

Falvey v Carlshire Tenants, Inc.
2020 NY Slip Op 34815(U)
April 28, 2020
Supreme Court, Westchester County
Docket Number: Index No. 65681/2018
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
CATHERINE J. FALVEY,

Plaintiff,

DECISION & ORDER

-against-

Index No. 65681/2018

CARLSHIRE TENANTS, INC., RMR RESIDENTIAL
REALTY LLC, and WESTECH ELEVATOR SERVICES,
INC.,

Seq. No. 1

Defendants.
-----X

GIACOMO, J.

The following papers were read on this motion by defendant Westech Elevator Services, Inc. (hereinafter "Westech"), for an order (a) pursuant to CPLR 3212 granting summary judgment in favor of Westech, dismissing the plaintiff's complaint, all claims and all cross-claims, on the grounds that there are no triable issues of material fact and that Westech is entitled to summary judgment as a matter of law; and (b) granting the moving defendant such other and further relief as this court deems just, proper and equitable:

- Notice of Motion
- Affirmation in Support of Stephen A. Denburg, Esq. - Exhibits A-N
- Affirmation in Opposition of James E. Romer, Esq.
- Affirmation in Opposition of Michael L. Taub, Esq.
- Expert Affidavit of William J. Seymour with CV - Exhibits A-H
- Reply Affirmation of Stephen A. Denburg, Esq. - Exhibit A
- Affidavit of Service
- NYSCEF File

Upon the foregoing papers and proceedings, this motion is determined as follows:

In this negligence action, plaintiff Catherine J. Falvey (hereinafter "plaintiff") alleges that on October 22, 2017 she was involved in an elevator accident (hereinafter the "subject accident") in a building located at 1 Washington Square, Larchmont, New York (hereinafter the "subject premises"). The subject premises are owed by defendant Carlshire Tenants, Inc. (hereinafter

“Carlshire”) and managed by defendant RMR Residential Realty LLC (hereinafter “RMR”). Westech entered into an elevator maintenance contract for the elevator at the subject premises with Carlshire/RMR.

The action was commenced by the filing of a summons and complaint with the court on October 1, 2018. Issue was joined by Westech when it served a verified answer to the complaint on October 18, 2018. Defendants Carlshire/RMR served a verified answer on October 26, 2018. Westech served a verified answer to Carlshire/RMR’s cross-claims on November 7, 2018.

Plaintiff alleges in her bill of particulars and supplemental bill of particulars that she was caused to be injured on October 22, 2017 in the elevator at the subject premises “when the door of the subject elevator on Defendants’ premises closed abruptly and forcefully on the Plaintiff as she attempted to exit the elevator.”

Examination Before Trial of Plaintiff

Plaintiff was deposed on February 7, 2019. She testified that she resides in a cooperative apartment located at 1 Washington Square, Apartment 5B, Larchmont, New York where she has lived for the previous fifteen (15) years (p 14). Plaintiff owns her apartment. The building has six (6) floors and one (1) elevator.

In the mid-afternoon of October 22, 2017, plaintiff left her apartment on the fifth floor to bring a plant to a neighbor, Isabelle Secuno on the fourth floor, but could not recall whether she took the elevator to make the delivery. Plaintiff hung the plant on the doorknob of Ms. Secuno’s apartment and took the elevator back to her apartment on the fifth floor. Plaintiff entered the empty elevator on the fourth floor and pressed “5”, causing the doors to close in a “normal” manner and the elevator to operate in its usual fashion. Before exiting, plaintiff pressed the lobby button and attempted to walk out of the elevator as quickly as possible, although her memory had to be refreshed with a security video depicting the incident before she recalled pressing the lobby button. Before fully exiting the elevator, the door came in contact with her right arm. Plaintiff testified “the door attacked me.” She did not recall when she was last on the elevator before that occasion. Plaintiff further stated that everyone using the elevator going “up” would get off at their floor and push the button for the lobby.

During the five years preceding the subject accident, plaintiff used the elevator one to three times per day without incident. Prior to October 22, 2017, plaintiff was unaware of anyone having

an accident or being injured by the elevator doors and never witnessed the doors being repaired. Her children who came to visit did not make complaints about the operation of the elevator. Plaintiff did not make complaints to anyone who owned or maintained the building about the operation of the elevator before October 22, 2017.

Examination Before Trial of Albert Santiago of Carlshire/RMR

Albert Santiago (hereinafter "Santiago") appeared for a deposition on behalf of defendants Carlshire/RMR on April 19, 2019. Santiago testified he has lived in the subject premises for five years and is employed both as an assistant resident manager for Carlshire and as the resident manager/superintendent for RMR. Santiago's duties include performing minor repairs and overseeing all work orders, building doormen, porters and staff. The subject premises are comprised of two buildings known as Washington Square and denoted as buildings one (1) and three (3). The workers are interchangeable between the buildings. Each building houses approximately fifty-five apartment units. Santiago could not recall the name of the buildings' owner. Building one (1), where plaintiff resided at the time of the incident, has seven (7) floors including the lobby and one (1) elevator. Santiago used the elevator between two (2) and five (5) times daily on his walk-through of the building. If issues were found with the elevator, the doormen and porters would contact Santiago who would then contact Westech, the company maintaining the elevator in October, 2017.

Santiago testified he has had prior positions in other buildings similar to his current job. He has no training in elevators. His duties as superintendent include repairs. If the job is too big Santiago calls in a contractor. Santiago stated that the porters use the elevator all day doing recycling, going to every floor and vacuuming the hallways. While the porters wipe down the elevator, Santiago was not sure if they wipe down the side of the door where the sensor may be.

Santiago was not working on the date of the subject accident but was notified of the occurrence by the doorman. That afternoon, he went to check the elevator and confirmed that the door sensor was working and that there were no apparent issues. When Santiago tested the doors by pressing a button inside the elevator and sticking his arm out, the door stopped. He stated that attempting to exit the elevator from a side angle may cause the doors to continue to close and speculated that this is what happened to plaintiff. Upon seeing the video recording of the incident,

Santiago opined that plaintiff was trying to “sneak out” of the elevator after pressing the button for the lobby and believed she tried to exit the elevator before the doors closed.

Santiago testified that other than a single instance of the elevator getting stuck between floors, there were no operational issues with the elevator in the three (3) year period prior to the subject accident, nor any complaints that the elevator doors were closing too quickly. Additionally, Santiago stated there were no complaints to him about the elevator doors in the two (2) year period prior to the incident. Santiago never spoke with Westech regarding any problems with the elevator doors.

Examination Before Trial of Yamil Quinones of Westech

Westech produced Yamil Quinones (hereinafter “Quinones”) of Westech for a deposition on April 19, 2019. Quinones testified he is the president and owner of Westech and has owned the company since February 6, 2018, after the subject accident. He learned of the incident from the prior owner, John Bochinis, prior to taking over the business. He has been involved in the elevator industry since 1991. He is involved in the operation and sale and elevators and performs work on them.

Quinones was familiar with the elevator at the subject premises and serviced the elevator pursuant to an elevator maintenance agreement. Under the terms of the maintenance agreement, which was in existence at the time Quinones took over as owner of Westech, the company would perform maintenance on the elevator at the subject premises on a monthly basis, although Quinones did not personally perform the work. Eduardo, a Westech employee, serviced the subject elevator in October, 2017, but Quinones was unaware if Eduardo performed work before October 22, 2017. As part of the monthly maintenance, Westech personnel would ride the elevator, listen for unusual noises, examine the controller in the machine room, and clean the machine room, the top of the car and the elevator pit.

The elevator at the subject premises is a variable voltage variable frequency (VVVF) multispeed overhead traction elevator. The elevator door is equipped with an electronic safety edge sensor consisting of two sticks. One stick is mounted and does not move, and another stick is mounted to the door and moves with it. Between the sticks there are rays that detect if someone is in the area of the door. If the rays detect someone in the path of the door, the door will retract without the necessity of contact with a person. Once the elevator arrives at the designated floor, it

dwells at the floor for about five (5) or six (6) seconds before the door closes. If a button for another floor is pressed, the dwelling time may be bypassed. Typically, a person does not press a button for another floor and then attempt to exit the elevator. After reviewing the video of the subject accident, Quinones stated that plaintiff, by pressing a button for another floor, appeared to have bypassed the dwelling time for the elevator.

The Elevator Maintenance Contract

The contract regarding the elevator at the subject premises was denoted "Elevator Service Agreement for Carlshire Tenants Inc. 1-3 Washington Sq. Larchmont NY 10538 C/O RMR Residential Realty, LLC 45 Knollwood Road, Suite 305, Elmsford, New York 10523 RE: Maintenance." The contract was signed on April 25, 2016 and effective as of June 1, 2016 until terminated. The contract was in effect on the date of the subject accident.

The contract provides, in relevant part, as follows:

Westech Elevator Services Inc. Hereinafter called (The Contractor) shall furnish services to: 1-3 Washington Sq. Larchmont, NY 10538

The owner of: 1-3 Washington Sq. Larchmont, NY 10538

(Hereinafter collectively called the Owner/Agent) on equipment for one (2) (*sic*) automatic passenger elevators, in accordance with the following terms.

The entire elevator equipment shall be maintained as hereinafter described, in accordance with the following detailed terms.

The Contractor shall use properly trained personnel directly employed and supervised by us. They will be qualified to keep your equipment properly adjusted, lubricated, and will use all reasonable care to maintain the elevator equipment in proper and safe operating condition, in accordance with all applicable federal, state and local laws, ordinances and regulations.

The Contractor will regularly and systematically on a monthly basis examine, adjust, clean and lubricate all equipment required. The Contractor shall provide the labor which may be required to perform yearly safety tests and remove violations or to comply with recommendations of public administrative agencies or departments and casualty companies resulting from normal wear. It is understood however, that this work will be done by us only in the event that it pertains to those items which the Contractor under the terms hereof,

are (*sic*) required to repair. The Contractor shall not be obliged to render any cleaning service except to the base machinery of the elevator in the machine room, the car tops and door operating mechanism on the top of the elevator, elevator pits.

The Contractor shall systematically examine adjust and lubricate the described hoist machines, hoist motors, controllers and selectors, on a monthly basis, including:

Worm shafts, worm gears, thrusts, bearings of the motors, machine brake, brake pins, coils, relays and resistors for all operating circuits, governor and hoist ropes, car door operators and their mechanisms, car and hoistway door hanger tracks and hanger rollers, door locks, gate switches, door closers, guide shoes, guide rails, overhead and governor sheaves and all other parts of the elevator equipment.

The Contractor shall have no responsibility for the following items of the elevator equipment: Car enclosure, hoistway enclosure, steel and concrete supporting structure, machine room enclosure and lighting, guide rails, hoistway doors, door frames, cab lighting and fixtures, cab flooring, machine and motor bearings, worms and gears, brake coils, hung ceilings, main line disconnect switches and building feeders. Car lighting, car and hoistway sills, car and hoistway hanger tracks, cab fans, smoke heads, emergency lighting, governor and tension and deflector sheave bearings. In car telephones, and phone lines, solid state boards and drives. **It is understood that the exclusions in this paragraph do not in any way enlarge the category of the terms for which we are responsible.**

The Contractor will respond to calls from the owner/agent or building personnel, for any conditions that require any adjustments or repair with the understanding that when not working in, about or on the said equipment the Contractor shall not be responsible for the leveling of elevators at landings, accidental application of car safeties, eccentricities in operation of car doors, shaft doors, or their locking devices and for any situation that may occur that cannot be revealed by the ordinary visual examination offered with this service.

The owner/agent or building personnel shall shut down the elevator immediately due to any noticeable irregularity of the operation or appearance of the elevator(s), and shall notify the Contractor at once. The owner/agent shall instruct the building personnel to keep the elevator shut down until the Contractor can examine and evaluate the condition of the elevator.

Should an accident occur in and about the elevator(s) the owner/agent shall give the Contractor all information immediately. Written notice shall be faxed or mailed to the Contractor within (48) (*sic*) hours after occurrence of any accident in or about the elevator.

Affidavit of Patrick J. McPartland, P.E.

In support of the motion, Westech submitted the Affidavit of Patrick J. McPartland, P.E. (hereinafter "McPartland"). McPartland holds a Bachelor of Science in Electrical Engineering from NYU Polytechnic School of Engineering and an Associate of Applied Science degree in Electrical Technology from New York City Technical College. He is a licensed professional engineer in the State of New York and has over forty (40) years of experience in the design, installation, modernization, maintenance and repair of elevators and escalators.

McPartland reviewed the "relevant maintenance, repair and inspection records, contracts, relevant deposition testimony, relevant discovery exchanged, photographs, and plaintiff's bill of particulars" and states he is familiar with the elevator at the subject premises based upon his inspection of the elevator on August 14, 2019.

Based upon McPartland's "educational and professional experience and knowledge of the design, operation and maintenance of elevators" it was his opinion that

... within a reasonable degree of engineering certainty, that the elevator work tickets for the period prior to the incident do not reflect any sort of unusual problem with the doors of the subject elevator, their timing, speed, or stall force.

It is further my opinion, within a reasonable degree of engineering certainty that Westech properly maintained the elevator in accordance with industry standards and no failure to maintain the elevator caused or contributed by the subject incident. Westech did not create or have any notice of any defect in the operation or maintenance of the elevator in question prior to the accident alleged in this case.

Affidavit of Plaintiff's Expert, William J. Seymour

In opposition to the motion, plaintiff submitted an expert affidavit of William J. Seymour, a Senior Elevator Consultant and Electrical Engineer at LIR Group, Inc. Seymour is an electrical engineering graduate who has been actively engaged in the elevator field for over thirty (30) years as a technician, engineer, company executive and consultant. He stated he is fully familiar and knowledgeable regarding industry standards and practices as they apply to elevator maintenance, repair and modernization of equipment. Seymour has been qualified in the Supreme Court of New York and other Courts on numerous occasions as an expert to render an opinion regarding the safety of elevators, including but not limited to elevator maintenance, service, repair and modernization of equipment.

Seymour reviewed deposition transcripts, the relevant records provided in discovery, the motion for summary judgment submitted by the defendant Westech, the affidavit of Patrick McPartland, the manual for Elevator Controls Model V-800 ("Specifications for Microprocessor Elevator Controls), the video of the accident, Affirmation in Support of Summary Judgment submitted by defense counsel, ANSI ASME A 17.1 Safety Code for Elevators, and the ADAAG (Americans with Disabilities Act Accessibility Guidelines), 28 CFR part 36 ADA Standards for Accessible design.

Seymour stated that in is his opinion, to a reasonable degree of engineering certainty within his field of expertise that several triable issues of fact exist in this case, including:

- a) The closing of an elevator door equipped with a door detector entrapping a person does not occur in the normal operation of an elevator absence (*sic*) negligence in its maintenance.
- b) The defendants were in exclusive and or shared exclusive control of the elevator.
- c) The defendants had full control over the adjustment of door related timing parameters.
- d) The subject elevator was defective in allowing the door to close immediately on the pressing of an in-car call button.
- e) The subject elevator was not operating within the guidelines set by ADAAG in that it failed to hold the doors open for the minimum required 3 seconds. The subject elevator was consequently, by reference, not in compliance with ANSI/ASME A 17.1 Safety Code for Elevators.

- f) The defendants (*sic*) apparent lack of knowledge of Field Reprogrammable Parameters of the subject elevator must be taken as a lack of sufficient technical knowledge regarding the subject elevator and an indicator of the quality of maintenance and repair that they were providing.
- g) The Plaintiff did not cause or contribute in any manner to the malfunction of the elevator resulting in her injuries.
- h) The defendant Westech's failure to inspect, maintain, repair and adjust the electronic door detector, its component parts, the relevant timing parameters of the door system and the closing speed and force of the door was the proximate cause of the Plaintiff's injuries.
- i) The Plaintiff could not have caused, contributed or prevented the door strike that led to her injuries and that she had a reasonable expectation that the elevator would perform as in her prior experiences and the door would remain open for sufficient time for her to safely. (*sic*).

Contentions of the Parties

Affirmation of Stephen A. Denburg, Esq. in Support of Westech

In his Affirmation in Support of the motion, counsel for Westech seeks summary judgment based upon four grounds. Each ground will be addressed, in turn, as follows:

First, Westech submits that plaintiff cannot establish a *prima facie* case of negligence against it because there is no evidence that Westech created or had actual or constructive notice of the elevator door condition that plaintiff alleges took place at the time of the subject accident. In support of this argument, Westech argues that despite numerous depositions in this action, there has been no testimony or any evidence produced by any party that establishes that Westech created or had either actual or constructive notice of any elevator door problems or malfunctions prior to the subject accident. There is no evidence that plaintiff, or anyone, notified Westech of any problem with the doors of the elevator in the subject premises before the incident. In addition, it is undisputed that the elevator doors did not require any maintenance or repair following the subject accident. Westech cites to its maintenance and repair records which show that there were no incidents of the elevator doors malfunctioning prior to the subject accident. In addition, the building superintendent testified that just after the occurrence he checked to see if the door was working properly and he found no problems with the door protection device at that time.

Westech cites to portions of the maintenance contract providing that the owner of the premises ultimately was responsible for the equipment. Those provisions include that (1) Westech does not assume possession or control of any part of the elevator equipment and that such equipment remains exclusively in the possession or control of the owner or agent thereof; (2) Westech shall not be responsible for the leveling of elevators at landings, accidental application of car safeties, eccentricities in operation of car doors, shaft doors, or their locking devices during the time Westech is not working on the equipment; and (3) upon an incident occurring, the owner/agent or personnel of the building is to shut down the elevator immediately and contact Westech at once and follow up with written notice within forty-eight (48) hours.

Westech submits that the expert affidavit of Patrick J. McPartland, P.E. establishes that there is no evidence in the record of any defect in the operation or maintenance of the elevator.

Second, Westech argues that it had no duty of care to plaintiff at the time of the subject accident. In support of this argument Westech submits that (1) there is no evidence that it failed to comply with its maintenance obligations for the subject premises which caused the condition of the elevator on October 22, 2017 or that it had notice thereof; (2) plaintiff has not claimed or submitted any evidence that she detrimentally relied on Westech's performance of its duties; and (3) Westech's limited contact with Carlshire/RMR did not displace the building owner's duty to maintain the subject premises. The building owner has a non-delegable duty to the plaintiff to keep the premises in a reasonably safe condition. Citing to the McPartland Affidavit, Westech submits it did not install or have any responsibility for the elevator feature that controlled the timing of the elevator door when another floor button is pressed.

Third, Westech submits that the doctrine of *res ipsa loquitur* is not applicable in this case. In order to establish a *prima facie* case of *res ipsa loquitur*, plaintiff must prove that (1) the event would not have ordinarily occurred in the absence of negligence; (2) the event was caused by an agency or instrumentality in the exclusive control of the defendant; and (3) plaintiff did not cause or contribute to the event (*citation omitted*). Westech argues that here, plaintiff cannot assert such an allegation against Westech, because plaintiff has not established that the elevator functioning was in the exclusive control of Westech. Further, Westech submits it is clear that plaintiff's own actions caused and/or contributed to the subject accident.

Finally, Westech argues that all cross-claims against it should be dismissed. In support of this argument, Westech submits that (1) the subject accident was not caused by the negligence of Westech; (2) the elevator contract does not contain any contractual indemnity provision that runs in favor Carlshire or RMR.

Affirmation in Opposition of James E. Romer, Esq. on behalf of co-defendants Carlshire/RMR

Counsel for co-defendants Carlshire Tenants, Inc. and RMR Residential Realty LLC submitted an affirmation in partial opposition to defendant Westech's motion for summary judgment.

In the affirmation, counsel summarizes Westech's arguments in support of its motion that there was no dangerous or hazardous condition of the subject elevator, that the subject elevator functioned as it was supposed to, and that plaintiff's action in pressing a floor button while the elevator door was opening was the cause of her accident. Carlshire/RMR submits that if this court accepts that there was no defective condition of the subject elevator, that it was functioning properly and that plaintiff's own actions caused the subject accident, the court's decision will become "law of the case" and must result with plaintiff's case being dismissed in its entirety, including plaintiff's case against the co-defendants.

Assuming, *arguendo*, that the court finds there is a triable issue of fact as to any defective condition of the subject elevator, Carlshire/RMR submits the court must also find that Westech entered into a full maintenance service agreement with Carlshire/RMR in which Westech contracted to maintain the elevator in a safe operating condition, and that Westech would be subject to liability for failure to use reasonable care to discover and correct a condition which it ought to have found. In the alternative, Carlshire/RMR argues that the court must find that there is a question of fact as to the negligence of Westech to maintain the subject elevator in a safe operating condition, requiring that the motion be denied in its entirety.

Affirmation in Opposition of Michael L. Taub, Esq. on behalf of Plaintiff

Plaintiff opposes the motion on several grounds. First, plaintiff argues that Westech has failed to meet its burden to awarded summary judgment. Plaintiff submits Westech offered only conclusory evidence that it did not have a comprehensive maintenance obligation as to the elevator

at issue. While Westech claims that the maintenance contract was limited in scope, plaintiff submits Westech had a comprehensive maintenance responsibility with respect to the elevator based upon the agreement.

Second, plaintiff submits that while Westech claims a lack of notice of the condition that caused plaintiff's injury, it offers no evidence of a recent inspection of the dwell time feature in order to support its notice argument.

Third, plaintiff argues that Westech has failed to prove that a *res ipsa loquitur* charge is unavailable to plaintiff under these circumstances, because elevator doors are not supposed to close on passengers as they exit the cab. Plaintiff submits that her conduct in pushing the button for the lobby before she exited was not so unusual as to cause this event to occur.

Fourth, plaintiff argues that Westech failed to prove that it is not liable as an outside contractor under the *Espinal* line of cases (see *Legal Analysis/Discussion*, below). Plaintiff argues that Carlshire/RMR were not involved in maintaining the elevator but performed only ministerial acts including cleaning the cab and changing lightbulbs. Plaintiff submits Westech failed to prove that it did not launch an instrument of harm in failing to maintain the elevator in a reasonable manner.

With respect to the remaining defendants, Carlshire and RMR, plaintiff notes that they have not formally moved for summary judgment, but instead have filed an Affirmation in Opposition which seeks summary judgment on a "search the record" argument. Plaintiff points out that Carlshire/RMR's current attorneys did not appear in the action until October 23, 2019, after the time to move for summary judgment had expired. As Carlshire/RMR could not file their own motion, they argue that if the court grants Westech's motion, it must in turn dismiss the case in its entirety. Plaintiff argues that Carlshire/RMR have different roles in the litigation and as the owner of the property, Carlshire/RMR has a non-delegable duty to reasonably maintain it, over and above any duty on the part of Westech. In addition, plaintiff submits she is entitled to put forth a *res ipsa loquitur* charge against Carlshire/RMR so that a jury can infer negligence even without proof of notice.

Legal Analysis/Discussion

A party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of some material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Summary judgment should be granted without hesitation in actions where there is no meritorious cause of action (*Lomnitz v Town of Woodbury*, 81 AD2d 828, 829 [2d Dept 1981]).

A motion for summary judgment should be granted if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212[b]). The purpose of a summary judgment motion is to “expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In searching the record for an issue of fact, the Court is not obligated to ferret out speculative issues in order to force the matter to trial in the hopes that the trial may disclose something that pre-trial proceedings did not (*Andre v Pomeroy*, 35 NY2d at 364). The issues of fact must be bona fide issues raised by evidentiary facts (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). “Mere surmise, suspicion and accusation are insufficient to defeat summary judgment” (*Holy Spirit Ass’n for Unification of World Christianity v Harper and Row, Publishers, Inc.*, 101 Misc.2d 30, 35 [Sup. Ct. New York Cty. 1979]).

Here, Westech has demonstrated entitlement to summary judgment dismissing the complaint and all cross-claims against it as a matter of law.

A review of the evidence demonstrates that plaintiff cannot establish a *prima facie* case of negligence against Westech. To establish a *prima facie* cause of action sounding in *negligence*, plaintiff must establish, *inter alia*, that defendant created a dangerous condition or had actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Gordon v American Museum of Nat. History*, 67 NY2d 836 [1986]; *Mullin v 100 Church, LLC*, 12 AD3d 263, 264 [1st Dept 2004]). In *Gordon, supra*, the Court held that in order to establish

constructive notice of an alleged defect, the alleged defect must (1) be visible and apparent; and (2) exist for a sufficient length of time prior to the accident to permit the defendant time to discover and remedy the defect.

Plaintiff must prove that defendant had notice, whether actual or constructive, of the specific defect that allegedly caused the accident (*Piacquadio*, 84 NY2d at 969; *Simmons v Metropolitan Life Ins. Co.*, 207 AD2d 290 [1st Dept 1994] *aff'd* 84 NY2d 972 [1994]).

It is well settled that “an elevator company which agrees to maintain an elevator in a 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 [1973]). However, the Second Department consistently has held that an elevator service company will not be found liable if there is insufficient evidence that the elevator company had actual or constructive notice of the allegedly defective condition (*see Bastien v Nouveau Elevator Industries, Inc.*, 102 AD3d 643 [2d Dept 2013]; *see also Forde v Vornado Realty Trust*, 89 AD3d 678 [2d Dept 2011]; *Cilinger v Arditi Realty Corp.*, 11 AD3d 880 [2d Dept 2010]; *Lee v City of New York*, 40 AD3d 1048 [2d Dept 2007]; *Farmer v Central Elevator, Inc.*, 225 AD2d 289, 290 [2d Dept 1998]).

Here, there is no evidence that Westech created or had actual or constructive notice of a defective condition with regard to the elevator doors at the time of the subject accident, as follows:

- (1) there has been no testimony or any evidence produced by any party that establishes that Westech created or had either actual or constructive notice of any elevator door problems or malfunctions prior to the subject accident;
- (2) there is no evidence that plaintiff, or anyone, notified Westech of any problem with the doors of the elevator in the subject premises before the accident;
- (3) it is undisputed that the elevator doors did not require any maintenance or repair following the subject accident;
- (4) Westech’s maintenance and repair records show that there were no incidents of the elevator doors malfunctioning prior to the subject accident; and
- (5) the building superintendent testified that just after the occurrence he checked to see if the doors were working properly and he found no problems with the door protection device at that time.

In addition, the supporting affidavit of Patrick J. McPartland, P.E., offers his expert opinion that there is no evidence in the record of any defect in the operation or maintenance of the elevator in question. McPartland stated, in relevant part, that

[a] review of Westech's maintenance and repair records for the subject elevator ... show that there were no prior complaints or incidents involving a malfunction of the elevator doors. Additionally, while the records show that Westech was present at the subject building on various dates in the months prior to the subject incident, it was not present at the time of the alleged incident. Thus, there is no evidence that Westech had notice of any alleged defective condition of the subject elevator doors or that Westech was in charge of the elevator at the time of the alleged incident.

Furthermore, the evidence shows that no call was made to Westech to examine or repair the subject elevator as a result of the alleged incident and the elevator did not require any repair or adjustment following the alleged occurrence. On the day of my site examination, August 14, 2019 ... the infra-red reopening device that was installed on the elevator on the day of the incident was still installed and was functioning properly and the car call button continues to reduce the dwell time when pressed ...

Based upon my educational and professional experience and knowledge of the design, operation and maintenance of elevators, it is my professional opinion, to a reasonable degree of engineering certainty as an expert in the field of operation, maintenance and engineering, that the accident involving plaintiff in this case was not the result of Westech creating or having notice of any elevator defect, or any alleged failure to examine, maintain or repair the subject elevator by Westech.

Moreover, Westech cannot be found to be negligent in the instant action because Westech had no duty of care to plaintiff at the time of the subject accident. The Court of Appeals has held that contractual obligations between two parties will generally not give rise to a duty of care and tort liability to persons outside the contract, except under certain specific circumstances (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140-141 [2002]). These circumstances are the following: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm (i.e., creates an unreasonable risk of harm to others or exacerbates that risk); (2) where the plaintiff detrimentally relies on the continuing

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.*, 98 NY2d at 140).

Here, Westech did not owe plaintiff a duty of care. First, there is no evidence that Westech failed to exercise reasonable care in the performance of its duties, thereby launching a force or instrument of harm. While plaintiff claims that the subject elevator doors did not work properly at the time of the subject accident, there is no evidence that Westech created the alleged condition or had notice of same. In his expert affidavit, Patrick J. McPartland, P.E., stated that

It is my professional opinion, within a reasonable degree of engineering certainty, that the elevator work tickets for the period prior to the incident do not reflect any sort of unusual problem with the doors of the subject elevator, their timing, speed, or stall force.

It is further my opinion, within a reasonable degree of engineering certainty that Westech properly maintained the elevator in accordance with industry standards and no failure to maintain the elevator caused or contributed by the subject incident. Westech did not create or have any notice of any defect in the operation or maintenance of the elevator in question prior to the accident alleged in this case.

In evaluating the second factor, while plaintiff claims that Westech was negligent in the maintenance and repair of the elevator in the subject premises, plaintiff has not claimed or submitted any evidence that she detrimentally relied on Westech's performance of its duties.

Finally, with respect to the third factor, Westech's contract with Carlshire/RMR did not displace the building owner's duty to maintain the subject premises. Indeed, a building owner has a non-delegable duty to the plaintiff to keep the premises in a reasonably safe condition (*see* Multiple Dwelling Law §78; *Mas v Two Bridges Assoc.*, 554 NY2d 680, 687 [1990]; *Vazquez v Diamondrock Hosp. Co.*, 100 AD3d 502 [1st Dept 2012]; *Oxenfeldt v 22 North Forest Ave. Corp.*, 30 AD3d 391 [2d Dept 2006]; *see Fernandez v Otis Elevator Co.*, 4 AD3d 69 [1st Dept 2004]).

Consequently, plaintiff is unable to satisfy any of the three (3) exceptions to the general rule that a party that enters into a contract to render services cannot be held to have a duty of care to a third party, as set forth in *Espinal v Melville Snow Contractors, Inc.*, *supra*.

Westech has established a *prima facie* showing of entitlement to judgment as a matter of law. Accordingly, the burden shifts to the party opposing the motion to produce evidence in

admissible form sufficient to establish the existence of some material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In opposing the motion, plaintiff has failed to establish the existence of a material fact requiring a trial of the action against Westech. Plaintiff asserts that (1) Westech was negligent and owed a legal duty to plaintiff; (2) Westech did not properly maintain and inspect the elevator prior to the date of loss and (3) the doctrine of *res ipsa loquitur* is applicable to the instant matter, and Westech had exclusive control of the elevator and was responsible for anything that took place on the elevator equipment.

Plaintiff relies heavily on the affidavit of her expert, William Seymour. The court notes that Mr. Seymour is not a professional engineer (P.E.) and thus cannot form an opinion "within a reasonable degree of engineering certainty" as he attempts to do. In addition, many of his opinions are conclusory in nature and unsupported by the record.

Mr. Seymour's conclusions are insufficient to overcome the evidence presented by Westech. Seymour was unable to refute that Westech had no actual or constructive notice of a defective condition in the subject elevator or that the elevator was properly maintained. As shown in the deposition testimony cited above, the elevator doors did not require any maintenance or repair following the subject accident. In addition, Westech's maintenance and repair records show that there were no incidents of the elevator doors malfunctioning prior to the subject accident, and the building superintendent testified that that just after the occurrence he checked to see if the doors were working properly, and found no problems with the door protection device at that time.

Plaintiff has failed to establish that a triable issue of fact exists with respect to whether or not Westech owed a duty of care to the plaintiff. It did not. Westech established, by admissible evidence, that it exercised reasonable care in the performance of its duties by responding to service calls from the owner and by conducting regular inspections of the subject elevator. Westech further established that plaintiff did not detrimentally rely upon Westech's continuing performance of its duties, as there is no allegation by plaintiff that such was the case. Finally, Westech established that it did not displace the owner's duty to maintain the premises safely, as described above and as indicated in the maintenance contract between Westech and Carlshire/RMR.

Finally, plaintiff has failed to establish that the doctrine of *res ipsa loquitur* applies in this matter. In order to establish a *prima facie* case of *res ipsa loquitur*, plaintiff must prove three

elements (1) that the event would not have ordinarily occurred in the absence of negligence; (2) that the event was caused by an agency or instrumentality in the exclusive control of the defendant; and (3) that plaintiff did not cause or contribute to the event (*Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 430 [1967]).

Here, plaintiff has failed to establish that the subject accident would not have occurred in the absence of negligence. Plaintiff's actions in pressing a button for another floor as the elevator door was opening overrode the dwell time for the elevator doors. In his affidavit in reply to that of plaintiff's expert Mr. Seymour, Mr. Mc Partland stated that the subject accident can occur on a properly maintained elevator. Moreover, there is no evidence that the elevator door was not functioning properly at the time of the subject accident, as no call was made to Westech to examine or repair the elevator as a result of the subject accident.

Plaintiff has also failed to establish that the subject elevator was in the exclusive control of Westech at the time of plaintiff's accident. The Appellate Division has recognized that an elevator maintenance contract does not include comprehensive assumption of the building owner's safety-related obligations by the elevator maintenance company (*Fernandez v Otis Elevator Co.*, 4 AD3d 69, 73 [1st Dept 2004]). In *Fernandez*, the court recognized that an elevator maintenance company was entitled to summary judgment because it owed no duty of care to the plaintiff under the three-prong analysis first articulated in *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, *supra*. In addition, it is clear that Westech never assumed exclusive ownership or control of the subject elevator as, pursuant to the terms of the maintenance contract, the elevator remained under the ownership and control of the building owner. As such, Westech did not displace Carlshire/RMR's non-delegable duty to maintain the elevator and the premises in a reasonably safe condition.

Finally, the evidence reveals that plaintiff's own voluntary actions caused or contributed to the subject accident. It is undisputed that plaintiff pushed the button for the lobby level before she started to exit the elevator, as confirmed by the security video and plaintiff's admission during her examination before trial. Plaintiff's action in pushing the button for another floor overrode the dwell time and caused the door to close. In contrast, Westech was not present on the date of plaintiff's accident and it is undisputed that Westech was not advised of any prior problems with the elevator doors. Moreover, the door protection device was checked after the incident and was found to be working properly.

For the foregoing reasons, plaintiff has not established entitlement to a *res ipsa loquitur* charge.

The court next turns to Carlshire/RMR's request for the affirmative relief of summary judgment. In their affirmation in opposition to the motion, co-defendants Carlshire/RMR improperly seek summary judgment for themselves and attempt to incorporate and adopt the arguments made by Westech in its motion papers.

Upon review of Carlshire/RMR's submissions, their request for affirmative relief is denied. Carlshire/RMR is not entitled to summary judgment because their application, made for the first and only time in their opposition papers to Westech's motion for summary judgment, is procedurally improper since such relief must be sought in the form of a motion or cross-motion (CPLR 2214, 2215).

Carlshire/RMR failed to timely move for summary judgment. A trial readiness order was filed on August 23, 2019 stating that summary judgment motions were to be served via NYSCEF within 45 days following the filing of the note of issue. Plaintiff's note of issue was filed on August 23, 2019, and, as such, any dispositive motions were to be filed on or before October 7, 2019. As Carlshire/RMR did not file a dispositive motion on or before that date, their application for summary judgment is untimely and must be denied.

Even if the court were to consider Carlshire/RMR's request for summary judgment on the merits, such would have to be denied. Westech's contract with Carlshire/RMR did not displace the building owner and property manager's duty to maintain the subject premises. It is well established that a building owner has a non-delegable duty to the plaintiff to keep the premises in a reasonably safe condition (*Oxenfeldt v 22 North Forest Ave. Corp.*, 30 AD3d 391 [2d Dept 2006]; *Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864, 867 [2d Dept 2011]). Accordingly, it is clear that Carlshire/RMR and Westech are not similarly situated and that co-defendants' attempt to obtain summary judgment must be denied.

Finally, all cross-claims against Westech should be dismissed. There is no valid basis for any cross-claim asserted against Westech. In order to recover on these claims, the other parties to the action would have to show that Westech's negligence, in whole or in part, resulted in them being held responsible for damages awarded to the plaintiff. Based upon the record and the submissions on this motion, there has been no such showing here.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that Westech Elevator Services, Inc.'s motion for summary judgment is granted and the complaint and all cross-claims asserted against it are dismissed; and it is further

ORDERED that to the extent that co-defendants Carlshire Tenants, Inc. and RMR Residential Realty LLC sought the affirmative relief of summary judgment in their affirmation in opposition to the motion, such relief is denied; and it is further

ORDERED that Westech Elevator Services, Inc. shall serve a copy of this decision and order upon all parties with notice of entry within 10 days of entry.

The foregoing shall constitute the decision and order of the court.

Dated: White Plains, New York
April 28, 2020


HON. WILLIAM GIACOMO, J.S.C.