

Stevens v 450 Tenants Corp.

2015 NY Slip Op 30021(U)

January 7, 2015

Supreme Court, New York County

Docket Number: 154183/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

PADMAWATTIE STEVENS,

Plaintiff,

- against -

450 TENANTS CORP. and CENTURY
ELEVATOR MAINTENANCE CORPORATION,
Defendants.

INDEX NO. 154183/12

MOTION SEQ. NO. 003

The following papers were read on this motion by defendant 450 Tenants Corp. for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED

Cross-Motion: Yes No

Padmawattie Stevens (plaintiff) alleges that she was injured while riding in an elevator at 450 West End Avenue, New York, New York (the premises) on May 20, 2011. Defendant 450 Tenants Corp. moves, pursuant to CPLR 3212, for an order: (1) granting it summary judgment dismissing plaintiff's complaint and all cross-claims against it; and (2) granting it summary judgment on its cross-claims for contractual and common-law indemnification against defendant Century Elevator Maintenance Corporation (Century). Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendants and for an order setting this matter down for an assessment of damages.

BACKGROUND

450 Tenants Corp. is the cooperative corporation that owned the premises on the date of the accident. 450 Tenants Corp. hired Century to perform elevator maintenance pursuant to a full coverage elevator maintenance contract.

Plaintiff testified at her deposition that she worked as a cleaning lady for various

residents in the building, and had worked in the building since 1992 (Plaintiff EBT tr at 12). According to plaintiff, there are two elevators in the building: one passenger elevator and one service elevator (*id.* at 21). On the morning of the accident, plaintiff arrived at the building at 9:30 a.m. to clean apartment 13A (*id.* at 27, 95-96). She took the passenger elevator up to the thirteenth floor, and did not observe any problems with the elevator as she rode up that morning (*id.* at 27, 97-98). Plaintiff cleaned the apartment, and left the apartment at approximately 1:00 p.m. (*id.* at 29, 30, 99). She pressed the elevator call button on the thirteenth floor, and the passenger elevator arrived (*id.* at 30, 87-88, 100). Plaintiff did not hear any unusual noises as the doors opened (*id.* at 100-101). When the doors closed, plaintiff heard a “funny noise on the door” and a “banging” (*id.* at 33, 101, 102). She stated that the lights went out in the elevator and the elevator filled with smoke (*id.* at 33, 103, 104). The elevator then “dropped” from the thirteenth floor and stopped between the eleventh and twelfth floors (*id.* at 33, 37, 113). Plaintiff remained in the elevator for approximately 10 minutes, when the superintendent came to assist and opened the elevator doors (*id.* at 35, 36, 37). After plaintiff exited the elevator, plaintiff was told that there was a fire in the elevator motor room (*id.* at 39).

Adam Krasniqui (Krasniqui), the building’s superintendent, testified that Century maintains the elevators in the building once a month, which includes cleaning, greasing, and changing brushes (Krasniqui EBT tr at 9, 44, 48, 50). The building’s employees do not perform any work on the elevators (*id.* at 29). According to Krasniqui, the building’s employees do not do any work in the motor room, and only Century’s employees clean and maintain the motor room (*id.* at 112-113). Krasniqui further stated that if there was a problem with the elevators, the building would call Century (*id.* at 32). Krasniqui recalled that the building called Century several days before the accident because the elevator door was stuck and did not open, and made an unusual noise (*id.* at 88-89). Krasniqui testified that Century’s mechanic responded to the call and made a repair to a panel, as well as something in the motor room (*id.* at 89). Just prior to the time of the incident involving plaintiff, the doorman told Krasniqui that there was a

fire in the elevator control room in the basement (*id.* at 65). Krasniqui observed white smoke and flames coming from the elevator motor (*id.* at 70, 71). He testified that the fire disabled the elevator from running, and that he used a fire extinguisher to extinguish the fire (*id.* at 72, 82). After he extinguished the fire, he heard a bell ringing indicating that someone was stuck on the twelfth floor (*id.* at 73, 74). Krasniqui then went to the twelfth floor and assisted plaintiff (*id.* at 75). He called Century, and Century's mechanic arrived within 10 or 15 minutes (*id.* at 84).

Brian Faerber (Faerber), Century's field supervisor, testified that Century performed elevator maintenance pursuant to a full service maintenance contract (Faerber EBT tr at 8, 46). Century's mechanic performed monthly maintenance, which included inspecting equipment, checking oil levels, and cleaning brushes (*id.* at 104-105). Faerber testified that, on May 20, 2011, he responded to a complaint regarding one of the elevators at the premises (*id.* at 21-23). He testified that he and his crew cleaned the motor room, took the elevator car off safety, ran the elevator and did not find any problems (*id.* at 55). The motor was removed to be checked and cleaned (*id.*). He saw no evidence of a fire other than the fire extinguisher debris (*id.* at 26, 34). After running the elevator, he determined that the elevator was fully functioning (*id.* at 56). Faerber stated that putting the car on safety meant "when the governor trips . . . the car safety activates to stop the car" (*id.* at 49). The safety is designed to stop the elevator if it overspeeds (*id.* at 50). The elevator could have been put on safety by someone in the motor room or the overhead (*id.* at 51).

Plaintiff commenced this action on July 2, 2012 against 450 Tenants Corp. and Century, alleging that her accident occurred "solely due to the negligence of the defendants, their agents, servants and/or employees in their maintenance, control, operation, and supervision of the aforesaid elevator" (complaint, ¶ 22). In its answer, 450 Tenants Corp. seeks contractual indemnification, common-law indemnification, and contribution against Century. Century also asserted a cross-claim for contribution and common-law indemnification against 450 Tenants Corp. Plaintiff filed the Note of Issue and Certificate of Readiness in this action on November

27, 2013.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *see also Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR 3212[b]). “Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court’s function on a motion for summary judgment is “issue-finding, rather than issue-determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v*

Stop & Shop, Inc., 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

A. Timeliness of Plaintiff's Cross-Motion for Summary Judgment

Initially, 450 Tenants Corp. argues that plaintiff's cross-motion for summary judgment is untimely. Even though 450 Tenants Corp. did not provide an order which set the deadline for making motions for summary judgment, the Court takes judicial notice of the preliminary conference order, which directed that motions for summary judgment were to be made within 60 days of the filing of the Note of Issue (see *Samuels v Montefiore Med. Ctr.*, 49 AD3d 268, 268 [1st Dept 2008]). Plaintiff filed the Note of Issue on November 27, 2013. An affidavit of service annexed to plaintiff's cross-motion indicates that it was served on May 23, 2014, nearly 120 days after the court-imposed deadline. In reply, plaintiff states that:

"during the pendency of the motion by 450 Tenants Corp., plaintiff and co-defendant were engaged in ongoing mediation negotiations that they hoped would lead to a resolution of the matter and obviate the need for further motion practice. Although mediation was held shortly before the most recent motion deadline of May 29, 2014 it failed to resolve the matter, leading to the instant cross-motion" (Manes reply affirmation, at 4).

In this case, plaintiff has not shown good cause for the delay in making her cross-motion for summary judgment (see CPLR 3212[a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004] ["'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness"]). In her moving papers, plaintiff does not offer any explanation for the delay in making her cross-motion for summary judgment. "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652). While plaintiff argues in reply that the cross-motion was untimely because the parties were engaged in settlement

negotiations, the Court does not consider this argument because “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). In any event, plaintiff’s vague and conclusory allegations are insufficient to establish good cause, particularly in light of plaintiff’s four-month delay in moving for summary judgment (*see State Farm Fire & Cas. v Parking Sys. Valet Serv.*, 48 AD3d 550, 550 [2d Dept 2008] [vague and conclusory allegations of “settlement talks” were insufficient to demonstrate good cause for six-month delay in making motion for summary judgment]).

“[A] cross motion is an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Terio v Spodek*, 25 AD3d 781, 785 [2d Dept 2006]). “A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief ‘nearly identical’ to that sought by the cross motion” (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007], quoting *Fahrenheit v Security Mut. Ins. Co.*, 32 AD3d 1326, 1328 [2006]). “An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion” (*Filannino*, 34 AD3d at 281). In *Kershaw*, the First Department clarified when a court may consider an untimely cross motion for summary judgment, explaining that:

“Allowing movants to file untimely, mislabeled ‘cross motions’ without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay. Moreover, the exception discussed in *Filannino* allowing the courts to consider proper but untimely cross motions, at least to issues shared with the original motion, addresses the dissent’s concern that a cross-moving party might be caused to file its motion late because it had insufficient time before the deadline occurred.

* * *

"We are concerned that the respect for court orders and statutory mandates and the authoritative voice of the Court of Appeals are undermined each time an untimely motion is considered simply by labeling it a 'cross motion' notwithstanding the absence of a reasonable explanation for its untimeliness. We therefore affirm the branch of the motion court's order which denied HSS summary judgment as untimely made without consideration of its merits" (*Kershaw*, 114 AD3d at 88-90).

Here, 450 Tenants Corp. moved, *inter alia*, for summary judgment dismissing the complaint, arguing that it did not create or have notice of the alleged defect in the elevator. Plaintiff opposed 450 Tenants Corp.'s motion, relying on the doctrine of *res ipsa loquitur* and on the ground that 450 Tenants Corp. had notice of similar complaints regarding the elevator. Plaintiff also cross-moved for partial summary judgment on the issue of liability against 450 Tenants Corp. and Century on the same grounds. To the extent that plaintiff's cross-motion seeks summary judgment against Century, it is improper since Century did not make its own motion for summary judgment. As discussed above, plaintiff has failed to establish good cause. "In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment" (*Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796, 796 [2d Dept 2011] [internal quotation marks and citations omitted]). Thus, the Court does not consider whether plaintiff is entitled to summary judgment against Century.

However, since plaintiff opposed 450 Tenants Corp.'s motion on the same grounds as in its motion for summary judgment against 450 Tenants Corp. (i.e., *res ipsa loquitur* and notice), the court shall determine whether plaintiff is entitled to summary judgment against 450 Tenants Corp. (see *Filannino*, 34 AD3d at 281).

B. 450 Tenants Corp.'s Motion for Summary Judgment/ Plaintiff's Cross-Motion for Summary Judgment Against 450 Tenants Corp.

I. *Plaintiff's Claims Against 450 Tenants Corp.*

450 Tenants Corp. argues that it did not cause or create the fire in the motor room, and did not have notice of the fire in the motor room. As support, 450 Tenants Corp. contends that

the elevator was maintained exclusively by Century. 450 Tenants Corp. points to the testimony of superintendent Krasniqui, wherein he stated that the building called Century if there were any problems with the elevator, and that Century's supervisor acknowledged that Century performed regular monthly maintenance of the elevator and motor room.

To establish its lack of notice, 450 Tenants Corp. relies on: (1) Century's call logs indicating that it performed monthly maintenance on the elevator for at least six months prior to the accident, and did work on the elevator on April 29, 2011, 21 days before the accident (Fippinger affirmation in support, exhibit E); and (2) plaintiff's own testimony, which demonstrates that the elevator appeared to be working properly when she first stepped onto the elevator and when she arrived on the thirteenth floor.

In opposition, and in support of her cross-motion, plaintiff relies on the doctrine of *res ipsa loquitur*. Plaintiff submits an affidavit from Patrick A. Carrajat, who reviewed the record and the Department of Buildings records relating to the subject elevator (device # 1P7180) (Carrajat aff, ¶ 4). Carrajat opines that 450 Tenants Corp. had a duty to supervise the work of Century and assure that the elevator hoist motor was clean and free of any potentially combustible materials (*id.*, ¶ 9). Since Krasniqui would open the motor room for Century, he was able to observe the condition of the hoist motor room (*id.*, ¶ 11). Carrajat further states that a fire in an elevator hoist motor room is a very unusual occurrence, and in the absence of a general building fire, is caused by negligent preventive maintenance (*id.*, ¶ 12). According to Carrajat, direct current hoist motors employ brushes, which give off electrical sparks if they are at an improper grade or are excessively worn, causing accumulated oil and grease to ignite (*id.*). As for exclusive control, plaintiff asserts that the elevator motor room was kept locked and only the superintendent and doorman had keys to the motor room. Plaintiff also argues that her actions were not a contributing factor to the accident.

Plaintiff further contends that, even if the doctrine of *res ipsa loquitur* does not apply, there are issues of fact as to whether 450 Tenants Corp. had notice of the defective condition

of the elevator based on: (1) complaints on April 29, 2011, March 9, 2011, and December 9, 2010 (Manes affirmation in opposition, exhibit D); and (2) the building superintendent's testimony that he called Century two days before the accident to report an unusual noise from the elevator door and that the door would not open (Krasniqui EBT tr at 88-90).

An owner has a nondelegable duty to maintain the premises, including its elevators, in a safe condition (see Multiple Dwelling Law § 78; *Mas v Two Bridges Assoc.*, 75 NY2d 680, 687 [1990]). Thus, an owner may be liable for elevator malfunctions or defects, causing injury to a passenger, which it created or about which it had actual or constructive notice (see *San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 591 [1st Dept 2012]; *Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]), or where it fails to notify the elevator company about a known defect (see *Isaac*, 84 AD3d at 458), even if the owner has contracted with an elevator company to handle all maintenance and repair (see *Camaj v East 52nd Partners*, 215 AD2d 150, 151 [1st Dept 1995]).

450 Tenants Corp. has made a prima facie showing that it neither created nor had notice of the fire in the motor room. The building's superintendent testified that if there were any problems with the elevators, the building would call Century (Krasniqui EBT tr at 32). He further testified that the building's employees do not perform any work in the motor room, and only Century's employees clean and maintain the motor room (*id.* at 112-113). Century's field supervisor testified that Century performed regular monthly maintenance of the motor room, which included inspecting the equipment, checking oil levels, cleaning the brushes, and checking whether the brushes needed to be replaced (Faerber EBT tr at 104-105). According to the call logs, Century last performed work on the elevator prior to the accident on April 29, 2011 (Fippinger affirmation in support, exhibit E).

Plaintiff argues that the doctrine of *res ipsa loquitur* is applicable to the facts of this case. A plaintiff is entitled to rely upon the doctrine of *res ipsa loquitur*, which creates an inference of negligence, where he or she establishes that: (1) the event is of a kind that does

not normally occur in the absence of negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the plaintiff did not contribute to the cause by any voluntary act (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 227 [1st Dept 2002]). This doctrine recognizes that “certain occurrences contain within themselves a sufficient basis for an inference of negligence” (*Dermatossian*, 67 NY2d at 226, quoting *Foltis, Inc. v City of New York*, 287 NY 108, 116 [1941]).

The Court of Appeals has explained the second prong – exclusive control – as follows:

“The exclusive control requirement, as generally understood, is that the evidence 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. The purpose is simply to eliminate within reason all explanations for the injury other than the defendant’s negligence. The requirement does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant’s door” (*id.* at 227 [internal quotation marks and citations omitted]; see also *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997]).

In *Hodges v Royal Realty Corp.* (42 AD3d 350 [1st Dept 2007]), the First Department considered whether a managing agent had “exclusive control” over elevators in a building. In concluding that the managing agent did not exercise sufficient control over the elevators to allow for the application of *res ipsa loquitur* to establish its liability for the accident, the Court noted that:

“all responsibility for the daily operation of the building’s elevators was ceded to [the elevator company]. [The managing agent] had no role in inspecting, maintaining or repairing the elevators; those duties and their faithful execution were the total and complete responsibility of [the elevator company] by virtue of its contract with [the owner]” (*id.* at 352).

By contrast, in *Singh v United Cerebral Palsy of N.Y. City, Inc.* (72 AD3d 272 [1st Dept 2010]), the Court found that the plaintiff had raised issues of fact as to the applicability of the *res ipsa loquitur* doctrine, noting that “*res ipsa loquitur* does not require sole physical access to the instrumentality causing the injury” and that “there was no exclusive maintenance contract between [the owner] and [the elevator company]; rather [the elevator company] performed work

on the doors on an as-needed basis” (*id.* at 277).

In this case, plaintiff cannot rely on the doctrine of *res ipsa loquitur* because 450 Tenants Corp. ceded all maintenance and repair responsibility to Century under an exclusive maintenance contract (*see Levine v City of New York*, 67 AD3d 510, 511 [1st Dept 2009]; *Hodges*, 42 AD3d at 351-352). Pursuant to sections 1.01 and 1.02 of its full coverage elevator maintenance contract, Century was required to “[p]rovide bi-weekly systematic examinations, adjustments, cleaning and lubrication of all machinery, machinery spaces, hoistways and pits,” and “maintain all parts of the elevator consisting of, but not limited to, machines, motor, generators, brushes, power units, controllers, selectors, worm gears . . .” (Fippinger affirmation in support, exhibit E). Under section 1.08 of the contract, entitled “Sole Responsibility,” “[t]he maintenance work shall be performed only by properly uniformed and trained men, directly employed and supervised by the Contractor, who are experienced and skilled in maintaining automatic group control elevators similar to those to be maintained under this Contract and shall not be assigned or transferred to any agent or subcontractor” (*id.*). Century’s supervisor acknowledged that Century had a full service maintenance contract for the elevators in the building (Faerber EBT tr at 104).

Moreover, plaintiff’s expert’s affidavit is insufficient to raise an issue of fact as to whether a fire in a motor room is an event that ordinarily does not occur in the absence of negligence. It is well settled that an expert’s opinion “must be based on facts in the record or personally known to the witness” (*Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959], *rearg denied* 6 NY2d 882 [1959]). “An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion” (*Rosato v 2550 Corp.*, 70 AD3d 803, 805 [2d Dept 2010]; *see also Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]). Carrajat opines that a fire in a motor room does not ordinarily occur in the absence of negligent preventive maintenance

(Carrajat aff, ¶ 12). However, Carrajat did not inspect the elevator or motor room, and thus, his opinion is speculative and not supported by an evidentiary foundation (*see San Andres*, 94 AD3d at 592 [plaintiff's expert's conclusory assertion, without inspecting elevator and relying on plaintiff's hearsay testimony, that misleveling was caused by negligent preventive maintenance, was speculative]; *Parris v Port of N.Y. Auth.*, 47 AD3d 460, 461 [1st Dept 2008] [expert's opinion that escalator could have jerked due to deterioration or wearing of various parts, and inferred that elevator company had not performed necessary maintenance, was speculative and not supported by an evidentiary foundation, where the expert did not conduct an on-scene inspection]; *Baumgardner v Rizzo*, 35 AD3d 223, 224 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007] [opinion of plaintiff's engineer, made without an on-site inspection, was based on speculation and insufficient to rule out other causes of the accident]).

As for notice, plaintiff points to a complaint on April 29, 2011 that there was door trouble- subclass "slamming" and also "making noise"; a complaint on March 9, 2011 of "noise in the motor room"¹; and another "noise complaint" on December 9, 2010 (Manes affirmation in opposition, exhibit D). In addition, plaintiff asserts that the superintendent called Century two days before the accident to report an unusual noise from the elevator door and that the door would not open (Krasniqui EBT tr at 88, 89). Nevertheless, plaintiff does not argue that these prior complaints had anything to do with a fire in the motor room. Indeed, there is no evidence that these prior trouble calls "were of a similar nature to the accident giving rise to this lawsuit" or "were caused by the same or similar contributing factors" (*Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 298 [1st Dept 2007], quoting *Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60-61 [1st Dept 2006]; *see also Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004] ["The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken"]).

¹ Contrary to plaintiff's assertion, the log states that there was a "noise complaint" on March 9, 2011 (Manes affirmation in opposition, exhibit D).

Therefore, since plaintiff has failed to raise an issue of fact, 450 Tenants Corp. is entitled to summary judgment dismissing the complaint and all cross-claims against it. In light of the foregoing, plaintiff's cross-motion for summary judgment is denied.

II. *Contractual Indemnification*

450 Tenants Corp. moves for full contractual indemnification against Century, arguing that there can be no finding of negligence on its part since Century had sole responsibility for maintaining the elevators pursuant to its exclusive maintenance contract. Alternatively, 450 Tenants Corp. requests a conditional award of indemnification against Century.

Century contends, in opposition, that there are issues of fact as to whether the accident was caused by Century's performance under the contract, or whether there was a non-negligent explanation for the accident. Century argues that it lacked notice of the fire, and that one of the employees of 450 Tenants Corp. may have caused the elevator to stop.

"The right to contractual indemnification depends upon the specific language of the contract" (*Sovereign Bank v Biagioni*, 115 AD3d 847, 848 [2d Dept 2014], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "As between the owner and one voluntarily undertaking responsibility for maintenance . . . the party assuming the contractual duty is liable to the owner for the damages the owner must pay" (*Mas*, 75 NY2d at 687-688).

Paragraph 1.12 of the elevator service contract provides as follows:

"The Contractor hereby agrees to indemnify and save harmless the Owner, the Consultant . . . and any of its subsidiaries from and against all liability claims and demands on account of injury to persons including death resulting therefrom and damages to property *arising out of the performance of this Contract by the Contractor, employees, and agents of the Contractor and Contractor's property, except from and against such claims and demands which may arise out of the sole negligence of the Owner, John A. Van Deusen & Associates, Inc., or any of its subsidiaries.* The Contractor shall, at his or her expense, defend any and all actions at law brought against the Owner and/or the Agent based thereon and shall pay all attorney fees and all other expenses, and promptly discharge any judgments arising therefrom. These conditions shall also apply to any subcontracted operations" (Fippinger affirmation in support, exhibit E [emphasis added]).

Here, as discussed above, 450 Tenants Corp. has shown that it was not negligent.

Century assumed full responsibility for the maintenance, repair, inspection, and servicing of the elevators under its exclusive maintenance contract. Century also agreed to defend all actions brought against 450 Tenants Corp. and pay 450 Tenants Corp.'s attorney's fees and all other expenses "arising out of the performance of this Contract by [Century] . . . except from and against such claims and demands which may arise out of the sole negligence of [450 Tenants Corp.]" (Fippinger affirmation in support, exhibit E). In moving for contractual indemnification, 450 Tenants Corp. asserts that Century inspected the motor room during every monthly inspection (Faerber EBT tr at 104). However, 450 Tenants Corp. has not demonstrated that the condition that caused the fire in the motor room could have been detected based upon a reasonable inspection.² Thus, it has not yet been shown that plaintiff's injuries arose out of Century's performance of its work under the contract. Accordingly, 450 Tenants Corp. is entitled to conditional contractual indemnification against Century (*see lanotta*, 46 AD3d at 300 [in action to recover for personal injuries when elevator doors unexpectedly closed on the plaintiff, the owner was entitled to conditional indemnification against elevator company in the absence of any showing of negligence on the owner's part, where the elevator company assumed responsibility for the maintenance, repair, inspection, and servicing of the elevators, and agreed to indemnify the owner for any injuries arising out of or resulting from the performance of that work]; *Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200, 202 [1st Dept 1998] [owner was entitled to conditional summary judgment on its cross-claim for contractual indemnification against elevator company in advance of any factual determination that elevator company was negligent and a showing of loss by the owner]; *see also DiStefano v Kmart Corp.*

² While 450 Tenants Corp. relies on *Camaj, supra*, to support its claim for full contractual indemnification, this case is distinguishable. In *Camaj*, the Court granted the owner indemnification against the maintenance contractor, noting that the "[owner's] liability arose, if at all, solely by reason of its non-delegable duty. Actual negligence, if found, must be attributable to the acts or omissions of [the maintenance contractor]" (*Camaj*, 215 AD2d at 152). In that case, the owner promptly notified the maintenance contractor of trouble with the elevator, and the plaintiff was injured in the elevator when it dropped and bounced several times shortly after the repair work was completed (*id.* at 151).

Intl., 89 AD3d 459, 459 [1st Dept 2011], *lv denied* 19 NY3d 802 [2012] [indemnification claim was properly dismissed where the evidence showed that the elevator did not malfunction and plaintiff was the sole cause of her accident]; *Rosen v New York City Tr. Auth.*, 295 AD2d 126, 126 [1st Dept 2002] [owner was not entitled to contractual indemnification from contractor because the accident was not in any manner caused by the contractor's "work," the walkway]).

III. *Common-Law Indemnification*

450 Tenants Corp. also seeks summary judgment on its cross-claim for common-law indemnification against Century. Century contends that there is an issue of fact as to whether the accident was caused by its performance under the exclusive maintenance contract.

"Implied [or common-law] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*Mas*, 75 NY2d at 690). To establish a common-law indemnification claim, the party "seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Blank Rome, LLP v Parrish*, 92 AD3d 444, 445 [1st Dept 2012], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). "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]).

Since the complaint has been dismissed against 450 Tenants Corp., there is no basis for the award of common-law indemnification in favor of 450 Tenants Corp. against Century (see *Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012] [court erred in granting owner common-law indemnification against decedent's employer where, prior to the grant of indemnification, court dismissed plaintiff's complaint against owner on the basis that

there was no non-speculative basis for its liability; "Absent liability, vicarious or otherwise, there is no basis for indemnification"). Therefore, 450 Tenants Corp.'s request for common-law indemnification against Century is denied.

CONCLUSION

Accordingly, it is

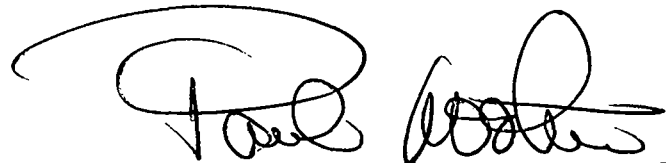
ORDERED that the motion of defendant 450 Tenants Corp. for summary judgment is granted to the extent of dismissing the complaint and all cross-claims against it and awarding it conditional contractual indemnification against defendant Century Elevator Maintenance Corporation, and is otherwise denied; and it is further

ORDERED that the cross-motion of plaintiff for partial summary judgment is denied; and it is further,

ORDERED that defendant 450 Tenants Corp. is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/7/15


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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