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

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DOROTHY VILLALBA AND CARLOS VILLALBA,

Index No.: 115799/2006

Plaintiffs,

Motion Seq. No. 007

-against-

NEW YORK ELEVATOR & ELECTRICAL CORPORATION, S/H/A NEW YORK ELEVATOR & ELECTRICAL CORPORATION, INC., WSA MANAGEMENT LTD., AND WSA EQUITIES, LLC,

Defendants.

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

MEMORANDUM DECISION

In this personal injury action, defendant New York Elevator & Electrical Corporation a/s/h/a New York Elevator & Electrical Corporation, Inc. ("NYE") moves to sever this action and for summary judgment dismissing the complaint of the plaintiffs Dorothy ("Dorothy") and Carlos ("Carlos") Villalba (collectively, "plaintiffs") and for summary judgment on its cross claims for breach of contract and common law indemnification against co-defendants WSA Management Ltd. ("WSA Management") and WSA Equities, LLC ("WSA Equities") (collectively, "WSA").

Factual Background

This action arises out of an elevator incident in a building in which plaintiffs resided, located at 80 John Street, New York, New York, which is owned and managed by WSA. NYE maintained the elevators pursuant to a certain agreement with WSA. At the time of the incident, the building was undergoing construction to convert the apartments therein to condominium units (Dorothy EBT, pp. 23-24). According to plaintiffs, dust and debris appeared on their terrace and in the lobby, and construction debris and dust, and garbage bags full of debris were seen on the

floors of the building (Dorothy EBT, pp. 27-31; Carlos EBT, pp. 20-21, 23-24, 28-29).

According to Dorothy's deposition, on December 17, 2005, she and her husband entered into the express elevator #1 on the 15th floor, and Carlos pushed the button for the lobby.

After the doors closed, the elevator began to overspeed downward, causing plaintiffs' feet to come off the floor for about a foot high. The elevator then changed directions and moved upwards at the same high rate of speed; Dorothy's feet were off the floor as if she were "floating in the air."

The elevator then rapidly descended again, causing her feet to elevate off the floor and her body to move farther from the wall while in mid-air, and then reversed and moved upward, with her feet still off the floor.

Then, the elevator reversed and went downward rapidly, causing her feet to come off the floor again, which was followed by a reversal of the elevator upward at a high rate of speed.

Finally, the elevator reversed and went downward at a high rate of speed but with her feet on the floor and came to a stop at an unknown location.[1] Dorothy called Victor Zubinsky at the front desk and reported the incident.

An elevator mechanic arrived shortly thereafter and caused the elevator to ascend to the 15th floor where the doors opened, and Carlos exited while Dorothy was, by that time, sitting on the floor. The doors closed, however, with Dorothy still in the elevator, and the elevator moved downwards. After calling Victor again, the elevator mechanic arrived a few minutes later and released her from the elevator. As Dorothy was exiting the elevator, she tripped over the misleveled elevator floor, which was "a step" below the 15th floor, and fell onto her hands and

[1] Carlos testified to essentially the same event.

knees.

In support of dismissal, NYE contends that it owed no duty to plaintiffs regarding the dust and cement accumulation conditions which caused the their incident. NYE had no control over the construction work or how the dust and debris were to be contained. The unexpected stop was momentary on a couple of occasions, due to dust getting into the door locks and interrupting the flow of electricity through the elevator's safety circuit. When the dust either burned away from its contact with the electricity or blew away in the updraft in the hoistway, the elevator then resumed operation and may have stopped again when the dust interfered with one of the 40 locking mechanisms in the hoistway. To the extent the elevator descended and came to a stop, and maybe restarted when the dust condition affecting the door lock abated, such a safety feature is not indicative of any improper operation. Plaintiffs cannot show that Elevator #1 operated in any defective manner; the Elevator operated as intended. The incident involved a simple entrapment, which does occur in the absence of negligent maintenance.

Further, plaintiffs' version of the event is physically, mechanically, and scientifically impossible, in light of plaintiffs' incredible deposition testimony that her feet remained levitated even when elevator ascended.

WSA also submits the affidavits of NYE's mechanics Michael Andrzejewski ("Andrzejewski"), who responded to the scene, and Dwight Northrup, who explained the work tickets for the two-year period prior to the accident. When Andrzejewski reported to the scene, he found that the that the governor electrical switch had tripped. Any abnormal stopping of the elevator can jolt the weights suspended from the governor and cause them to move outwardly to trip the governor electrical switch. Such a stop can be caused by any number of factors,

including a door lock suddenly coming open, a person pulling the stop button in the elevator, or any other point in the safety circuit coming open while the elevator is running. The work tickets fail to show that there were any complaints of elevator #1 overspeeding, and show the many situations that could cause the elevator to shut down.

Any finding of liability would be based on speculation about what the elevator may have done, the cause of its movements, and why, apart from the dust condition, the elevator came to a stop. Thus, there is noactionable defect in the operation of the elevator.

NYE also argues that the doctrine of *res ipsa loquitur* is inapplicable to this action. The starting and stopping of the elevator is not something which ordinarily does not happen in the absence of negligence of the elevator company under the conditions present at the building. Instead, it was proper for the elevator to start and stop in light of the conditions in the hoistway due to the construction. And, the travel of the elevator was in the exclusive control of NYE in light of the dust condition interfering with the elevator's operation.

Further, there was no prior notice of any similar condition of the elevator overspeeding up and down the hoistway multiple floors. Although plaintiffs claim that the elevator was problematic from December 2003 to December 17, 2005, plaintiffs testified only to one conversation with the doorman Victor Zabcynski, and there is no specificity as to when any alleged prior incidents occurred (¶¶17, 14) or when the alleged prior repairs were improper.

In support of summary judgment against WSA, the affidavit of NYE contends that the maintenance contract between WSA and NYE's predecessor Gemini/Empire, under which NYE was maintaining the elevators, contained an additional insured and indemnification clauses, pursuant to which WSA agreed to include NYE's predecessor, as an additional insured. NYE

contends that it owed no duty to plaintiffs regarding the dust and/or debris that accumulated in the hallways and interfered with the electricity that controlled the elevator. WSA admitted that it did not add NYE's predecessor as an additional insured on its insurance policies, and NYE has incurred costs and expenses in defending this action. A hearing should be ordered to determine the amount of NYE's damages.

In opposition, WSA argues that plaintiffs' credibility is never a ground for summary judgment. Further, NYE's expert does not establish that NYE was not negligent and his explanation for the incident, that construction dust got onto an unspecified electrical contact, in an unspecified manner, caused the elevator to do what it did, but the dust then burned off, is pure speculation and unsupported by the record. At the time of this incident the only construction definitely taking place was the renovation of three apartments on the ninth floor. However, Elevator # 1 was an express elevator that stopped only at the lobby and the floors above the fourteenth floor. And, it is not known where the masonry contractor installing air conditions was working at the time of the incident. Further, NYE's mechanic spent one and one-half hours performing routine maintenance the day before the incident and when he left all three elevators were operating properly in every respect Such facts raise an issue as to NYE's expert's theory that there was so much construction dust in the elevator that it got onto door interlock contacts and caused this malfunction. Andrzejewski never came to a conclusion as to why the governor safety switch tripped, and could not explain why he was looking to adjust the reference voltage as stated on his work ticket of the incident.

WSA also submits an affidavit from an elevator expert stating that the evidence indicates an electrical cause of the malfunction, because the elevator oversped by about 25 percent and the

only change made by the mechanic who responded was to adjust the reference voltage of a potentiometer.

And, although it is undisputed that NYE is not an additional insured on WSA's policies, NYE failed to prove that TKE's insurance policy applies to this case, in that not only is "New York Elevator and Electrical Corp." not an insured entity under such policy, but also NYE has submitted no proof, other than a TKE's affidavit, that NYE allegedly was merged into TKE so that TKE's insurance policy might apply to this lawsuit. Although TKE is the named insured, the defendant herein, "New York Elevator and Electrical Corp." is not one of the 11 other entities appearing on the declarations page. Further, a TKE employee testified at his deposition that TKE actually has an additional policy that it considers also a "primary" policy but NYE has not submitted a copy of that policy, leaving an issue as to whether NYE has coverage for this case, including litigation expenses, under that other policy. Further, TKE's employee claims that TKE has a self-insured retention in the amount of $1,000,000 but the insurance policy submitted states that the self-insured retention is in the amount of $2,000,000. Thus, if there was jury award between those figures, there would be an issue of fact as to the amount that WSA allegedly should pay NYE. And, the only expenses that NYE claims to have incurred are the expenses of this litigation. But it has not submitted copies of WSA's general and excess policies, so that it has not shown that it would not be subject to a self-insured retention even if it had been named as an additional insured on WSA's policies.

Plaintiff also opposes the motion to dismiss, adopting many of arguments made by WSA and adding that Andrzejewski was negligent in not bringing the elevator up to the door zone the second time when releasing Dorothy, and created a tripping hazard for her. Also, the work

tickets as testified to by Andrzejewski establish that NYE had prior notice of mechanical malfunctions of Elevator #1. Further, caselaw indicates that *res ipsa loquitur* applies to this incident.

In reply, NYE argues that WSA's expert's affidavit is insufficient in that he has no knowledge of the operative facts, does not explain the exact documentary evidence he reviewed in making his opinion, and fails to dispute Ribaudo's expert opinion that the incident as alleged is impossible. According to NYE's expert, dust from elevator #3 would have been able to access the hoistway for Elevator #1. Further, the alleged absence of any record of when contractors were in the building is disingenuous given that WSA disposed of the logbook revealing such information.[2] Since *res ipsa loquitur* only applies to an event that could actually have happened, the movement of Elevator #1 as described by plaintiffs at a speed that caused them to be elevated above the floor is impossible. And, the instrumentality, *i.e.*, the construction dust was not in the control of NYE. Further, Dorothy's failure to realize that the elevator was below the floor level constitutes a voluntary, contribution to the event.

And, a further affidavit from Scott Silitisky shows that NYE is a named insured on a policy issued to TKE (a successor to Gemini/Empire Elevator), and that WSA's claim against NYE exposes NYE's successor ThyssenKrupp to damages up to $1,000,000 as a result of its self-insured retention.

Discussion

CPLR 3212 provides that the "proponent of a summary judgment motion must make a

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[2] Plaintiff also raises an issue of sanctions for spoliation, based on WSA's disposal of relevant logbooks after NYE served its demand for same, but acknowledges that this issue is not before the court and should be addressed at a future time.

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 opponent "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]).

WSA established that dust generated from on-going construction at the building was seen on the lobby floor and hallway. WSA's expert believed that the dust that gets into the elevator hoistway rises as a result of warm air rising, and "was drawn into the elevator hoistway and accumulated inside the hoistway door interlocks and onto the interlock contact surfaces." The alleged rapid movements of Elevator #1 was caused when dust particles generated from the construction interfered with the elevator door interlocks. Dust upon the contact surface of the door interlocks causes the safety circuit's integrity to become compromised; the presence of dust causes the safety circuitry to open and close; the intermittent opening and closing of the door interlock safety circuitry will "definitely cause the elevator to operate erratically. It may cause the elevator to stop and reverse its direction. It may cause an elevator to make an abrupt stop." (P. 8). Further, Elevator #1 "could not have oversped to any degree in the course of [plaintiffs'] event becasuse it was equipped with a governor . . . ." WSA's expert further explains the manner

in which the governor attempts to stop an elevator that reaches a speed greater than the elevator's rated speed, either electrically and if not electrically, then mechanically (P. 6).

In opposition, plaintiff's expert raised an issue of fact as to the theory that dust accumulated sufficiently to cause the incident. Plaintiff's expert, Patrick McPartland, opines that Elevator #1 oversped and activated the mechanical safety system. Andrzejewski's notation on his work ticket of the word "safety" and that he "reset" the governor means that both the electrical and mechanical switches on the governor were tripped, and that Elevator #1 oversped by about 25% and the system for cutting off the electricity if the car overspeeds by 15% either did not work or did not stop the elevator before it had increased to its speed of 25% faster than the contract speed. Also, the fact that Andrzejewski moved Elevator #1 to the 15th floor as opposed to the lobby indicates that he wanted to mechanical jaws to disengage in order to reset the mechanical safety under the car. Also, the fact that Andrzejewski adjusted the potentiometer, which affects the voltage of the circuit it is in, indicates that the car oversped by over 25% as the potentiometer was not at its proper setting. This is consistent with the fact that in mid-October 2005, Elevator #1 was intermittently moving slowly and shutting down and a mechanic found a problem with the voltage regulator and a new regulator was installed. Thus, opines McPartland, "the elevator malfunction that gives rise to this lawsuit was not caused by construction dust on the door interlock contacts." The evidence shows that the construction work that was performed before the accident did not generate the level of dust for a sufficient period of time for the dust to accumulate as alleged; the maintenance allegedly performed the day before the accident, if properly done, would have included making sure the door interlock contacts were clean; if the dust burned off, the door interlock contacts would have been burned and would have needed

replacement, but Andrzejewski did not find burned contacts; nor did Andrzejewski find dust on the door interlock contacts when he responded to the scene; and there is no evidence of malfunctions due to dust on contacts; and NYE never warned the building employees of the risk to dust interfering with the operation of elevators.

Therefore, given that an issue of fact exists as to whether the dust particles on the contacts, for which NYE claims it had no duty to control or remedy prior to the incident, caused Elevator #1 to travel as alleged, summary dismissal of the complaint on this ground is unwarranted.

Further, an issue of fact exists as to whether WSA, the exclusive elevator maintenance contractor, owed no duty to plaintiff, a passenger in an elevator for which WSA was contractually obligated to maintain. "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" (*Rogers v Dorchester Assoc.*, 32 N.Y.2d 553, 347 NYS2d 22 [1973]; *Oettinger v Montgomery Kone, Inc.*, 34 AD3d 969, 824 NYS2d 447 [3d Dept 2006]; *see Scafe v Schindler Elevator Corp.*, 111 AD3d 556, 975 NYS2d 399 [1st Dept 2013], *citing Rogers, supra* ("Defendant, the exclusive elevator maintenance contractor, did not make a prima facie showing that it either lacked actual or constructive notice of any condition or defect in the subject elevator that would have caused the doors to quickly slam shut and trap plaintiff's hand as she exited, or that it did not fail to use reasonable care to correct a dangerous condition that it should have been aware of")).

In *Ruiz-Hernandez v TPE NWI General* (106 AD3d 627, 966 NYS2d 62 [1st Dept 2013]),

the Court held that triable issues of fact exist as to whether the elevator maintenance contractor had notice of the defective mechanism that allegedly caused the elevator to malfunction. A "Trouble Site Report" indicated that approximately one month before the alleged accident, the elevator company installed a new relay, the "landing control system," and replaced that component less than one month before plaintiff's accident. The Court first held that the installation and replacement of this component within the weeks immediately preceding plaintiff's accident, raised a triable issue as to whether the elevator company had notice of the defective condition. Plaintiff was also "entitled to invoke the doctrine of res ipsa loquitur because the relay was exclusively within the control of the elevator company, *an elevator would not suddenly drop into a free fall in the absence of negligence, and the record gives no indication that plaintiff somehow contributed to the occurrence*." (Emphasis added).

Assuming as true, that Elevator #1's erratic operation and sudden stop were due to a mechanical failure as asserted by WSA's expert, the work tickets raise an issue of fact as to whether NYE was on prior notice of mechanical malfunctions of this Elevator. For example, the work ticket of October 18, 2005, a couple of months before the alleged accident, indicates that Elevator #1 was shut down because the "voltage on the regulator was nor correct." The work ticket for October 17, 2005 shows that Elevator #1 was shut down due to getting stuck. And, passengers were previously trapped in Elevator #1 on October 7, 2005 and August 11, 2005. There were also issues with the MPU board. Such incidents raise an issue of fact as to whether NYE was on prior notice of the malfunction that caused plaintiffs' alleged accident. Thus, summary dismissal of the complaint for lack of notice is unwarranted.

Further, WSA's contention that plaintiffs' testimony is incredible as a matter of law is

unsupported by the cases and record. While plaintiff Dorothy testified at times that her feet were off the floor during the descent and ascent of the Elevator, she also agreed that for the three instances when her feet had been off the floors, each time her feet left the floor and then hit the floor ('Right . . ." p. 186) and that her feet were not off the floor the entire time (p. 186). Further, the cases cited by WSA, *Cortes v Central El., Inc.*, 45 AD3d 323, 845 NYS2d 259 [1st Dept 2007], *Dorazio v Delbene*, 37 AD3d 645, 830 NYS2d 329 [2d Dept 2007] (plaintiff's version of the accident was not credible as a matter of law since it was refuted by the physical evidence at the accident scene and the characteristics of the location where the collision occurred . . . , and it also was contrary to eyewitness accounts of the accident, the findings of police investigators, and the plaintiff's own admission following the collision), and *Hardy v Lojan Realty Corp.* (303 AD2d 457, 755 NYS2d 901 [2d Dept 2003] (*see discussion infra*)) are factually distinguishable. Notably, the opinion in *Hardy* only reports of an elevator that "allegedly free-fell and came to an abrupt stop after a mainline fuse blew." Also, the opinion states, without explanation that affidavits demonstrated that "the allegations were physically and mechanically impossible." As such, the opinion offers no guidance. Third, the opinion cites to three cases, all of which are factually distinguishable from the case herein. *Williams v Port Auth. of New York and New Jersey* (247 AD2d 296, 669 NYS2d 285 [1st Dept 1998]), involved an escalator, as opposed to an elevator, in which a defendant's expert opined that the escalator at issue could not "reverse itself from an ascent to a descent direction. To reverse direction, the expert stated, the escalator must be stopped by the use of the stop button. To restart it in the opposite direction would require a specific key to activate the switch." The expert's opinion in *Williams* was uncontradicted. The opinion also cited to *Braithwaite v Equitable Life Assur. Soc. of U.S.* (232 AD2d 352, 648

NYS2d 628 [2d Dept 1996]), a case involving an escalator accident where plaintiff alleged that the escalator had stopped and reversed direction, which the Court found was physically impossible based on various expert opinions. And, the third case *Hardy* cites, *Loughlin v City of New York* (186 AD2d 176, 587 NYS2d 732 [2d Dept 1992]), found plaintiff's testimony at trial incredible as a matter of law based on, *inter alia*, his demeanor and failure to initially testify to the essential allegation that he was struck by a vehicle.

And, WSA's reliance on *Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611, 942 NYS2d 519 [1st Dept 2012]) is misplaced. The Court in *Espinal* found first that defendants established through deposition testimony, affidavits, and expert opinions that the elevator which allegedly went up and down at twice its normal speed, was "mechanically, scientifically and physically impossible"; the expert opined that "multiple redundant safety features that would have stopped the elevator instantly in a case of excessive speed." The Court then found that plaintiff failed to raise an issue of fact, as follows:

> plaintiff's version of the incident incredible as a matter of law. *It is not supported by the other witnesses or evidence submitted on this motion. Plaintiff did not produce an expert to contradict Hughes's opinion that the incident was mechanically impossible, and that other reasons for the elevator's shut down involved the safety features* incorporated into the elevator itself, and not improper maintenance as she claims.
> (Emphasis added)

Here, WSA's expert corroborates plaintiffs' claim that Elevator #1 oversped in different directions.

Further, dismissal of the *res ipsa loquitur* claim is unwarranted.

The doctrine of *res ipsa loquitur* may be invoked against a defendant in an action involving an allegedly malfunctioning elevator, where is it shown that the event is of a kind that does not ordinarily occur in the absence of negligence; the accident must be caused by an

instrumentality within the exclusive control of the defendant; 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] ("There is no dispute that such an abrupt and potentially catastrophic event could not have occurred if the elevator was operating properly or that plaintiff in any way contributed to the cause of this accident."); *Miller v Schindler Elevator Corp.*, 308 AD2d 312, 763 NYS2d 826 [1st Dept 2003]). "[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 AD3d 191, 795 NYS2d 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 AD2d 708, 601 NYS2d 904 [1993]). This doctrine was recently permitted to be invoked based on a plaintiff's account that the elevator in which in was the sole passenger "dropped suddenly, causing him to fall [and that he] had to be lowered to the lobby level, where several persons had to pry the door open" *(Stewart v World Elevator Co, Inc.*, 84 AD3d 491, 922 NYS2d 375 [1st Dept 2011] ("Certainly, this is the type of event that does not ordinarily happen in the absence of negligence, and plaintiffs are entitled to invoke the doctrine as against defendants based on plaintiff's testimony concerning the elevator malfunction")).

As explained in *Stewart*, the application of *res ipsa loquitur* applies as follows:

> In *Williams* [*v Swissotel N.Y.*, 152 AD2d 457, 542 NYS2d 651 [1989], the plaintiff was injured when the elevator on which he was riding dropped nine stories and abruptly stopped just below the lobby floor landing. Although one of defendant's principals maintained, as here, that the accident as described by the plaintiff was "physically impossible" due to the existence of certain safety features and the findings of a post-accident inspection revealing no "telltale markings" on the elevator cable, this Court found that the testimony of plaintiff was sufficient to support application of the res ipsa doctrine, stating "the testimony of [plaintiff] as to how the elevator fell is sufficient evidence, if found credible by the trier of fact, to support the application of the doctrine" (id. at 458, 542 NYS2d 651).

On this record, plaintiffs are entitled to invoke the doctrine based on their testimony that the elevator began descending and ascending at high rates of speed, which testimony must be treated as true on defendant's motion for summary judgment. Although defendant presented evidence that the elevator was not malfunctioning immediately after the incident, plaintiff's testimony to the effect that a malfunction actually occurred is sufficient to create a triable issue of fact (*see Stewart, supra*; *see also, Bryant v Boulevard Story, LLC*, 87 AD3d 428, 928 NYS2d 285 [1st Dept 2011] (finding that an issue of fact exists, in that "It cannot be concluded as a matter of law that the doctrine of res ipsa loquitur will not be available to plaintiff at trial, given that the alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence; the evidence shows that defendant Uplift [elevator company] was exclusively responsible for maintenance and repair of the elevator; and the record is devoid of any evidence that plaintiff contributed to the misleveling of the elevator")).

And, NYE's expert opinion to the effect that the occurrence as described by plaintiff is a physical or mechanical impossibility is contradicted by WSA's expert opinion.

NYE's contention that it was proper for the elevator to start and stop in light of the conditions in the hoistway due to the construction, and that the travel of the elevator was in the exclusive control of NYE in light of the dust condition does not render the doctrine inapplicable, under the circumstances, as the NYE, like the elevator company in Stewart, had "exclusive control over the mechanisms and devices in the elevator" (*see Stewart, supra*).

Therefore, the branch of NYE's motion for summary dismissal of plaintiffs' complaint is denied.

As to NYE's motion for summary judgment against WSA for failure to name NYE's

predecessor as an additional insured, summary judgment is warranted on the issue of liability. Silitisky, TKE's Risk Manager and manager of the Contract Administration Department since 2000 attests to the validity of the subject maintenance agreement, wherein WSA was required "to name [Gemini/Empire] as an additional insured under their general liabilty and excess (umbrella) insurance policies for the claims set out above" and "agree[d] to indemnify, defend and save harmless" Gemini/Empire. Central Elevator merged with Gemini/Empire and Gemini/Empire's maintenance contracts pursuant to a Certificate of Merger filed on in 1999, and Gemini/Empire changed its named to Central Elevator. Central Elevator then merged with NYE in 2003 and Central Elevator, the surviving entity, changed its name to NYE in accordance with a Certificate of Merger filed in 2003. Thereafter (and after the subject incident), in 2009, TKE merged with NYE, and TKE is the surviving entity pursuant to Certificate dated in 2009. The documentary evidence submitted in support of Silitisky's affidavits (submitted on the motion and in reply) sufficiently establish that NYE was performing elevator maintenance obligations pursuant to such elevator maintenance contract and that WSA failed to name NYE's predecessor as a named insured. Such documentary evidence also demonstrates that New York Elevator Company, Inc. merged with Central Elevator, Inc., forming the named defendant, New York Elevator & Electrical Corp., as of January 31, 2003. And, as pointed out by NYE, the "Broad Form Named Insured" Endorsement, revises the "Named Insured" to include the first named Insured, and any "acquired company or corporation (including subsidiaries thereof) of which any insured named as the Named Insured . . . has more than 50% ownership interest in or exercises management or financial control over . . . ." Such clause supports Silitisky's attestation that the omission of cures any issues of omission of "New York Elevator & Electrical Corp." in the policy.

TKE has demonstrated and clarified that it has two policies, the first of which has a limit of $2,000,000 single limit and the second of which has a $4,000,000 per occurrence and $8,000,000 annual aggregate limit and a $1,000,000 self-insured retention.

Silitisky attests that both policies erode simultaneously, and that policy with the self-insured retention requires that the first $1,000,000 be paid by TKE before the insurer begins to pay. Silitisky attests that TKE has incurred costs in defending the instant claims, and is exposed to an award of damages if plaintiffs' prevail in this suit.

It is undisputed that NYE's predecessor was named as an additional insured. And, the issues raised by WSA in opposition have been eliminated as a matter of law.

"Because the insurance procurement clause is entirely independent of the indemnification provisions in the contract (*Kinney v Lisk Co.*, 76 NY2d 215, 219 [1990]), a final determination of liability for the failure to procure insurance "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 955 NYS2d 302 [1st Dept 2012]).

Therefore, NYE is entitled to summary judgment against WSA for breach of contract, and damages to be determined at a hearing.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant New York Elevator & Electrical Corporation a/s/h/a New York Elevator & Electrical Corporation, Inc. to sever this action and for summary judgment dismissing the complaint of the plaintiffs and for summary judgment on its cross claims for breach of contract and common law indemnification against co-defendants WSA

Management Ltd. and WSA Equities, LLC is granted solely to the extent that summary judgment in favor of New York Elevator & Electrical Corporation a/s/h/a New York Elevator & Electrical Corporation, Inc. and against WSA Management Ltd. and WSA Equities, LLC is granted on the issue of liability for breach of contract, and summary judgment as against plaintiffs is denied; and it is further

ORDERED that damages against WSA Management Ltd. and WSA Equities, LLC shall be assessed at a hearing at the time of the trial of the action or disposition of the action; and it is further

ORDERED that defendant New York Elevator & Electrical Corporation a/s/h/a New York Elevator & Electrical Corporation, Inc. shall 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 29, 2014

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

HON. CAROL EDMEAD