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| Orea v NH Hotels USA, Inc. |
| 2019 NY Slip Op 31019(U) |
| April 9, 2019 |
| Supreme Court, New York County |
| Docket Number: 152367/2013 |
| Judge: James E. d'Auguste |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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JUAN CARLOS OREA,

Plaintiff,

Index No.: 152367/2013

-against-

Mot. Seq. No. 004

NH HOTELS USA, INC., NH JOLLY MADISON TOWERS,
JOLLY HOTELS, USA, INC., MANHATTAN
HOSPITALITY ASSOCIATES, MIGDAL MADISON N.V.,
INC and NH HOTELES, S.A., TRANSEL ELEVATOR AND
ELECTRIC, INC. d/b/a TEI GROUP,

Defendants.
-----X

Hon. James E. d'Auguste, J.S.C.

Defendant Transel Elevator and Electric, Inc. d/b/a TEI Group (TEI), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Juan Carlos Orea (Orea), as well as all cross claims asserted against it. Defendant Jolly Hotels USA, Inc. d/b/a and s/h/a NH Jolly Madison Towers (Jolly), cross-moves, pursuant to CPLR 3212, for summary judgment dismissing Orea's complaint and all cross claims asserted against it.

Background

Jolly operates the Jolly Madison Hotel (the Hotel), located at 22 East 38th Street. This action arises out of an accident that occurred at the Hotel when Orea, a worker for non-party Perfect Laundry, was attempting to load a bin of laundry into what is variously referred to by the parties as a lift, sidewalk elevator, freight elevator, or vertical reciprocating conveyer (the lift). Before Orea could exit the lift, the chains which hoist and lower the lift broke, causing the lift to fall into the pit beneath the subbasement. Plaintiff sustained injuries to, among other things, his back and legs.

In 2005, Jolly and TEI entered into an Oil and Grease Maintenance Service Agreement (the

Agreement) regarding the lift (Brooks aff dated 9/21/17, exhibit A, Agreement dated 5/26/05). Pursuant to the Agreement, TEI agreed to “regularly adjust and lubricate as required” certain listed components of the lift, and to provide emergency callback service as required (*id.* at 2). Notably, the Agreement does not appear to be a comprehensive maintenance agreement. The Agreement contains both a merger clause and a “no oral modifications” clause (*id.* at 5). The term of the Agreement was five years, and it expired by its terms in May 2010 (*id.*). The record reflects that after the Agreement expired, TEI continued to service the elevator on an as needed basis, providing both repairs and preventative maintenance (Brooks aff, exhibit D, job tickets).

The lift itself operates between the street level, the basement, and the subbasement of the Hotel and is rated to carry up to 1000 pounds (Halpern aff dated 9/21/17, ¶ 8). The lift platform is raised and lowered by two chains, each attached to the platform by a master link (*id.*). There is a safety device attached to each chain, which is designed to hold the platform in place when it jams (*id.*). When the safeties are active, there is slack in the chains (*id.*). The exterior doors of the lift bear signs indicating that there are no riders allowed, and that the platform is limited to 400 pounds (*id.*; Steccato affirmation dated 9/22/17, exhibit N, Karpinski EBT dated 5/26/16 at 49:12-50:3). Susan Di Baggio (Di Baggio), an executive assistant at the Hotel, testified that the Hotel had decided to limit the lift to 400 pounds in response to the elevator jamming when overloaded (Steccato affirmation, exhibit O, Di Baggio EBT dated 2/28/17 at 44:22-45:4). Outside the street level lift door is a cement floor, with a metal plate on the floor in front of the lift door (Karpinski EBT at 53:11-21). Orea testified that the plate was four feet wide, between two and a half and three feet long, about an inch thick, and ridged on the top to aid with traction (Steccato affirmation, exhibit L, Orea EBT dated 8/7/15 at 269:10-271:9). The plate was slanted, and Felix Gonzalez (Gonzalez, Orea’s coworker testified that laundry workers had complained to Jolly about the plate,

though nothing was done (Steccato affirmation, exhibit J, Gonzalez EBT dated 8/11/14 at 109:6-13). Further, there is a two and a half inch gap between the lift platform and the floor when the lift door is open (Orea EBT at 272:4-17).

Several witnesses testified that the lift was frequently broken or otherwise out of service, though the parties differ over who is at fault. Gonzalez testified that the lift was frequently out of order, and, in fact, had been out of service for somewhere between four and six weeks prior to the day of the accident (Steccato affirmation, exhibit J, Gonzalez EBT dated 8/11/14 at 35:23-36:2). Walter Betancourth (Betancourth) and Richard Karpinski (Karpinski), Jolly's engineer and Chief Engineer, respectively, testified that there were elevator problems on at least a monthly and, occasionally, a weekly basis, frequently with the locks on the lift door (Steccato affirmation, exhibit M, Betancourth EBT dated 3/9/16 at 15:5-14, 23:18-24:2; Karpinski EBT at 19:5-11). Karpinski testified further that the hotel was concerned that the laundry workers were striking part of the lock when they loaded carts onto the lift (Karpinski EBT at 54:12-57:25). TEI was concerned enough about elevator misuse that Glen Smocovich (Smocovich), TEI's account executive for Jolly, wrote a letter to Karpinski warning that it would shut down the lift if "building staff" did not stop misusing the lift (Steccato affirmation, exhibit U, Letter dated 1/17/12 from Smocovich to Karpinski). The record also reflects that the lift itself was of an obsolete design. Several years prior to the accident, TEI proposed to Jolly that it replace the lift with a more modern design (Steccato affirmation, exhibit T, Letter dated 8/8/08 from Smocovich to Karpinski). Karpinski stated that Jolly ultimately did not replace the lift (Karpinski EBT at 60:19-23).

As noted above, the lift was out of service prior to the accident. Alejandro Landestoy (Landestoy), a mechanic and foreman for TEI (Steccato affirmation, exhibit P, Landestoy EBT dated 3/25/16 at 9:22-25), testified that he went to the hotel to replace the master links connecting

the chains to the lift platform (*id.* at 22:19-23:4). He replaced both chains and noted that the master links had become warped (*id.* at 41:9-23). He could not say for certain how long they had been warped, or why they had warped in the first place (*id.*).

On the day of the accident, December 20, 2012, Orea and Gonzalez delivered clean laundry to and picked up dirty laundry from the Hotel as usual (Orea EBT at 33:14-20). One of them, in this case Gonzalez, would remain on the street level and load bins of laundry into the lift, while Orea went down to the basement and retrieved the carts from the lift after it arrived (*id.* at 34:16-35:20). After Gonzalez loaded four bins of clean laundry into the lift, and Orea removed them from the lift without incident, Gonzalez encountered a problem while loading the fifth bin of laundry when the two wheels of the cart closest to him became stuck in the gap between the lift and the floor (*id.* at 268:20-269:4). Orea came back upstairs from the basement to help Gonzalez get the cart out of the gap and into the lift (*id.* at 125:15-126:2). Surveillance footage, which both men attested to at deposition, shows them using a broom and a long-handled ice chopper to attempt to lever the cart out of the gap (*id.* at 132:19-133:13). Orea testified that workers from the Hotel had lent them those tools in prior situations when carts got stuck in the gap, though the use of same was usually unsuccessful (*id.* at 284:12-19, 303:15-304:13). Eventually, Orea entered the lift and pulled on the cart, while Gonzalez pushed it from outside the lift, and the two were eventually able to free the cart (*id.* at 87:5-10, 281:3-7; Gonzalez EBT at 93:7-14). Orea then adjusted the wheels of the cart to prevent it from sliding while the lift was moving (Orea EBT at 59:10-60:21; Gonzalez EBT at 94:12-96:21). He testified that while he could not read the sign prohibiting riders on the lift, he was aware that the lift was not for passenger usage (Orea EBT at 243:17-244:21, 247:12-21). Indeed, he was about to exit the lift when he heard a sound (*id.* at 66:4-25, 68:14-69:18). He testified that within seconds, the lift dropped (*id.* at 68:14-69:18). He fell over when the lift hit the

bottom of the pit below the subbasement (*id.* at 71:13-72:25). Gonzalez testified that he climbed down the inside of the shaft and lifted the laundry cart off of Orea (Gonzalez EBT at 25:24-26:7). Gonzalez notified housekeeping, and housekeeping called the New York City Fire Department (NYFD) (*id.*). Gonzalez also notified Betancourth, who entered the lift with Gonzalez after opening the lift door and began removing the laundry from the cart to lighten it (Betancourth EBT at 37:4-39:22). Once the NYFD arrived, Orea was stretchered out of the Hotel and taken to a nearby hospital (*id.* at 44:5-8; Orea EBT at 83:14-84:4).

Carl De Bellis (De Bellis), an inspector with the New York City Department of Buildings (DOB), issued a cease use violation against Jolly and shutdown the elevator after the accident (Ronemus affirmation dated 11/21/17, exhibit A, DOB accident report at 3). DOB issued a further notice of violation against Jolly on January 2, 2013 (*id.*, DOB notice of violation dated 1/2/13). After a hearing on April 11, 2013, the New York City Environmental Control Board (ECB) imposed a \$1,000 penalty against Jolly (*id.*, ECB decision dated 4/16/13). At the hearing, De Bellis testified that he observed that both chains attached to the lift had snapped and the sprockets through which the chains passed were missing, and that further photos of the lift taken by a DOB accident inspector showed that the chains were “twisted and stressed” (*id.* at 1). He concluded that the lift had not been properly maintained (*id.*).

The parties provide competing experts to explain the accident. Jon Halpern (Halpern), TEI’s expert, averred that he reviewed the bill of particulars, the Agreement, the deposition transcripts, and TEI’s repair proposal, and personally inspected the lift on four occasions in coming to his conclusions (Halpern aff, ¶ 3). He averred further that he observed that both chains were broken by excessive force somewhere in the middle, that the master links were still intact, and that the sprockets had detached from their mounting points (*id.*, ¶ 9). He concluded that the accident

was caused by Orea and Gonzalez attempting to lever the cart out of the gap, and by Jolly failing to replace the lift in the first instance (*id.*, ¶ 17). When the cart was caught in the gap, the lift's safety device activated, causing the chains to go slack (*id.*, ¶ 16). After they freed the cart, the safety disengaged, though Halpern did not explain how or why this happened (*id.*). Once the safety disengaged, the cart fell onto the slack chains, causing the chains to break (*id.*). He also opined that TEI was not responsible for the accident, as the master links remained intact, and the warping that required their replacement was evidence of overloading and misuse of the lift (*id.*, ¶ 17).

Plaintiff proffered the affidavit of Patrick Carrajat (Carrajat), who reviewed deposition transcripts, the pleadings, DOB records, photos of the elevator that he took during his inspection, the surveillance video, the ECB decision, and Halpern's affidavit in reaching his conclusions (Carrajat aff dated 11/20/17, ¶ 4). He noted that the chain and master links were never produced for him to examine, but opined that the point where the chain fractured should have been detected by TEI while Landestoy was replacing the master links (*id.* at 8-9). Further, Orea's and Gonzalez's use of the broom and ice-chopper could not have disengaged the safety (*id.* at 9). Ultimately, the failure of the chain and the chain sprockets was caused by negligent maintenance and repair, and TEI was the only party who maintained or serviced the chains (*id.* at 11-12).

Plaintiff filed his complaint in this action on March 14, 2013, alleging a single cause of action for negligence. TEI and Jolly now move and cross-move, respectively, for summary judgment dismissing the complaint.

Discussion

Preliminary Matters

Orea seeks sanctions against both defendants for filing allegedly frivolous motions and failing to withdraw them at plaintiff's request. "The court, in its discretion, may award to any

party or attorney in any civil action or proceeding . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1). Conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]; see *Premier Capital v Damon Realty Corp.*, 299 AD2d 158, 158 [1st Dept 2002]). The court has discretion as to both the imposition and amount of sanctions (*Seldon v Bruno*, 204 AD2d 180, 180 [1st Dept 1994]), and such discretion should rarely be disturbed (*Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231, 231 [1st Dept 1998]). Here, the record does not disclose a sufficient basis to impose sanctions on either defendant, and plaintiff's request is denied.

Orea also argues that Jolly's cross motion for summary judgment is untimely, as it was filed more than 120 days after Orea filed his note of issue (CPLR 3212 [a]), and, moreover, it is not a proper cross motion. Jolly argues that it failed to timely file its cross motion due to law office failure, and, regardless, the cross motion should be considered because it raises similar issues as TEI's timely filed motion for summary judgment.

"The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving part" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]). Such a cross motion is also subject to the 120-day filing requirement, and leave to file thereafter must be supported by good cause shown (CPLR 3212 [a]; *Kershaw*, 114 AD3d at 89-90). "Law office failure is insufficient to demonstrate the good cause necessary to permit an untimely summary judgment motion" (*Hennessey-Diaz v City of New York*, 146 AD3d 419, 420 [1st Dept 2017]).

Here, the only excuse proffered by Jolly is that it meant to file its cross motion on the 120th day, but inadvertently did not do so until the 121st day. Thus, Jolly has failed to demonstrate good cause for failing to timely file its cross motion, and to the extent Jolly's cross motion seeks relief against Orea, a non-moving party, the cross motion is denied as untimely. Jolly's reliance on *Altschuler v Gramatan Mgt., Inc.* (27 AD3d 304 [1st Dept 2006]), the only binding case cited by Jolly on this issue, is inapposite. *Altschuler* has been called into doubt by the Appellate Division, First Department (*Kershaw*, 114 AD3d at 86), and the court in *Altschuler* did not address whether the defendant had shown good cause for its untimely filing.

TEI's Motion

Orea's complaint asserts a single cause of action for negligence against TEI. In support of its motion, TEI argues that it had no duty to Orea under the Agreement, as a third-party beneficiary, or pursuant to *Espinal v Melville Snow Contractors* (98 NY2d 136 [2002]). Further, TEI claims that it was not the proximate cause of Orea's accident, as it had previously recommended that Jolly replace the lift, which was obsolete. Alternatively, TEI asserts that its maintenance and repair work did not cause the accident, and Orea's use of the broom and ice chopper to manipulate the cart that was stuck in the lift doorway, and his subsequent entry into the lift, was either a superseding cause or the sole proximate cause of the accident. Further, Jolly's failure to replace the elevator is also a superseding cause. Finally, TEI states that Orea cannot establish liability based on *res ipsa loquitur*. In opposition, Orea argues that issues of fact remain as to TEI's potential duty to Orea, its allegedly negligent repair and maintenance of the lift, and the potential application of *res ipsa loquitur*.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof

to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

“In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [internal quotation marks and citation omitted]). “In the absence of a duty, as a matter of law, there can be no liability” (*id.*). As the New York Court of Appeals has held “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party” (*Espinal*, 98 NY2d at 138). In three situations, a contracting party may assume a duty of care to a third party:

“(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.”

(*id.* at 140 [internal quotation marks and citations omitted]).

Here, issues of fact preclude summary judgment in TEI's favor. There is some question in the record as to the nature of the contractual relationship between TEI and Jolly, as the Agreement appears to have expired by its terms in May 2010, roughly two and a half years prior to the accident (Agreement at 5). However, Di Baggio testified that the hotel had a contract with TEI on the date of the accident (Di Baggio EBT at 16:). Moreover, TEI was on an on-call basis to provide repairs and maintenance after the Agreement had expired, and no one from Jolly serviced the lift (Betancourth EBT at 34:19-22). Regardless of the precise relationship, *Espinal* is the proper point

of analysis.

Of the three possible situations set forth in *Espinal* where TEI may be liable to Orea for its repair and maintenance of the lift, the record clearly does not support the second scenario, as there is no evidence that Orea was relying on TEI's performance of its repair and maintenance duties. Nor does it appear from the record that TEI has completely displaced Jolly's responsibility to maintain the lift. Jolly, as the property owner, had a non-delegable duty to safely maintain the Hotel (*e.g. Edwards v BP/CG Ctr. I, Inc.*, 102 AD3d 413, 413-414 [1st Dept 2013]). Moreover, the Agreement was not comprehensive as to the repair and maintenance of the lift, and there is no evidence in the record that any contract that might have existed between TEI and Jolly on the day of the accident was comprehensive. TEI's position as the sole contractor to work on the lift does not change this analysis. However, TEI has not satisfied its prima facie burden with respect to the remaining scenario, whether it launched a "force or instrument of harm" (*Espinal*, 98 NY2d at 140).

The record reflects that TEI replaced the master links holding the chains to the lift platform, inspected the lift, and placed it back into service. The following day, both chains broke at a different point of the chain, causing the lift to fall into the pit below the subbasement, injuring plaintiff. Halpern opines that Jolly's failure to replace the outdated lift, Orea's actions in manipulating the trapped cart and overloading the lift, as well as entering the lift when riders were prohibited, were all proximate causes of the accident. Further, he opines that TEI's repair and maintenance of the master links did not cause the accident. In opposition, Carrajat opines that TEI must have negligently placed the lift back into service because the failure of the chain should have been detected when TEI was examining the lift prior to returning it to service. Moreover, he states, Orea's use of the broom and ice-chopper to attempt to free the cart would not have caused the lift

to fall, nor would Orea entering the lift for a short period of time have done so. There is insufficient evidence in the record to suggest Orea overloaded the lift, as both experts stated that the lift had a 1000-pound capacity (Halpern aff, ¶ 8; Carrajat aff at 3-4), and the 400-pound weight limit was arbitrarily set by Jolly (Di Baggio EBT at 44:22-45:4). TEI argues that the court should disregard Carrajat's affidavit as conclusory and unsupported by evidence, and cites other cases in which courts have done so. The record, however, reflects that Carrajat proffered a sufficient evidentiary basis for his opinions, and the weight to give such an opinion is a question for the jury (*e.g. Gleeson-Casey v Otis El. Co.*, 268 AD2d 406, 407 [2d Dept 2000]). Whether other courts have chosen to disregard Carrajat's opinion in other circumstances is not relevant to this court's consideration of the instant motion.

In addition to the expert opinions, TEI's own witness testified that the master links he replaced were warped, and that he did not know for how long or why they had been warped. Further, the ECB determination stated that the DOB had successfully established that negligent maintenance was a factor in the lift falling.¹ Taken together, the foregoing establishes that, at minimum, there is a question of fact as to whether TEI's negligent repair of the master links and certification of the lift for service "launched a force or instrument of harm" sufficient to find it liable for negligence (*Espinal*, 98 NY2d at 140). The same record also establishes an issue of fact as to whether or not plaintiff's own actions contributed to or were the sole cause of the accident. It is noted that both Orea and Gonzalez testified that the elevator frequently suffered problems relating to jams and trapped carts, yet the record does not disclose any other instances in which such problems caused the lift chains to break and the lift to fall.

¹ TEI argues that the ECB determination has no preclusive effect in this action, which, the court notes, is not an argument that any party has made. Indeed, the court considers only whether such determination may raise a factual issue as to TEI's conduct.

TEI, relying on *Fernandez v Otis El. Co.* (4 AD3d 69 [1st Dept 2004]), argues that it satisfied any duty it had to plaintiff when it proposed that Jolly should replace the lift and Jolly refused to do so. In *Fernandez*, the plaintiff fell down an elevator shaft (*id.* at 70). The defendant elevator company proffered a contract in the same style as the Agreement in the instant action, and stated that it had told the building owner that the elevator was obsolete and should be replaced, but the owner refused to do so (*id.* at 71-72). The Appellate Division, First Department upheld the denial of the plaintiff's motion for summary judgment. The court held that the elevator company had no duty under *Espinal*, as “[defendant] submitted evidence showing that it complied with the terms of the contract, that it recommended modernization of the elevator systems, and that it repeatedly advised the college that the RPR had to be replaced” (*id.* at 73). While the court did not go into great detail about the defendant's contractual compliance, it may be inferred that there was no record evidence on the motion that the defendant had negligently repaired or maintained the elevator in question. Here, by contrast, there are issues of fact relating to whether TEI was negligent in repairing or maintaining the lift prior to the accident. Accordingly, *Fernandez* is distinguishable.

Issues of fact also prevent the court from granting summary judgment that Orea may not rely on the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* is an evidentiary doctrine which permits the inference of negligence to be drawn from the circumstances of an occurrence when a plaintiff can establish that “(1) the event [is] of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it [was] caused by an agency or instrumentality within the exclusive control of the defendant; (3) it [was] not due to any voluntary action or contribution on the part of the plaintiff” (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [internal quotation marks and citations omitted]). “[A] plaintiff need not conclusively eliminate the

possibility of all other causes of the injury. It is enough that the evidence . . . afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997] [internal quotation marks and citation omitted]).

"The doctrine of *res ipsa loquitur* has frequently been applied in cases involving elevator malfunctions" (*Barkley v Plaza Realty Invs. Inc.*, 149 AD3d 74, 77 [1st Dept 2017]). As the First Department has often held, "a free-falling elevator does not ordinarily occur in the absence of negligence" (*Kleinberg v City of New York*, 61 AD3d 436, 438 [1st Dept 2009]). As set forth above, there is a hotly disputed issue of fact as to whether Orea's conduct actually contributed to the lift falling. To the extent that TEI argues that Orea and Gonzalez manipulated the lift in attempting to free the cart, thus proving that TEI did not exclusively control the lift, there is no record evidence that any party other than TEI had access to the lift chains themselves, or to the safety device that kept the lift from falling while jammed. Moreover, to the extent that TEI claims that Jolly also had access to the lift, "the 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, 193 [1st Dept 2005] [internal quotation marks and citation omitted]; *see also Kleinberg*, 61 AD3d at 438 ["the fact that more than one entity may have been in control of the elevator does not preclude the application of the doctrine"]).

For the foregoing reasons, that branch of TEI's motion for summary judgment dismissing Orea's complaint is denied. TEI also moves for summary judgment dismissing Jolly's cross claims for contribution, common law and contractual indemnification, and failure to procure insurance, and for summary judgment on its own cross claim for common law indemnity. Jolly does not oppose summary judgment dismissing the cross claim for failure to procure insurance, and,

accordingly, TEI is granted summary judgment dismissing that cross claim. Further, regarding the claim for contractual indemnification, the record does not reflect a current indemnification provision between Jolly and TEI. As set forth above, the Agreement has expired. Jolly refers to a Comprehensive Elevator Maintenance and Repair Agreement between the parties, but a review of a copy of that contract submitted by TEI shows that it relates to the Hotel's passenger elevators only, and not to the lift (Weisburd affirmation dated 2/16/18, exhibit D, Comprehensive Elevator Maintenance and Repair Agreement dated 5/26/05 at 1). Accordingly, TEI is entitled to summary judgment dismissing the cross claim for contractual indemnification.

Turning to the common law indemnification and contribution cross claims, “[t]o establish a claim for common-law indemnification, ‘the one 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’” (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). “Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citations omitted]). Here, as set forth above, issues of fact exist as to TEI's alleged negligence, precluding summary judgment on both the common law indemnification and contribution cross claims. Accordingly, that branch of TEI's motion for summary judgment on its own cross claim for common law indemnification, and for summary judgment dismissing Jolly's cross claims for common law indemnification and contribution, is denied.

Jolly's Cross Motion

The remaining portion of Jolly's cross motion seeks summary judgment dismissing TEI's cross claims for contribution, common law and contractual indemnification. As set forth above, there is no active contractual indemnity provision set forth in the record between Jolly and TEI relating to the lift, and, thus, Jolly is entitled to summary judgment dismissing the cross claims for contractual indemnification.² As for the common law indemnification and contribution claims, the court has denied Jolly's cross motion for summary judgment dismissing Orea's claim for negligence. Accordingly, any determination regarding indemnification and contribution must await final disposition of Jolly's liability, if any. Therefore, that branch of Jolly's motion for summary judgment dismissing TEI's cross claims for common law indemnification and contribution is denied.

The court has examined the remaining contentions of the parties and finds them to be unavailing.

Accordingly, it is hereby

ORDERED that the motion of defendant Transel Elevator and Electric, Inc. d/b/a TEI Group, for summary judgment dismissing the amended complaint of plaintiff Juan Carlos Orea and all cross claims asserted against it is granted to the extent of dismissing defendant Jolly Hotels USA, Inc. d/b/a and s/h/a NH Jolly Madison Towers' third and fourth cross claims for contractual indemnification and failure to procure insurance, and is otherwise denied; and it is further

ORDERED that the cross motion of defendant Jolly Hotels USA, Inc. d/b/a and s/h/a NH Jolly Madison Towers, for summary judgment dismissing the amended complaint and all cross

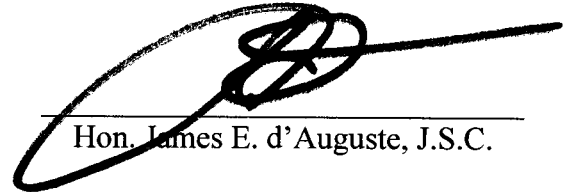
² TEI's fourth cross claim, which is not a model of clarity, appears to be a cross claim for contractual indemnification, and, thus, is duplicative of the third cross claim for contractual indemnification.

claims asserted against it is granted to the extent of dismissing TEI's third and fourth cross claims for contractual indemnification, and is otherwise denied; and it is further

ORDERED that the remainder of this action shall continue; and it is further

Dated: April 9, 2019

ENTER:



Hon. James E. d'Auguste, J.S.C.