| **LaRock v Barist El. Co., Inc.** |
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| 2019 NY Slip Op 32905(U) |
| October 4, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 14-7444 |
| Judge: William G. Ford |
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**SHORT FORM ORDER**

**INDEX No.** 14-7444
CAL. No. 18-00686OT

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 38 - SUFFOLK COUNTY**

***PRESENT:***

**Hon. WILLIAM G. FORD**
**Justice of the Supreme Court**

**MOTION DATE** 9-27-18
**ADJ. DATE** 4-18-19
**Mot. Seq. # 002 - MD**

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**CHRISTOPHER LAROCK and VERONICA LAROCK,**

**Plaintiffs,**

**- against -**

**BARIST ELEVATOR COMPANY, INC.,**

**Defendant.**

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**Attorney for Plaintiffs:**
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 15; Answering Affidavits and supporting papers 16 - 19; Replying Affidavits and supporting papers 20 - 22; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendant Barist Elevator Company, Inc., for summary judgment dismissing the complaint against it is denied.

This action was commenced by plaintiff Christopher LaRock to recover damages for injuries he allegedly sustained on September 6, 2013, as a result of being "squeezed" in an elevator's doors while in his employ as a corrections officer at the Riverhead Correctional Facility. His wife, Veronica LaRock, asserted a derivative claim for loss of services, which was subsequently discontinued, with prejudice, by a stipulation dated July 17, 2017.

Barist Elevator Company, Inc. (Barist) now moves for summary judgment in its favor, arguing that it did not create or have notice of the alleged dangerous condition, that it did not owe plaintiff a duty of care, and that the doctrine of res ipsa loquitur is inapplicable to this matter. In support of its motion, it submits, among other things, transcripts of the parties' deposition testimony, transcripts of nonparty witnesses' deposition testimony, a copy of a maintenance contract, copies of inspection records, and an expert report by Jon B. Halpern.

Plaintiff testified that he was employed as a corrections officer by the Suffolk County Sheriff's Department from 1997 until his retirement in 2016. He stated that the entirety of his career with the

Sheriff's Department was spent at the Riverhead Correctional Facility, and that his duties included the "[c]are, custody, and control of inmates in Suffolk County." Plaintiff indicates that on the date in question, he was "in charge of the mailroom for the whole Suffolk Correction mail facility system," a post he had held since approximately 2000. He testified that on the date of his incident, he was working a 3:00 p.m. to 11:00 p.m. shift, which included the task of delivering mail to inmates. He further testified that he retrieved the mail, which had been placed on a four-wheeled push cart prior to his arrival, from a trailer adjacent to the correctional facility and entered the jail. Plaintiff stated that at a time shortly after 3:00 p.m., he was about to exit Elevator 2 onto the third floor of the facility. Asked to describe the elevator in question, he explained that it had one door that slid open from left to right, had an area of approximately 9-feet by 11-feet, and had pushbuttons for each floor. He indicated that there was also a steel gate located between the elevator's door and the open space of the third floor. Plaintiff testified that the steel gate was controlled by a sergeant stationed at a lobby on each floor, and that it opened in the same direction as the elevator's door. Specifically, he indicated that the sergeant would typically observe that the elevator door had opened, walk over to the steel gate, unlock it, and allow the elevator's passenger to disembark.

Plaintiff testified that on the date in question, Sergeant Joseph Nasta was stationed on the third floor, standing approximately 25 feet from the elevator. He indicated that after the elevator door opened, he heard Sergeant Nasta say "I'll be right there," but that the sergeant continued working on a task at his station before beginning to walk toward the elevator. Plaintiff stated that he was unable to exit the elevator due to the steel gate remaining closed, but that he placed his body in its entryway to prevent its door from closing while he waited, which was his usual practice. He testified that he does not recall how much time had elapsed before the sergeant began walking toward the elevator, but that during such time, the elevator's door started closing and pinned him in the approximately 8-inch gap between it and the steel gate. Plaintiff stated that on prior occasions when using his body to prevent the elevator's doors from closing while he waited for a sergeant, the elevator's door would remain open. He could not recall any prior occasion when an elevator door closed while he waited in its doorway, and was unaware of that happening to any other person at the facility.

Upon questioning, plaintiff denied observing the subject elevator malfunction in any manner prior to his incident. Plaintiff explained that he would have made a written report to the duty lieutenant present if he had observed it malfunction. He further testified that he never made a complaint regarding any of the elevators at the facility, nor is he aware of any complaints made by others.

Nonparty Robert Alford testified he was employed by Barist as an elevator mechanic at the time of Mr. LaRock's incident, and had worked for that company since approximately 2004. He stated that his duties included the repair and maintenance of elevators, and that he would make monthly visits to the Riverhead Correctional Facility. Asked to describe the manner in which the subject elevator's door sensors operated, Mr. Alford indicated that "[i]f you stand in the doorway too long, it will time out and it shuts the elevator down." He testified that an elevator mechanic can adjust the amount of time the door may be permitted to be held open before it "times out," but he is unaware of the subject elevator's setting. He further testified that the elevator's door will move quickly across its entranceway, until it reaches a point approximately eight inches from the door jamb, at which point it slows down markedly. Mr. Alford stated that the speed that the elevator door closes is "standard," and not adjusted. Questioned regarding the type of sensors present in the subject elevator's door, he explained that there is a receiver and a transmitter, one

attached to the elevator door, and the other attached to the elevator's door jamb, which run the full length of the opening. When the invisible beam generated by the transmitter is broken by the presence of a person or object obstructing the elevator door's transit, the door's movement is automatically halted and the door retracts. Mr. Alford testified that he tests an elevator's door sensors by sticking an object into the elevator's entranceway as its door began to close, and ensuring that the door stops. He indicated that it would be extremely dangerous to insert one's hand into the space between the closing door and the door jamb when the door was almost entirely closed, as it could break the person's fingers.

Nonparty Joseph Nasta testified that he is a sergeant with the Suffolk County Sheriff's Department, and that he was stationed on the third floor of the Riverhead Correctional Facility at the time of plaintiff's incident. Specifically, he stated that his desk was located approximately 20 feet from the two side-by-side elevators on that floor, and that a gate with jail-cell-like bars was located immediately outside the elevator doors. Mr. Nasta indicated that there is a second gate beyond the first, forming a vestibule. He further indicated that he held the key to the gates, and would open them each time a person wanted to enter or exit an elevator. He testified that at the time in question, he observed plaintiff arrive at the third floor via the service elevator, got up from his desk, and began walking toward the elevator's gate. Asked to describe plaintiff's position, Mr. Nasta stated that he was in "the opening that leads to the elevator . . . up against the gate" which is approximately 18 inches from the elevator's door. Mr. Nasta estimated that it took him 20 seconds from the time he got up from his desk until he reached the first, outermost gate. He testified that as he was about to unlock that first gate, he saw the elevator door close, impacting plaintiff's right arm, twisting him around, and caused him to be "stuck in the gap" between the elevator door and the second, closer, gate. Mr. Nasta indicated that he freed plaintiff by unlocking the two gates, and later observed that the elevator returned to the third floor and opened, revealing plaintiff's mail cart.

In an expert report and affidavit by Jon B. Halpern, he states that he is a professional engineer licensed in New York, and that he has more than 38 years of experience "in the design, installation, modernization, maintenance and repair of elevators." He indicates that in preparation for the drafting of his report he conducted an inspection of the subject elevator on November 24, 2015, and reviewed the records relating thereto. Mr. Halpern states that the subject elevator is an automatic geared overhead traction type with a GAL door operator, a two speed, 48 inch by 7 foot side slide door, and a Pana40 Plus door protection device. He avers that the Pana40 Plus door protection device "consists of a curtain of direct infrared beams as well as an infrared proximity detector which operates between the hoistway door and into the landing."

Mr. Halpern states that his review of the subject elevator's maintenance records revealed no prior complaints or incidents involving a malfunction of its doors, and that "there is no evidence of any defective condition of the elevator doors at issue," or "that the elevator operated outside of its design parameters." With regard to the door's protection device, he avers that the Pana40 Plus device is maintenance free, requires no periodic adjustment, and that it possesses "an internal troubleshooting system that will signal to hold the doors open in the event of a failure." In conclusion, Mr. Halpern opines that, within a reasonable degree of engineering certainty, the accident in this case "was not the result of Barist creating or having notice of any elevator defect, or any alleged failure to examine, maintain or repair the subject elevator by Barist." He further opines that Barist properly maintained the subject elevator "in accordance with industry standards."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (***Orlando v New York Homes By J & J Corp.***, 128 AD3d 784, 785, 11 NYS3d 76 [2d Dept 2015], quoting ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 576, 934 NYS2d 43 [2011]). Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). A contractual obligation alone "will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 138, 746 NYS2d 120 [2002]). However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care– and thus be potentially liable in tort– to third persons: (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]).

An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found (***Rogers v Dorchester Assoc.***, 32 NY2d 553, 559, 347 NYS2d 22 [1973]; *see* ***Hussey v Hilton Worldwide, Inc.***, 164 AD3d 482, 82 NYS3d 565 [2d Dept 2018]). Res ipsa loquitur is an evidentiary doctrine which permits the inference of negligence to be drawn from the circumstances of the occurrence when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and (3) the event was not caused by the plaintiff's actions (***Barkley v Plaza Realty Invs. Inc.***, 149 AD3d 74, 77, 49 NYS3d 105 [1st Dept 2017] [internal quotation marks omitted], quoting ***Dermatossian v New York City Tr. Auth.***, 67 NY2d 219, 226, 501 NYS2d 784 [1986]).

Here, Barist established a prima facie case of entitlement to summary judgment in its favor (*see* ***Hussey v Hilton Worldwide, Inc.***, *supra*; ***Goodwin v Guardian Life Ins. Co. of Am.***, 156 AD3d 765, 68 NYS3d 100 [2d Dept 2017]; ***Nunez v Chase Manhattan Bank***, 155 AD3d 641, 63 NYS3d 481 [2d Dept

2017]; ***Vilardi v Jones Lang LaSalle, Inc.***, 145 AD3d 711, 42 NYS3d 336 [2d Dept 2016]; ***Tucci v Starrett City, Inc.***, 97 AD3d 811, 949 NYS2d 419 [2d Dept 2012]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). The party and nonparty deposition testimony demonstrated that Barist conducted monthly inspections of the subject elevator, that it inspected the subject elevator five days after the plaintiff's incident and found no malfunction, and that it had no prior notice of any malfunction or dangerous condition related to the subject elevator's door (*see* ***Pacheco v Serviam Gardens Assoc., L.P.***, 161 AD3d 416, 76 NYS3d 522 [1st Dept 2018]; ***Bastien v Nouveau Elevator Indus.***, 102 AD3d 643, 956 NYS2d 920 [2d Dept 2013]; *cf.* ***Roserie v Alexander's Kings Plaza, LLC***, 171 AD3d 822, 97 NYS3d 174 [2d Dept 2019]). The burden, then, shifted to plaintiff to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to the motion, plaintiff argues that Barist falls within one or more of the exceptions to ***Espinal*** and, therefore, owed him a duty of care. Plaintiff also argues that since Mr. Alford admitted he did not test the subject elevator door's closing speed and closing force, his monthly inspections were inadequate and allowed the alleged dangerous condition to persist. Further, plaintiff argues that the doctrine of res ipsa loquitur is applicable here because, for all intents and purposes, the subject elevator was under defendant's exclusive control and that his incident would not have occurred but for an act of negligence. In support of his arguments, plaintiff submits an expert affidavit of William J. Seymour, and relies upon the materials submitted by defendant with its moving papers.

In his affidavit, Mr. Seymour states that he is "an elevator consultant and Electrical Engineering graduate" with more than 30 years of experience in the elevator field, and that he is "fully familiar with and knowledgeable regarding industry standards and practices." He indicates that he was retained by plaintiff to render an opinion regarding the subject accident, and that he reviewed the documents and testimony relevant thereto. Mr. Seymour does not state that he visited the subject premises or that he conducted an inspection of the subject elevator, but states that he reviewed the photographs taken by Barist's expert. Upon his review of the evidence in this matter, he opines, in relevant part, that "Mr. LaRock had his right arm stretched behind him holding the mailcart which was still inside the elevator at the time [and that this] would have clearly placed his arm in the field of view of the infra-red door detector . . . and should have caused the door to remain open." He further opines that since Mr. Alford testified that he never possessed a tool to measure the elevator door's closing force, "he was unable to ensure that they were properly adjusted, were operating correctly and were properly inspected." Mr. Seymour also opines that since Mr. Alford did not test how the subject door reacted upon being held open for a significant period of time, his inspection was inadequate. Finally, he opines that "an occurrence of this type does not occur on a properly maintained elevator absent negligence in its maintenance and operation."

In Barist's reply affirmation, it argues that plaintiff's expert's affidavit should be disregarded as it was notarized in Connecticut and lacks a certificate of conformity. The Court will consider plaintiff's expert's affidavit, as "such a defect is not fatal and no substantial right of [defendant] was prejudiced by disregarding it." (***Seiden v Sonstein***, 127 AD3d 1158, 1161-1162, 7 NYS3d 565 [2d Dept 2015]). Here, plaintiff's expert fails to state what, if anything, malfunctioned, how such malfunction could occur, or how Barist could detect such malfunction. Conversely, Barist's expert did not state that an occurrence such as plaintiff's accident was impossible. Neither of the experts submitting affidavits in this matter asserts that there were any door protection features on the subject elevator in addition to the infrared beam system. Specifically, it is not alleged that the elevator door should have, or could have, retracted upon contact with

plaintiff's body. Thus, measurement of the subject elevator door's closing speed and force are irrelevant absent complaints that an excess of either created a dangerous condition. Despite plaintiff's expert assailing Barist for not specifically testing the subject elevator door's closing force and speed, he did not conduct such testing himself to confirm or refute that anything was awry. Further, plaintiff's expert stated that "there is no standard closing speed for elevator doors." Like defendant's expert's affidavit, plaintiff's expert affidavit was conclusory and speculative (*see* ***Reed v Nouveau Elevator Indus., Inc.***, 123 AD3d 1102, 999 NYS2d 182 [2d Dept 2014]).

Essentially, while viewing all evidence in the light most favorable to plaintiff, the Court must determine whether Barist knew, or should have known, that this alleged single incident of the elevator door closing while an obstruction was present across its threshold could occur. Neither plaintiff nor any of the other witnesses testified to prior or subsequent similar incidences of the elevator closing while obstructed (*see* ***Sanchez v New Scandic Wall LP***, 145 AD3d 643, 42 NYS3d 802 [1st Dept 2016]; *cf.* ***Mable v 384 E. Assoc., LLC***, ___AD3d___, 2019 NY Slip Op 06442 [1st Dept 2019]; ***Rogers v Dorchester Assoc.***, *supra*). Thus, even assuming for the purposes of this motion that Barist owed plaintiff a duty under an exception to ***Espinal***, plaintiff has failed to establish the existence of prior actual or constructive notice on behalf of Barist.

Turning to plaintiff's claim that defendant is liable under the doctrine of res ipsa loquitur, the Court acknowledges that such doctrine is frequently raised by plaintiffs in elevator cases in New York (*see* ***Barkley v Plaza Realty Invs. Inc.***, *supra*). In many cases involving the mis-leveling of an elevator's floor or shaking, the doctrine is not applied (*see* ***Palladino v New York City Hous. Auth.***, 173 AD3d 1196, 101 NYS3d 626 [2d Dept 2019]; ***Goodwin v Guardian Life Ins. Co. of Am.***, *supra*; ***Torres-Martinez v Macy's, Inc.***, 146 AD3d 638, 45 NYS3d 449 [1st Dept 2017]; ***Fasano v Euclid Hall Assoc., L.P.***, 136 AD3d 478, 24 NYS3d 636 [1st Dept 2016]; *contra* ***Perry v Kone, Inc.***, 147 AD3d 1091, 49 NYS3d 696 [2d Dept 2017]). However, in most cases involving allegations of improper elevator door closing or "free-falls," the doctrine is held to be applicable (*see* ***Lilly v City of New York***, 161 AD3d 461, 73 NYS3d 419 [1st Dept 2018]; ***Barkley v Plaza Realty Invs. Inc.***, *supra*; ***Ianotta v Tishman Speyer Props., Inc.***, 46 AD3d 297, 852 NYS2d 27 [1st Dept 2007]; *contra* ***Pacheco v Serviam Gardens Assoc., L.P.***, 161 AD3d 416, 76 NYS3d 522 [1st Dept 2018]).

In this case, plaintiff's testimony raises triable issues as to the applicability of the doctrine of res ipsa loquitur, which must be determined by the factfinder (*see* ***Colon v New York City Hous. Auth.***, 156 AD3d 406, 66 NYS3d 237 [1st Dept 2017]; ***Miller v Schindler Elevator Corp.***, 308 AD2d 312, 763 NYS2d 826 [1st Dept 2003]).

Accordingly, the motion by defendant Barist Elevator Company, Inc., for summary judgment dismissing the complaint against it is denied.

Dated: October 4, 2019
Riverhead, New York

**WILLIAM G. FORD J.S.C.**

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**