Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

LINDA PIERRO,
Plaintiff(s),

- against -

NEW YORK SCHOOL CONSTRUCTION AUTHORITY, et al.,
Defendant(s).

SKANSKA MECHANICAL & STRUCTURAL, INC., et ano.,
Third-Party Plaintiff(s),

- against -

HEIGHTS ELEVATOR CORP.,
Third-Party Defendant(s).

Index No. 702631 2012

Motion Date August 18, 2016

Motion Cal. No. 115

Motion Seq. No. 14

The following papers read on this motion by defendant Otis Elevator Company (Otis) for an order granting it summary judgment dismissing the complaint and all cross-claims.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF262-284
Answering Affirmation - Exhibits.....	EF338-341
Reply.....	EF345-346

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on May 7, 2012 at approximately 2:05 p.m., during the course of her employment as a school lunch aide, when she fell exiting a misleveled elevator in the basement level of the premises of P.S. 499, located at 148-20 Reeves Avenue, Flushing, New York. Plaintiff has alleged, inter alia, that defendants were negligent in their maintenance, supervision, use, and control of the elevator, in their failure to properly maintain and repair same, and in permitting the elevator floor to become uneven.

Otis, the provider of elevator maintenance and repair services at P.S. 499 at the time of the accident, now moves for summary judgment dismissing the complaint and all cross-claims on the grounds that: (1) plaintiff cannot establish that the elevator malfunctioned and, in any event (2) Otis neither had actual nor constructive notice of any alleged leveling problem with the subject elevator.

In support of the motion, Otis submits, inter alia, plaintiff's deposition transcript. She testified, in relevant part, to the following: the accident occurred at the end of her work day, as she was going to the basement locker room from the first floor to change out of her work clothes; of the two elevators she was facing, she took the one on her left; she rode that elevator every day, multiple times per day; just prior to the accident, she felt as if the elevator was descending too fast; as the elevator reached the basement, it made a loud noise and it took time for the door to open; these occurrences usually happened when this elevator reached the bottom level, however, this time, it took an unusually longer time for the door to open; further, the door shook as it opened, which was also out of the ordinary; she did not check the floor before she exited to ensure there were no problems with the elevator; she started to walk out when something "blocked" her, causing her to trip and fall; her toes on her right foot came in contact with the basement floor; she looked back and saw that the basement floor was higher than the elevator floor; she could not see the elevator floor, and was unable to describe the height differential between the two floors, as she was unable to get up; she is not aware whether a similar issue has happened to anyone else, but there were never any prior issues with misleveling of the elevator; she had, however, complained to the school custodian about the elevator before, regarding it not moving when she pressed a button, as well as the door delaying in closing; she never saw anyone working on the elevator either before or after her accident; she did, at one point during the 2011-2012 school year, see a cone blocking the elevator and yellow tape across the door for one or two days, but she does not know for what reason.

Otis also submits its own testimony, by Robert Lawrence Lynagh, the company's elevator maintenance service mechanic. He testified, in relevant part, to the following: he has worked as such for 26 years; in that capacity, he performs routine maintenance and scheduled tasks with the assistance of an electronic PDA (personal digital assistant); he has repaired

elevators with misleveling problems often in his career; at the time of plaintiff's accident, Otis performed elevator maintenance for the school pursuant to a service contract, which included routine service, routine maintenance, shut downs, service calls, and repairs; he was the regular service mechanic for P.S. 499, which had two elevators; he visited the school once per month for routine maintenance, which included following the automated schedule from the PDA, speaking to the customer to address any particular concerns, and addressing any other issues that may have come up; the PDA would have a list of tasks/maintenance procedures to be performed for a specific location; Otis has a list of more than 100 different kinds of procedures which may be performed; the procedure for addressing a misleveling issue includes riding the elevator, checking the door operation, checking leveling, among other things; since "anything" could cause a misleveling and because every elevator is different, it is impossible to create a standard work procedure – as opposed to procedures created for typical repairs – and, as such, there is no typical maintenance procedure to check for a misleveling; to that end, he does not evaluate for the possibility of misleveling during a typical maintenance visit; rather, when misleveling is a concern, it is specifically addressed on a case-by-case basis; depending upon the vintage of an elevator, a three-inch mislevel could be considered normal for that elevator, while it would warrant the city inspector shutting the elevator down on another; usually, he tells customers who call about a mislevel that, if same is more than one-quarter- or one-eighth-inch, they should take the elevator out of service but, in any event, he would have to come and evaluate it first to determine if it were an issue; Otis' records are generated through the PDA and, further P.S. 499 required the use of a paper ticket; he never received a call from P.S. 499 for a mislevel; he first heard about it after the accident at his next routine maintenance visit when his contact at the school, Kevin, told him that a woman tripped and fell because the elevator had misleveled; he then personally rode the elevator to every floor, checked for misleveling, checked the equipment, among other things, and saw no misleveling or other problems; the records generated from his PDA indicate that he performed routine maintenance on the elevator cartop – which is the specific leveling-related component on the P.S. 499 elevators – on February 10, 2012 and March 20, 2012; his last routine maintenance prior to the accident was performed on April 20, 2012.

Otis also annexes to its motion Mr. Lynagh's records generated from his PDA, as well as the paper tickets for P.S. 499 (the latter labeled as "Service Order and Certificate of Time"), demonstrating that routine monthly maintenance visits (as well as three additional service calls which were unrelated to leveling issues) were performed from November 2011 to April 2012, and that no misleveling of the elevator was indicated.

Also annexed are New York City Department of Education Building Condition Assessment Surveys for the 2010-2011 and 2012-2013 years whereby no elevator deficiencies were noted for P.S. 499.

Also annexed are New York City Department of Buildings (DOB) records for the subject building, documenting that no violations were issued and the elevator was satisfactory in all respects when routine mandated inspections were performed by the local jurisdictional authority on October 12, 2011 and October 24, 2012. The DOB also performed a satisfactory survey on January 18, 2012, with no violations issued. The one defective condition noted by the DOB on October 6, 2011 inspection was unrelated to leveling, as per Otis' expert affidavit, referenced *infra*.

Otis further submits the affidavit of Nicholas A. Ribaudo, its expert. Mr. Ribaudo states that, for this type of elevator, based upon applicable codes and industry standards – which recognize a permissible leveling tolerance – leveling within plus or minus one-half-inch is considered acceptable. Further, Mr. Ribaudo opines that, if this leveling system was malfunctioning at the time of the accident, it would not have been intermittent but rather would have been a continuing problem until corrected.

Otis first argues that plaintiff cannot establish that the elevator malfunctioned. To that end, Otis points to plaintiff's deposition testimony wherein which she stated that (1) she did not look down prior to her fall to see if there was, indeed, a misleveling, and (2) she was unable to quantify the height differential and, as such, she cannot establish whether or not said differential was de minimus (particularly based upon Mr. Ribaudo's opinion that any misleveling plus or minus one-half-inch is acceptable). Further, Otis' records reveal that there were neither misleveling complaints nor incidents prior to and after plaintiff's accident, which suggests that there is no evidence of a mislevel at all: *e.g.*, plaintiff could have easily tripped over her own feet.

Otis has failed to meet its prima facie burden of establishing that the elevator was functioning properly at the time of plaintiff's accident. Plaintiff's testimony, taken as a whole, was sufficiently specific to establish that she was caused to fall due to a misleveling issue as opposed to, to use Otis' suggestion, a trip over her own feet (*see e.g. Richichi v CVS Pharmacy*, 127 AD3d 951 [2015]; *Martino v Patmar Props., Inc.*, 123 AD3d 890 [2014]; *Cipriano v City of New York*, 120 AD3d 738 [2014]; *Altinel v John's Farms*, 113 AD3d 709 [2014]). Plaintiff specifically indicated that her foot came into contact with the basement floor and, when she looked back, she was able to see that the basement floor was higher than the elevator level to such a point that she was unable to see the elevator level. It is noted that, to the extent Otis anticipatorily attempts to reject any reliance plaintiff may have on the doctrine of res ipsa loquitur based on the fact that plaintiff's accident could have occurred due to a "misstep on plaintiff's part," such assertion is unsupported by the record, as indicated above.

To the extent Otis states that plaintiff was unable to affirmatively establish the height differential between the elevator floor and the basement floor, same is not fatal to her claim, since plaintiff need not demonstrate the precise manner in which the accident occurred (*see Kahn v Gates Constr. Corp.*, 103 AD2d 438 [1984]). Further, that she could not quantify the exact amount by which the elevator misleveled does not render the misleveling within an "acceptable" limit of misleveling,[1] nor does it, for that matter, follow that the accident was not due to a misleveing issue. Finally, and with respect to Otis' argument as a whole on this particular issue, it cannot meet its prima facie burden simply by pointing to gaps in plaintiff's case, *i.e.*, by arguing that "she cannot establish that the elevator malfunctioned" (CPLR 3212 [b]; *see Englington Med., P.C. v. Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223 [2011]; *Shafi v Motta*, 73 AD3d 729 [2010]; *Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 857 [2009]).

Otis next argues that it neither had actual nor constructive notice of any alleged leveling problem with the subject elevator. "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 [1973]; *see Little v Kone, Inc.*, 139 AD3d 678 [2016]; *Reed v Nouveau El. Indus., Inc.*, 123 AD3d 1102 [2014]; *Papapietro v Kone, Inc.*, 123 AD3d 894 [2014]; *Tucci v Starrett City, Inc.*, 97 AD3d 811 [2012]).

Here – absent res ipsa loquitur considerations – Otis met its prima facie burden of establishing its entitlement to judgment as a matter of law by producing evidence that the elevator was functioning properly before and after the accident and that, even if misleveling occurred, it neither had actual or constructive notice of same (*see Little*, 139 AD3d at 679; *Reed*, 123 AD3d at 1103; *Bastien v Nouveau El. Indus., Inc.*, 102 AD3d 643 [2013]; *Tucci*, 97 AD3d at 812; *Devito v Centennial El. Indus., Inc.*, 90 AD3d 595 [2011]). First, Otis produced its own records demonstrating that, for the six months leading up to the subject accident, it performed routine scheduled maintenance on the elevator. Second, the three service calls in January, February, and March of 2012 were unrelated to leveling. Third, the record indicates that Otis received no prior leveling complaints. Fourth, the elevators passed mandated inspections conducted by the DOB, with no misleveling issues noted.

In opposition to the motion, plaintiff has failed to raise a triable issue of fact with respect to actual or constructive notice of a prior issue of misleveling. Plaintiff first asserts that Mr. Lynagh's testimony and records cannot be considered. To that end, counsel points

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1. It is noted that the expert fails to provide the basis for that authority by failing to cite to any specific safety code provisions (*see Green City of New York*, 76 AD3d 508 [2010]), an issue also discussed *infra*.

to that portion of his testimony in which he states that he did not know what "the law" or "the specs" were on how much an elevator may be permissibly out of level. Plaintiff reasons, then, that Mr. Lynagh could not know at what point an elevator would be deemed misleveled and, thus, his records may not reflect actual instances of misleveling. Plaintiff also attempts to discredit the records by stating that Mr. Lynagh had discretion about what to memorialize in his notes. However, with respect to the first issue noted, Mr. Lynagh explained that different kinds of elevators stop and/or level in different ways (*i.e.*, a design issue and not a maintenance issue) to the extent that stopping accuracy of three inches may be acceptable for one particular vintage but not for another, but that, in any event, he would advise a customer to shut down an elevator that was misleveling by as little as an eighth of an inch until he could respond to the complaint. Thus, Mr. Lynagh need not have been familiar with specific laws on misleveling. The testimony and records show that: (1) P.S. 499 never made a service call as to any misleveling issue[2]; and (2) Mr. Lynagh stated that part of his regular schedule procedure for maintaining the elevator (which was performed pursuant to contract once per month) would be to ride the elevator, check the leveling and generator brushes, *etc.*; further, every maintenance visit was indeed recorded (*see* PDA records and paper tickets dated November 14, 2011, December 8, 2011, January 5, 2012, February 10, 2012, March 20, 2012, April 20, 2012).

To the extent plaintiff points to her own testimony in which she stated that she made prior complaints, as well as the "numerous service calls, maintenance visits, and elevator shut downs," those complaints were not made to Otis, and Otis established, prima facie, that those issues were unrelated to leveling, respectively (*see Reed*, 123 AD3d at 1103 [plaintiff required to show notice of the "specific defect" that allegedly caused an elevator to malfunction]; *cf. Papapietro*, 123 AD3d at 895). Further, the statement by plaintiff's expert that Otis' records fail to reflect any maintenance to any device involved in the stopping or leveling of the elevator is belied by Mr. Lynagh's testimony and corresponding records (*i.e.*, cartop maintenance). It is noted that Otis cannot correct a condition of which it could not have been aware (*see e.g. Tucci*, 97 AD3d at 812).

The affidavit of plaintiff's expert is otherwise conclusory, lacking in foundation, and speculative with regard to the issue of notice (*Little*, 139 AD3d at 679; *Reed*, 123 AD3d at 1103; *Tucci*, 97 AD3d at 813; *Forde v Vornado Realty Trust*, 89 AD3d 678 [2011]). Specifically, the expert points to two components of an elevator which, if not properly maintained, are "known cause[s] of miss-leveling [sic]." However, there is no evidence in the record to establish that either (or both) components caused the misleveling incident and, thus, the expert cannot conclude that it was Otis' failure to properly maintain either that caused the incident (*see Johnson v Nouveau El. Indus., Inc.*, 38 AD3d 611 [2007]).

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2. Mr. Lynagh had no discretion whether to record a service/complaint call.

Plaintiff also relies upon the doctrine of res ipsa loquitur. That doctrine permits the inference of negligence solely from the happening of the accident, when a plaintiff can show that the event is one that would not occur in the absence of negligence and was caused by an instrumentality within the exclusive control of the defendant, without any contribution on the part of the plaintiff (*see Keyser v KB Toys, Inc.*, 82 AD3d 713, 714 [2011]; *Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 276-277 [2010]). Here, plaintiff has raised a triable issue of fact as to the applicability of the doctrine by submitting proof, by way of her expert's affidavit, that misleveling of the elevator is an occurrence that does not ordinarily occur in the absence of negligence and that nothing she did contributed to the malfunction complained of (*see Fiermonti v Otis El. Co.*, 94 AD3d 691 [2012]; *Devito*, 90 AD3d at 596; *Fyall v Centennial El. Indus., Inc.*, 43 AD3d 1103 [2007]; *Garrido v International Bus. Mach. Corp. (IBM)*, 38 AD3d 594 [2007] *Carrasco v Millar El. Indus.*, 305 AD2d 353 [2003]). Though Otis' expert opines, in contrast, that applicable codes and elevator industry standards recognize a permissible leveling tolerance within plus or minus one-half-inch for the type of elevator involved in this accident, he did not provide the basis for that authority by failing to cite to any specific safety code provisions, as pointed out above (*see Green*, 76 AD3d at 509).[3] Thus, it is irrelevant that plaintiff did not submit evidence that the mislevel was beyond one-half-inch.[4] Moreover, as discussed, *supra*, there is no evidence on the record to suggest that the accident was due to a misstep.

It should be mentioned that the case of *Ezzard v One E. Riv. Place Realty Co., LLC* (129 AD3d 159 [1st Dept 2015]), one dealing specifically with the issue of a trip and fall which occurred while the plaintiff therein was exiting a misleveled elevator, states the following: "We have a long established jurisprudence in this Department recognizing that elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur." While this court was unable to find a comparable case in this Department which definitively establishes such a rule, it would appear that this court is constrained by the same precedent which exists in the Second Department when confronted with the issue of misleveling (*see Fiermonti*, 94 AD3d at 692 [plaintiff raised triable issue of fact based upon doctrine of res ipsa loquitur when he was injured due to a sudden misleveling]; *Devito*, 90 AD3d at 596 [plaintiff raised triable issue of fact, relying upon the doctrine, since she submitted proof, inter alia, that a misaligned stop does not occur in the absence of negligence]; *Dykes v Starrett City, Inc.*, 74 AD3d 1015 [2010] [doctrine was viable in action where plaintiff tripped and fell stepping into misleveled elevator]; *Fyall*, 43

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3. While the court notes that Mr. Lynagh testified that, depending upon the type of elevator, a misleveling could occur within the normal operation of said type, he did not state specifically that the type of elevator involved in this accident could mislevel during its normal operation.

4. There is no evidence that it was within that alleged tolerance level either.

AD3d at 1104 [plaintiff raised triable issue of fact based upon doctrine since there was a submission of proof that, inter alia, a misaligned stop does not occur in the absence of negligence]; *Garrido*, 38 AD3d at 594 [same]; *cf. Vaynshteyn v Cohen*, 266 AD2d 280 [1999] [evidence adduced during depositions permitted the inference that plaintiff lost her balance and, as such, the doctrine did not apply]).

Accordingly, Otis' motion is denied. It is noted that the trial in this matter is scheduled to appear on November 15, 2016.

Dated: September 30, 2016

J.S.C.