

<b>Booth v Otis El. Co.</b>
2021 NY Slip Op 30273(U)
January 7, 2021
Supreme Court, New York County
Docket Number: 158604/2017
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM**

*Justice*

-----X INDEX NO. 158604/2017

PATRICIA BOOTH, JOHN BOOTH,  
Plaintiff, MOTION DATE 09/28/2020,  
09/28/2020,  
09/28/2020

- v -

MOTION SEQ. NO. 003 004 005

OTIS ELEVATOR COMPANY, TRIBORO ELEVATOR  
CONSULTANTS LLC, MEMORIAL SLOAN-KETTERING  
CANCER CENTER

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 128, 131, 132, 133, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 175, 178, 179, 180, 181, 182, 183

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 129, 130, 134, 135, 136, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 177, 184, 185, 186, 187, 188

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209

were read on this motion to/for MISCELLANEOUS

Upon the foregoing papers, Defendant Otis Elevator Company (Otis) moves for summary judgment dismissing the complaint and cross claims brought against it (motion sequence no. 003). Defendant Memorial Sloane-Kettering Cancer Center (MSKCC) moves for summary judgment dismissing the complaint and cross claims brought against it (motion sequence no. 004). Defendant Otis moves for an order striking, in part or in whole, the affidavit of non-party Kristen Lescinsky (motion sequence no. 005).

In the complaint, plaintiffs allege that plaintiff Patricia A. Booth (Ms. Booth) sustained serious injuries as a result of her encountering closing elevator doors which resulted in her fall. This incident occurred on July 28, 2017 at MSKCC, located at 1276 York Avenue in the County, City and State of New York. As for the cause of her injuries, plaintiffs allege that defendants were liable due to negligence on the part of MSKCC, and negligence and strict liability (design and/or manufacturing defect) on the part of Otis. Plaintiff John M. Booth (Mr. Booth) is suing defendants for loss of consortium.

#### SUMMARY OF FACTS

The complaint alleges as follows: On July 28, 2017, Ms. Booth and her daughter Kristin Lescinsky had visited Mr. Booth at MSKCC. Mr. Booth was a patient at MSKCC at the time. The incident occurred when Ms. Booth and Lescinsky were leaving the hospital. After Lescinsky entered an elevator, she held the “Door Open” elevator button on the elevator panel with her left hand and the elevator door with her right hand in order to allow her mother to enter after her. While entering the elevator, Ms. Booth, who walked with a cane, was contacted by closing elevator doors, which re-opened upon contact with her shoulders. Thereafter, she fell backwards outside the elevator. The intervention of another person prevented her from hitting the floor headfirst.

Among plaintiffs’ arguments for liability are Otis, as the manufacturer of the elevator, is liable for having defective equipment at the time of the incident; and MSKCC is liable for negligence in failing to maintain the premises in a reasonably safe condition, and in failing to repair and/or warn others of a defective elevator. Both defendants are liable for common-law negligence.

Defendants filed cross claims against each other based on indemnification and/or

contribution.

Motion Sequence Nos. 3 and 5

Otis moves for summary judgment dismissing the complaint and MSKCC's cross claims, based on the lack of any issues of fact pertaining to liability. Otis contends that the elevator that it manufactured and sold to MSKCC was not defective or dangerous at the time of the incident. Alternatively, as contracted with MSKCC to maintain the subject elevator, Otis did not create a defect in the elevator or had notice, actual or constructive, of any defect in the elevator prior to the incident. Since it claims not to be liable to plaintiffs, Otis seeks the dismissal of cross claims from MSKCC.

As evidence, Otis submits as follows: the deposition testimony of Ms. Booth; the deposition testimony of Mr. Booth; the deposition testimony of nonparty Lescinsky; the deposition testimony of Otis employee, Danny Smith; the deposition testimony of MSKCC Employee, Fernando Vasquez; the records of elevator callbacks, services and maintenance for a 30-day period prior to the incident; the deposition testimony of Otis employee, Glen Spence; a copy of the elevator video and stills from the video; and the affidavit of Gregory DeCola, an expert witness who investigated the elevator after the incident.

In its affirmation in support of summary judgment, Otis discusses the relevant aspects of the subject elevator in order to assert that the elevator was, at all times, code compliant. The Lambada III Delectronic door re-opening device installed in the elevator provided 56 infrared beams in its 2D crossbeam feature, which was 23 times more than the two beams required under the applicable codes, statutes and regulations in effect at the time of the incident. Otis discusses the installation of the elevator and its component parts, which occurred in 2009-2010, before the time of the incident. According to Otis, between the time of the installation to the time of the

incident, there had been no complaints about the elevator doors or the electronic door reopening device.

Otis contends that another device in the elevator, the 3D feature, was optional and not required by code and statute, and not subject to any violation. Otis argues that the device was not activated at the time of the incident and had no relevance to the functioning of the elevator.

The deposition of Ms. Booth indicates that she had no clear recollection of the incident and the consequences of which she endured. Ms. Booth asserts that she was not aware of any complaint about the functioning of the elevator prior to the incident. She had visited the hospital regularly to see Mr. Booth and had no problems with elevators there, particularly the subject elevator. Mr. Booth's deposition testimony, which concerned his time as a patient at the hospital, also asserts no problems related to the subject elevator.

Lescinsky's deposition is the clearest testimony regarding the incident. She testifies that she had no awareness of any prior problems with the particular elevator. She states the events leading up to her mother's fall, as alleged in the complaint. She states that after entering the elevator, she pressed the door open button with her left hand while holding the elevator door with her right hand. She concludes that upon contact with Ms. Booth, the elevator doors re-opened and Ms. Booth reacted by falling backwards outside of the elevator.

Danny Smith, a mechanic employed by Otis, was deposed. Smith asserts that Otis provided service mechanics on site at MSKCC from Monday through Friday from 7:00 am to midnight, and mechanics were available on call on weekends and after midnight. He performed routine maintenance of the elevators there, including the subject elevator. His last performance was on July 21, 2017, three days prior to the incident. He testifies that he found no problems with the subject elevator, including the electronic door detector. Another Otis mechanic, Glen

Spence testified as to his work at MSKCC. Upon his regular maintenance and inspection work, Spence stated that he found no defects in the subject elevator and claimed not to have been aware of any complaint related to the door opening device prior to the incident.

Fernando Vasquez, designated as the "Supervisor of Elevator Operations" for MSKCC, testified as to his involvement with the incident. Vasquez discussed his knowledge of elevator sensors and their place in the hospital. He testified that he was not aware of any problems with the sensors in any of the MSKCC elevators. He observed that elevator doors would reopen if anything broke the beam of the sensors between the car doors.

Vasquez referred to an ongoing maintenance agreement between the two defendants. Upon being notified of the incident, he told Spence to take the subject elevator out of service for inspection. After Spence conducted the inspection, he notified Vasquez that the elevator was acting properly. Vasquez subsequently placed the elevator back in service. On the following Monday, July 31, 2017, Vasquez told Smith to conduct specific tests on the subject elevator to determine its "torque force." As a result, Smith assured Vasquez of the proper functioning of that elevator upon the conclusion of the tests.

Otis submits a copy of a surveillance video produced by a camera mounted in the subject elevator. About 20 seconds of the incident are shown. The video contains a time stamp on the bottom right hand corner. There are also stills derived from the video which provide the sequence of Lescinsky and Ms. Booth entering the subject elevator.

In sum, Ms. Booth was walking slowly using a cane in her left hand as she approached the subject elevator. Lescinsky anticipated that the elevator doors may begin to close and blocked the beam matrix created by the sensors as she entered. There were two sets of doors, two hoistway doors attached to the building and two car doors attached to the elevator.

Lescinsky then entered the elevator and pushed a button on the panel. She testified that she pressed the Door Open button, although Otis argues that she pressed the first-floor button, which would cause the elevator doors to close. As she pressed the button, the doors began to close, and the hoistway doors came into contact with Ms. Booth before she crossed the threshold and broke the beam matrix. As she lost her balance and tried to catch herself, Ms. Booth's arm crossed the threshold between the hoistway and the car doors, interrupting the matrix and causing the car doors to reopen. No other part of Ms. Booth's body apparently interrupted the beam matrix prior to her arm making contact. Otis contends that since the car doors automatically changed direction and reopened upon Ms. Booth's contact with the matrix, the sensors in the elevator were working properly.

Otis submits an affidavit from its expert Gregory DeCola, an Elevator Agency Director for the New York City Department of Buildings. DeCola affirms that he reviewed and examined the evidence submitted by the parties, including the video. He also examined the subject elevator on behalf of defendants on February 7, 2019. In his affidavit, he discusses the Lambda 2D system in detail, its components and its functioning as a door detection device. He avers that the system in the subject elevator is code compliant, specifically in compliance with the standards of the American Society of Mechanical Engineers. DeCola also avers that there was no evidence of a defect prior to the incident, based on the documentary evidence of elevator maintenance and inspections compiled over a year from the date of the incident.

DeCola also discusses the 3D system, which was inactivated at the time of the incident. He concludes that the arguments that the inactivation of the system could have contributed to the incident are baseless speculation. Based on the video, he concludes that the sensors worked

properly and that it was Lescinsky's conduct on the subject elevator that contributed to the incident.

Otis argues that based on the evidence, there is no evidence of defects with respect to the subject elevator and its components as they complied with the standard codes and guidelines. Otis claims that it had no actual or constructive notice of any defects prior to the incident based on the documentary evidence, the depositions and the affirmations of various individuals involved with the maintenance of the subject elevator. Otis also asserts that the elevator did not malfunction at the time of the incident, and there was no defective condition. Thus, Otis seeks dismissal based on summary judgment grounds. Otis also contends that since it is not liable to plaintiffs, it seeks the dismissal of MSKCC's cross claims brought against it.

MSKCC submits a partial opposition to this motion. MSKCC discusses its maintenance agreement with Otis, in effect at the time of the incident. MSKCC states that the agreement holds that Otis assumes the exclusive maintenance of the subject elevator. While MSKCC is also moving for summary judgment/dismissal from this action, it contends that its cross claims have merit and should not be dismissed. MSKCC argues that, in its motion papers, Otis did not address the legal basis for dismissal of the cross claims. Based on the terms of the agreement, Otis is obligated to procure insurance on MSKCC's behalf, and to indemnify and hold harmless MSKCC from any damages or liability that arises out of Otis's contractual obligations. MSKCC argues that Otis is responsible for the maintenance and repair of MSKCC's elevators, including the subject elevator. Unless Otis is found not liable for the negligence alleged in the complaint, MSKCC contends that it is entitled to maintain its cross claims against Otis.

Plaintiffs oppose the motion and submit an affidavit from Lescinsky and an affidavit from their expert witness, Richard Sena, owner of Murray and Sena, LLC, a company specializing in vertical transportation consultation.

Plaintiffs' opposition raises a number of issues that they claim are material issues of fact: (a) did the subject elevator start to close, despite Lescinsky's pressing the Door Open button on the elevator panel?; (b) did Ms. Booth's body and torso break the 2D beam which allegedly triggered the reopening of the doors?; (c) did the 3D system, as deactivated, contribute to the incident?; (d) was the instrumentality that failed to trigger a reversal of the doors as Ms. Booth entered the elevator subject to *res ipsa loquitor*?; and, (e) did the failure of Otis to notify the New York City Department of Buildings of the incident create an inference of negligence?'

Lescinsky reasserts her eyewitness story and makes a change, explaining that she held the Door Open button with her right hand, instead of her left hand. She also states that she watched the video. She does not address defendants' argument that she pressed a different button on the panel, or that Ms. Booth made contact with the beam with her hand. In his affidavit, Sena states that he examined the evidence, witnessed the video and examined the subject elevator with DeCola on February 7, 2019. He raises issues as to the adequacy of the 2D system at the time of the incident. He also discusses the 3D system, then inactivated, concluding that there is an issue as to whether it should have been operative at the time. Sena asserts that Otis should have been aware of potential defects prior to the incident.

Plaintiffs also raise the doctrine of *res ipsa loquitor*, arguing that an inference of negligence could be found from this incident. This would apparently be based on factors like the nature of the incident, specifically a kind that does not occur in the absence of negligence. Plaintiffs contend that the Court should consider the application of the doctrine to this case.

In reply to MSKCC's opposition, Otis notes that the indemnification provision in the maintenance agreement is only triggered where such claims brought against MSKCC are not a result of MSKCC's acts or omissions. Otis contends that in its motion, it has demonstrated that the incident was not caused by Otis's conduct, and that Otis did not perform any acts or omissions which resulted in any defective or dangerous condition. Otis also argues that in the aforesaid agreement, Otis did not assume exclusive authority over the maintenance of the elevators, and that MSKCC reserved some of the authority. Otis mentions that it accepted MSKCC'S tender under a reservation of rights provision. Based on these factors, Otis argues that MSKCC is not entitled to its cross claims for indemnification/contribution.

Otis replies to plaintiffs with evidence that includes a reply affidavit from DeCola. Otis contends that Lescinsky's affidavit and deposition testimony should be disregarded in their entirety. (Otis subsequently moved for the striking of her affidavit, which is motion sequence no. 005, the matter which will be discussed later in this section). Otis argues that Lescinsky's affidavit in opposition to this motion contradicts the sworn testimony she gave and is essentially a self-serving and inaccurate presentation of the facts. Otis contrasts her evidence with the video and screen prints, which it considers to be more accurate.

Otis contends that Sena's expert affidavit is speculative, conclusory and insufficient to raise a triable issue of fact. According to Otis, Sena: relied on plaintiffs' interpretation of the Video; failed to contradict its position that the subject elevator was code compliant; and failed to show how the activation of the 3D system would have averted the incident.

Otis argues that *res ipsa loquitor* would not be applicable in this case because Otis could not have had exclusive control of the subject elevator, as passengers would have some control over the operation of the elevator.

Otis argues that it was under no duty to comply with the New York City Department of Buildings, pursuant to the Building Code, because it is not the owner or manager of the subject elevator. The code provisions cited by plaintiffs involve reporting certain incidents to the proper City authorities after their occurrence. Otis contends that even if it was under such a duty, the failure to comply would not constitute any evidence or inference of negligence.

After receiving opposition to its summary judgment motion, Otis filed a second motion against plaintiffs, a motion to strike, in part or in whole, Lescinsky's affidavit in opposition to Otis's motion for summary judgment. Otis argues that the affidavit is materially inconsistent with Lescinsky's deposition testimony, and that the affidavit is cumulative, based on hearsay, inflammatory and prejudicial.

Otis cites the differences between the deposition testimony and the subsequent affidavit. In her deposition testimony, Lescinsky testified that upon entering the subject elevator, she placed her right hand over the elevator doors to block them while pressing the Door Open button on the panel with her left hand. In the affidavit, Lescinsky states that she pushed the Door Open button with her right hand. Otis also claims Lescinsky affirmed that the car doors continued to close after Ms. Booth made contact with the matrix beam in the elevator; Lescinsky then held the car doors back to their fully open position. Referring to the video, Otis contends that Lescinsky did not press the Door Open button and did not hold the doors open. Based on the video, Otis argues that the doors automatically reopened upon Ms. Booth's contact with the beam. Otis thus seeks to strike the affidavit.

In opposition to the motion, plaintiffs argue that this is a self-serving attempt to seek relief that is duplicative of the summary judgment motion. Plaintiffs argue that this should not be permitted as it is contrary to procedural law. They also argue that the affidavit is very

important because Lescinsky is the primary witness in this action and her affidavit raises issues of fact pertaining to Otis's alleged liability. Plaintiffs contend that Otis raises the issue of credibility, a matter that is usually a jury issue.

In reply, Otis denies that this current motion is duplicative of the summary judgment motion. Otis reaffirms its position that the affidavit is prejudicial and insufficient to raise any material issues of fact.

The Court shall determine the motion to strike before deciding the motion for summary judgment. Otis argues that this motion is valid because an affidavit that materially contradicts a prior sworn deposition should not be considered as evidence by the court (*see Perez v Mekulovic*; 13 AD3d 158, 158-159 [1<sup>st</sup> Dept 2004]). Otis also contends that the affidavit contradicts the video, is prejudicial and cumulative, and lacks probative value.

Plaintiffs contend that Otis is simply restating its summary judgment motion. Plaintiffs also contend that the affidavit has merit, raises issues of fact and Otis's motion involves a witness's credibility, usually a matter that is decided by a jury (*see LeBlanc v Skinner*, 103 AD3d 202, 212 [2d Dept 2012]).

Upon examining the video, Lescinsky's deposition testimony and her affidavit, the Court concludes that the affidavit is not materially inconsistent with the deposition. Lescinsky affirms almost everything that she previously testified about. In the affirmation, she states that she used her other hand to press the Door Open button. She continues to deny pressing the first floor button, a major issue here. Upon examining the video, one sees proof that she did not hold the elevator doors the way she said she did. The video also shows that Ms. Booth's hand connected with the beam, causing the doors to reopen, while her upper body and head were directed away from the entrance to the elevator.

As for the buttons, the Court cannot confirm whether Lescinsky pressed the Door Open button or the first floor button in the video. This is an underlying issue and Lescinsky is the primary eyewitness in this case. For this reason, the Court will not grant this motion, but will still consider summary judgment with respect to Otis's prior motion.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues” (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). “The substantive law governing a case dictates what facts are material, and ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment ’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [citation and quotation marks omitted]). “To prevail on a summary judgment motion, the moving party must provide evidentiary proof, in admissible form sufficient to warrant the direction of summary judgment in his or her favor” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*id.* at 82).

“A plaintiff alleging injury by a dangerous condition must show that defendant either created the condition, or failed to remedy it, despite actual or constructive notice thereof” (*Haseley v Abels*, 84 AD3d 480, 482 [1s Dept 2011] [internal citation omitted]).

To prove negligence, plaintiff must establish a duty on defendant's part, a breach of that duty, and the breach as the proximate cause of injury to plaintiff (*see Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1<sup>st</sup> Dept 2013]).

“A party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing

the injury. ‘A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product’” (*Speller v Sears, Roebuck, & Co.*, 100 NY2d 38, 41 [2003]).

Plaintiffs’ negligence claim against Otis consists of allegations of a defective elevator or component in the elevator which contributed to Ms. Booth’s injury. The debate centers on the aforesaid 2D system in the subject elevator. In its summary judgment motion, Otis provided an explanation of this system, how it was code compliant at the time of the incident, and that defendants had not received any complaints about the system or the elevator doors regarding the subject elevator prior to the incident. For this, Otis submitted documentary evidence of various inspections of the elevator by its employees over a lengthy period of time, and reports and records indicating a lack of complaints about the 2D system. Otis also submitted deposition testimony from its mechanics and a representative of MSKCC involved with elevator maintenance to demonstrate the lack of any indication of a defective condition prior to the incident.

Otis submitted a copy of the surveillance video which showed the moment of the incident, and an expert affidavit from a specialist which appears to confirm Otis’s argument that the system worked as it should have. The video shows Ms. Booth’s hand contacting the beam matrix of the sensor inside the elevator, triggering an automatic reaction in which the closing car doors reversed and reopened. DeCola, the specialist, affirmed the response as proof of the proper functioning of the 2D system.

Plaintiffs, in opposition, contend that issues of fact preclude dismissal of the negligence claim. There is the argument that Lescinsky’s pushing the Door Open button did not prevent the closing of the doors; that the deactivation of the 3D system, though claimed to be optional, could

have contributed to the incident, and that an inference of res ipsa loquitor could arise from the circumstances alleged by plaintiffs.

With respect to the 3D system, the Court concludes that since the system had been deactivated for a considerable length of time, any effort to ascertain its potential effectiveness remains speculative at most. The proof of the proper functioning of the 2D system has been shown here, and whether the 3D system could have been effective is not relevant.

Res ipsa loquitor is a doctrine which allows an inference of negligence to be drawn from circumstances of the occurrence when plaintiff can establish that (a) the event is of a kind which “ordinarily does not occur in the absence of negligence”, (b) it is “caused by an agency or instrumentality within the exclusive control of the defendant,” and (c) it was not “due to [a] voluntary action or contribution on the part of the plaintiff” (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]).

The Court finds that this doctrine would not be applicable here, where it is apparent that Otis does not have exclusive control over the subject elevator, particularly at the time of the incident. It is obvious that a passenger in such an instrumentality could exert some control or could have brought about an incident independent of defendant’s own acts.

There is an issue as to Lescinsky’s eyewitness evidence. The parties dispute over the button that she pressed after entering the subject elevator. Had she pressed the first-floor button, as asserted by Otis, it was inevitable that the elevator doors would close. Had she pressed the Door Open button, then the doors should not have closed, regardless of the effectiveness of the 2D system.

The Court finds that despite this issue, Otis is entitled to the dismissal of the negligence claim on the ground of lack of notice, actual or constructive, of any defective condition prior to

the incident.

As for the claim that Otis is allegedly in violation of section 3012.1 of the New York City Building Code and section 27-1006 of the New York City Administrative Code, which concerns reporting accidents to City authorities, the Court finds that these provisions apply to the owner or manager of the premises (elevator), which is not Otis, but MSKCC. Moreover, violations of the codes are not indicative of negligence, as alleged here.

The strict liability claim brought against Otis differs somewhat from the negligence claim. It cannot be concluded that strict tort liability imposes liability without fault, albeit plaintiff in such a case need not prove negligence. As the Court stated earlier, strict liability requires proof that the product was defective when it left the hands of the manufacturer, whether the defect consisted of a mistake in manufacturing, a design defect, or the absence or inadequacy of warnings as to the use of the product (*see Rosado v Proctor & Schwartz, Inc.*, 106 AD2d 27, 30 [1st Dept 1984], *affd* 61 NY2d 21 [1985]).

While plaintiffs have not demonstrated that the components of the subject elevator were defective, the issue of which elevator button was pressed by Lescinsky remains unresolved. The Court finds that this issue must be decided before this claim can be dismissed.

Since the negligence claim against Otis has been dismissed, the Court shall dismiss MSKCC's cross claims in indemnification/contribution, as they are based on negligence. Motion Sequence No. 4

MSKCC moves for summary judgment dismissing the complaint and Otis's cross claims against it. MSKCC is allegedly liable for negligence in failing to maintain reasonably safe premises, and for operating a defective elevator which resulted in the serious injuries suffered by Ms. Booth. In its motion, MSKCC submits almost the same evidence that Otis submitted,

including the same deposition testimony, documentary evidence, the surveillance video and party affidavits. The purpose of the evidence is to demonstrate that MSKCC maintained the premises in a reasonably safe condition, that the subject elevator, which is in its possession, was not defective, and even if it was defective, MSKCC had no prior notice, actual and constructive, of any defects.

MSKCC submits an expert affidavit from its own expert, William Meyer, associated with Affiliated Engineering Laboratories, Inc., attesting to examining the evidence submitted by the parties and to inspecting the subject elevator on June 26, 2019. His affidavit provides a detailed explanation of the 2D system and an assessment of the incident. His conclusions are similar to those of Otis's expert, DeCola. Meyer asserts that the 2D system was functioning properly at the time of the incident. He also denies that the deactivation of the 3D system had any effect on the incident. He is critical of plaintiffs' expert, Sena, in that regard. Meyer concludes that MSKCC had no prior notice of any complaints with respect to the subject elevator, that all records indicate a normally functioning elevator, and that the 2D system was not in violation of any code or statute.

MSKCC seeks dismissal of the complaint based on the evidence. MSKCC also seeks dismissal of Otis's cross claims based on a lack of liability.

In partial opposition, Otis argues against the dismissal of its cross claims, using similar arguments that MSKCC used in opposing the dismissal of its cross claims. In opposition, plaintiffs submit the same affidavits from Lescinsky and Sena that were used against Otis to raise the same arguments, including the issue as to the inactivation of the 3D system, the application of res ipsa loquitor, and the Building Code violations.

In negligence actions, a building owner has a duty to maintain its premises in a reasonably safe condition (*see Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). MSKCC has provided sufficient admissible evidence that it did not create or allow a defective condition on the subject elevator. Moreover, the evidence indicates that the 2D system, in effect at the time of the incident, worked properly, as the video shows Ms. Booth's hand contacting the matrix of the 2D system and the car doors reopening as a result. Alternatively, MSKCC has shown that it had no prior notice of a defect.

With respect to *res ipsa loquitor*, the Court finds this doctrine is not applicable because despite its ownership of the subject elevator, MSKCC did not have exclusive control over it, as passengers could have some control over the mechanism. Regarding the Building Code violations, although MSKCC is the owner and manager of the subject elevator, even if it was in violation, this would not be indicative of negligence, since it occurred after the incident.

This Court finds MSKCC is not liable for negligence, and the motion to dismiss the complaint is granted. The cross claims brought against it by Otis are also dismissed, as they are based on negligence.

Accordingly, it is ORDERED that defendant Otis Elevator Company's motion for summary judgment (motion sequence no. 3) is granted as to the negligence cause of action in the complaint and the cross claims, which are dismissed, and is otherwise denied; and it is further

ORDERED that defendant Memorial Sloane-Kettering Cancer Center's motion for summary judgment (motion sequence no. 4) is granted and the complaint and cross claims are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further


ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Otis Elevator Company's motion to strike the affidavit of non-party Kristen Lescinsky is denied (motion sequence no. 5); and it is further

ORDERED that the action is severed and continues as against Otis Elevator Company.

This constitutes the decision and order of the Court.

1/7/2021  
DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE