

Taylor-Rosenbaum v BCRE 230 Riverside, LLC

2014 NY Slip Op 31078(U)

April 24, 2014

Sup Ct, New York County

Docket Number: 115625/09

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
CATHERINE TAYLOR-ROSENBAUM,

Index No.: 115625/09

Plaintiff,

Motion Seq. No. 003

-against-

BCRE 230 RIVERSIDE, LLC, B.C.R.E.-230 RIVERSIDE
NY CORP., B.C.R.E.-230 RIVERSIDE PARTNERS LLC,
B.C.R.E.-230 RIVERSIDE HOLDINGS LLC, R.A. COHEN
& ASSOCIATES, INC., and DUNWELL ELEVATOR
ELECTRICAL INDUSTRIES, INC.,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, defendant Dunwell Elevator Electrical Industries, Inc. (“Dunwell”) moves pursuant to CPLR 3212 for an order granting summary judgment and dismissing plaintiff Catherine Taylor-Rosenbaum’s (“plaintiff”) complaint as well as all cross-claims asserted against it.

Defendants BCRE 230 Riverside LLC, B.C.R.E.-230 Riverside NY Corp., B.C.R.E.-230 Riverside Partners LLC, B.C.R.E.-230 Riverside Holdings LLC and R.A. Cohen & Associates, Inc. (collectively, “BCRE”) cross-move pursuant to CPLR 3212 for summary judgment dismissing plaintiff’s complaint and all cross-claims against them.

Factual Background

Plaintiff resides at 230 Riverside Drive, apartment PH-J in Manhattan (the “building”). The building was owned and managed by BCRE. The alleged accident at issue occurred on November 8, 2006 at approximately 11:00 p.m. in the east side passenger elevator (the “Elevator”) of the building.

The Elevator system features two types of doors: outer, “hoistway” doors located on each floor, and one inner “cab” door within the Elevator itself. The hoistway doors are closed by default, and open only when the Elevator cab is at that particular floor. When the cab reaches a specific floor, the hoistway door on that floor opens and closes automatically. Likewise, the cab door opens and closes automatically as it stops at each floor. (Cudabac EBT pages 19-21)

On the date of the alleged accident, the cab door was equipped with an electronic detector edge consisting of an infrared sensor (the “Detector Edge”), which is made up of two components. One component is attached to the cab door (and thus moves with the cab door as it opens and closes); the other is stationary and mounted on the side where the cab door closes (Cudabac EBT). The sensor consists of multiple beams that shoot in different directions. There is no such Detector Edge with respect to the individual hoistway doors.

The Detector Edge was designed to cause the cab door to retract as soon as it detects motion and/or objects, when working properly, a detectible object need not come into contact with the cab door itself to trigger retraction. However, when the cab door is more than three-quarters of the way closed, it continues to close even if something interrupts the beam. Once the door is “fully closed,”¹ the Elevator moves. (Cudabac EBT p 22-24)

Dunwell and the building entered into a maintenance agreement in 1999 regarding the Elevator, which was in effect on the date of the alleged accident. As per the agreement, Dunwell performed various maintenance tasks on a monthly basis (which included visual inspections) (Cudabac EBT pp 9-10). The Detector Edge is tested by a visual inspection; unless any physical

¹ The cab door does not actually fully close in the sense that it actually comes into contact with the other side of the cab, as a small “pocket” or gap remains even when the cab door is “fully closed.”. (Cudabac EBT p 23).

damage is observed, no maintenance is performed (Cudabac EBT p 44).

Since July 2005, the building had been undergoing a conversion from rental apartments to condominiums. This conversion, which was in progress on the date of the alleged accident, involved construction at several apartments of the building. From July 2005 to November 2006, work crews often used the Elevator to haul construction debris in containers, as the freight/service elevator was not in operation during this period of time.

As a result of the construction, there was on an ongoing and/or intermittent dust condition in the hallways, lobby and Elevator, and on the carpets and stairs. Certain tenants complained to building staff regarding the dust and unavailability of the Elevator for tenants' use, and also about the Elevator itself. Complaints related to the Elevator described it as "shaking," featuring a "rattling sound" or "scraping sound," "jerking," "not going to the desired floor," and "the door not opening."

Dunwell was aware of the construction activities before the alleged accident, and was concerned with the amount of dust inside the building as it related to the Elevator and Elevator equipment (Cudabac EBT p 28-31). John Cudabac, one of Dunwell's part-owners (who also had 14 years of supervising elevator operations in both existing and new construction at Columbia University) testified that dust could affect the Elevator's operation in that dust could make its way into the track of the doors and door locks, leading to malfunction (Cudabac EBT p 31). Cudabac also believed that excessive dust could cause the Detector Edge to malfunction (Cudabac EBT p 49). Dunwell communicated with the building's super regarding the need to clean up the area regarding dust (Cudabac EBT p 59).

On the day of the alleged accident, plaintiff, who had been out of town, returned to her

apartment in the mid-afternoon. Plaintiff used the Elevator to go up to her apartment when she returned, and did not observe any problems with the Elevator or Detector Edge at that time.

At approximately 11:00 p.m., plaintiff left her apartment to walk her dog (a Labrador weighing approximately 120 pounds), which she was holding by a leash made of a densely woven layer of nylon and synthetic material, about an inch in thickness with a bow handle. At that time, she was holding the handle of the leash in her right hand and a raincoat in her left hand. Upon entering the Elevator, plaintiff let go of the leash so that she could turn around and press the lobby button (on the left side) (Plaintiff EBT p 42). When plaintiff bent down to pick up the leash, she realized it was stuck between the edge of the cab and cab door, which did not retract when it came into contact with the leash and closed.² The Elevator began to descend toward the lobby.

As the elevator descended, plaintiff's dog was being pulled up by the collar. Plaintiff pressed floor buttons below her floor in an effort to stop the elevator at the next floor so she could free her dog. Nevertheless, the Elevator continued to go down and pull the dog by its collar, strangling it.

Plaintiff pushed the emergency button which set off the alarm, while at the same time, she held her dog to prevent it from further asphyxiating. When the Elevator reached the lobby, both the hoistway and cab doors of the Elevator would not open. Eventually, FDNY personnel arrived and pried open the doors, which apparently cut the leash from the hook that latched onto the dog's collar. As a result, the dog, which did not survive the incident, fell backwards onto plaintiff, and plaintiff fell to the floor of the elevator. Plaintiff allegedly sustained injuries,

² Prior to the subject incident, the leash had never been caught in the Elevator's doors.

including a right rotator cuff tear in the incident.

Dunwell's Motion

Dunwell argues that it is entitled to summary judgment as the evidence fails to establish it had control over or notice of any defect, and plaintiff fails to set forth a *prima facie* case of negligence. Rather, the evidence demonstrates that the Elevator operated normally and did not malfunction.

Although plaintiff alleges, by way of her deposition testimony and bill of particulars, that Dunwell was negligent in the maintenance and operation of the Elevator door, plaintiff fails to allege or establish any specific defect or dangerous condition which plaintiff claims caused the alleged accident. As to any issues caused by the alleged misuse of the Elevator by construction workers, plaintiff fails to establish how Dunwell caused or created such issues. Also, plaintiff fails to show how any issues with building construction led to the alleged accident in which plaintiff dropped the dog's leash and the leash was caught in the Elevator door.

While plaintiff's testimony suggests that her theory of liability is related to the Detector Edge, there is no evidence which shows that it was defective or malfunctioned at the time of the alleged accident. Cudabac testified that the Detector Edge worked properly at that time, as it was manufactured to detect body motion and certain objects, but not a small nylon strip, such as a leash, dragging on the floor. Therefore, the Detector Edge did not engage and the cab door closed, as designed. Once fully closed, the Detector Edge is out of the picture, and the leash getting caught should not have caused the cab door to reopen once it had closed, nor should it have caused the Elevator to stop.

Plaintiff fails to show any prior problems or issues regarding the Detector Edge. Also,

the Elevator maintenance records do not indicate any specific prior problems or defects related thereto. All prior complaints pertained to construction debris and misuse of the elevator, not the Detector Edge. Also, there is no evidence that plaintiff made specific complaints to Dunwell regarding the Detector Edge, or that Dunwell was on notice of any specific issues relating thereto. Thus, while the testimony shows that plaintiff complained to the building, there is nothing suggesting that complaints were made to Dunwell regarding the Detector Edge.

Furthermore, any alleged negligence by Dunwell was not a proximate cause of plaintiff's injuries. The alleged accident was a result of plaintiff's own negligence, and not due to any negligence by Dunwell, when plaintiff dropped her dog's leash when she entered the elevator, which became stuck in the elevator door. But for plaintiff's actions, the accident would not have occurred. Thus, even assuming there was a defect in the Detector Edge, this defect alone would not have caused the leash to become caught in the door.

Further, any malfunction or erratic behavior of the Elevator that led to the accident would be likely due to the abundance of construction debris in the building, and/or the workers' misuse of the Elevator as indicated by Cudabac's deposition testimony. Thus, the possible proximate causes of the accident were plaintiff's own negligence in dropping the leash, and BCRE's negligence in failing to properly control the dust problem and its workers' misuse of the Elevator.

Dunwell is further entitled to summary judgment as *res ipsa loquitur* is inapplicable in the case at bar. Plaintiff cannot show that the instrumentality (the Elevator) was in Dunwell's exclusive control, because it was used by tenants in the building and was misused by BCRE's workers on a daily basis. Also, the doctrine is inapplicable because the accident occurred due to plaintiff's own negligence.

BCRE's Cross-Motion for Summary Judgment

In support of dismissing the complaint, BCRE joins in Dunwell's arguments regarding the lack of a defective condition regarding the Detector Edge. BCRE also asserts that plaintiff cannot establish BCRE's liability, as she cannot show that there was a defect in the Elevator and that the building owner had actual or constructive notice of the defect. There is no admissible evidence about any prior complaints or problems with the Detector Edge. Moreover, plaintiff failed to present admissible evidence that the dust/debris and/or use of the Elevator by BCRE contributed to the accident's occurrence. Cudabac testified that any excessive dust build up in the Elevator might affect the operation of the Elevator door, as opposed to the Detector Edge. BCRE adds that plaintiff used the Elevator uneventfully earlier in the day, establishing that there was no problem with the door or detection edge.

BCRE also argues that to the extent that Dunwell avers that the construction work in the building caused the accident, such a claim is merely a red herring.

In opposition to BCRE's cross-motion, Dunwell argues said cross-motion should be denied because it was untimely filed, and lacks merit. Dunwell contends that there is no evidence of an operational defect regarding the Elevator, or of any operational defect with the Elevator related to elevator maintenance by Dunwell. Thus, any such defect would be related to BCRE's failure to maintain the building in a safe condition. As such, issues of fact remain regarding BCRE's liability. The record shows that there were problems with dust and debris from construction throughout the building, which affected the operation of the Elevator's door, not the detection edge, as well as issues with construction workers misusing the Elevator. Thus, any malfunction or erratic behavior of the Elevator that caused plaintiff's accident would be due

to BCRE's actions and/or inactions.

Plaintiff opposes both the motion and cross-motion, arguing that the cab door should have retracted from, and not closed on, her dog's leash. Defendants were aware of the cab door's propensity to malfunction and were thus negligent in failing to remedy the condition.

Plaintiff contends she established a *prima facie* case of *res ipsa loquitur* against both Dunwell and BCRE. The elevator's failure to retract, which led to plaintiff's injury, was a malfunction of a kind that ordinarily does not occur in the absence of negligence. And, Cudabac testified that excessive dust could lead to an Elevator cab door malfunction. The Elevator's failure to retract was caused by an agency and/or instrumentality within Dunwell's exclusive control, as Dunwell was the entity exclusively responsible for the Elevator's maintenance. The doctrine applies even though Dunwell was not in exclusive continuous control of the Elevator. And, the Elevator's failure to retract was not due to any voluntary action or contribution on the part of plaintiff.

Res ipsa loquitur is also applicable to BCRE, because where an accident indicates a failure of two defendants to perform a joint and separate duty, the doctrine permits an inference of each defendant's failure to perform its duty. Here, it was BCRE's obligation to control the Elevator within its property.

Furthermore, defendants failed to safely maintain the Elevator in violation of New York's Multiple Dwelling Law § 78 ("MDL 78") and Building Code § [C26-105.1] 27-127 ("BC 27-127"). MDL 78 provides, in pertinent part, that "every multiple dwelling . . . shall be kept in good repair." The duty under MDL 78 is non-delegable. Any claim of lack of notice is unconvincing, as BCRE was placed on notice of ongoing problems regarding the Elevator, usage

thereof, and debris/dust, and it cannot reasonably be argued that BCRE maintained the Elevator in a way that could be described “in good repair.” Likewise, BC 27-217 provides, *inter alia*, that “all buildings and all parts thereof shall be maintained in a safe condition. All service equipment . . . shall be maintained in good working order.” BCRE’s ongoing failure to maintain the Elevator in good repair, despite repeated notice of the hazardous condition and notice of the urgent need to repair and/or replace the Elevator, is a violation of both MDL 78 and Building Code § [C26-1804.2] 27-1006.³ Dunwell is also liable under MDL 78, as it assisted BCRE in its violation. MDL 78 provides that “any such persons who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided...”.

Caselaw cited by BCRE is distinguishable, because here, there is evidence of prior written complaints of the malfunctioning Elevator and its door. Plaintiff also requested the logbook of tenants’ complaints regarding the Elevator; however, BCRE asserts it cannot locate same, even though its witness, Fatos Hoxha, testified that such a logbook existed. In any event, the affidavits of building tenants Suzanne Creamer (“Creamer”), Ruth Baron, and Linda Miller establish defendants had prior notice of the malfunctioning Elevator.⁴

Plaintiff also argues generally that the defendants’ acts and omissions were the proximate cause of plaintiff’s injuries, and that summary judgment should not be granted because there

³ This section is not noted anywhere else in plaintiff’s opposition.

⁴ Plaintiff also submits an affidavit in opposition. Plaintiff, Baron and Miller discuss general problems with the Elevator, including issues related to the aforementioned debris/dust condition before the alleged accident, as well as the existence of a logbook wherein tenants’ complaints were contained. Creamer describes an incident that occurred the day before the alleged accident, in which she put her arm between the two Elevator doors to cause them to retract, but they did not retract and she got “wedged” between the two doors.

exist triable issues of fact which warrant a trial.

Dunwell's Reply

Dunwell contends that plaintiff's conclusory allegations that the Elevator malfunctioned fails to establish that the Elevator cab door malfunctioned. Dunwell established that the Detector Edge/cab door functioned properly on the date of the alleged accident, and the accident occurred due to plaintiff's own negligence in dropping the leash. Plaintiff's claim in her affidavit that ". . . had the Elevator door been properly working and would have retraced when it caught the leash, I would not have sustained my injuries" is speculative, and Cudabac testified to the contrary. Cudabac testified that the Detector Edge worked properly at the time of the alleged accident in that it is manufactured to detect body motion and certain objects, but that a nylon strip, such as a leash, dragging on the floor would not be the type of object that would be sensed. Thus, the cab door would fully close and the Detector Edge would be out of the picture, and the Elevator would move. The leash being caught should not have caused the door to reopen once it had closed, nor should it have caused the Elevator to stop. Moreover, plaintiff does not submit any expert evidence to the contrary.

Even assuming a defect existed regarding the Detector Edge, plaintiff failed to offer any evidence to rebut Dunwell's showing that it was not on notice of such defect. None of Dunwell's maintenance and repair records plaintiff attaches in opposition pertain to the Detector Edge. As Cudabac testified, prior instances of when an Elevator door became misaligned were promptly fixed when reported, and did not concern the Detector Edge.

Also, although plaintiff testified she complained to building staff regarding debris/dust and Elevator misuse, plaintiff does not demonstrate she complained to Dunwell or that Dunwell

was on notice of any issues regarding the Detector Edge. As explained in the moving papers, evidence of notice to the building does not equate to notice to the elevator maintenance company.

Furthermore, plaintiff testified that the dog's leash had never been caught by the Elevator doors before, and that she rode the Elevator earlier in the day without incident.

As to the affidavits presented in opposition, such affidavits merely describe construction-related issues (and complaints related to same) regarding debris/dust and Elevator misuse. The incident involving Creamer does not suggest that she was hit by the cab door or that the Detector Edge malfunctioned. In any event, there is no evidence that Creamer's incident was reported to Dunwell, nor is there evidence of the incident in the maintenance records.

Plaintiff cannot show that defendants either created the dangerous condition or had actual or constructive knowledge of it. And plaintiff has not submitted any evidentiary proof or expert testimony to rebut Dunwell's showing that it is free from liability.

Additionally, the MDL 78 claim fails as there is no evidence that Dunwell violated this statute; also, it applies to the building's owner and not to an elevator maintenance company that contracted with the building's owner for routine maintenance. Thus, Dunwell has no duty under this section.

Lastly, plaintiff fails to establish that any alleged negligence by Dunwell was a proximate cause of her injuries, and that in sum, plaintiff fails to raise a triable issue of fact anywhere in her opposition.⁵

⁵ Dunwell also submits a reply to BCRE's partial opposition. Among other things, Dunwell's argument regarding building construction is not a red herring, because if it is assumed that an Elevator defect existed which caused plaintiff's accident, that defect would be related to BCRE's failures regarding construction. Also, based on the evidence suggesting that complaints were made to building staff regarding the construction, questions of fact may

BCRE's Reply

BCRE echoes Dunwell's arguments in reply, and adds that plaintiff failed to submit any expert affidavit to support her self-serving theory that construction dust or containers filled with debris in the Elevator on days prior to the incident contributed to her accident. Rather, the only expert herein, Cudabac, testified that the Detector Edge worked properly at the time of the accident.

Moreover, as the alleged incident took place on a Sunday, there was no construction ongoing at that time, nor was there any construction debris in the hallway or Elevator.

Also, plaintiff admits in her affidavit that on the day of the incident, the cab door had a rubber piece that extended from the door's top to its bottom, and that "by touching the rubber, the inner door would retract" (§14). Plaintiff's affidavit confirms Cudabac's testimony that the Detector Edge functioned as designed - that it does not detect a nylon leash dragging on the floor.

Nor does Creamer's incident contradict Cudabac's affidavit, wherein she stated that her incident occurred when she put her arm in the path of the closing door. As Cudabac testified, once the door reaches three-quarters of the way closed, it will continue to close completely. Thus, the Detector Edge functioned properly even in Creamer's incident, but Creamer chose to stick her arm (and perhaps her body) in front of the closing cab door to carry out a conversation. This is not the failure of defendants to maintain the building in a reasonably safe manner.

As to Dunwell's contention that BCRE's marginally late cross-motion should not be considered, among other things, plaintiff did not object to the cross-motion's timeliness, and

Footnote 5, cont'd

exist as to whether BCRE was on notice of any construction-related problems with the Elevator.

there is no prejudice to either party if the court considers the cross-motion.

Discussion

As to dismissal pursuant to CPLR 3212, 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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]; *Murray v City of New York*, 74 AD3d 550, 903 NYS2d 34 [1st Dept 2010]).

In a negligence action where liability is premised upon an allegedly dangerous or defective condition, the plaintiff must show that the defendant either created the dangerous condition, or had actual or constructive knowledge of the condition (*see Segretti v Shorestein Co.*, 256 AD2d 234, 235, 682 NYS2d 176 [1st Dept 1998]). To constitute constructive notice, the

defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the discovery and remedy thereof (*id.*).

Based on the parties' submissions, it is clear that plaintiff's claims of negligence (as well as her claims based on *res ipsa loquitor* and on statutory violations) are all based on the theory that the Detector Edge was defective in that it failed to recognize the dropped leash and cause the cab door to re-open, and that this caused plaintiff's subsequent accident.

Dunwell's Motion

"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" (*see Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 559 [1973]).

Dunwell failed to demonstrate that the Detector Edge was not defective at the time of the alleged accident as a matter of law. Cudabac stated that the Detector edge "gives the ability that" if, "until it's three quarters" of closing, "you interrupt that beam, the door will reopen"; otherwise, the door fully closes (Cudabac EBT p 24) Although Cudabec also stated that there was a "good possibility" that the Detector Edge would not sense "strip . . . just totally *dragging on the floor*," (Cudabac EBT p 48 (emphasis added), he testified that the "detector edge is manufactured to detect body . . . objects" and "*If there is an object that goes in between the sensor beams, it would detect it and re-open.*" (Emphasis added). Plaintiff testified that when entering the Elevator, she dropped the leash to press the lobby button; shortly thereafter, she realized that the cab door had closed on the leash and the Elevator door did not re-open (plaintiff EBT pp 42-46). The testimony of Cudabec and plaintiff raises an issue as to whether the

Elevator door failed to re-open/retract when the leash fell between or came into contact with the doors.

However, Dunwell established a lack of notice regarding prior problems or issues concerning the Detector Edge. Dunwell is required to perform monthly maintenance, and there is no indication in the maintenance records submitted in support of the motion of any specific prior problems or defects related to the Detector Edge and Cudabac did not testify to the contrary. Dunwell established that any prior problems that it was aware of before plaintiff's accident regarding the Elevator did not relate to the Detector Edge (*see, Ianotta v. Tishman Speyer Properties, Inc.*, 46 A.D.3d 297, 852 N.Y.S.2d 27 [1st Dept 2007] (finding a lack of notice where it did "not appear that the incidents noted in the elevator service report log on which plaintiff relies 'were of a similar nature to the accident giving rise to this lawsuit' and "were caused by the same or similar contributing factors.")). Also, plaintiff's testimony shows that the dog's leash had never been caught by the Elevator doors before the accident, and that she used the Elevator on the day of the incident without any issue.

And, although plaintiff testified that she had complained to building staff and the New York City Department of Buildings about issues related to debris/dust and/or Elevator misuse by construction workers, there is no evidence that plaintiff made complaints to Dunwell (or the building) regarding the Detector Edge, or that Dunwell was on notice of same.

Thus, Dunwell established its *prima facie* entitlement to summary judgment.

Plaintiff fails to raise a triable issue of fact in opposition. Plaintiff's argument boils down to the following: the defective condition was caused by the build up of debris and/or dust from the building's construction and Elevator misuse by construction workers, and that defendants

were on notice of such conditions *via* tenant complaints to building staff due to tenant complaints regarding the Elevator's "shaking," "rattling sound," "scraping sound," "jerking," "not going to the desired floor," and "the door not opening."

However, plaintiff presents no expert evidence which establishes a causal connection between the above conditions and her accident (*see Sarmiento v. C & E Associates*, 2006 WL 6103160 [Sup Ct New York Cty 2006]).

And, there is no evidence that Dunwell created, or was on notice of any such defect. The only evidence before the court presented and discussed in the instant motion regarding a prior specific instance of the cab door's closing on an object is contained in Creamer's affidavit. Therein, Creamer discusses an incident that occurred one day prior to plaintiff's accident, and of which she complained only to building staff. Nothing in the record indicates that building staff relayed information regarding Creamer's incident to Dunwell in the day before plaintiff's accident (*see Karian v. G & L Realty, LLC*, 32 AD3d 261, 820 NYS2d 231 [1st Dept 2006] (evidence of notice to building staff does not constitute evidence of notice to the elevator maintenance company)). Thus, even assuming an issue of fact exists as to a defective condition, Dunwell lacked notice of that condition (*see Gjonaj v. Otis El. Co.*, 38 A.D.3d 384, 832 N.Y.S.2d 189 [1st Dept 2007]; *Ezzard v. One East River Place Realty Co., LLC*, 2014 WL 771232 [Sup Ct New York Cty 2014] (a lack of actual and constructive notice is established by demonstrating that no complaints about the subject defect were made prior to the incident at issue, and that regular inspections of the subject elevator were conducted which did not reveal the subject defect)).

Accordingly, Dunwell established that it was not negligent under any theory of common

law negligence.

BCRE's Cross-Motion

Despite being made more than 120 days after the filing of the note of issue in violation of the court's rules, the court will consider BCRE's cross-motion for summary judgment. The cross-motion is only marginally untimely, made only weeks after Dunwell's motion, and raises nearly identical issues as those raised by the Dunwell motion (*see Lapin v. Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 851 NYS2d 543 [1st Dept 2008]). Moreover, neither Dunwell nor plaintiff claims prejudice as a result of the cross-motion (*id.*).

To establish that a building owner is liable for an elevator-related injury, the plaintiff must establish that there was a defect in the elevator, and that the building owner had actual or constructive notice of the defect (*see Isaac v. 115 Macombds, LLC*, 2011 NY Slip Op 3717 [1st Dept 2011]).

As noted above, an issue of fact exists as to whether a defect existed with respect to the Elevator's Detector Edge.

And here, the Creamer affidavit raises a triable issue of fact as to BCRE's liability. As noted above, on the day before plaintiff's accident, Creamer unsuccessfully placed her right forearm up in an attempt to stop the cab door from closing "when it started to close" (Creamer aff para 9). Creamer notified Jean Ayala, a building custodian, as well as Luan, the building's doorman of the incident. On the morning of plaintiff's accident, Creamer and Luan apprised Jamie Elias, the building's superintendent of what Luan referred to as a "very dangerous situation" (Creamer para 10).

Thus, Cudabac's testimony as to how the Detector Edge was supposed to function,

coupled with Creamer's affidavit, raises an issue of fact as to whether BCRE had notice that the Detector Edge malfunctioned on the day before plaintiff's incident (*see Lowenstein v. Normandy Group, LLC*, 51 AD3d 517, 859 NYS2d 29 [1st Dept 2008]; *Jeffries v. State*, 160 AD2d 838, 554 NYS2d 271 [2d Dept 1990]; *Wajner-Tobias v. Delizia Restaurant Corp.*, 2013 WL 2299613 [Sup Ct New York Cty 2013]) and precludes the court dismissing the complaint as a matter of law.

Lapin, supra, cited by BCRE, is not controlling since, unlike *Lapin*, Creamer's affidavit, raises an issue of fact as prior notice of the alleged malfunctioning Detector Edge.

And, although BCRE asserts that plaintiff's negligence was the sole proximate cause of the accident, the record indicates that a potential malfunction of the Detector Edge was a proximate cause of the accident, thus summary judgment is precluded.

BCRE's claim in reply that Cudabac testified that the Detector Edge "simply does not detect a nylon leash dragging on the floor" is accurate. Yet, BCRE's claim that even in Creamer's incident, the Detector Edge functioned properly, is speculative and unsupported by the record. Notably, there is no evidence suggesting that Creamer placed her arm (or her body) in the Elevator's threshold after the cab door had already closed at least three-fourths of the way. In fact, Creamer's affidavit indicates that she placed her arm in the threshold when the door *started* to close.

Accordingly, BCRE's cross-motion to dismiss plaintiff's complaint against it must be denied.

Res Ipsa Loquitur

While the doctrine of *res ipsa loquitur* may be invoked against a defendant in an action

involving an allegedly malfunctioning elevator, it may only be applied if it can be established that: the event must be of a kind that does not ordinarily occur in the absence of negligence; it must be caused by an instrumentality within the exclusive control of the defendant;⁶ and nothing plaintiff did in any way contributed to the happening of the event (*see Hodges v. Royal Realty Corp.*, 42 AD3d 350, 351, 839 NYS2d 499 [1st Dept 2007]).

Plaintiff's reliance on this doctrine is misplaced, as plaintiff's accident could have occurred in the absence of negligence. The purported failure of the Elevator to reopen with the leash in between the doors could have been caused by the fact that the dog leash did not interrupt the Elevator beams before the doors were within three quarters closed, or that the dog leash was on the ground when it became lodged between the doors (*see Meza v. 509 Owners LLC*, 82 A.D.3d 426, 918 N.Y.S.2d 78 [1st Dept 2011] (“[P]laintiff's [trip and] fall [while exiting the elevator] could have occurred in the absence of negligence and could have been caused by a misstep on [her] part)). The caselaw cited by plaintiff is factually distinguishable (*Dickman v. Stewart Tenants Corp.*, 221 A.D.2d 158, 633 N.Y.S.2d 35 [1st Dept 1995] (three to six-inch misleveling of the elevator); *Bonifacio v. 910-930 S. Blvd.*, 295 A.D.2d 86, 743 N.Y.S.2d 105 [1st Dept 2002] (elevator fell four floors)). In any event, plaintiff admits that she dropped the leash and it cannot be said that plaintiff did not contribute to the occurrence of the event.

Therefore, the *res ipsa loquitur* claim is severed and dismissed.

Statutory Violations

Dunwell

⁶ “[T]he doctrine of *res ipsa loquitur* can be applied even when more than one defendant is in a position to exercise exclusive control” (*DiPilato v. H. Park Cent. Hotel, L.L.C.*, 17 A.D.3d 191, 795 N.Y.S.2d 518 [1st Dept 2005] (applying the doctrine to both the hotel owner and elevator company that maintained elevator) *citing Wen-Yu Chang v. Woolworth Co.*, 196 A.D.2d 708, 601 N.Y.S.2d 904 [1993]).

Plaintiff's contention that Dunwell violated MDL 78 provision that "any such persons who shall willfully violate or assist in violating any provision of this section shall also" be liable, lacks merit. Plaintiff rests her argument on the claim that Dunwell had knowledge of the chronic misuse of the Elevator by construction works, and of the dust therein and tenants' complaints. However, as demonstrated above, there is no admissible evidence establishing that Dunwell had notice of any such misuse and/or dust accumulation (*Becker v. Manufacturers Trust Co.* 262 A.D. 525, 30 N.Y.S.2d 542 [1st Dept 1941] ("an essential element of liability under the statute [MDL 78] is notice of the defect")). Also, Dunwell did not have prior notice *via* prior complaints regarding the Detector Edge.

Accordingly, no triable issue of fact exists as to Dunwell's purported violation of MDL 78.

BCRE

Nevertheless, the court finds that triable issues of fact exist regarding BCRE's alleged violations of MDL 78 and BC 27-127. The subject provisions at issue herein require a building owner to keep the building and every part thereof in "good repair" and in a "safe condition." Although plaintiff fails to produce an expert affidavit establishing a causal link between such alleged violations and her accident, it is not her burden to do so; rather, it is BCRE's burden to demonstrate the absence of such violations and/or a causal link between same. BCRE's arguments in reply are unpersuasive, as BCRE, based on its submissions, cannot overcome the court's finding that issues of fact exist with respect to whether BCRE was on notice of a defective condition regarding the Detector Edge. Based on the above, it cannot be said, as a matter of law, that BCRE did not violate these alleged statutory violations.

Lastly, because the court has determined that Dunwell is not liable to plaintiff in this matter, BCRE's cross-claims against Dunwell are hereby dismissed. Also, because Dunwell no longer has any interest in the matter, its cross-claims against BCRE are also dismissed.

Conclusion

Based on the foregoing, it is hereby

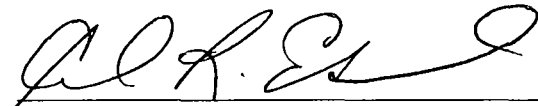
ORDERED that Dunwell's motion for summary judgment dismissing the plaintiff's complaint and all cross-claims asserted against it is granted in its entirety; and it is further ordered

ORDERED that BCRE's cross-motion is granted only to extent that the claim of *res ipsa loquitor* is severed and dismissed as against BCRE, and Dunwell's cross-claims against it are severed and dismissed; and it is further

ORDERED that Dunwell serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 24, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD