Ravinsky v Greenthal Mgt. Corp.
2019 NY Slip Op 32826(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 153748/2013
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 17

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THOMAS M. RAVINSKY,

Plaintiff,

- against -

GREENTHAL MANAGEMENT CORPORATION, CHARLES H. GREENTHAL MANAGEMENT CORP., CENTURY ELEVATOR MAINTENANCE CORPORATION and CENTURY ELEVATOR ONE CORP.,

Defendants.

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DECISION AND ORDER

Index No. 153748/2013

HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence nos. 011 and 012 are consolidated for disposition herein.

In motion sequence no. 011, defendant Century Elevator Maintenance Corporation ("Century") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross-claim for contractual indemnification made against it.

In motion sequence no. 012, defendants Greenthal Management Corporation and Charles H. Greenthal Management Corp. (together, "Greenthal") move pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross-claim for contractual indemnification made against it.

FACTS AND PROCEDURAL BACKGROUND

This personal injury action arises out of an incident that occurred on January 17, 2012 when plaintiff Thomas M. Ravinsky fell while exiting a manually-operated service elevator at 910 Fifth Avenue, New York, New York, a residential cooperative where he was employed as a deskman.

By contract dated November 1, 1993 (the "Management Agreement"), non-party 910 Fifth Avenue Corporation ("910 Fifth"), the owner of the building where the accident occurred, retained

Greenthal as its managing agent for the property. The portion of the Management Agreement describing Greenthal's duties related to repairs and alterations reads, in part, "[k]eep the building properly maintained. Order routine repairs and incidental operations to the building and to any of the building subsystems including … [the] elevator," although repairs costing more than $1,000 required approval from 910 Fifth (NYSCEF Doc No. 225, affirmation of Greenthal's counsel, Exhibit "K" at 1). Greenthal was also authorized to "enter into contracts in [sic] behalf of [910 Fifth] for … elevator maintenance" with 910 Fifth's prior approval (*id.*). Although the Management Agreement expired by its terms on October 31, 1994 (*id.* at 6), it remained in effect through the date of the accident (NYSCEF Doc No. 213, Irwin B. Cohen [Cohen] aff, ¶ 3).

In March 2007, Greenthal, as 910 Fifth's agent, entered into a preventive maintenance agreement for Century to maintain the service elevator bearing identification no. 1P24518 at the building (the "Maintenance Agreement") (NYSCEF Doc No. 204, affirmation of Century's counsel, Exhibit "I" at 1). Century agreed to "examine, lubricate and adjust" certain elevator components and to "replace the wearing parts" listed in the document (*id.*). The agreement provides that "**CENTURY** … is to be held harmless by the owner for any injuries … when said liability is established solely by referenc[e] to the doctrine of res ipsa loquitur and without proof of any negligent act or omission on the part of **CENTURY** … or its employees" (*id.* at 2). The agreement further reads as follows:

> "**CENTURY** … does not at any time assume possession or control of the equipment covered under the terms of this agreement and when not working on said equipment does not accept any responsibility for erratic leveling, door operations, shaft doors/top or side exit doors and their locking assemblies or for any situation that can not be revealed at the time of the regular service examination. It shall be the owners [sic] responsibility to notify **CENTURY** … of any erratic operation, accident or alteration affecting the performance of the elevators"

(*id.*). Century serviced and maintained the two passenger elevators at the building under separate full-service contracts (NYSCEF Doc No. 203, affirmation of Century's counsel, Exhibit "H" [Timothy Fine ("Fine") tr] at 249]).

Plaintiff testified that he had been employed by 910 Fifth since January 1998 (NYSCEF Doc No. 199, affirmation of Century's counsel, Exhibit "D" [plaintiff tr] at 21). There was a manually operated service elevator at the building, and Giuseppe Riccobono ("Riccobono") was the dedicated service elevator operator (*id.* at 78-80). The accident occurred as plaintiff returned to work following a lunch break (*id.* at 88). Plaintiff testified that he entered the elevator without incident on the basement level (*id.*), but instead of stopping on the first floor, he and Riccobono rode to the fourth floor (*id.* at 89). When the elevator stopped, the doors opened automatically (*id.*). He and Riccobono talked for a few minutes while the elevator remained in a stationary position (*id.* at 103). Plaintiff testified that when he saw a resident, Gloria Gottlieb ("Gottlieb"), and her housekeeper, "Anna," approach the trash and recycling bins near the elevator, he stepped out of the car to assist them (*id.* at 108). He stated, "when I was about to step out, there was a big loud noise in the elevator and it shook underneath me and my right leg went one way and my left leg went back and got stuck between the crack of the elevator" (*id.*). The noise sounded "like something dropped, a loud echoing sound in the shaft" (*id.* at 149). Plaintiff explained that the front of his left foot was caught in the two-inch "crack" between the elevator car and the landing (*id.* at 109). He did not know if the car misleveled because of the shaking (*id.* at 121-122), but after the car shook, "it felt like it went down" (*id.* at 199).

The building superintendent, Robert Vuljaj ("Vuljaj"), arrived on the floor shortly after the accident (*id.* at 25 and 111). Plaintiff told Vuljaj "the floor's wet" because he felt a "quarter-size [sic] of water penetrating through" a rear pocket of his trousers (*id.* at 111). Apart from that one

wet spot, plaintiff did not see anything else that would have indicated that the landing floor was wet (*id.* at 182). Plaintiff acknowledged that the "C-3" form for Workers' Compensation benefits he had completed did not mention a problem with the elevator (*id.* at 114-115).

The incident was captured on a surveillance camera positioned inside the elevator (*id.* at 128). Plaintiff admitted that he could not see the elevator rattling in the surveillance video or in the still images taken from that footage (*id.* at 153).

Plaintiff maintained that the service elevator often malfunctioned, and that he personally experienced "banging, rattling, mis-leveling, [and] very heaving bouncing" at least 12 times in the year preceding the accident (*id.* at 177). He reported these issues to Vuljaj, who was responsible for deciding whether Century ought to be called (*id.* at 177-178). Other building employees and medical practice employees on the second floor complained two to three times a week about the elevator misleveling or jumping (*id.* at 199). Plaintiff explained that Century was called "[a] few times a week" (*id.* at 178).

Riccobono, a porter at the building, testified that plaintiff entered the service elevator at the basement (NYSCEF Doc No. 209, affirmation of Century's counsel, Exhibit "N" [Riccobono tr] at 41). He was supposed to stop the car on the first floor, but he and plaintiff rode to the fourth floor instead because the call button for that floor was illuminated (*id.* at 41-42). Riccobono stated that the elevator was "temporarily shaky, [sic] it was a little nois[y] and then the door open[ed] before we went to the fourth floor, which usually would happen" (*id.* at 45). Plaintiff stepped forward out of the car but "[a]s soon as he step[ped] off on [sic] the elevator, he fell down" (*id.* at 47). The car jumped and shook momentarily (*id.* at 109-110), and there was "a nice little boom, crack, shaken [sic] and that's it" (*id.* at 162). Riccobono stated that the car was misleveled between one to one and one-half inches (*id.* at 47 and 54).

Riccobono explained that the service elevator misleveled every other day (*id.* at 54). He described recurring problems with the elevator prior to the accident, including misleveling and jumping before the car came to a complete stop (*id.* at 104-105 and 142). Riccobono was aware that Century was often called about misleveling because he had signed some of Century's work tickets (*id.* at 152). As to the accident, Riccobono stated, "the elevator sometime[s] it just like was level and then it go[es] nnnnnnnn, you don't even feel it goes [sic] up. That's what happened" (*id.* at 60).

Vuljaj testified that Greenthal was a "typical" property management company tasked with addressing complaints and overseeing projects (NYSCEF Doc No. 210, affirmation of Century's counsel, Exhibit "O" [Vuljaj tr] at 43). Greenthal answered to 910 Fifth's board (the "Board") (*id.*). Fine worked for Greenthal (*id.* at 31). Although he was not a Greenthal employee (*id.* at 29), Vuljaj reported to Fine, who in turn reported any building issues to the Board (*id.* at 58-59). Greenthal did not maintain an office at the building (*id.* at 83).

Century serviced the subject elevator under an "oil and grease" contract, which meant "no parts included, no major replacement, no major work on it included, besides typical oil and grease and cleaning, clean the pit, clean the top of the car, bare minimum" (*id.* at 239). Vuljaj did not know which entity signed the Maintenance Agreement (*id.* at 47-48) or if Greenthal was authorized to hire or fire Century (*id.* at 53), but Greenthal would report to the Board and the Board would make any final decision (*id.* at 54 and 76). Vuljaj could not recall receiving any proposals from Century to perform extra-contractual work on the service elevator (*id.* at 78).

Vuljaj maintained that the service elevator was in "[g]ood condition" prior to the January 2012 accident (*id.* at 107). He testified that he would contact Century on issues related to that elevator (*id.* at 49), although he could not recall any specific issues (*id.* at 62). Vuljaj could not

recall if he had ever witnessed the elevator mislevel (*id.* at 95), or if he ever spoke to Fine or Century about a misleveling incident before the accident (*id.* at 112 and 119). Vuljaj could not recall receiving any complaints from residents about the elevator (*id.* at 98), or from the employees at the medical practice about the elevator jumping or shaking (*id.* at 102-103). However, Vuljaj testified that he was sure the elevator shook "[j]ust like every other elevator" (*id.* at 107), and he was aware of other instances where the elevator "jumped" (*id.* at 107-108). He did not recall any conversations he may have had with Century about those issues (*id.* at 119). He did not know if Greenthal or Fine ever spoke to the Board about the elevator prior to the date of the accident (*id.* at 74).

Vuljaj witnessed plaintiff's accident in real time on the surveillance video screen in the lobby (*id.* at 123-124). Vuljaj stated, "I can't really say that I saw the foot slip" (*id.* at 126), only that plaintiff fell "backwards" (*id.* at 132). He did not see if the floor was wet when he arrived at the scene, and he did not speak to plaintiff about the condition of the floor at that time (*id.* at 130-131). Vuljaj testified that after taking plaintiff to his office, plaintiff told him that "he slipped on the floor, [the] wet floor" (*id.* at 137). Plaintiff never told him the elevator had malfunctioned (*id.* at 266). Riccobono also confirmed that plaintiff had slipped on a wet floor (*id.* at 166-167). Vuljaj testified that he did not see the elevator move or shake in the video of the accident (*id.* at 166-167), and that the car appeared level with the adjacent landing (*id.* at 257). The elevator was not removed from service after the accident (*id.* at 226-227 and 260).

Fine, a former executive or senior vice president at Greenthal, testified that Greenthal managed the building from 1993 to 2015 (NYSCEF Doc No. 203, affirmation of Century's counsel, Exhibit "H" [Fine tr] at 16-18). Greenthal's duties included billing and collecting maintenance from 910 Fifth's shareholders, meeting with the Board to discuss finances,

operations, and capital improvement projects, responding to resident complaints, and processing payroll for workers at the building (*id.* at 17-19), all of whom were employed by 910 Fifth (*id.* at 75). Greenthal had the authority to perform repairs, but repairs costing more than $5,000 required Board approval (*id.* at 102). The Board had ultimate control over the building (*id.* at 64), including oversight over all building alterations (*id.* at 244).

Fine testified that as 910 Fifth's agent, he signed an "oil and grease" contract with Century for the service elevator (*id.* at 249). Oil and grease contracts involved a "lower level of maintenance" and limited which elevator components could be replaced (*id.* at 249). The Maintenance Agreement provides that the owner shall notify Century of any erratic operation (*id.* at 119), but in practice, it was the superintendent who contacted Century (*id.* at 120). Fine testified that he never saw the service elevator mislevel, and that he has never been trapped inside it (*id.* at 247-247). He could not recall receiving any complaints about misleveling or shaking from two doormen at the building (*id.* at 229-230), or from employees at the dermatology practice on the second floor (*id.* at 227). Fine expressed that misleveling and entrapments were serious issues (*id.* at 181-182), and that it was Greenthal's responsibility to ensure that contractors working for the building performed their work properly (*id.* at 182-183). When presented with work tickets and dispatch calls for the elevator, including misleveling, entrapments, bouncing and jumping, Fine explained that he had no independent memory of those incidents (*id.* at 207).

Fine testified that Century had presented 910 Fifth with written proposal no. 0611081 dated June 17, 2011 to furnish and install 22 items related to the service elevator (*id.* at 135). The proposal read, in part, that "[t]he above noted elevator has become increasingly troublesome and we highly recommend the following work" (NYSCEF Doc No. 205, affirmation of Century's counsel, Exhibit "J" at 1). The phrase "not accepted" is handwritten across the top of the proposal

(*id.*). Fine testified that 910 Fifth elected to modernize the service elevator after the accident, but he could not recall when the project was completed (NYSCEF Doc No. 203, affirmation of Century's counsel, Exhibit "H" at 136-137).

Richard Gladitz ("Gladitz") was deposed on behalf of Century. Gladitz testified that he was a service manager and vice president at Century (NYSCEF Doc No. 207, affirmation of Century's counsel, Exhibit "L" [Gladitz tr] at 10). According to the Maintenance Agreement, Century agreed to lubricate and adjust the equipment on the service elevator on a routine or on an as needed basis and to participate in the one-, two- and five-year inspection tests (*id.* at 31-33). Gladitz was "not intimately familiar with the equipment in the building," so he could not give specific details about the elevator's leveling system (*id.* at 46). However, he stated that the equipment for the service elevator, including the leveling system, was original to the building (*id.* at 42 and 46), explaining that "[it] had basically outlived its useful life" (*id.* at 40).

Gladitz testified that Century recorded its work on service tickets and computerized dispatch notes (*id.* at 43-44), and that he had reviewed the records related to the service elevator from June 2010. He noted two specific instances of misleveling reported on June 8, 2011 and June 10, 2011 (*id.* at 120 and 122). There was one reported incident on May 13, 2011 of the elevator shaking, bouncing and jumping, but the text on the dispatch note indicated that the incident involved a different elevator (*id.* at 117-118). Other dispatch reports recorded "trouble calls" without specifying whether the problem involved a leveling issue. Gladitz did not know what could have caused a loud bang inside the elevator or what could have caused a car with an automatic leveling system to move after having come to a complete stop on a floor (*id.* at 55-57). Gladitz, though, testified that the frequency of trouble calls was an indication that there was a

serious problem with the elevator (*id.* at 124). Century was first notified of plaintiff's accident thirteen months after it had occurred (*id.* at 146).

Anthony Pennino ("Pennino"), a field supervisor at Century, testified that he was familiar with the elevators at the building having worked on them previously, although he could not recall if the service elevator was a manually-operated car (NYSCEF Doc No. 208, affirmation of Century's counsel, Exhibit "M" [Pennino tr] at 8-12). He explained that it is acceptable for an elevator to come within one-quarter inch to one-half inch of the adjacent floor, but each elevator is different (*id.* at 30-31). Pennino testified that multiple misleveling incidents do not indicate that the brake on an elevator is failing (*id.* at 42). He further testified that once an elevator is stopped and the doors are opened, the car should not move (*id.* at 113-114).

Pennino testified that the elevator components referred to in Century's work tickets, such as the brake, brake sleeve, commutator, brushers, generator and tape head, were all outside a passenger's control (*id.* at 115-116). When asked whether the failure of the brake sleeve could cause the car to mislevel, Pennino responded, the "[b]rake sleeve could be anything. I mean, it depends. I didn't see it" (*id.* at 56). He testified that a malfunctioning tape head at the top of the car can affect leveling and should not cause the car to move after coming to a stop (*id.* at 114-115). Pennino added, however, that "[a]nything is possible. It's mechanical" (*id.* at 114). After reviewing the surveillance video of the incident, Pennino maintained that the car was level to the adjacent floor (NYSCEF Doc No. 208, affirmation of Century's counsel, Exhibit "M" at 138 and 145).

In April 2012 after the subject accident, 910 Fifth executed a contract for Century to modernize the service elevator (NYSCEF Doc No. 206, affirmation of Century's counsel, Exhibit "K" at 1).

Plaintiff commenced this action sounding in negligence against Greenthal and Century by filing a summons and complaint on April 25, 2013. Greenthal and Century interposed answers to the complaint and asserted cross-claims against each other for indemnification. Greenthal has also asserted a cross-claim for breach of contract for Century's failure to procure insurance. However, neither defendant moved on this ground.

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

A. Century's Motion

Century contends that the service elevator was not defective because its records do not reflect prior complaints of shaking or misleveling with the car doors open, and thus, it was not on notice of any prior similar incidents in the six months preceding the accident. Plaintiff's accident

was never reported to Century, and the elevator remained in operation after it had occurred. Century also relies on the surveillance video of the incident to show that the elevator car did not move after it came to a complete stop on the fourth floor. Century also argues that it did not owe a duty of care to plaintiff because it had fulfilled its contractual obligations under the Maintenance Agreement. As against Greenthal, Century argues that it is entitled summary judgment dismissing Greenthal's cross-claim for indemnification because it was not negligent.

At the outset, Century's contention that a wet or slippery condition on the fourth floor, as opposed to a dangerous condition with the elevator, caused plaintiff to fall is unpersuasive. Vuljaj claimed that plaintiff told him he slipped on a wet floor, but plaintiff testified that his left foot got caught in the gap between the car and the fourth-floor landing. Riccobono also testified that he saw a misleveling condition immediately after plaintiff fell. Conflicting testimony as to how the accident occurred raises a credibility issue which cannot be resolved on a summary judgment motion (*see Sutherland v Comprehensive Care Mgt. Corp.*, 155 AD3d 414, 415 [1st Dept 2017]).

In addition, the surveillance video and still images of the incident are not dispositive on the issue of whether the elevator shook or misleveled immediately before plaintiff fell. Plaintiff's expert videographer, John Afrides ("Afrides"), avers that the video would not depict the elevator moving or misleveling because of the slow rate at which the images were captured and the poor-quality resolution of those images (NYSCEF Doc No. 245, affirmation of plaintiff's counsel, Exhibit "L" [Afrides aff], ¶ 11). Even after using special software to increase the rate of frames per second and after zooming in on the car doors, Afrides avers that he could not determine whether the elevator had misleveled because the image was extremely pixelated and blurry (*id.*, ¶¶ 9 and 12). Afrides also notes that given the placement and angle of the camera inside the elevator, it

would have been difficult to capture any height differential between the car and the adjacent landing (*id.*, ¶ 13).

Century urges the court to disregard Afrides's affidavit because he is not an elevator expert. Additionally, in his affidavit, Gladitz refutes Afrides's opinion that a misleveling event could not have been captured on video. The video captured frames at four to five frames per second. As such, Gladitz submits that it is mechanically impossible for the service elevator to "have mis-leveled and re-leveled within the .2 to .25 time period" (NYSCEF Doc No. 272, reply affirmation of Century's counsel, Exhibit "A" [Gladitz aff], ¶ 5]). However, Afrides did not opine on the mechanical impossibility of the misleveling incident. Afrides stated only that the surveillance system could not have picked up either the movement of the car or a height differential between the car and the fourth-floor landing.

"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], *rearg denied* 28 NY3d 956 [2016] [internal quotation marks and citation omitted]). The question of whether a duty exists (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]), and the scope of that duty is an issue for the court to determine, as there can be no liability in the absence of a duty (*see Pasternack*, 27 NY3d at 825). Ordinarily, a contractor does not owe a duty of care to noncontracting third parties except under three circumstances. A contractor may be held liable to a third party in tort:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] 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"

(*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [citations omitted]). Contrary to plaintiff's position, the *Espinal* exceptions apply to this action.

Addressing the third *Espinal* exception first, the evidence fails to demonstrate that 910 Fifth had ceded all control over the service elevator to Century. It is well settled that an owner has a nondelegable duty to maintain the elevators on its premises in reasonably safe condition (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687 [1990]). An examination of the Maintenance Agreement reveals that Century's service and repair work was limited to only those components listed in the agreement. Any extra-contractual work required prior approval from 910 Fifth, as evidenced by Century's written proposals. Thus, the Maintenance Agreement was not so "'comprehensive and exclusive' ... as to preventative maintenance, inspection and repair" of the service elevator (*Church v Callanan Indus.*, 99 NY2d 104, 113 [2002], quoting *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]; *Hernandez v Pace El. Inc.*, 69 AD3d 493, 495 [1st Dept 2010] [stating that "Pace's contract with the City was not so comprehensive and exclusive as to displace the City's obligations to maintain the elevators in a safe condition"]; *Fernandez v Otis El. Co.*, 4 AD3d 69, 73 [1st Dept 2004] [concluding that the limited terms of the elevator's contractor's oil, grease and survey contract was not "a comprehensive assumption of all of the college's safety-related obligations with respect to the elevator from which this plaintiff fell"]; *Abato v Millar El. Serv. Co.*, 298 AD2d 884, 884-885 [4th Dept 2002] [concluding that an elevator oil & grease examination service contract was "not so 'comprehensive and exclusive' as to give rise to a duty of care"]).

Plaintiff cites to *Rogers v Dorchester Assoc.* (32 NY2d 553 [1973]) for the proposition that "[a]n 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" (*id.* at 559). However, "[t]hat duty … is limited … to cases where, pursuant to contract, the elevator company has assumed 'exclusive control' of the elevator at the time of the accident" (*Casey v New York El. & Elec. Corp.*, 82 AD3d 639, 640 [1st Dept 2011]). As discussed earlier, the Maintenance Agreement is not the type of comprehensive and exclusive maintenance and repair contract contemplated in *Rogers*, and thus, plaintiff's contention otherwise is unsupported.

As to the second *Espinal* exception, the "nexus between the defendant's contractual obligation and the noncontracting plaintiff's reliance and injury 'must be direct and demonstrable, not incidental or merely collateral'" (*Cresvale Intl. v Reuters Am.*, 257 AD2d 502, 504 [1st Dept 1999], quoting *Palka*, 83 NY2d at 587). There is no evidence, nor does plaintiff suggest, that he detrimentally relied on Century's continued performance of the Maintenance Agreement.

Nevertheless, triable issues of fact preclude granting Century summary judgment. The first *Espinal* exception requires a plaintiff to show that the defendant contractor failed to exercise reasonable care in performing its duties, thereby launching a force or instrument of harm (*Espinal*, 98 NY2d at 140]). It is not enough that an elevator contractor negligently inspected the elevator (*see e.g. Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007] ["[i]nspecting the car did not create or exacerbate a dangerous condition''; *cf. Abato*, 298 AD at 885 [finding that "Millar owed a legal duty to plaintiff to perform its inspection properly"]). There must be some proof that the contractor affirmatively created or exacerbated an unsafe condition (*see Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 811 [2d Dept 2013] [stating that "the contractor left the premises in a more dangerous condition than he or she found them"]).

Plaintiff's elevator expert, Patrick A. Carrajat ("Carrajat"), avers that he reviewed the deposition transcripts; the Maintenance Agreement; Century's work tickets, dispatch records and

written proposals, 910 Fifth's building logs; the surveillance video footage; and two still images[1] (NYSCEF Doc No. 244, affirmation of plaintiff's counsel, Exhibit "K" [Carrajat aff], ¶ 5). Carrajat states that, based on his review of the records, Century visited the subject elevator 32 times in the 12-month period preceding the accident, with the majority of those calls related to leveling or door issues (*id.*, ¶ 23). Carrajat states that there was a history of issues regarding the brake and brake sleeve and a high mica condition on the hoist motor commutator (*id.*, ¶ 28).[2] He explained that a high mica condition between the bars of the commutator "can cause the carbon brushes to fail to transmit sufficient power to assure positive leveling" (*id.*, ¶ 29). Century's records showed sparking at the motor generator armature from loss of commutation (*id.*, ¶ 30), and multiple failures of the brake and brake sleeve, including one post-accident failure two weeks after the accident (*id.*, ¶ 29). Carrajat opines that the failure to replace the brake sleeve and to properly repair a high mica condition on the motor generator or hoist motor was one of the proximate causes of the accident (*id.* at 20). Carrajat also reviewed the records maintained by the New York City Department of Buildings for the elevator. He states that the service elevator failed an inspection on December 6, 2011, less than six weeks before the accident (*id.*, ¶ 45).

In reply, Gladitz avers that the elevator would have risen upward had there been a failure of the brake or brake sleeve (NYSCEF Doc No. 272, affirmation of Century's counsel, Exhibit "A", ¶ 7), but he does not address what could have caused the elevator to rattle, shake and mislevel.

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[1] To the extent Carrajat relies on observations he may have made at a February 5, 2015 inspection of the service elevator (NYSCEF Doc No. 244, affirmation of plaintiff's counsel, Exhibit "K' [Carrajat aff], ¶ 5), that portion of his affidavit is without probative value because the elevator had been completely modernized three years earlier (NYSCEF Doc No. 206, affirmation of Century's counsel, Exhibit "K" at 1).

[2] Carrajat states that "mica is the insulating material between the copper bars of the commutator of the hoist motor" (NYSCEF Doc No. 244, affirmation of plaintiff's counsel, Exhibit "K" [Carrajat aff], ¶ 29).

Furthermore, Gladitz does not address whether Century's actions could have created or exacerbated a high mica condition, which Carrajat opined caused the accident. As Century assumed a duty to plaintiff by performing repairs and returning the elevator to service (*see Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33 AD3d 332, 333 [1st Dept 2006] [finding that the defendant assumed a duty of care to plaintiff when it put a machine back into operation after the defendant had repaired it]), a question of fact exists as to whether it breached that duty by negligently inspecting and repairing the elevator.

Century's reliance on *Fernandez (*4 AD3d 69) is unavailing. The plaintiff in Fernandez was injured when a reverse phase relay, or RPR, which is a component of the elevator controller, malfunctioned (*id.* at 71). The RPR, which had been installed in 1923, was not one of the devices listed in the elevator contractor's "oil, grease and survey" contract (*id.*). Here, Carrajat opines that the accident was proximately caused by an excess mica condition involving the brushes used on the commutator. Commutators, brushes and armatures were identified as some of the components covered under the Maintenance Agreement (NYSCEF Doc No. 204, affirmation of Century's counsel, Exhibit "I" at 1), and Century's records show that it had worked on the components responsible for leveling the elevator, including the brushes and the commutator, numerous times prior to the accident (NYSCEF Doc Nos. 239 and 240, affirmation of plaintiff's counsel, Exhibits "F", "G").

Furthermore, the "misleveling of an elevator does not ordinarily occur in the absence of negligence'" (*Dzidowska v Related Cos., LP*, 157 AD3d 447, 448 [1st Dept 2018], quoting *Roajs v New York El. & Elec. Corp.*, 150 AD3d 537, 537-538 [1st Dept 2017]; *Gutierrez v Broad Fin. Ctr., LLC*, 84 AD3d 648, 649 [1st Dept 2011]). Century argues that it lacked notice of a recurring misleveling issue, but the record is replete with prior instances of misleveling involving the service

elevator (*see Dzidowska*, 157 AD3d at 448; *Villalba v New York El. & Elec. Corp., Inc.*, 127 AD3d 650, 650 [1st Dept 2015] [finding "[i]ssues of fact ... as to whether prior malfunctions of the subject elevator provided notice of an unsafe condition that caused the malfunction resulting in plaintiff's injuries]).

Century's work tickets for the subject elevator, which are appended to plaintiff's papers, documented misleveling events occurring May 30, 2011 (NYSCEF Doc No. 240, affirmation of plaintiff's counsel, Exhibit "G" at 20), February 24, 2011 (*id.* at 29), October 15, 2010 (*id.* at 40), October 14, 2011 (*id.*), and October 6, 2010 (*id.* at 41). Its dispatch records indicate that trouble calls for misleveling issues were made June 10, 2011 and June 8, 2011 (NYSCEF Doc No. 239, affirmation of plaintiff's counsel, Exhibit "F" at 12), February 17, 2011 and February 24, 2011 (*id.* at 18), December 7, 2010 and December 15, 2010 (*id.* at 26), November 1, 2010 (*id.* at 27), October 14, 2010 and October 6, 2010 (*id.* at 28-29). The service elevator scored an "Unsatisfactory" mark at the one-year inspections performed June 29, 2011 and October 8, 2010 (NYSCEF Doc No. 237, affirmation of plaintiff's counsel, Exhibit "D" at 1 and 4). A comment from the October 2010 test also states, "Relevel car on all floors" (*id.* at 7). While none of Century's records show that a report of a specific misleveling event had been made in the six months preceding plaintiff's incident, Gladitz admitted that Century was aware of the existence of a recurring misleveling condition prior to the date of plaintiff's accident (NYSCEF Doc No. 207, affirmation of Century's counsel, Exhibit "L" at 221-222).

In addition to plaintiff's and Riccobono's testimony that the service elevator frequently shook and misleveled, plaintiff proffers affidavits from Don DiBenedetto ("DiBenedetto"), Lorna Kamen ("Kamen") and Edwin Ruiz ("Ruiz"), all of whom attested to frequent misleveling events, including one incident that occurred approximately three weeks prior to plaintiff's accident

(NYSCEF Doc No. 242, affirmation of plaintiff's counsel, Exhibit "I" [Kamen aff], ¶ 7). While Century objects to the belated offer of Kamen and Ruiz as notice witnesses because their names were not disclosed during pretrial discovery (*see Rivera v Glen Oaks Vil. Owners, Inc.*, 41 AD3d 817, 819 [2d Dept 2007], *lv denied* 9 NY3d 817 [2008] [stating that it was not an improvident exercise of discretion for the trial court to decline to consider the affidavits of three notice witnesses whose identities had not been exchanged during discovery]; *Masucci-Matarazzo v Hoszowski*, 291 AD2d 208, 208 [1st Dept 2002] [same]), plaintiff identified DiBenedetto at his deposition as a person with knowledge of the elevator misleveling (NYSCEF Doc No. 199, affirmation of Century's counsel, Exhibit "D" at 182). Thus, this Court will consider DiBenedetto's affidavit (*see Parra v 167 Allison Meat Corp.*, 7 AD3d 451, 451 [1st Dept 2004] [stating that the plaintiff had named the affiant at his deposition as a potential notice witness]). DiBenedetto, 910 Fifth's former superintendent and resident manager, avers that Century was called nearly every other day for issues related to the service elevator (NYSCEF Doc No. 235, affirmation of plaintiff's counsel, Exhibit "B" [DiBenedetto aff], ¶ 8). DiBenedetto states that the subject elevator would shake, bounce and jump while passengers exited the car (*id.*, ¶11). This Court will also consider the affidavits from Kamen and Ruiz because plaintiff had disclosed their identities in an email message dated March 28, 2017[3] (NYSCEF Doc No. 282, sur reply affirmation of plaintiff's counsel, Exhibit "A" at 1).

Century also moves for summary judgment on its cross-claim for "full indemnification" from Greenthal (NYSCEF Doc No. 196, affirmation of Century's counsel, Exhibit "A" at 5). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be

[3] Plaintiff did not seek leave of court to submit a sur reply (*see* CPLR 2214 [c]), but the court will accept it as plaintiff seeks to clarify a statement in Century's reply concerning the discovery exchange (*see Indian Harbor Ins. Co. v Alma Tower, LLC*, 165 AD3d 549, 550 [1st Dept 2018]).

strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). The "intention to indemnify [must] be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *mot to amend remittitur dismissed* 70 NY2d 999 [1988] [internal quotation marks and citation omitted]).

It is not disputed that Century was not informed of plaintiff's accident on the day or days after it occurred, that the Maintenance Agreement seemingly provides that Century "does not assume possession" of the elevator outside of the hours spent servicing it, or that Century shall be held harmless for injuries without proof of its own negligence. Nevertheless, Century is not entitled to indemnification at this time. The Maintenance Agreement, which is addressed to 910 Fifth in care of Greenthal, does not define the term "owner" and makes no reference to an owner's managing agent. Given the ambiguity as to which party must indemnify Century (*see Pereira v J.P. Morgan Chase Bank, N.A.*, 159 AD3d 566, 567 [1st Dept 2018]), that part of Century's motion for summary judgment on its cross-claim for indemnification must be denied.

To the extent the cross-claim can be read to assert a claim for common-law indemnification, that part of Century's motion is denied for the additional reason that, as discussed *supra*, a question of fact exists as to whether Century was negligent (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010] [finding that the defendants, the building owner and the managing agent, failed to establish their freedom from negligence]).

B. Greenthal's Motion

Greenthal advances three arguments in support of its motion for summary judgment. First, Greenthal contends that, as an agent for a disclosed principal [910 Fifth], it owed no duty to

plaintiff. Second, Greenthal submits that plaintiff was its special employee. As such, his claims would be barred by the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6). Third, Greenthal submits that there was no defect with the service elevator.

In response, plaintiff argues that Greenthal executed a comprehensive service agreement with 910 Fifth and therefore, it had a non-delegable duty to maintain the elevators in the building. Plaintiff disputes that he was Greenthal's special employee. Plaintiff also contends that summary judgment is unavailable where "defendants, in toto, have either negligent [sic] or willfully destroyed records and emails regarding the truth above [sic] this elevator" (NYSCEF Doc No. 233, affirmation of plaintiff's counsel, ¶ 71).

Generally, an "agent is not liable to third persons for non-feasance but only for affirmative acts of negligence or other wrong" (*Greco v Levy*, 257 AD 209, 211 [1st Dept 1939], *affd* 282 NY 575 [1939]). Insofar as this standard relates to managing agents, a plaintiff seeking to hold the agent of a property liable in tort must show that the agent "was affirmatively negligent or in complete and exclusive control of the building" (*Caldwell v Gumley-Haft L.L.C.*, 55 AD3d 408, 408 [1st Dept 2008]). However, a managing agent may be held liable "for failing to exercise due care in the execution of the contract if 'the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393, 394 [1st Dept 2008], quoting *Espinal*, 98 NY2d at 140). Additionally, a managing agent may be held liable where the plaintiff shows that he or she reasonably relied upon the agent's "continuing performance of a contractual obligation to an owner" to his or her detriment (*Vushaj*, 50 AD3d at 394).

The Management Agreement and the testimony establish that Greenthal served as an agent acting for 910 Fifth, the building's owner. Greenthal was prohibited from entering into any service

contract without 910 Fifth's prior approval (NYSCEF Doc No. 225, affirmation of Greenthal's counsel, Exhibit "1" at 1). 910 Fifth retained control over designating or approving the type of insurance obtained for the building, delivering delinquency notices to residents, referring potential legal issues to 910 Fifth's counsel, and commencing any legal action (*id.* at 3). Building employees were considered employees of 910 Fifth and not Greenthal. Hiring and firing of the building's employees were subject to "such direction as Owner may give to Agent" (*id.* at 1). Hence, the terms of the Management Agreement establish that Greenthal could not have entirely displaced 910 Fifth's duty to maintain the building as its control over the building was not absolute (*see Davis v Prestige Mgt. Inc.*, 98 AD3d 909, 910 [1st Dept 2012]; *Caldwell v Two Columbus Ave. Condominium*, 92 AD3d 441, 442 [1st Dept 2012]; *Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 555-556 [1st Dept 2011]; *Vushaj*, 50 AD3d at 394; *Clark v Kaplan*, 47 AD3d 462, 463 [1st Dept 2008], *lv denied* 11 NY3d 701 [2008]; *Gardner v 1111 Corp.*, 286 App Div 110, 112-113 [1st Dept 1955], *affd* 1 NY2d 758 [1956]). Moreover, both Cohen and Fine state that repair work costing more than $5,000 required prior Board approval (NYSCEF Doc No. 213 [Cohen aff] at ¶ 4; NYSCEF Doc No. 224, affirmation of Greenthal's counsel, Exhibit "J" [Fine deposition] at 101-102), and Century's June 2011 proposal to modernize the service elevator lists a price of $187,500 plus sales tax (NYSCEF Doc No. 205, affirmation of Century's counsel, Exhibit "J" at 1). Thus, Greenthal did not possess "'complete and unfettered authority'" to undertake repairs such that liability may be imposed (*Clark*, 47 AD3d at 463, quoting *Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44, 48 [1st Dept 2002]).

Plaintiff complains that Greenthal failed to notify the Board of the issues related to the service elevator, as evidenced in minutes from several Board meetings Fine had attended. However, plaintiff ignores the precept that "individual liability cannot be based upon an allegation

that amounts to mere nonfeasance unless plaintiff establishes, as a matter of law, that the managing agent was in complete and exclusive control of the premises" (*Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 375 [1st Dept 2007], citing *Gardner*, 286 App Div at 112]). Greenthal's action, or more accurately, inaction, amounts to nothing more than nonfeasance, which is insufficient. Furthermore, Greenthal lacked authority to hire and fire service contractors without prior Board approval.

Plaintiff's argument based on *Rogers* (32 NY3d 553) that a managing agent has a nondelegable duty to maintain a building's elevators is unpersuasive (NYSCEF Doc No. 284, oral argument 3/18/19 tr at 13-14). The Court in that action declined to consider the managing agent's argument that it could not be held liable to the plaintiff solely for the owner's nonfeasance because the argument was raised for the first time on appeal (*Rogers*, 32 NY2d at 563). Here, Greenthal has argued that it is not liable because of its position as a managing agent, and 910 Fifth is not a party to the present action.

In view of the foregoing, the court need not consider the alternative arguments raised by Greenthal in support of summary judgment on the complaint and the cross-claim made against it. In any event, the record does not support Greenthal's contention that plaintiff was its special employee (*see Marrero v Akam Assoc. LLC*, 39 AD3d 716, 717 [2d Dept 2007] [denying summary judgment to the defendant managing agent because it failed to support its allegations that it had exclusive authority to supervise and control the manner and details of work performed by the cooperative building's employees, such as the doorman/porter plaintiff]).

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Century Elevator Maintenance Corporation for summary judgment dismissing the complaint and the cross-claim asserted against it and for summary judgment in its favor on its cross-claim for indemnification against defendants Greenthal Management Corporation and Charles H. Greenthal Management Corp. (motion sequence no. 011) is denied, and it is further

ORDERED that the motion of defendants Greenthal Management Corporation and Charles H. Greenthal Management Corp. for summary judgment dismissing the complaint and the cross-claim asserted against it (motion sequence no. 012) is granted, and the complaint and the cross-claim are dismissed as against them; and it is further

ORDERED that the said claims and cross-claim against defendants Greenthal Management Corporation and Charles H. Greenthal Management Corp. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Greenthal Management Corporation and Charles H. Greenthal Management Corp. dismissing the claims and cross-claim made against them in this action, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs.

Dated: September 20, 2019 ENTER:

Hon. SHLOMO S. HAGLER, J.S.C.