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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

WILLIAM SKROBE, an infant by his Father and Natural Guardian, THOMAS SKROBE, and THOMAS SKROBE, individually,

Plaintiff,

-v-

756 WAYWEST DEVELOPMENT CO., LLC and ROTAVELE ELEVATOR, INC.,

Defendants.

Index No.: 116555/10

Motion Date: 09/06/13

Motion Seq. No.: 01

The following papers, numbered 1 to 8 were read on these motions for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1, 2
Answering Affidavits - Exhibits	No(s).	3, 4, 5
Replying Affidavits - Exhibits	No(s).	6, 7, 8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Motion sequence numbers 001 and 002 are consolidated for disposition.

Thomas Skrobe (Skrobe), the father and natural guardian of William Skrobe (William), seeks damages arising from injuries that William sustained when his hand was caught in the space between the elevator door and the casing (also called the frame or return) into which the door slides upon opening.

In motion sequence number 001, defendant 756 Waywest Development Co., LLC (Waywest), the building owner, moves for

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

summary judgment dismissing the complaint and, in the alternative, for common-law indemnification against defendant Rotavele Elevator, Inc. (Rotavele), the elevator service company. In motion sequence number 002, Rotavele moves for summary judgment dismissing the complaint and all cross claims.

It is undisputed that the building has two elevators. Plaintiff asserts that on August 17, 2010, at sometime after 3 o'clock in the afternoon, William, an infant who was then twenty months old, his father, and his grandmother were in one of the elevators traveling from the first to the second floor, where William resides with his parents and brother. When the elevator stopped and the door began to open, William was touching the door with the fingertips of his right hand, and his right hand and arm past the elbow became stuck in the gap between the door and the casing. Once the elevator door was fully open, Skrobe activated the emergency stop and struggled to pull out his son's arm; he pushed the door away from William enough to be able to free his arm. William was taken by ambulance to a hospital where he was treated with stitches to repair a jagged cut across the width of his wrist.

The next morning, John Mallia, a Rotavele supervisor and elevator mechanic, and an inspector from New York City Department of Buildings (DOB) examined the elevator.

At his deposition, Skrobe testified that, on the day of the

accident, the space between the door and the casing was approximately two to four inches wide, and the door was wobbly, moving from side to side and could be shaken. He stated that the day after the accident, the gap was smaller, zero to two inches wide, and the door was sturdier. He testified that before the accident, he noticed that the gap was two to four inches wide, but he did not observe that the door was shaky until the day of the accident. He never complained about the door to building personnel or Rotavele.

Nonparty representative Daniel Garcia (Garcia) is a handyman employed by the company that manages the building. At the time of the accident, he was the relief doorman and had been employed there for two months. He worked part-time, eight hours a day, fewer than five days a week. He called 911 on the day of the accident, and the building superintendent was on vacation on that day.

Garcia testified that his duties concerning the elevators were "making sure the stainless steel was clean; there was no paper on the floor. That's it". He cleaned the elevators, including the doors, twice a day. Garcia did not know what duties the superintendent had concerning the elevators. Garcia testified that he never observed any malfunctions or received complaints about the elevator and knew of none. After the incident, he went into the elevator and did not notice any

unusual gap between the door and the casing.

Mallia, the Rotavele supervisor, testified that Rotavele installed and maintained the elevators. Mallia's duties included elevator maintenance and troubleshooting. Once a month, a Rotavele mechanic and a mechanic's helper came to the building for maintenance purposes. Mallia attended some, not all, of those monthly checks. On each visit, the mechanics would examine a different part of the elevators according to a checklist, except that the doors were examined during every visit. The mechanics would ascertain that the doors' rollers, gibs, electric eyes, and speed functioned correctly. Before the accident, there was no discussion about replacing the doors and Mallia was not aware of any malfunctions regarding the doors. There were no complaints about a gap between the door and the casing.

He testified that the elevator mechanics used maintenance logs and work tickets. At the deposition, maintenance records dating from September 4, 2009 to August 10, 2010 were produced, some parts of which were redacted. Rotavele's attorney represented that the redacted parts concerned elevator "# 2," not the elevator in which the child was injured, which was elevator "# 1."

The maintenance log for February 3 and 4, 2010 indicated that a cab door gib had been replaced in elevator "# 1." Mallia testified that a gib is the neoprene guide under the door that

the door rides in. He did not know why the gib was changed. August 10, 2010 was the date of the last entry in the maintenance log. It did not state what was done on that date.

The work ticket that Mallia issued on August 18, 2010, the day after the accident, was the subject of testimony at the deposition. Mallia wrote on the ticket that everything was up to code, that the door was working correctly, and that "I made minor adjustments to door after D.O.B. Inspector made his inspection to close the gap". Mallia testified that regulations mandate that the gap between the door and the casing cannot be wider than 3/8 of an inch. He said that he and the DOB inspector noted that the gap was less than 3/8 inches, that the elevator was working properly, and that the door was not shaky or wobbly. Mallia stated that the DOB inspector used a ruler to measure the gap.

The DOB inspector's report, dated August 18, 2010, states that the gap between the door and the return was 1/4 to 5/16 inches, and that the car's gibs and saddle were not worn. The inspector noted that a Rotavele elevator mechanic was present and that the mechanic "will be closing the gap on the car door clearance to less than 1/4 - 3/16 and will be replacing the car door gibbs with new ones. The gap was within code requirements". The report states that the child's hand got caught in the gap between the car door and return wall as the car door opened, and "it is unknown how small the child's fingers/hand are that they

were [sic] to fit in the gap".

The New York City Building Code, Administrative Code of City of NY § 27-982 et seq., establishes minimum safety requirements for the maintenance and operation of elevators and escalators. Administrative Code of City of NY § 27-983 incorporates the provisions of reference standard RS-18. RS-18 incorporates the provisions of ANSI/ASME[1] A.17.1-1996, entitled Safety Code for Elevators and Escalators, of which Rule 110.11 (e) (2) provides that the clearance between the door panels and the entrance frame shall not exceed 3/8 of an inch.

A party seeking summary judgment must present a prima facie case entitling it to judgment as a matter of law by presenting competent and admissible evidence to negate any material issues of fact (Forest v Jewish Guild for the Blind, 3 NY3d 295, 314 [2004]). If the movant meets this burden, the opponent must offer evidence showing that factual issues exist that must be determined at trial (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If the movant does not meet its burden, the motion must be denied, regardless of the sufficiency of the opposition (Winegrad, 64 NY2d at 853).

A DOB report that states that the safety code was not violated and that no defects or malfunctions exist is enough to

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[1] American National Standards Institute/American Society of Mechanical Engineers. A copy of the regulations is at Rotavele's motion, exhibit M.

establish a prima facie case for the party claiming nonnegligence in regard to an injury (see Cilinger v Arditi Realty Corp., 77 AD3d 880, 882 [2d Dept 2010]; Gell-Tejada v Macy's Retail Holding Inc., 2013 WL 5293818, 2013 NY Misc LEXIS 4156, 2013 NY Slip Op 32180[U], *13 [Sup Ct, NY County 2013] [about an escalator]; Lam v 39 Cam, LLC, 2011 WL 6891579, 2011 NY Misc LEXIS 6195, 2011 NY Slip Op 33407[U], *2-3 [Sup Ct, NY County 2011]). Rotavele submits the DOB report, which if admissible, is sufficient to establish that the elevator door was not defective for the purposes of both defendants' motions. However, as plaintiff points out, the report is not admissible, as it is not certified (*see* CPLR 4518 [c]), or otherwise authenticated or rendered admissible as evidence (*see e.g.* CPLR 3122-a). No deposition transcript or affidavit of the inspector who wrote the report or any other DOB employee is offered to authenticate the report. Therefore, the court must disregard the report as it is inadmissible hearsay (see Coleman v Maclas, 61 AD3d 569 [1st Dept 2009]). Defendants has not come forward with proof prima facie that shows that the elevator door was not defective.

"A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it" (Singh v United Cerebral Palsy of N.Y. City, Inc., 72 AD3d 272, 275 [1st Dept 2010]). "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 NY2d 553, 559 [1973]). To escape liability, a defendant must show that it did not create the allegedly defective or dangerous condition that caused the injury or that it did not have notice, actual or constructive, of the dangerous condition (Mitchell v City of New York, 29 AD3d 372, 374 [1st Dept 2006]). Constructive notice exists when the defect is "visible and apparent and . . . exist[s] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

Viewing the evidence in the light most favorable to the plaintiff, defendants have not established the absence of a defective elevator door. Further, although there is no allegation that defendants created any defect, defendants fail to show lack of notice.

Waywest produces the deposition transcript of the doorman who was there for two months only and whose responsibility concerning the elevator was limited to wiping off the sides and picking up any dirt on the floor. He did not claim to be an employee who regularly observed the operation of the elevator.

Rotavele comes forward with no record or testimony from a mechanic who actually worked on the elevator. Mallia did not testify as to the last time before the accident that he saw the elevator. Parts of the maintenance log are blacked out and entries are missing as to what happened on the last maintenance date.

Thus neither defendant presents prima facie evidence that establishes lack of notice of any defective condition of the elevator door in question.

Given that defendants have not met their burden, the court will not examine plaintiff's opposition to the motions, except in regard to the doctrine of res ipsa loquitur, raised in plaintiff's opposition papers.

Defendants contend that plaintiff, having not given notice that it was going to rely upon the doctrine, should be precluded from so doing. However, the failure to specifically plead res ipsa loquitur does not constitute a bar to its invocation (Ianotta v Tishman Speyer Props., Inc., 46 AD3d 297, 298-299 [1st Dept 2007]). The doctrine may be used at trial provided that the plaintiff can show a "hypothesis from which a finding of negligence may be drawn" (Williams v Port Auth. of N.Y. & N.J., 247 AD2d 296, 297 [1st Dept 1998]).

Rotavele argues that the facts do not permit the doctrine to be applied. The doctrine of res ipsa loquitur

> "allows the factfinder to infer negligence from the mere happening of an event where the plaintiff presents evidence (1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event"

(Miller v Schindler El. Corp., 308 AD2d 312, 313 [1st Dept 2003]). Lack of notice is not a defense to the doctrine (*Mejia v New York City Tr. Auth.*, 291 AD2d 225, 226 [1st Dept 2002]).

To rely on the doctrine, the plaintiff need not eliminate all other possible causes of the accident (Kambat v St. Francis Hosp., 89 NY2d 489, 494 [1997]). The plaintiff's evidence must provide "a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence" (*id.* [internal quotation marks and citation omitted]). The elements of res ipsa loquitur, once shown, do not create a presumption of negligence in favor of plaintiff; rather, they "permit the inference of negligence to be drawn from the circumstance of the occurrence" and have "the effect of creating a prima facie case of negligence that sufficient for submission to the jury" (Dermatossian v New York City Tr. Auth., 67 NY2d 219, 226 [1986]). Defendants may submit evidence tending to rebut the foundational elements of res ipsa loquitur, and the jury considering all of the evidence "may but is not required to draw the permissible inference" (Dermatossian, supra) of negligence.

Plaintiff has come forward with evidence of the first element, as a child's hand is not normally caught in an elevator door in the absence of negligence. The third element of the doctrine, is met, as a matter of law, as a child of two lacks legal capacity and is incapable of negligence (*Boyd v Trent*, 297 AD2d 301, 302 [2d Dept 2002]; Lopez v No Kit Realty Corp., 254 AD2d 155, 155-156 [1st Dept 1998]). Nor may the parent's contributory negligence be imputed to the infant (*Boyd*, 297 AD2d at 302). Under General Obligations Law § 3-111, a child's recovery is not reduced by the culpable conduct of a parent (see Kelly v Metropolitan Ins. & Annuity Co., 82 AD3d 16, 24 [1st Dept 2011]).

In regard to the second element of the doctrine, Rotavle argues that it did not have exclusive control over the elevator. The "Basic Services Agreement" between Waywest and Rotavele provides that each month Rotavele will inspect, lubricate, and adjust certain items when it deems it necessary or advised, including the "car door operating mechanism," and "will periodically examine all safety devices . . .". Rotavele "does not assume any management or control over any part of the equipment except during periods of work when our employees actually take direct charge of the equipment, and such management and control over the elevator equipment remains exclusively with the purchaser". Waywest, the purchaser, agrees "to keep the

elevator equipment from being exposed to the elements or to physical damage". The purchaser agrees to notify Rotavele at once of "manifestations or appearance of any irregularity" in the elevator operations. The purchaser "will keep the equipment under observation by personnel competent to detect any such manifestation or appearance of any irregularities in operation between periods of the company's inspection".

Rotavele argues that the contract limits its responsibility, and points out that the contract has not provisions about replacing parts. However, the contract provides that Rotavele must maintain and repair and those duties, unless explicitly stated otherwise, generally encompass replacement of nonfunctioning parts. Mallia's testimony and the maintenance log show that Rotavele replaced parts.

A contract that requires an elevator maintenance company to periodically inspect and maintain means that the elevator and its parts were under the company's control (see Gutierrez v Broad Fin. Ctr., LLC, 84 AD3d 648, 649 [1st Dept 2011], *affg* 32 Misc 3d 1217[A], 2009 NY Slip Op 52805[U] [Sup Ct, NY County 2009]; Stewart v World El. Co., Inc, 84 AD3d 491, 496 [1st Dept 2011]; Devito v Centennial El. Indus., Inc., 90 AD3d 595, 596 [2d Dept 2011]). The agreement between Rotavele and Waywest places control of the elevators in Rotavele. Nonetheless, Rotavele contends that its control was not exclusive.

The requirement of exclusive control is not applied in a fixed and mechanical fashion (Dermatossian, 67 NY2d at 227; Mejia, 291 AD2d at 227). The evidence put forth to show exclusive control "must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it" (Dermatossian, 67 NY2d at 227 [internal quotation marks and citations omitted]). It must be shown that more likely than not the defendant was responsible for any negligence (id.). The exclusive control must be over the instrumentality that caused the injury, that is, the specific mechanism that malfunctioned (*Pavon v Rudin*, 254 AD2d 143, 146 [1st Dept 1998]). More than one defendant can exercise such control (Banca Di Roma v Mutual of Am. Life Ins. Co., 17 AD3d 119, 121 [1st Dept 2005]; see also Crawford v City of New York, 53 AD3d 462, 464-465 [1st Dept 2008]). Thus, res ipsa loquitur may be charged against the owner and the elevator maintenance company, where both had exclusive control over the defective portion of the elevator (Kleinberg v City of New York, 61 AD3d 436, 438 [1st Dept 2009]: DiPilato v H. Park Cent. Hotel, LLC, 17 AD3d 191, 193 [1st Dept 2005]; Felder v Host Marriott Corp., 276 AD2d 276, 273 [1st Dept 2000]; Whalen v Tower 53 Condominium, 202 AD2d 267, 267 [1st Dept 1994]).

Whether Rotavele's exclusive control was shared by Waywest depends upon the cause of the alleged malfunction. If any

malfunction was caused by parts that only Rotavele had access to, that would eliminate control on the part of Waywest. If Waywest also had access to the parts that caused the malfunction, that could indicate shared control. The question of Waywest's control depends upon what sort of responsibilities and duties it had regarding the elevators.

It should be noted that to the extent that Rotavele maintains that it and Waywest had the same responsibilities under the service contract, such reading is contrary to the terms of the contract. The parts of the contract under which Waywest undertakes responsibility for protecting the elevators against physical damage and for detecting faults in the elevator operations do not place the responsibility for repairing and maintaining the elevator upon Waywest. Rotavele, the paid elevator expert, was to maintain and repair the equipment that controls the elevator, while Waywest was to notify Rotavele if it detected "problems in the *operation* of the elevators" (see Willis v Westin Hotel Co., 884 F2d 1556, 1564 [2d Cir 1989] [where the contract between the elevator maintenance company and the building owner has the same language as in this case] [emphasis in original]). That Waywest also had to provide protection against physical damage does not make Waywest a mechanic and does negate Rotavele's duty towards the elevators. The contract does provide a benefit for Rotavele in that, if Rotavele is found

liable to plaintiff and Rotavele's liability was brought about because Waywest breached its contractual duty to Rotavele, then Waywest is liable to Rotavele.

Defendants have failed to come forward with evidence in reply to plaintiff's opposition that there is no evidence of one of the elements of the doctrine of res ipsa loquitur, and therefore the doctrine is applicable to this case.

Waywest's entitlement to common-law indemnification depends on a showing that Waywest's liability, if any, arose only vicariously, and that the accident was caused directly by Rotavele's negligence (see Donnelly v Treeline Cos., 13 AD3d 143, 144 [1st Dept 2004]; Gutierrez, 32 Misc 3d 1217[A], 2009 NY Slip Op 52805[U] at *6). Whether Waywest is liable and whether the liability is vicarious has not been determined. The motion for common-law indemnification is denied.

It is therefore,

ORDERED that the motions for summary judgment by defendant 756 Waywest Development Co., LLC (motion sequence number 001) and by defendant Rotavele Elevator, Inc. (motion sequence number 002) are denied.

This is the decision and order of the court.

Dated: June 6, 2014 **ENTER:**

DEBRA A. JAMES J.S.C.