Porter v Guardsman El. Co., Inc.
2021 NY Slip Op 31170(U)
April 6, 2021
Supreme Court, Kings County
Docket Number: 505805/2018
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of April, 2021.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

---------------------------------------X

Marcela Porter,

Plaintiff,

- against -

Index No. 505805/2018

Guardsman Elevator CO., Inc., Guardsman Elevator Company of New York, Inc., Guardsman Elevator Services, INC., Reliant Realty Services, INC., Grace Towers Housing Development Fund Company, INC., and Omni New York, LLC.,

Defendants.

---------------------------------------X

The following e-filed papers read herein:	NYSCEF Doc Nos.[1]
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	133-134, 136-143, 146-160, 166-171
Opposing Affidavits (Affirmations)	147-160, 167-171, 175-177, 180
Reply Affidavits (Affirmations)	183

Upon the foregoing papers in this personal injury action, defendants Reliant Realty Services, Inc., Grace Towers Housing Development Fund Company, Inc., and Omni New York, LLC (collectively, "RGO") move, in motion (Motion Seq. 7), pursuant to CPLR § 3212, for an order granting them summary judgment against plaintiff, Marcella Porter ("plaintiff" or "Ms. Porter").

Defendant Guardsman Elevator Co., Inc. ("Guardsman") cross-moves (Motion Seq. 8) pursuant to CPLR § 3212, for an order granting it summary judgment dismissing plaintiff's complaint against it with prejudice and dismissing all cross claims asserted against it, and denying RGO defendants' summary judgment motion, dismissing plaintiff' complaint and all cross claims against it.

Plaintiff cross-moves (Motion Seq. 9) pursuant to CPLR § 3212, for an order granting her summary judgment on the issue of liability against defendants, denying RGO defendants' summary

[1] New York State Courts Electronic Filing Document Numbers

judgment motion and denying Guardsman's cross motion.

Background and Procedural History

Plaintiff alleges she was personally injured on July 10, 2017 when she exited an elevator that was not leveled with the floor inside a building owned and managed by RGO, located at 272 Pennsylvania Avenue in Brooklyn. At the time of the accident, RGO and Guardsman were parties to a contract that required Guardsman to routinely service the subject elevator.

On March 22, 2018, plaintiff commenced this action by filing a summons and verified complaint. The complaint alleges that "prior to the happening of the subject accident, defendants had actual and constructive notice of the defective condition thereat" [and] "it was the duty of the defendants, their agents, servants and/or employees to properly manage, provide safety, operate and control the aforesaid location in good condition, free from dangerous, unsafe and unsupervised conditions" (NYSCEF Doc No. 1, complaint at 13, ¶¶ 82-83).

On April 9, 2018, Guardsman served its verified answer addressing the allegations in plaintiff's verified complaint. The answer asserted various affirmative defenses and cross claims, for contribution, common-law and contractual indemnity. RGO's verified answer, served on May 3, 2018, also addressed the allegations in plaintiff's verified complaint and asserted cross claims for contribution and for common-law and contractual indemnity. RGO's answer further denied Guardsman's cross claims. On May 9, 2018, Guardsman filed a stipulation of discontinuance without prejudice that plaintiff signed as to defendants Guardsman Elevator Company of New York, Inc. and Guardsman Elevator Services, Inc.

Discovery and motion practice followed, and plaintiff eventually filed a note of issue (NOI) along with a certificate of readiness on January 14, 2020. The court's August 17, 2020 order denied Guardsman's motion (Motion Seq. 6) to vacate the NOI and extend the time to move for summary judgment with leave to renew before the IAS judge and without prejudice to continued nonparty depositions and other discovery demands (*see* NYSCEF Doc No. 163). The instant motions ensued.

RGO's Motion

Collectively, RGO argues that summary judgment is warranted in their favor, because the instant case lacks merit and there are no material factual issues in dispute. More specifically, RGO contends that plaintiff cannot demonstrate that the landlord created or was on notice of the claimed hazardous condition said to have caused plaintiff's injury. RGO argues that they did not have actual knowledge of any defect and that they duly operated and managed the subject apartment building employing a live-in-super, a property manager, handyman, and three porters, all of whom were present on a daily basis. RGO further argues that they are not liable because they contracted with Guardsman to regularly examine and perform routine preventative maintenance of the elevator, and it

was in Guardsman's discretion when to repair or replace parts of the elevator.

RGO asserts that it is undisputed that prior to the accident the elevator did not mislevel, and, in this regard, RGO makes the point that on the day of the incident plaintiff used the elevator to go down to the lobby about an hour before the incident and used the elevator again without issue to return to her apartment minutes before the incident. RGO maintains that the elevator was working properly when the incident occurred with no signs of mis-leveling or other issues. RGO submits that plaintiff has not demonstrated, as required, that RGO, or any other defendant herein, created a dangerous or defective condition or had actual or constructive notice of such condition. RGO reasons that the absence or lack of complaints, or previous problems with the elevator's leveling, establishes that there was no notice and consequently, no showing of negligence. RGO claims that plaintiff has not set forth any evidence to contradict these factual statements, and therefore, summary judgment in favor of RGO is appropriate.

Guardsman's Cross Motion

Preliminarily, Guardsman seeks leave to file this late motion pursuant to CPLR § 3212 (a) and submits that good cause for the delay in filing exists because the Covid-19 pandemic that commenced on March 19, 2020 halted nonessential proceedings around the time the motion was originally due, on March 24, 2020. Guardsman's counsel avers that he underwent three surgical procedures during the pandemic, that their offices reopened with limited in-office assistance, and because of his age and health condition, he could not return to work in the office until August 6, 2020. Counsel for Guardsman further avers that he had no electrical power for five days because of tropical storm Isaias. Guardsman argues that given these extraordinary circumstances, good cause has been provided for the delay in filing its summary judgment motion.

The court finds that Guardsman has demonstrated good cause for its filing delay and therefore, leave to file its cross motion (Motion Seq. 8) is granted.

In support of the cross motion, Guardsman argues that plaintiff's claims and its co-defendant's cross claims against Guardsman should be dismissed with prejudice. Guardsman contends that RGO's motion should be denied, because Guardsman owed no duty to the plaintiff and further, no evidence has been offered by any party to demonstrate that Guardsman had notice before the incident that the leveling of the elevator was allegedly defective. Guardsman claims that its contract with RGO to service the elevator did not include ensuring that the elevator properly leveled at landings. Guardsman makes the point that the contract specifically excludes the leveling of elevators at landings from their responsibility.

Additionally, Guardsman argues that its contract with RGO to conduct maintenance at the subject building did not create a duty to plaintiff because standing alone, contracts do not give rise to

tort liability in favor of a third party, such as plaintiff herein. Guardsman further argues that it also did not create an unreasonable risk of harm that would trigger the imposition of any such duty to plaintiff. Guardsman also contends it owed no duty to plaintiff because Guardsman did not create or exacerbate the alleged dangerous condition, which, in this case, is the alleged mis-leveling of an elevator within the subject building. Guardsman asserts that it inspected the elevators the month preceding plaintiff's accident, the day of plaintiff's accident, and the month after plaintiff's accident, in accordance with its contract and its ordinary business practices. Guardsman indicates that these inspections and repairs did not concern the leveling of the elevator.

Guardsman also contends that it is not liable because plaintiff did not rely on Guardsman's continued performance under the contract with RGO. Guardsman explains that the plaintiff cannot establish that she detrimentally relied on Guardsman's continued performance of their contractual duties and contends that there is no evidence in the record to the contrary. Guardsman refers to plaintiff's testimony that, while she often observed individuals working on the elevators, she could not identify the workers as either employees of the building or another entity. Ms. Natasha Carter, RGO's agent, testified, according to Guardsman, that RGO remained responsible for ensuring that the elevator worked properly and was safe for tenants' use and that the superintendent and the porters of the building had to ensure daily that the building's elevator was operating safely. Guardsman also argues that its contractual obligations with RGO did not displace the landlords' duty to maintain the building safe from hazards. In further support of this point, Guardsman relies on the deposition testimony of it representative, Mr. Robert Cummins, who averred that the Guardsman/RGO agreement was not a full-service, comprehensive contract. Guardsman maintains that the contract omits any language that obligates Guardsman to assume all safety related obligations to the building.

Further, Guardsman argues that it is not liable for plaintiff's incident, because it was not made aware of an alleged leveling problem at the subject premises. Guardsman contends that liability can not be imposed where an elevator maintenance company is not made aware of an alleged hazard. Guardsman points out that there is evidence in the record that it had no notice of an alleged leveling problem, namely plaintiff's deposition testimony that in her 20 years as a resident she never experienced mis-leveling problems and RGO's agents, whose deposition testimony corroborates plaintiff's averments. Guardsman also argues that its maintenance of the elevator is not the proximate cause of plaintiff's incident. Guardsman submits that the contract did not require inspection for proper leveling and, in fact, specifically excluded responsibility for leveling problems. Lastly, Guardsman maintains that there is no evidence that Guardsman was a wrongdoer; that plaintiff's accident was caused solely by a negligent act or omission attributable to Guardsman; and,

under these circumstances, the indemnity clause in the contract between RGO and Guardsman does not apply. Thus, Guardsman maintains that plaintiff's causes of action against it should be dismissed as well as all of the co-defendant's cross claims.

Alternatively, Guardsman requests that if its cross motion is denied, RGO's motion should also be denied because RGO has a nondelegable duty to maintain the subject elevator in proper working condition. Guardsman highlights the testimony of RGO's representative, that RGO remained responsible for ensuring the proper working condition of the elevator. Guardsman reasons that RGO's nondelegable duty to maintain the elevators means that RGO remained responsible for the proper working of the elevators.

Plaintiff's Cross Motion and Opposition

Plaintiff, in support of her cross motion, argues that she is entitled to summary judgment because the defendants have failed to meet their prima facie burden of showing that they did not have notice of a defect before the incident. Plaintiff asserts that factual questions also exist regarding RGOs' control, negligence in their ownership, operation and maintenance of the subject elevators. Plaintiff further argues that the res ipsa loquitur doctrine applies and bars summary judgment in favor of the defendants, because they had exclusive control of the subject elevator. Moreover, plaintiff asserts that the testimony of Guardsman's agent's, that RGO/Guardsman agreement was not a full service contract creates a factual issue as to the control the defendants had over the elevator.

Next, plaintiff states that summary judgment must be denied to Guardsman because it had exclusive control over the subject elevator along with RGO. Plaintiff asserts that this creates a factual issue whether the res ipsa loqitor doctrine applies as it is asserted that Guardsman was negligent in failing to discover and correct a mis-leveling problem, which it should have found. Plaintiff alleges that Guardsman breached its duty to maintain the leveling system of the subject elevator, failed to provide any records of a maintenance control plan for the subject elevator and also alleges that there is no factual issue as to both defendants' negligence in the ownership, operation and maintenance of the subject elevator. Thus, plaintiff argues that it is entitled to summary judgment against both defendants because the facts show both defendants asserted exclusive control of the subject elevator; plaintiff had no control over the misleveling of the elevator and these types of incidents do not ordinarily occur absent negligence. Moreover, plaintiff argues that Guardsman should have discovered the condition, and it had notice 20 days before the incident that the elevator kept getting stuck.

In opposition to both RGO and Guardsman's respective motions, plaintiff asserts that there is a dispute as to whether the defendants had notice of the misleveling of the elevator, since there had been recent complaints about the elevator malfunctioning and that plaintiff had previously been

unable to open the elevator doors. Plaintiff provides an affidavit from an elevator expert, William Seymour, in which Mr. Seymour stated that he reviewed a recent inspection listing from the New York City Department of Buildings (NYCDOB), which revealed that the subject building failed two prior routine inspections and three "Category 1" inspections, including the inspection that was conducted on the day of the accident. Plaintiff highlights that portion of Mr. Seymour's affidavit, wherein he explained that the inspection listing demonstrates that the elevator was not maintained well and further, Mr. Seymour's statement that it is the building owner's responsibility to ensure the safety of the premises. Plaintiff points out that Mr. Seymour also opined that having an elevator that repeatedly fails to pass inspection shows a breach of this responsibility.

Plaintiff contends that there is evidence that RGO failed to comply with the Building Code. Referring to Mr. Seymour's report, plaintiff states that RGO failed to report her July 10, 2017 incident to the NYCDOB, which had the reciprocal effect of ensuring that a contemporaneous, third-party examination of the elevator did not occur. Plaintiff argues that Mr. Seymour also opined that Guardsman breached its duty of maintaining the elevator's leveling system in proper order by failing to provide records of its maintenance control plan for the subject elevator, which contravenes the American Society of Mechanical Engineers (ASME) Safety Code for Elevators A 17.1, Section 8.6. Relying on Mr. Seymour's opinion, plaintiff also argues that the service contract did not release Guardsman from the duty of maintaining the elevator's leveling system.

Plaintiff concurrently argues that RGO failed to produce evidence tending to show that RGO inspected the subject elevator and what RGO did, if anything, to document reported issues with the elevator's operation. Plaintiff claims that RGO did not produce daily inspection reports to support its contention that there were no prior complaints of the subject elevator's misleveling. Furthermore, plaintiff argues that RGO failed to meet their prima facie burden by not providing a sworn statement from the super as to the *absence* of misleveling by an elevator, since the super is said to be the person who would have received such complaints. Plaintiff points out that the facts in the cases cited by RGO in its motion papers are distinguishable from the facts presented here, because the landlords (in this case) have not produced an expert who inspected the subject condition and determined that there was no defect a day after the incident.

Additionally, plaintiff notes that the testimony of the property manager did not establish whether there were prior complaints since she did not inspect the premises and report problems to Guardsman. Plaintiff argues that RGO had a duty to inform Guardsman of problems with the subject elevator and that such failure was unreasonable. Thus, plaintiff asserts that there is a factual question concerning whether RGO acted negligently by failing to notify Guardsman of prior problems with the elevator. Plaintiff submits that RGO's alleged failure to provide an affidavit from

their superintendent creates a factual question as to whether RGO acted negligently in failing to report complaints to Guardsman about the elevator. Overall, plaintiff states that there are factual questions whether RGO acted reasonably based on evidence that they were aware of prior problems with the elevator. Plaintiff also argues that RGO had a nondelegable duty to keep the elevator reasonably safe for passengers' use, and that there is a factual question whether that duty was breached.

Guardsman Opposition to Plaintiff's Cross Motion

Guardsman, in its opposition to plaintiff's motion, incorporates its legal arguments from its August 14, 2020, Memorandum of Law and reasserts that it did not owe a duty to plaintiff, who is therefore not entitled to summary judgment or the inference of negligence afforded by the res ipsa locquitur doctrine. Guardsman also contends that plaintiff's summary judgment motion should be denied because there are factual issues as to whether the elevator mis-leveling could occur without negligence. Guardsman reiterates that it was not responsible for operational problems about which it had no notice, and it is therefore possible that the subject elevator mis-leveled without Guardsman's mistake or error. Guardsman further argues that plaintiff's expert conflates issues and incorrectly intimated that the absence of a Maintenance Control Plan is equivalent to improper maintenance and a causal factor in the alleged incident. Guardsman makes the same point regarding plaintiff's expert's opinion that maintenance records which are not detailed somehow constitute evidence of improper maintenance that is causally related to plaintiff's accident. Guardsman similarly argues that, although the elevator failed two prior routine inspections and three category 1 inspections, plaintiff's experts fails to acknowledge that it is not common for violations to be issued for elevator systems and further, that the issuance of such violations does not constitute evidence of improper maintenance and is not a causal factor in the alleged incident. Guardsman also highlights the fact that category 1 inspection performed on the day of the alleged incident found no misleveling defect. Consequently, Guardsman contends that there are factual issues regarding whether the elevator mis-leveled without negligence.

Guardsman also asserts that there are factual issues as to whether it exercised exclusive control over the subject elevator. Although Guardsman does not contest that some New York cases recognize that the res ipsa loquitur doctrine may apply where more than one defendant is in position to exercise exclusive control of the elevator, here, Guardsman states that it and its co-defendants, did not exercise exclusive control of the elevator. Instead, Guardsman claims that it never had exclusive control of the elevator, because the contract was not for full service. Guardsman states that leveling of the elevator was not covered by the contract, and, even when Guardsman conducted its monthly maintenance it had no control of the elevator's leveling system. Guardsman claims that its only

involvement with category 1 testing was to schedule it, and that the category 1 test performed on the incident date found no defect related to leveling. Thus, Guardsman contends that the evidence of its exclusive control of the subject elevator on the date of the incident is lacking and requests that plaintiff's summary judgment motion be denied.

RGO's Opposition to Plaintiff's Cross Motion

Contrary to plaintiff's claim, RGO argues that res ipsa loquitor does not apply here because it is unclear if the elevator was even mis-leveled. RGO states that a subsequent inspection revealed no problem with the leveling of the elevator and that no repairs were necessary. RGO further asserts that there were no prior complaints about the leveling of the elevator, not even by plaintiff, and there is no evidence other that plaintiffs testimony that the elevator was mis-leveled. RGO contends that the plaintiff may have simply mis-stepped from the elevator. This type of accident, RGO claims, could have occurred without a negligent act or omission by any of the defendants.

Additionally, RGO contends that the elevator was not in anyone's exclusive control, because visitors and residents frequently used the elevator. According to RGO, the possibility exists that plaintiff could have caused the accident by failing to proceed with caution and falling. Further, RGO argues that even if res ipsa loquitor applies, summary judgment is nonetheless inappropriate as the doctrine serves only to create an inference of negligence for the jury, and the conclusion of negligence is not inescapable in this case. RGO also joins in relying on Guardsman's expert's opinion regarding causation as well as the inaccuracies in his report. Moreover, RGO contends that their summary judgment motion should be granted because plaintiff has failed to effectively rebut its arguments by only highlighting irrelevant facts.

Guardsman's Reply

In its reply, Guardsman states that plaintiff failed to establish that it owed her a duty as there is no evidence that it created a dangerous condition, that plaintiff relied on it or that it displaced RGO's duty to maintain the elevator. Guardsman states that plaintiff does not dispute that it did not create the dangerous condition, that she did not rely on its performance, or that it did not displace RGO's duty to maintain the elevator, as the contract was not a full service one. Guardsman thus argues that it had no duty to plaintiff and that plaintiff has not provided contrary evidence.

Next, Guardsman, argues that res ipsa loquitur does not apply here because it and RGO did not have joint exclusive control over the elevator, and there is no showing that the alleged mis-leveling would not normally occur in the absence of negligence. Guardsman argues that even if it had joint exclusive control over the elevator, res ipsa loquitur does not apply because there is no showing that the alleged mis-leveling ordinarily does not occur in the absence of negligence. Guardsman states that it is possible for the subject elevator to have mis-leveled without its

negligence.

Moreover, Guardsman asserts that there is no evidence that it was negligent in not discovering a leveling problem with the elevator. Guardsman argues it had no duty to inspect the elevator, and, even if it did, there is no showing that problems with mis-leveling could have been discovered. Specifically, Guardsman argues that it had no duty to maintain or inspect the leveling of the elevator and had no notice of any defective condition. Guardsman argues that the contract specifically excluded it from responsibility for the elevator's leveling, that it had never received any complaints concerning mis-leveling, that the property manager was not aware of a history of mis-leveling and no mis-leveling problems were found with the category 1 inspection on the incident day.

Additionally, Guardsman argues that plaintiff's expert's affidavit does not establish that it had a duty to maintain the elevator's leveling, that it breached a duty or that mis-leveling was discovered at the time of service of the elevator. Guardsman also argues that plaintiff's expert affidavit is speculative and does not raise a triable factual issue. Further, Guardsman argues that the failure to produce a maintenance control plan does not establish it was negligent regarding the elevator's leveling, does not mean that it was negligent in its service, that it breached a duty or that it proximately caused the alleged incident. RGO maintains that the absence of a plan, if accurate, is not evidence of improper maintenance and does not establish a causal relationship to the alleged incident. For these reasons, Guardsman submits it is entitled to summary judgment in its favor and dismissal of all claims and cross claims against it.

Plaintiff's Reply

Plaintiff asserts that summary judgment should be granted in her favor against defendants because they all exercised exclusive control over the subject elevator, she had no control over the mis-leveling and mis-leveling does not occur in the absence of negligence. Plaintiff also asserts that RGO fails to raise an issue of fact concerning how the incident occurred because an affidavit from someone with firsthand knowledge is not provided to contradict her. Plaintiff contends that defendants failed to report the incident, that there was no subsequent inspection by an independent expert and, consequently, defendants' proof is deficient. Plaintiff further argues that defendants' assertion that defendants were not in exclusive control of the elevator, as guest and residents used it, is inadmissible because it is not made by an expert. She also contends that defendants' attorney cannot establish that guests or residents caused the elevator to mis-level. Moreover, plaintiff argues that there is no factual question that defendants retained exclusive control over the subject elevator, that the proximate cause of plaintiff's fall was the misleveling of the subject elevator, that defendants knew or should have known of the subject defect and that she did not contribute to the incident. She further argues that defendants are not entitled to summary judgment because they failed to provide

sufficient evidence regarding the elevator's maintenance procedures.

Plaintiff argues that defendants failed to dispute the assertion that evidence of their lack of notice of mis-leveling was insufficient. Plaintiff relies on the lack of an affidavit from the superintendent to argue that defendants have not effectively countered the claim that they lacked notice of the mis-leveling condition. Similarly, plaintiff argues that Guardsman's opposition does not dispute that res ipsa loquitur applies to this case because expert testimony on the issue is not provided to counter plaintiff's expert's opinion. The affidavit of Guardsman's expert, plaintiff argues, is insufficient to counter plaintiff's expert because defendants produced no maintenance care plan. Since they did not provide evidence concerning their maintenance procedures, plaintiff argues that their claim of lack of notice is insufficient. Plaintiff also argues that defendants' opposition is deficient because no documentation was provided of the results of the category 1 inspection allegedly performed on the date of the incident.

Lastly, plaintiff states that RGO's' expert opinion was purely conclusory and based on hearsay concerning the elevator's condition after the accident. Plaintiff contends that the res ipsa loquitur doctrine applies here because mis-leveling does not ordinarily occur in the absence of negligence, the subject elevator's maintenance and internal operation was within RGO and Guardsman's exclusive control, and plaintiff in no way contributed to or caused the accident.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010]). If it is determined that the movant has made such showing, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Gensuale Campanelli & Assoc., P.C.*, 126 AD3d 936, 937 [2d Dept 2015] quoting *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]).

[I]ssue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

A property owner has a nondelegable duty to passengers to maintain its building's elevator in a reasonably safe manner and can be held liable for injury due to a defective elevator where the property owner has actual or constructive notice of the defect or when it fails to notify the elevator company which has the maintenance and repair contract about a known defect (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Hussey v Hilton Worldwide, Inc.*, 164 AD3d 482, 483 [2d Dept 2018]; *Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 [2d Dept 2017]; *Cilinger v Aditi Realty Corp.*, 77 AD3d 880, 882 [2d Dept 2010]).

A defendant property owner moving for summary judgment meets its prima facie burden by negating a single essential element of the cause of action (*see Nunez v Chase Manhattan Bank*, 155 AD3d 641, 643 [2d Dept 2017]). Thus, a defendant owner meets its prima facie burden by demonstrating that it neither created nor had actual or constructive notice of the elevator defect that allegedly caused the accident/incident (*see Hussey*, 164 AD3d at 483-484; *Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2d Dept 2006]). In opposition, a plaintiff may raise a triable issue of fact by submitting affidavits of witnesses who have frequently observed the elevator to mislevel in the months prior to the accident (*see Oxenfeldt*, 30 AD3d at 392), thus creating a question of fact as to whether the plaintiff's injury was caused by the alleged misleveling (*see Ardolaj v Two Broadway Land Co.*, 276 AD2d 264, 265 [1st Dept 2000]).

While an elevator company's contractual obligation, standing alone, generally does not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Dautaj v Alliance Elevator Co.*, 110 AD3d 839, 840 [2d Dept 2013]), "[a]n elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (*Rogers*, 32 NY2d at 559; *see also Hussey*, 164 AD3d at 483-484; *Daconta v Otis El. Co.*, 165 AD3d 753, 753 [2d Dept 2018]; *Goodwin*, 156 AD3d at 766; *Little v Kone, Inc.*, 139 AD3d 678, 679 [2d Dept 2016]). "However, this duty is limited to cases where the elevator company has assumed exclusive control of the elevator at the time of the accident pursuant to contract" (*Kawka v 135-55 35th Realty, LLC*, 139 AD3d 677, 678 [2d Dept 2016]). An elevator contractor may be liable: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[e]s a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140 [citations and internal quotation marks omitted]).

Here, there are considerable facts in dispute that bar summary judgment as to all the parties. The court finds that RGO is not entitled to summary judgment in its favor or to dismissal of

plaintiff's complaint and the cross claims against RGO. By RGO's own admission, there are factual issues as to whether a mis-leveling occurred on the day of plaintiff's accident. Missing from RGO's motion is testimony of the witness, namely, the superintendent, who is responsible for collecting and reporting complaints concerning the elevator's functioning and condition. There is also evidence that RGO was responsible for the elevator's operation and maintenance even though it contracted with Guardsman to maintain the subject elevator. Specifically, there is evidence that the superintendent was responsible for maintaining the elevator, inspecting it for any issues, and collecting reports and complaints about it. Similarly, RGO's porters were responsible for the daily upkeep of the premises including the subject elevator, as Ms. Carter, RGO's agent testified.

The absence of records concerning the maintenance of the elevator, as required by law, and the fact that RGO is unable to establish that mis-leveling was not an ongoing issue also require denial of RGO's motion. RGO failed to produce records concerning the category 1 inspection that occurred at the subject building on the date of the incident and apparently, plaintiff's accident was not reported to the New York City Department of Building, which thwarted a contemporaneous, third-party inspection as provided under the code. It should also be noted that the opinions proffered by the parties' respective experts raised more disputed facts.

Additionally, there is evidence that the RGO defendants either had an ownership interest in the property or acted in a capacity of an agent for the owner and thus, the court finds that the RGO defendants have failed to overcome the principle that real property owners have a duty to keep their property reasonably safe for people foreseeably on the premises (*see Peralta v. Henriquez*, 100 NY2d 139, 144 [2003]; *Cupo v. Karfunkel*, 1 AD3d 48, 51 [2d Dept. 2003]). Of particular relevance here, the Appellate Division Second Department holding, in *Dykes v Starrett City, Inc.*, 74 AD3d 1015, 1016 [2d Dept 2010], where the court recognized that a property owner owes a nondelegable duty to elevator passengers to maintain its building elevator in a reasonably safe manner." The RGO defendants duty to maintain the subject property, including elevator repair, applies despite any contractual delegation of maintenance obligations by the RGO defendants to Guardsman *(see Mas v Two Bridges Assocs.*, 75 NY2d 680 [1990]; *Camaj v East 52nd Partners*, (215 AD2d 150, 151 [1st Dept 1995]).

Further, the court finds that the evidence Guardsman provided in support of its motion does not foreclose the plaintiff's claims. Guardsman has not shown the absence of issues of fact concerning its obligations under the contract. Nor does the evidence proffered by Guardsman show that a duty was not owed to the plaintiff, and it does not negate plaintiff's allegations that Guardsman may have been negligent or contributorily negligent in fulfilling its duties related to the elevator. Indeed, the Appellate Division Second Department in *Roserie v Alexander's Kings Plaza, LLC*, 171

AD3d 822, 823 [2019], quoting the Court of Appeals in *Rogers*, 32 NY2d at 559 has recognized that "[a]n elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found."[2] The court finds that issues of fact exists concerning the scope of Guardsman's duties under the contract, and whether Guardsman adhered to its contractual obligation, properly inspected, and provided preventive maintenance for the subject elevator.

Plaintiff's motion for summary judgment is subject to denial for essentially the same reason. Further, contrary to plaintiff's contention, summary judgment based upon the doctrine of res ipsa loquitur is inappropriate in this case, since there is an issue as to control, exclusive or otherwise. The court also finds that a basic, factual question remains: whether plaintiff mis-stepped or was the subject elevator mis-leveled when plaintiff allegedly tripped and fell.

The court has considered the parties' remaining contentions and finds them unavailing. All relief not expressly addressed herein is denied. Accordingly, it is

ORDERED that the motion (Motion Sequence 7) of Reliant Realty Services, Inc., Grace Towers Housing Development Fund Company, Inc., and Omni New York, LLC for an order granting them summary judgment is denied; and it is further

ORDERED that Guardsman Elevator Co., Inc. cross-motion (Motion Sequence 8) for leave to file and serve its late application for summary judgment and granted; however, the motion itself is denied; and it is further

ORDERED that the cross motion (Motion Sequence 9) filed by plaintiff Marcella for summary judgment on the issue of liability is denied.

This constitutes the decision and order of the court.

E N T E R,

HON. INGRID JOSEPH, J. S. C.

Hon. Ingrid Joseph
Supreme Court Justice

[2] This quotation from the Court of Appeals 1973 *Rogers* decision in the Appellate Division Second Department's 2019 *Roserie* opinion, 17 years after *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002], suggests that the Appellate Division Second Department regards the *Rogers* case as enduring in recognizing a duty to a passenger in an elevator maintenance setting, not needing an *Espinal* analysis, and, in any event, arguably controlling in this jurisdiction.