

<b>Robinson v Harlem River Park Houses</b>
2016 NY Slip Op 30668(U)
March 28, 2016
Supreme Court, Bronx County
Docket Number: 300745/2012
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----X **Index No. 300745/2012**  
Ora J. Robinson,  
Plaintiff,

-against-

**DECISION and ORDER**

Harlem River Park Houses, River Park  
Associates and R.Y. Management Inc.,  
Defendants.

Present:

Hon. Julia I. Rodriguez  
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion for summary judgment as to liability.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

This is an action to recover for personal injuries allegedly sustained by Plaintiff, on September 28, 2011, while she was a passenger in an elevator upon premises known as 40 Richmond Plaza, Bronx, New York. At the time of the alleged accident, Defendant Harlem River Park Houses owned, operated, controlled, managed and maintained the subject premises. Defendant R.Y. Management, Inc. ("R.Y. Management") also managed the subject premises. Plaintiff now moves for summary judgment as to liability, pursuant to CPLR 3212, under the doctrine of *res ipsa loquitur*.

In support of summary judgment, Plaintiff submitted, *inter alia*, her deposition testimony. At her deposition, Plaintiff testified as follows: She is a registered nurse employed by the Visiting Nurse Services of New York. On the date of her accident, she went to the subject premises to care for two patients, a female who resided on the 11<sup>th</sup> floor and a male who resided on the 23<sup>rd</sup> floor of the subject building. She arrived with a security guard and a translator. They entered the elevator on the lobby floor and intended to proceed to the 23<sup>rd</sup> floor. The elevator doors opened in a normal manner and were level to the lobby floor before they stepped inside the elevator. After they stepped inside the elevator, the doors closed in a normal manner. One of them pressed the button for the 23<sup>rd</sup> floor. Then, the elevator "took off with a speed faster than

anything, [she] had ever seen before, so fast.” The elevator never stopped at the 23<sup>rd</sup> floor but continued to speed upward to the 40<sup>th</sup> floor. “When it got up all the way, [she] thought it was going to go through the ceiling, but it didn’t.” The elevator “made a quick dip down and then back up.” The elevator went all the way down to the lobby floor and then “flew back up again.” The “second time was just as powerful as the first, the same jolting thing.” The elevator sped to the top floor again, and then “jolt[ed] down and stopped at the 23<sup>rd</sup> floor where the doors finally opened. While in the elevator, she “was thrashed and thrown about, [her] body twisted, [she] banged into the wall of the elevator, [her] knee hit the wall, and it made [her] bend to a squatting position.” After they exited the elevator on the 23<sup>rd</sup> floor, her male patient was exiting his apartment because he had an appointment and thought that she was to arrive a half-hour earlier. She told him what had just happened and he said that “these elevators are terrible, but you shouldn’t have got on that one.” She does not recall his name. When she exited the elevator on the lobby level and went outside the building, she saw the building security guard and “told him what happened, trembling and shaking and yelling and telling him that [she] had just gotten hurt in the elevator and [they] almost got killed in there.” The security guard asked her to show him which elevator, which she did. He told her that that elevator “was supposed to have a ‘not working’ sign on it.” The security guard told her that the accident took place inside Elevator 14 and that “he was going to make a report into the office.”

In her Affirmation, Plaintiff’s counsel states that none of the Defendants responded to Plaintiff’s discovery requests and, therefore, Plaintiff moved to preclude, strike and/or compel certain discovery. According to Counsel, said motion was adjourned several times at the request of the Defendants, “in part, due to defendants’ representation the premises had been sold and/or transferred to new owners that were not in privity with the action and over whom, defendants alleged, they did not have control or authority.” In response to those contentions, Counsel prepared and served a judicial subpoena duces tecum upon “River Bronx Apartments, Inc. as Nominee for River Park Residence LP, c/o Omni NY LLC (the purported new owner)” on March 6, 2014. Counsel states that she received a single response from River Park Bronx Apartments in March 2014 that consisted of a proposal from “an entity” to conduct Category 1

and/or Category 5 periodic inspections and tests of all elevators at 10, 20, 30 and 40 Richmond Plaza in connection with Department of Building requirements. However, she received no response as to the itemized records demanded to be produced in response to the subpoena. As a result, the Hon. Mitchell J. Danziger issued an Order, dated May 14, 2014, resolving Plaintiff's motion wherein Defendants were directed to provide Plaintiff with the name and address of the elevator company pertaining to service prior to Plaintiff's accident, any and all maintenance, inspection, repair records, prior complaints and prior accidents pertaining to elevators at the subject building. That Order also states that "if anything noted in this Order not timely provided defendants are precluded from offering that at . . . trial in any way including via witness testimony, affidavits, subpoena to another individual or entity, document, and any other manner." According to Counsel, "not a single document was exchanged in response to said Order." Counsel contends that Defendants "are now precluded from producing a witness at trial or at any point in this litigation, from producing a witness statement and/or affidavit at trial or at any point in this litigation."

In opposition to summary judgment, defense Counsel contends that Plaintiff's motion is premature "as defendants have always been willing to produce a representative from R.Y. Management, Inc., but plaintiff's counsel has never sought their deposition which could shed some light on the fact that the building's elevators did have various service contracts with a number of maintenance companies. Counsel contends that this refutes Plaintiff's claim that the elevators were under the exclusive control "of the owner- Harlem River Park Houses/River Park Associates." Counsel states that he "pressed" R.Y. Management to do everything in its power to find out the names of any and all elevator maintenance companies that may have serviced the elevators at the subject building and that it was not until late July 2014 that the office manager for R.Y. Management advised him that a company named "BP Elevator Co." was the likely elevator maintenance company that worked on the subject elevators. Counsel states that subpoenaed BP Elevator Co. and it was not until January 8, 2015 that his law firm received a set of maintenance records, etc. from BP Elevator Co.'s counsel. However, the maintenance records are incomplete because BP Elevator Co. could not locate any maintenance records after

December 2010, but BP Elevator Co. is continuing to search for additional maintenance records. Counsel asserts that, while the preclusion order may prevent these records from being offered at trial, the Order does not prevent the records from being considered in opposition to Plaintiff's summary judgment motion for the purpose of refuting the claim that the maintenance of the elevator was in the exclusive control of Harlem River Park Houses/River Park Associates.

In support of the aforementioned assertions, Plaintiff submitted the affidavit of R. Y. Management's President, Robert Vaccarello, a copy of a Maintenance Contract and BP Elevator Co. maintenance/repair records. In his affidavit, Vaccarello states that R. Y. Management "continued to manage River Park Associates until December 13, 2012 when the management was transferred to Reliant Realty services and ownership was transferred to Omni New York LLC." At that time, "all of the maintenance files and records were at the site office of the property and management files and documents relating to River Park Associates were transferred to the possession of the new owners Omni New York LLC." According to Vaccarello, a search of the files of R. Y. Management "revealed that [his] company is not in possession of any documents, or copies of documents, relating to the management of River Park Associates."

The Maintenance Contract<sup>1</sup> between BP Elevator Co. and R. Y. Management is dated January 12, 2009 and states that service under the contract "shall commence on January 15, 2009 Seven (7) Days a week, twenty-four (24) hours a day" and shall consist of "MONTHLY examination, and lubricate the following: MACHINE, MOTOR, GENERATOR, CONTROLLER PARTS, BRAKE. The contract also provides that "the Company will inspect, repair, and adjust car leveling devices and automatic operators and locking devices for car and/or shaft way doors on its regular inspections." The contract further provides that "[i]f the present control equipment is of single speed design, it is impossible to maintain perfect floor stops (levels) and we assume no responsibility whatsoever for failures, mishaps or accidents attributable thereto." The following language is included at the end of the contract, in

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<sup>1</sup>Plaintiff objects to the consideration of the Maintenance Contract and maintenance/repair records on the grounds that: (1) Defendants are precluded from utilizing said documents to oppose summary judgment pursuant to the Order issued by Judge Danziger and (2) they are neither certified nor authenticated.

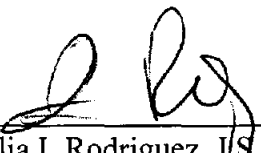
handwritten language initialed by two parties: "Full Time mechanic on premises." All but one monthly service record concern services performed in 2010. The remaining record is dated May 4, 2011 and indicates "monthly maintenance and service" as the work performed on elevators 14, 15 and 16.

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While the doctrine of res ipsa loquitor may be invoked against the defendant in an action involving a malfunctioning elevator, it may only be applied if it can be established that: (1) the occurrence, i.e., the sudden and abrupt fall of the elevator, would not ordinarily occur in the absence of negligence, (2) when the elevator fell and caused plaintiff injury it was within the exclusive control of the defendant(s), and (3) nothing plaintiff did in any way contributed to the happening of the event. *See Hodges v. Royal Realty Corp.*, 42 A.D.3d 350, 351-352, 839 N.Y.S.2d 499, 501 (1<sup>st</sup> 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. What is in dispute is whether any of the defendants exercised such a degree of control over the elevator's operation as to provide a rational basis for finding that the malfunction that caused the elevator to fall occurred as the result of either or any of the defendants' negligence. *See Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844 (1997).

For the purpose of deciding the instant motion, it is not necessary for the Court to make a determination with regard to the preclusion issue. Plaintiff has failed to submit any evidence to establish the degree of control, if any, that any of the defendants had over the elevator's operation at the time of the accident. As such, Plaintiff has failed to establish her *prima facie* entitlement to judgment as a matter of law. Accordingly, Plaintiff's motion is **denied** without regard to the sufficiency of Defendants' opposition papers. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.2d 923 (1<sup>st</sup> Dept. 1986).

Dated: Bronx, New York  
March 28, 2016

  
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Hon. Julia I. Rodriguez, J.S.C.