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

PRESENT: Hon. Shlomo S. Hagler *Justice* **PART:** 17

DOROTHY DOLAN,

Plaintiff,

- against -

SCHINDLER ELEVATOR CORPORATION, BROOKFIELD PROPERTIES MANAGEMENT, LLC, and NEWPORT TOWER CO., LLC,

Defendants.

INDEX NO.: 109663/2009

MOTION SEQ. NO.: 003

Motion by defendants Brookfield Properties and Newport Tower for summary judgment dismissing plaintiff's complaint and all cross-claims and granting them judgment for indemnity over co-defendant Schindler Elevator.

	Papers Numbered
Defendants Brookfield Properties and Newport Towers' Notice of Motion with Affirmation of Counsel William J. Smith, Esq., in Support of Motion & Exhibits "A" through "P"	1, 2, 3
Defendants Brookfield Properties & Newport Towers' Memorandum of Law in Support of Motion	4
Affirmation of Co-Defendant Schindler Elevator's Counsel James C. De Norscia, Esq., in Opposition to the Motion with Exhibits "A" through "I"	5
Reply Affirmation of Defendants Brookfield Properties and Newport Towers' Counsel William J. Smith, Esq., with Exhibits "A" and "B"	6
Plaintiff's Notice of Cross-Motion with Affirmation of Counsel Christopher L. Sallay, Esq., with Exhibits "A" and "B"	7
Affirmation of Defendant Schindler Elevator's Counsel James C. De Norscia, Esq., in Opposition to Plaintiff's Cross-Motion with Exhibits "A" through "C"	8
Reply Affirmation of Plaintiff's Counsel Christopher L. Sallay, Esq.,	9
Transcript of Oral Argument of September 10, 2012	10
Gray Sheet Short Form Order dated January 27, 2012, entered January 30, 2012	11

Cross-Motion: ☐ No ☑ Yes **Number of Cross-Motions:** 1

Cross-Motion by Plaintiff for summary judgment only against Schindler Elevator.

Upon the foregoing papers, and as set forth in the attached separate written Decision and Order, it is hereby ordered that the motion of defendants Brookfield Properties Management LLC and Newport Tower Co., LLC is granted to the extent of dismissing the cross-claim of co-defendant Schindler Elevator Corporation for common-law indemnification and is otherwise denied; and it is further ordered that the cross-motion of plaintiff Dorothy Dolan is hereby denied.

FILED

MAR 07 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: February 26, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	☐ Final Disposition		☒ Non-Final Disposition	
Motion is:	☐ Granted	☐ Denied	☒ Granted in Part	☐ Other
Cross -Motion is:	☐ Granted	☒ Denied	☐ Granted in Part	☐ Other
Check if Appropriate:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
	☐ DO NOT POST		☐ REFERENCE	

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

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DOROTHY DOLAN,

Plaintiff,

- against -

SCHINDLER ELEVATOR CORPORATION, BROOKFIELD PROPERTIES MANAGEMENT LLC, and NEWPORT TOWER CO., LLC,

Defendants.

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Index No.: 109663/09

Motion Seq. No: 003

DECISION and ORDER

SHLOMO S. HAGLER, J.:

Plaintiff Dorothy Dolan ("Dolan" or "plaintiff"), allegedly sustained personal injuries as a result of an accident on February 27, 2009, when a rapidly descending elevator, in which she was a passenger, abruptly halted. The elevator is located in a building known as Newport Tower ("Newport Tower"), at 525 Washington Boulevard in Jersey City, New Jersey, then owned by defendant, Newport Tower Co., LLC ("NPT") and managed by defendant Brookfield Properties Management LLC (collectively, "the Brookfield Parties").

The Brookfield Parties move, pursuant to CPLR § 3212, for summary judgment dismissing the cross-claim of co-defendant Schindler Elevator Corporation ("Schindler") and for an order of conditional judgment for common-law indemnification against Schindler. Plaintiff cross-moves, pursuant to CPLR § 3212, for an order granting her summary judgment against Schindler on the issue of liability.

The Brookfield Parties had also moved for summary judgment, pursuant to CPLR § 3212, dismissing plaintiff's complaint on the ground that they were not liable to plaintiff because (1) they did not have notice of any elevator problem which caused plaintiff's accident or failed to notify

Schindler of a known defect prior to the accident, and (2) they had a comprehensive elevator service contract, the National Service Agreement dated January 1, 2007, with Schindler to inspect and maintain the elevators at Newport Tower ("the Agreement") (Exhibit "B" to the Brookfield Parties' motion). Due to the Agreement and no evidence produced demonstrating that the Brookfield Parties had anything to do with the accident, plaintiff did not oppose the Brookfield Parties' motion to dismiss the plaintiff's complaint (Affirmation of Plaintiff's Counsel, Christopher L. Sallay, Esq., In Support of Plaintiff's Cross-Motion ["Aff. In Support of Plaintiff's Cross-Motion"], ¶¶ 5-6). By order dated January 27, 2012, the portion of the Brookfield Parties' motion seeking dismissal of plaintiff's complaint against them was granted without opposition from the plaintiff.

FACTUAL BACKGROUND

It is undisputed that plaintiff was a passenger in a descending high-rise elevator that stopped abruptly twice, and which Schindler then elevated to a higher floor in order to rescue the plaintiff and another passenger, Ralph Thomas ("Thomas"). Plaintiff was then taken directly to the hospital. In her complaint, plaintiff alleges that the incident and her injuries were caused and/or contributed to by the negligence of the defendants in the ownership, maintenance, management, operation, control, repair, service, installation and inspection of elevator number 15 at NPT's building ("Elevator 15") (Brookfield Parties Motion, Exhibit "C" at ¶ 26).

At her deposition, Dolan testified that she and Thomas were passengers in Elevator 15, both boarding the elevator on the 27th floor. Dolan further testified that, after she boarded, the elevator began to descend normally, and then jolted to a stop, which did not cause plaintiff physical injury at that time. Dolan stated that the elevator then continued descending, started to rumble or shake,

and then dropped, after which Elevator 15 came to a very hard and abrupt halt (*id.*, Exhibit "F" at 19), and plaintiff found herself on the elevator floor.

DISCUSSION

Summary Judgment Standard

The Court of Appeals in *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968) set forth the standard for granting summary judgment as follows:

> To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Di Menna & Sons v City of New York*, 301 NY 118, 92 NE2d 918.) This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable' [sic]. (*Barrett v Jacobs*, 255 NY 520, 522, 175 NE 275.) The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned. (*Curry v Mackenzie*, 239 NY 267, 269-270, 146 NE 375, 376.)

The First Department in *Broadway 111th Street Associates v Morris*, 160 AD2d 182, 184-85 (1st Dept 1990) emphasized that:

> [A]s repeatedly held, the remedy of summary judgment is a drastic one which should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 A.D.2d 943, 944) or where the issue is even arguable (*Barrett v Jacobs*, 255 N.Y. 520, 522), since it serves to deprive a party of his [or her] day in court. Relief should be granted only where no genuine, triable issue of fact exists (see *Werfel v Zivnostenska Banka*, 287 N.Y. 91).

In addition, the movant has the initial burden of proving entitlement to summary judgment. As the Court of Appeals in *Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 853 (1985) held:

> The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Zuckerman v City of New York*, 49 N.Y.2d 557, 562;

> *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 A.D.2d 648, 649; *Greenberg v Manlon Realty*, 43 A.D.2d 968, 969).

If this showing is made, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (CPLR § 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260, 401 NYS2d 176 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983]). "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial." (*Spearmon*, 96 AD2d at 553 [quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 (1st Dept 1959)]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975]).

In addition, "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d at 439 [citing *Curry v Mackenzie*, 239 NY 267, 269-270]; *See also Dell v Turner Const. Co.*, 299 AD2d 293 [1st Dept 2002]; *Alvarez v New York City Hous. Auth.*, 295 AD2d 225 [2002]).

Plaintiff's Cross-Motion for Summary Judgment on Liability Against Schindler

Plaintiff moves for summary judgment based on negligence and the doctrine of res ipsa loquitur. "An elevator company which 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 [citation and quotation marks omitted]" (*Johnson v Nouveau El. Indus. Inc.*, 38 AD3d 611, 612 [2d Dept 2007]; *see also Rodgers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]). However,

> "[f]or a case to fall within [the doctrine of res ipsa loquitur], (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; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff [citation and quotation marks omitted]"

(*Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611, 614 [1st Dept 2012]).

The First Department has recently stated that "[t]he only instance when res ipsa loquitur can be established as a matter of law is when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of [the] defendant's negligence is inescapable" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [citing *Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 (2006)]).

Plaintiff states that she is entitled to summary judgment because elevators do not abruptly stop absent negligence, there is evidence concerning worn elevator parts, Schindler had exclusive control over the elevator by virtue of the Agreement, and plaintiff was not negligent. Plaintiff asserts that Elevator 15 abruptly stopped because of specific worn governor parts, which she contends caused the jaws on the governor's rope grip mechanism to engage prematurely and suddenly stop

the elevator while it was traveling at or near its 1000 feet per minute speed, resulting in plaintiff's injury (Aff. In Support of Plaintiff's Cross-Motion, ¶¶ 3, 7).

In moving for summary judgment, plaintiff provides testimony that her only role in the incident was as an elevator passenger. To demonstrate Schindler's exclusive control over the Elevator 15's components, plaintiff points to the Agreement and the testimony of David Clelland ("Clelland"), Schindler's resident mechanic at the premises, that Schindler was responsible for maintaining the elevator and that he daily inspected Elevator 15's governor (Aff. In Support of Plaintiff's Cross-Motion, ¶ 8). Plaintiff also points to the report of Jersey City Building Department elevator inspector, George Shershanovich ("Shershanovich"), in which he found the rope grip mechanism defective and issued a violation for the replacement of worn governor parts, but did not indicate whether he deemed the worn parts to have caused the accident (Aff. In Support of Plaintiff's Cross-Motion, ¶ 9).

Plaintiff also points to a report from Schindler's employee, Ed Cable ("Cable"), which indicates that after the incident Cable ran Elevator 15 ten to twelve times, with 350 pounds in it, without a safety mechanism engaging ("no safety's sets"), and concluded that there was "some wobble in the vertical shaft of the governor" (Aff. In Support of Plaintiff's Cross-Motion, ¶ 10; Exhibit L to Brookfield Parties' Motion, at pages 1-2). The report also indicates that, compared to measurements taken in two other elevators, Elevator 15's governor's movable jaw was a fraction of an inch closer to the stationery jaw, and that this was because the governor latch pin link and latch pin were worn (*Id.*)

Plaintiff also submits, as an expert opinion,[1] the affidavit of Patrick A. Carrajat ("Carrajat"), who inspected the elevator parts on January 21 and February 24, 2010, approximately a year after the accident occurred (Exhibit "A" to Aff. In Support of Plaintiff's Cross-Motion). Carrajat opines that the reason that Elevator 15 came to an unexpected and abrupt halt was because the governor jaws engaged prematurely due to worn governor parts. Carrajat further opines that any proper and reasonable inspection by Schindler's resident mechanic, Clelland, would have revealed the defective condition of the rope grip mechanism on the governor, and that this condition existed for a significant length of time prior to the accident, and was the cause of plaintiff's injury. Plaintiff argues that the only reasonable conclusion is that Clelland failed to perform the inspections that he said he did, or performed them negligently, and not in keeping with the standards of elevator mechanics in the industry.

In anticipation that Schindler would argue that the accident was the result of an electrical power interruption or fluctuation outside of its control, plaintiff provides the testimony of an assistant property manager for the building, Michael Kinney ("Kinney"), who testified that he was not aware of power outages or issues at the building on the day of the incident. Kinney also testified that when the building had , in fact, experienced a power dip, unrelated to the elevator event at issue here, that there had been additional indications of this, such as computers going down, lights going off, alarms on equipment and calls from tenants (Exhibit I to Brookfield Parties' Motion, at page 88). Kinney states that the building had never had a power surge or outage that caused a single, individual

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1. While Carrajat lists many positions he has held within the elevator industry and numerous accomplishments, he neither mentions if he is a licensed engineer nor concludes or frames his opinion within a reasonable degree of engineering (or other scientific methodology) certainty, which is the expected terminology for expert opinions.

elevator, that is, only one elevator in a bank of several elevators, to shut down or have a problem. Kinney also stated that his understanding, based on hearsay conversations with his engineers, was that each elevator bank, and not each individual elevator, had its own electrical sub-power banks.

In opposition, Schindler maintains that the accident was not caused by its negligence, but by an outside power issue, beyond Schindler's control. In support of this causation contention, Schindler submits selected portions of the deposition of Jon B. Halpern ("Halpern"), a licensed engineer who, according to his curriculum vitae, affidavit and deposition testimony, has over thirty (30) years of experience in the design, maintenance and modernization of elevators and their components (Halpern Curriculum Vitae, Exhibit "A" and Halpern Deposition Testimony, Exhibit "B" to Schindler's Opposition to Brookfield Parties' Motion; Exhibit "C" to Schindler's Opposition to Plaintiff's Cross-Motion). Halpern avers that the opinion he offers is made to a reasonable degree of engineering certainty,[2] and lists many facts, which he avers are relevant to his analysis, including Dolan and Thomas' testimony,[3] which he states that he reviewed.

Halpern states that the elevator control system did not indicate that an elevator over-speed had occurred but that, despite this, the governor over-speed switch and mechanical mechanism both tripped. Halpern opines that this completely eliminates a safety trip from a faulty governor jaw or grip and that any loose grip findings were due to the fact that, after the incident, the governor was reset with a pry bar. Halpern opines that because the governor was found to be properly calibrated,

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2. This is in stark contrast to the Carrajat opinion which was not stated to be based on a reasonable degree of engineering certainty.

3. Thomas had commenced a law suit in New Jersey and was deposed in that suit, but was not deposed in this action. Thomas' deposition transcript has not been submitted here and is not part of the record in this case.

it had to trip from one of two possibilities: (1) an over-speed; or (2) an inertial set from a sudden stop. Halpern continues that it is very unlikely that the elevator over-sped without detection by its speed monitoring system, thus leaving the cause of the governor trip as an inertial set of the governor.[4] Halpern states that such a set can occur from a sudden stop or movement of the elevator, and is more likely to occur when the elevator is forced to stop from a full-speed run. Halpern further states that the cause of this can be: (1) any safety device on the elevator that trips and stops the elevator; (2) dirt or debris in the governor ropes or sheaves; or (3) a power fluctuation. Halpern opines that since no dirt or debris of significance was found after the incident, and no other safety circuits were found to be activated, the only remaining possibility involves electrical power. Halpern concludes that the mostly likely cause of the incident was a power fluctuation, which caused a high speed stop and an inertial set of the governor, resulting in the setting of the elevator safety, and that this is consistent with Thomas's testimony that the elevator lights flickered. Halpern also concludes that the behavior of Elevator 15 before the setting of the elevator safety is inconsistent with that of an elevator with a faulty governor.

In his deposition testimony, based on Dolan's testimony, Halpern stated that Elevator 15 stopped twice, and, similar to his affidavit, that Dolan and Thomas described a shaking and rumbling within the car. Halpern stated that these circumstances did not fit a governor set, but are consistent with a power disturbance.

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4. In his deposition, Halpern testified that an inertial set of the governor is when it "sets because the elevator stops and there's still inertia in the governor ropes and there's enough inertia to actually jerk the governor such that it overspeeds for an instant, the balls will fly out, and the governor will set" (*see* Schindler Op. to Pl. Mov., Exh. B, at 58-59).

Also in opposition, Schindler points to the testimony of its resident mechanic at the building, Clelland, who testified that he regularly inspected the governor, including the rope grip mechanism, and that prior to plaintiff's accident he had never noticed that it was defective, but that a defective rope grip mechanism would not have caused the elevator to malfunction and go on safety (Exhibit "H" to Brookfield Parties Motion, at pages 164-166). Clelland's supervisor, Jerry Manchec ("Manchec"), also confirmed Clelland's testimony that there was nothing wrong with the governor or the rope grip mechanism of Elevator 15 (Exhibit "K" to Brookfield Parties Motion, at pages 122-123). It is noteworthy that Clelland and Manchec were the only two individuals that inspected Elevator 15 prior to the accident and both opined that neither the governor nor the rope grip mechanism of Elevator 15 were defective.

In reply, plaintiff argues that Schindler's submissions can neither be considered nor admissible. Plaintiff states Halpern's deposition testimony is inadmissible, pursuant to CPLR § 3117, because plaintiff was not provided notice of the deposition and did not attend it. However, even inadmissible hearsay may be offered in opposition to a motion for summary judgment, if it is not the only evidence offered (*see DiGiantomasso v City of New York*, 55 AD3d 502, 502-503 [1st Dept 2008]; *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002] [hearsay evidence may suffice to demonstrate existence of triable fact if not sole evidence]). In addition to Halpern's deposition testimony, Schindler also relies on Halpern's sworn affidavit and Clelland's and Manchec's testimony. While plaintiff takes issue with the basis for part of Halpern's averments, his affidavit is clearly admissible.

Plaintiff also contends that Halpern's opinion is improperly based on the testimony of Thomas, the other elevator passenger, contradicted by the testimony of Kinney and speculative. As previously mentioned, Thomas was not deposed in this case.

Opinion evidence must be based upon facts in the record or "personally known to the witness, and . . . the expert may not assume facts not supported by the evidence in order to reach his or her conclusion [citation and quotation marks omitted]" (*Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 724 [2d Dept 2010]). "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). While Halpern considered Thomas's testimony, he states that he reviewed the testimony of Dolan and other record evidence, as listed in his affidavit. Significantly, Halpern bases his opinion on Dolan's testimony that Elevator 15 jolted to a stop and then dropped again and finally came to a very abrupt stop. Halpern concluded that such a double stop would not implicate a problem with the governor, but would fit squarely with a power disturbance or fluctuation. Moreover, much of Halpern's opinion is based on record findings concerning the elevator systems and his professional knowledge. Plaintiff does not challenge this, and Halpern's opinion may not be deemed not based on facts in the record. In fact, Halpern bases his opinion on the over-speed monitors, the tripping of the governor over-speed switch and mechanical mechanism, the re-setting of the governor with a pry bar and its calibration, the safety circuits, and the lack of dirt or debris detected, none of which has been challenged by plaintiff as outside the record.

Whether, absent consideration of Thomas's testimony, Halpern's opinion would change is not, as a matter of law, determinable here. However, on summary judgment, courts must view the evidence and the parties' contentions in a light most favorable to the non-moving party, affording that party the benefit of reasonable favorable inferences (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). Where Halpern's affidavit and testimony do not demonstrate that Thomas's testimony was either the lynchpin or sole basis for Halpern's opinion, discounting the opinion entirely based on that assumption is unwarranted. Furthermore, while the fact-finder may draw inferences against Schindler based on Kinney's testimony concerning the electricity to the elevators and other evidence, Kinney's testimony here is not conclusive, as he speaks of his own knowledge concerning outages and disturbances that day, and of indications of power dips at the building, but does not address all types of power disturbances.[5] Kinney also testified that his knowledge concerning power surges or outages to one individual elevator in a bank was based on hearsay conversations with others. Therefore, plaintiff has not sufficiently demonstrated that Halpern's opinion is without foundation, or must be disregarded. Moreover, Kinney never distinguished between a power fluctuation such as a surge in energy as opposed to an assumed power outage which is more noticeable and verifiable.

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5. The Brookfield Parties state that Kinney testified that he was told by power supplier PSE&G that there was no type of transient power surge reported on the date of the accident (Brookfield Parties Reply Aff., ¶ 18), but Kinney's cited testimony is not that he was told anything by PSE&G, or even contacted by it, but that **he had never been advised by PSE&G that there was either a power surge or transient power surge on the incident date.** Kinney does not state that the power company would necessarily have contacted him to alert or advise him of either of these things, or of any power disturbance.

Generally, disagreements over the validity of an expert's opinion go to the weight and probative value, to be tested through a contrary expert opinion or cross examination (*see People v Cronin*, 60 NY2d 430, 432 [1983]).[6] Here, the experts' opinions merely conflict, a credibility issue properly left to the trier of fact for resolution (*see Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]). The court may not "pass on issues of credibility" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]) unless testimony is "physically impossible [or] contrary to experience [that] it has no evidentiary value [citation and quotation marks omitted]" (*Espinal*, 94 AD3d at 613). As Halpern provides an alternative theory for why the accident occurred, which does not implicate Schindler's negligence, a material fact issue is raised (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [court's function is limited issue finding, not determination]). Consequently, plaintiff's motion for summary judgment must be denied.

Brookfield Parties' Motion for Conditional Judgment for Common-Law Indemnification and for Dismissal of Schindler's Indemnification Cross-Claim

In their cross-claim against Schindler, the Brookfield Parties allege that if plaintiff recovers a judgment against them, they are entitled to judgment over against Schindler for the full amount of the judgment, and attorneys' fees and costs both in defending the underlying action, and in

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6. On this point, plaintiff's expert does not address Halpern's assertions or opinion concerning a power disturbance, despite that plaintiff specifically noted, in moving, that she anticipated that Schindler would raise this as its defense.

prosecuting their cross-claims. In moving, the Brookfield Parties seek a conditional judgment for common-law indemnification and dismissal of Schindler's cross-claim.[7]

"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], quoting *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [2003], *lv denied* 1 NY3d 504 [2003]; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]). A party seeking indemnification must prove that it was not guilty of negligence beyond statutory liability, and that the proposed indemnitor committed negligence that contributed to the incident's causation (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

In moving, the Brookfield Parties submit the Agreement and Kinney's affidavit. Kinney avers that the Brookfield Parties never received any complaints that Elevator 15 previously made any abrupt stops or about its governor or component parts, or observed an open and apparent problem with the governor or its parts. The Brookfield Parties note that neither the Schindler work records nor the Jersey City elevator inspection record prior to the accident denote any specific problems relating to the governor or component parts or abrupt stops of Elevator 15, but contend that if there were any problems relating thereto, that Schindler was responsible for them under the Agreement, and was provided with relevant reports. The Brookfield Parties argue that there is no evidence from which a jury could conclude that the Brookfield Parties either failed to advise Schindler of known

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7. Schindler argues that the Agreement's language provides only for indemnification to the extent that the injury was caused by Schindler's negligence, and the indemnification issue cannot be addressed until after a jury has apportioned liability to all parties, but the Brookfield Parties did not move for contractual indemnification, which will not be addressed.

defects, or had notice of the defect plaintiff alleges herein. They conclude that this demonstrates that any liability to plaintiff on their part would be vicarious only, arising solely due to their status as the premises owner or managing agent, entitling them to common-law indemnification.

In opposition, Schindler contends that: (1) common-law indemnification is only available where there is no negligence by the party seeking indemnification, and the question of whether the Brookfield Parties were negligent is for a jury; (2) that the Brookfield Parties had a non-delegable duty to make the premises safe for Dolan, and their liability would not be vicarious if they had actual or constructive notice of defects, a hazard or a dangerous condition; and (3) that the Brookfield Parties have failed to meet their prima facie burden, because they have not eliminated material issues of fact regarding their negligence. Schindler also maintains that the Agreement implicitly requires the Brookfield Parties to notify it of elevator problems, that they had notice of a dangerous condition, and that they failed to fulfill both their contractual duty to notify Schindler, and their duty to plaintiff to make the elevator safe.

The parties' submissions pre-date the January 2012 order dismissing the complaint against the Brookfield Parties. As the complaint was dismissed against the Brookfield Parties, there is no common-law indemnity (*see Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012] ["Prior to the grant of indemnification, the [trial] court had granted [the owner's] motion for summary judgment dismissing plaintiff's complaint on the ground that there was no non-speculative basis for its liability. Absent liability, vicarious or otherwise, there is no basis for indemnification"]). Moreover, the legal expenses of pursuing a common-law indemnity action are not recoverable in any

event (*see Hernandez v Ten Ten Co.*, 102 AD3d 431 [1st Dept 2013]; *see Chapel v Mitchell*, 84 NY2d 345, 348 [1994]).

Regarding the Brookfield Parties' motion for dismissal of Schindler's indemnification cross-claim against them, Schindler does not dispute that the Agreement was exclusive, comprehensive and required it to inspect, maintain and repair Elevator 15 and that its mechanic, responsible for the elevators, was on-site at the building five days a week. Significantly, Schindler's own expert, Halpern, admitted that the Brookfield Parties were not the cause of Dolan's accident (Halpern Deposition at pages 78-80, attached as Exhibit "B" to Brookfield Parties' Reply Affirmation). As Schindler has not submitted evidence to demonstrate or raise a fact issue as to the Brookfield Parties' knowledge of Elevator 15's pre-incident abrupt stops, or of the defect of which plaintiff complains, that is, the worn governor parts, or demonstrated another basis to support its cross-claim for judgment over against the Brookfield Parties, Schindler's cross-claim is dismissed.

CONCLUSION

In light of the foregoing, it is

ORDERED that motion sequence no. 003 of defendants Newport Tower Co., LLC and Brookfield Properties Management LLC for conditional summary judgment on their cross-claim against Schindler Elevator Corporation for common-law indemnification and for dismissal of Schindler Elevator Corporation's cross-claim for indemnification is granted to the extent that Schindler Elevator Corporation's cross-claim for indemnification is dismissed and is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

ENTER:

Dated: February 26, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.