this issue (*see Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [1st Dept 2007]).

Plaintiff turns to the doctrine of res ipsa loquitur to establish an issue of fact, as where it applies, plaintiff need not prove notice (*see Bigio v Otis El. Co.*, 175 AD2d 823 [2d Dept 1991]). For plaintiff to benefit from the application of this theory:

> "'(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff'"

(*Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987], quoting Prosser, Torts § 39, at 218 [3d ed]). The parties dispute the control element of the doctrine only.

Building Defendants argue that Elevator Corp. had exclusive control over maintenance of the elevator pursuant to what it contends is a full-service elevator maintenance contract (the Agreement) with 583 in effect at the time of the accident. Elevator Corp. contends that their control was not entirely exclusive, as 583 had elevator keys, and the ability to shut the elevator down. Plaintiff argues that both defendants are liable, as "the doctrine of res ipsa loquitur can be applied even where more than one defendant is in a position to exercise exclusive control" (*Wen-Yu Chang v Woolworth Co.*, 196 AD2d 708 [1st Dept 1993]). As previously mentioned, plaintiff's expert maintains that the malfunctioning part was under defendants' control.

Building Defendants rely on *Hodges v Royal Realty Corp.* (42 AD3d 350 [1st Dept 2007]), in which the First Department granted summary judgment to defendant (Royal), which "retained ownership of the elevators, [but] did not have anything to do with their maintenance or operation which would warrant the conclusion they did something, or failed to do something, that caused this accident" or "notice that a dangerous condition existed in their operation" (*id.* at 352, 353). In

Hodges, plaintiff claimed that res ipsa loquitur applied to more than one defendant because Royal and the elevator company both exercised a degree of control over operation of the subject elevator (*id.* at 351). The Court framed the issue as "whether Royal shared exclusive control over the elevators with [the elevator company] to such a degree that its failure to fulfill its responsibilities constitutes a rational explanation for the occurrence of this accident" (*id.* at 352). The Court stated that determination of that issue required review of the "true nature" of Royal's relationship with the elevator company, in terms of the relative control over the elevators that each exercised (*id.*).

The elevator contract between the parties in *Hodges* ceded responsibility for the daily operation, inspection, maintenance and repair of the elevators to the elevator company, and Royal merely retained ownership of the elevators (*id.*). The contract also prohibited the owner from allowing an entity other than the contracting elevator company to make alterations, repairs or adjustments. In addition, the elevator company provided an onsite mechanic who handled service, and was, apparently, at the premises daily (*Hodges v Royal Realty Corp.*, 2005 WL 6218784, 1, 2005 NY Misc Lexis 8413 [Civ Ct, NY County 2005], *affd* 12 Misc 3d 136[A], 2006 NY Slip Op 51267[U] [App Term, 1st Dept 2006], *revd* 42 AD3d 350 [1st Dept 2007]). Because Royal had nothing to do with the elevator's maintenance or operation, the Court found that it did not exercise a degree of control that would permit the application of res ipsa loquitur (*Hodges*, 42 AD3d at 352).

Plaintiff cites to *Ianotta v Tishman Speyer Props., Inc.* (46 AD3d 297 [1st Dept 2007]), in which the plaintiff alleged that she was injured when elevator doors slammed on her. The doors were the type that contained an embedded sensor, and the Court found that res ipsa loquitur applied as against the defendant owner and elevator company, because as between them, and members of the public without access to the sensor, the greater probability of responsibility for the malfunction lay with defendants (*id.*, at 299; *see DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191 [1st Dept

2005][finding lower court's conclusion that doctrine of res ipsa loquitur was inapplicable erroneous where evidence existed that owner and the elevator company shared responsibility]).

Here, no party disputes that the Agreement provides that Elevator Corp. was responsible for elevator repair, and regular and systematic maintenance at the subject premises, as well as to test equipment, and dispatch technicians promptly in the event that a problem occurred. Additionally, similar to the building owner in *Hodges* (42 AD3d 350, *supra*), the Agreement did not permit 583 to allow other companies to make adjustments or repairs to the equipment, or to replace parts or component parts of the elevator. 583 was also required to accept Elevator Corp.'s judgment as to the means and methods to be employed for any corrective work under the Agreement. Unlike *Hodges*, however, where the relationship included the regular presence of the elevator company's service person on the premises, here the defendants do not dispute that the total time spent by Elevator Corp. in maintaining or operating the elevators was 12.5 hours in the 11 months preceding the incident. In fact, unless Elevator Corp. was called about a problem, the Agreement provides only for monthly scheduled visits to the premises. Thus, this case is distinguishable from *Hodges*, where the contracting elevator company, in fact, exercised such extensive and exclusive control over the elevators, that drawing an inference of negligence against Royal would not have made sense.

Whether Building Defendants had access to the speed control mechanism that plaintiff maintains is implicated in the elevator malfunction has not been addressed here. If the evidence at trial indicates that Building Defendants had no such access, it may be that an inference that it was more likely than not that the injury was caused by Building Defendants is not justified, but as the parties have not addressed this issue sufficiently, Building Defendants' request to dismiss the complaint as to them must be denied.

Elevator Corp. submits that if the court grants the Building Defendants' motion on the basis of lack of actual or constructive notice of a defective condition, it should also be granted summary judgment on this basis. The court has not granted summary judgment to Building Defendants. In addition, an elevator company that agrees to maintain an elevator in safe operating condition, may be liable to a passenger for "failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]). Negligent inspection and repair may be inferred from the failure of a device when the elevator company has complete charge over and maintenance of the device (*id.* at 560; *see also Solowij v Otis El. Co.*, 295 AD2d 145 [1st Dept 2002] [inference that elevator company did not conduct reasonably prudent inspections or competently maintain elevator raised fact issue as to whether company created or had constructive notice of defective condition]). Elevator Corp. did not meet its burden to establish that it exercised reasonable care to discover and correct a dangerous condition which it ought to have found (*see Mezon v Dover El. Co.*, 272 AD2d 227 [1st Dept 2000]), and has not attempted to address plaintiff's expert's contentions about its maintenance. Furthermore, fairness dictates that plaintiff be permitted to address Elevator Corp.'s contentions at trial, as she was not afforded an opportunity to do so here, where Elevator Corp. requested summary judgment only in opposition papers.

On another note, Building Defendants maintain that they have established that they are free from negligence, or notice of a defective condition, and are entitled to summary judgment against Elevator Corp. for contractual indemnification and defense pursuant to the Agreement's indemnification provision. Indeed, Elevator Corp. agreed to indemnify, defend and save harmless the owner and its agents from claims brought against them of any nature, including, but not limited to, those caused by acts, omissions or the negligence of Elevator Corp. Elevator Corp. counters that this provision is unenforceable under General Obligations Law § 5-322.1 (GOL 5-322.1).

While GOL 5-322.1 is violated where the party seeking indemnification is found to be negligent, the statute has not been interpreted to preclude indemnification of the "innocent" owner (*see Mahoney v Turner Constr. Co.*, 37 AD3d 377, 380 [1st Dept 2007]). As Elevator Corp. had responsibility under the contract to service and maintain the elevators in the premises, if the jury should find that Building Defendants are liable under the theory of res ipsa loquitor, Elevator Corp. would be liable to them for contractual indemnification and defense costs (*see Ianotta,* 46 AD3d at 300).

Accordingly, it is

ORDERED that the motion of defendants 583 Riverside Drive, L.P., Broadway Housing Communities, Inc., and Broadway Housing Development Fund Company, Inc. for summary judgment dismissing the complaint is denied; and it is further

DECLARED that the motion of defendants 583 Riverside Drive, L.P., Broadway Housing Communities, Inc., and Broadway Housing Development Fund Company, Inc. for summary judgment on their third-party cause of action against Thyssenkrupp Elevator Corporation is granted and Thyssenkrupp Elevator has a duty to provide contractual defense and indemnification to the third-party plaintiffs.

Dated: 1/8/09

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK