Jackson v Forest City Jay St. Assoc., L.P.
2021 NY Slip Op 31881(U)
June 4, 2021
Supreme Court, Kings County
Docket Number: 505857/2018
Judge: Debra Silber
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At an IAS Term, Part 9 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 4th day of June, 2021.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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RAYLENE JACKSON,

Plaintiff,

DECISION / ORDER

- against -

Index No. 505857/2018

FOREST CITY JAY STREET ASSOCIATES, L.P., AND, FIRST NEW YORK PARTNERS MANAGEMENT, LLC, AND SCHINDLER ELEVATOR CORPORATION,

Mot. Seq. # 2, 3

Defendants.

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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	32-48, 49-64
Opposing Affidavits (Affirmations)	67-69, 70-71
Reply Affidavits (Affirmations)	74-77, 78, 79-80

Upon the foregoing papers in this personal injury action, defendant Schindler Elevator Corporation (Schindler) moves, in motion sequence (mot. seq.) 2, pursuant to CPLR 3212, for summary judgment in its favor and dismissal of the claims of plaintiff Raylene Jackson and the cross claims of codefendants Forest City Jay Street Associates, L.P. (Forest City) and First New York Partners Management, LLC (First New York)

[1] New York State Courts Electronic Filing Document Numbers.

(together, "building defendants").

Forest City and First New York move, in mot. seq. 3, pursuant to CPLR 3212, for an order granting them summary judgment and dismissing plaintiff's complaint and all cross claims against them with prejudice.[2]

Background and Procedural History

On February 2, 2017, around midnight, plaintiff alleges she was injured when an elevator she took, designated by Schindler as elevator #18, descended faster than normal and came to an abrupt stop at the basement parking level inside One Metrotech Center in Brooklyn. Forest City owns and First New York manages the premises at One Metrotech Center and, at the time of the accident, had an elevator maintenance contract with Schindler. On March 23, 2018, plaintiff commenced this action solely against Forest City and First New York by filing a summons and verified complaint, and, on or about June 26, 2018, plaintiff commenced a separate action solely against Schindler, under Kings County Supreme Court Index Number 513129/2018, by filing another summons and verified complaint. On May 16, 2019, the court consolidated the two actions in deciding mot. seq. 1 in this action. Plaintiff filed a note of issue and certificate of readiness on March 9, 2020 and these motions followed.

Schindler's Summary Judgment Motion

Schindler, in support of its summary judgment motion, mot. seq. 2, acknowledges that a property owner of a premises containing an elevator has a duty to maintain the elevator in a safe and functioning condition. It also recognizes that a property owner,

premises manager, or service contractor may be liable for failing to correct known conditions or failing to use reasonable care to discover and correct conditions it ought to have found. However, Schindler asserts that for a plaintiff to establish a prima facie case of negligence, she must demonstrate actual or constructive notice of the defective condition and the absence of such evidence requires dismissal. Here, Schindler claims it had no notice, either actual or constructive, of any problem that caused the alleged February 2, 2017 malfunction with elevator #18; that it used reasonable care; and that plaintiff cannot demonstrate that Schindler had notice of the defective condition alleged to have caused the accident and her injury.

Schindler relies on plaintiff's deposition testimony that the subject elevator was operating normally the day of, and the day before, the incident, and the testimony of its resident elevator mechanic at One Metrotech Center, Arthur Swaine, Jr., to establish that it had no notice, actual or constructive, of the condition that caused the elevator problem. Swaine recounts that on February 3, 2017, the day after the incident, he received a call about elevator #18, inspected it, and noted that it was "not slowing down properly in the down direction" (NYSCEF Doc No. 42 at 45, lines 3-6 [Swaine tr]). He further testified that he believed the problem was caused by the "slowdown solenoid valve not closing properly." He ordered the necessary parts and, on Monday, February 6, 2017, repaired the elevator and returned it to service. His repair work revealed a defective pin within the valve, not observable through a routine maintenance inspection, because the solenoid valve had to be opened to inspect the subject pin. Schindler therefore maintains that it

[2] However, Forest City and First New York acknowledge that Schindler has not filed any cross claims against them (*see* NYSCEF Doc. No. 50, supporting affirmation of building defendants' counsel at 17, ¶

had no prior notice of the condition that caused plaintiff's alleged accident until after it occurred.

Additionally, Schindler notes that although Swaine testified that the elevator traveled faster than normal before it came to a stop, he also testified that an elevator cannot free fall. Schindler further supports its motion by submitting the results of an annual New York City Building Inspector's category 1 inspection on January 27, 2017, less than a week before the incident, which found elevator #18 to be satisfactory.

Further, the affidavit of engineer Jon Halpern provides an expert opinion to support Schindler's position that the incident was not caused by its negligence. Mr. Halpern reviewed file materials, including pleadings, depositions, Schindler elevator service records, and New York City Department of Buildings (DOB) records, and opines that this incident could occur in a properly maintained elevator; that Schindler had no notice of the defect; that the defect Mr. Swaine identified was not observable with routine maintenance or inspection; that the category 1 inspection of elevator #18 by the DOB inspector, a week before the incident, found the elevator to be satisfactory; and that no failure on Schindler's part caused or contributed to the plaintiff's accident.

The court notes that Schindler seeks, in its notice of motion, to also dismiss the building defendants' crossclaims against it. The building defendants' crossclaims include claims for indemnification and contribution. In its papers in support of its motion (mot. seq. 2), Schindler fails to make any arguments why dismissal of the crossclaims is warranted (in fact, Schindler does not even address the building defendants' claim for indemnification in its papers other than its unsupported conclusion that "any and all of

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the co-defendants' cross-claims" should be dismissed). While the building defendants do not oppose mot. seq. 2, this portion of the motion that seeks to dismiss the crossclaims is denied, without prejudice to renew, given that none of the defendants actually argue or otherwise discuss this request made in Schindler's notice of motion.

Forest City and First New York's Motion

The building defendants argue, in mot. seq. 3, that plaintiff's claims against them should be dismissed with prejudice because no evidence plaintiff provides raises a triable factual issue as to whether they are liable. Specifically, they submit that there is no evidence that shows that they created a dangerous condition, had actual or constructive notice of the defect, or failed to notify Schindler about a known defect. The building defendants claim it is undisputed that they did not create the alleged condition or have actual notice of the specific condition as to elevator #18 before the incident. They assert that all discovery herein confirms that they were never notified of any complaints concerning elevator #18 dropping suddenly, and that the deposition testimony establishes that there was no similar occurrence before the plaintiff's incident. The building defendants highlight that plaintiff admitted that she had never made any complaints, and was unaware of anyone else complaining, about elevator #18. They rely on plaintiff's testimony that she used elevator #18 on the day before the incident, and twice on the day of the incident, without issue. They further argue that controlling precedent necessitates dismissing the claims against them under these circumstances.

Additionally, the building defendants argue that the defective condition was not visible or apparent and did not exist for a sufficient length of time before the incident to

permit them to discover and repair the condition. They also note that Schindler repaired elevator #18 on January 17, 2017, 16 days before plaintiff's incident, and there was no indication at that time that any additional work was required or was performed during those 16 days.

Defendants contend that elevator #18 was at all relevant times maintained in a reasonably safe condition. They acknowledge that a landowner has a duty to maintain its property in a reasonably safe condition, and, to this end, the maintenance contract with Schindler covered elevator #18 on the date of plaintiff's incident. Notably, the contract, according to Stanley Hamilton, property manager for the building defendants at One Metrotech Center since 2006, was a "full service agreement" that "cover[ed] the elevators 24/7" (NYSCEF Doc. No. 57 at 90, line 11; 93, lines 13-17; 26, lines 22-25 [Hamilton tr]) and required Schindler to ensure that the elevators were in good working order at all times, and to perform all necessary inspections, repairs, and replacements. Further, Schindler provided an onsite resident elevator mechanic, Mr. Swaine, who was responsible for ensuring these duties were properly performed. (*id.* at 25, lines 9-23; 28, lines 2-10).

Mr. Hamilton testified that the building defendants would call Schindler if there were any problems with the elevators as he did not have any training regarding elevators and there was nobody else on site with the requisite knowledge at the times when Mr. Swaine was not present. Hence, the building defendants allege that they were not involved with and did not perform any inspections, maintenance, or repairs to the elevators. In this regard, they reference the Building Log entry for the date of the

incident, which shows that the security guard turned the elevator off, putting it out of service, after he was notified of plaintiff's incident and noted that repairs would be made in the morning. Likewise, the building defendants assert that Mr. Swaine's testimony and Schindler's Service Call and Maintenance records show that Schindler was solely responsible for performing all regular elevator maintenance.

Thus, the building defendants argue they had no role in inspecting, maintaining, or repairing elevator #18 and that they relied exclusively on Schindler to perform such duties pursuant to the contract. They ask that, in the alternative, should the complaint not be dismissed as against them (not in the notice of motion but, for the first time, in the last paragraph of counsel's affirmation in support), for summary judgment on their cross claims for common law indemnification from Schindler. They argue that there is no evidence that establishes their negligence, that the undisputed evidence confirms they were not negligent, and that they maintained the premises in a reasonably safe condition.

The court notes that the building defendants do not request summary judgment regarding their crossclaims against Schindler in their notice of motion for mot. seq. 3. However, in the last paragraph of their affirmation in support, the building defendants seek, "[i]n the alternative, . . . summary judgment on their cross-claims seeking common-law indemnification and contribution over and against Schindler." Because this request is not included in the applicable notice of motion, and because the building defendants do not make any arguments concerning their crossclaims, and Schindler doesn't respond to this branch of the building defendants' motion, this branch of the building defendants' motion is denied without prejudice to renewal in a properly noticed motion.

Plaintiff's Opposition to Schindler's Motion

Plaintiff asserts that Schindler has not met its prima facie burden to eliminate all material questions of fact. Specifically, plaintiff contends that Schindler fails to establish that it had no notice of the elevator malfunction before plaintiff's incident because it failed to produce any evidence as to when the elevator parts that allegedly caused the malfunction were last inspected, repaired, or replaced. That is, plaintiff argues that preventative maintenance is required for elevators, and that it negligent to wait for a part to fail before replacing it. In addition, plaintiff maintains that a factual question exists as to whether Schindler caused the malfunction by returning contaminated oil into the tank following a prior repair, and/or by failing to properly maintain the oil filtering system, resulting in dirt and debris entering the valves and causing the valve/pin failure. Further, plaintiff asserts that Schindler fails to prove that the doctrine of res ipsa loquitur does not apply to the facts of this case. Thus, plaintiff contends that defendant Schindler is not entitled to summary judgment.

Plaintiff posits that, under their full-service contract, Schindler failed to perform timely and proper inspections and to replace necessary system components to maintain the proper functioning of elevator #18. The building defendants and Schindler had a comprehensive Elevator Preventative Maintenance Contract, wherein Schindler agreed to be present at the subject premises 40 hours per week, and to perform routine maintenance, inspection and repair of all the building's elevators and their components. Plaintiff asserts that Schindler's limited maintenance records do not show that any routine maintenance or inspection of the solenoid valves or the elevator's oil filtration system

was ever performed.

Plaintiff disputes the conclusions of Schindler's expert, Mr. Halpern, and asserts that her expert, Patrick Carrajat, opines that the DOB's category 1 test does not impose a full load on the elevator and therefore the valve functions are not tested at such an inspection. Plaintiff's expert opines that passing a category 1 inspection does not relieve defendants from their obligations to inspect, clean, and/or replace the solenoid valves and the hydraulic fluid filtration components, and that without such maintenance a satisfactory category 1 test does not guarantee that the elevator will not malfunction a week later. Plaintiff's expert avers that Schindler failed to properly inspect, maintain, and test the solenoid valves and the hydraulic fluid filtration components and, thus, failed to detect the defect. Plaintiff argues that there is a factual question as to whether Schindler had constructive notice of the valve issue before the accident. Plaintiff characterizes Schindler's expert affidavit as conclusory and speculative and argues that it should be disregarded as unsupported by proper evidence. She asserts that Schindler had a duty to discover the defect because it had a full-service contract and it breached such duty. Plaintiff states that Schindler's records do not demonstrate any recorded maintenance visit to the elevator machine room, where the valve at issue is located, except for the January 17, 2017 repair.

Plaintiff argues that Schindler fails to establish that the accident was not caused by its negligence. She notes that valves, like other electromechanical devices, require frequent cleaning, lubrication, examination, adjustment, and repair. She asserts that the slowdown solenoid valve did not receive any documented maintenance in the three

months preceding her accident. She argues that proper maintenance of the valve does not require merely replacing one pin, but rather requires replacement of the entire solenoid valve as preventative maintenance. Further, contrary to Mr. Halpern's opinion**,** plaintiff asserts that the valve pin can be examined for debris or wear by removing the valve's cover and then removing the pin and inspecting it. She argues that his opinion is contradictory in stating that the solenoid pin was not observable while also asserting that upon inspection, Mr. Swaine found a pin that had failed in the down solenoid value.

Plaintiff's expert opines that Schindler not only would have noticed the valve malfunction if it had performed proper preventative maintenance, including periodic valve inspection and replacement, but that Schindler may have contributed to the valve's malfunction by its practice of returning leaked, unfiltered hydraulic fluid back into the tank or by failing to keep the oil filtration system free from dirt and debris. The plaintiff's expert opines that neither valve malfunctions nor incidents of this nature are common with proper preventative maintenance (such as periodic valve inspection and replacement and proper hydraulic fluid filtration system maintenance).

Further, plaintiff argues that Schindler can be held liable under the doctrine of res ipsa loquitur because her injury could not occur in the absence of negligence, her injury was caused by an instrumentality within defendants' exclusive control, and plaintiff did not contribute to her injury. She argues that the res ipsa loquitur doctrine has been applied under identical circumstances and thus warrants denying summary judgment here. She argues that application of the doctrine is supported by her expert's opinion that incidents of this nature are not likely to occur on properly maintained elevators. She

emphasizes that the defendants had exclusive control of the elevator and the defect was not in plain view or accessible to the public. Plaintiff contends she could not have contributed to causing the accident as she simply entered the elevator to go down to the parking lot. Thus, she claims she is entitled to an inference that Schindler was negligent in maintaining elevator #18 under the doctrine.

Plaintiff's Opposition to the Building Defendants' Motion

Plaintiff argues that the building defendants fail to show they lacked notice of elevator #18's malfunction before plaintiff's accident and that they fail to demonstrate they did not cause or create the dangerous condition by timely and properly removing the malfunctioning elevator from service prior to the accident. She argues there is an issue of fact as to whether defendants had actual notice and knew about the elevator having malfunctioned at least an hour before her accident. She notes that the building defendants fail to even argue that the res ipsa loquitur doctrine is inapplicable to this case.

Plaintiff contends that the limited records produced by the building defendants show that there were complaints about the subject elevator's malfunctioning before her accident. The testimony of property manager Hamilton, plaintiff submits, demonstrates that Mr. Hamilton, the building defendants' agent, personally inspected all of the elevators at least once per week to make sure they were clean and ran smoothly, and he also performed a monthly "fireman's test" on the elevators, which included running the elevators up and down. The building log for the date of the accident, maintained by the front desk security personnel, demonstrates that the building defendants were aware of an issue with elevator #18 at least an hour before her accident. Specifically, an entry made

by security guard Timothy Brand at 11:00 p.m., about an hour before the incident, notes that the "garage Elevator to C2 [elevator #18] is unavailable at this time until further notice." There is no explanation provided for this entry; thus, plaintiff argues there is an issue of fact as to whether the building defendants had notice that the elevator had malfunctioned and failed to take it out of service. She asserts that if the subject elevator had been taken out of service, she would not have had her accident an hour later. She contends that the 11:00 p.m. entry in the Building Security Logbook is uncontroverted evidence of the building defendants' actual knowledge that the subject elevator had malfunctioned.

Plaintiff notes that Schindler's work ticket, prepared in connection with the February 6, 2017 repair work it performed after the incident, only mentions that the building defendants had complained that elevator #18 was making "a loud noise" and was "not responding" (*see* NYSCEF Doc. No. 62). The work ticket does not mention the plaintiff's accident or plaintiff's complaint of a "slamming ride," as is noted in the Building Logbook after the accident. The work ticket indicates that the solenoid valves were replaced in connection with the "loud noise" complaint. Plaintiff's expert, Mr. Carrajat, opines that malfunctioning valves may cause a "loud noise" during elevator ascent or descent along with, or prior to, causing changes in the elevator car's deceleration speed.

Additionally, plaintiff argues that the building defendants may be held liable under the res ipsa loquitur doctrine because elevator #18 failed to slow down while descending from the second floor to the garage and then made a hard stop at the basement. She relies

on her expert's opinion that such an incident is not likely to occur with proper elevator maintenance. She also reiterates that the defendants, collectively, exclusively controlled the elevator, as only they had access and control and the defect was inaccessible to the public. Plaintiff again contends that she could not have caused the accident as she simply entered the elevator to retrieve her vehicle from the parking garage. She asserts that the exclusivity factor does not require a single person or entity to be in control of elevator #18, and that it can apply where more than one defendant had exclusive control. Thus, she contends that the building defendants and Schindler may be held jointly liable under the doctrine.

Schindler's Reply

Schindler, in further support of its motion, maintains that it has met its prima facie burden in providing evidence that unequivocally establishes that it had no notice, actual or constructive, of any prior or similar problem with elevator #18. It further asserts there was no observable, foreseeable defect before the incident. Schindler cites plaintiff's testimony that she used the elevator on a daily basis for many years without any problems, and the testimony of its resident technician, Mr. Swaine, that he was not aware of any prior, similar incidents regarding elevator #18 to establish that the accident was unforeseeable. It relies on Mr. Swaine's testimony that the broken pin within the solenoid valve was not observable during the routine inspection of the equipment and that there was no evidence of any defect with this component part either before or on February 3, 2107. Additionally, Schindler relies on the property manager's testimony that he was not aware of any prior or similar problems with free falling, dropping, or

rapid descending of elevator #18 in the 10 years prior to February 3, 2017. Schindler notes that Mr. Hamilton testified that he inspected elevator #18 on at least a weekly basis and never observed any problems similar to what plaintiff described.

Schindler further relies on elevator #18's satisfactory category 1 inspection, conducted by DOB, an independent agency, on January 27, 2017, less than a week before the incident. Schindler also points to the sworn opinion of its engineering expert, Mr. Halpern, that a category 1 inspection would have included observing the operation of elevator #18, a check of its safety features and a review of the maintenance performed. Mr. Halpern concludes that the accident was not due to Schindler's negligence and instead resulted from an unobservable and unanticipated failure of a component part of elevator #18, wholly contained within the solenoid valve, and not observable during routine inspection or maintenance.

Schindler contends that plaintiff concedes that there was no notice of a defect before the incident and, thus, there is no evidence of negligence and therefore res ipsa loquitur does not apply. Rather, Schindler asserts that the cause of the incident was the unobservable failure of a pin contained wholly within the solenoid valve, which could not have been anticipated. It argues that plaintiff's testimony shows that, when elevator #18 came to a stop at the basement level, she did not fall to the floor and no part of her body struck any part of the elevator. She allegedly exited the elevator without assistance and was able to get into her car and drive home. Schindler further claims that the affidavit of plaintiff's expert, Mr. Carrajat, is conclusory, speculative, unsupported by relevant facts, and has no probative value. Mr. Carrajat, Schindler posits, has no personal knowledge of

the relevant facts to rebut the opinions of witnesses who were present and have personal knowledge of the facts.

The Building Defendants' Reply and Sur-reply

In reply, the building defendants argue that there is no evidence that they were negligent, that Schindler was solely responsible for maintaining elevator #18, and the elevator did not have to be taken out of service before the accident. They counter that the security logbook entry which plaintiff references is speculative and does not raise an issue of fact as to whether there were issues with the elevator before the subject incident. They note that the logbook entry states that the elevator was "unavailable" about an hour before the incident and argue that this does not establish that they had notice of, or created, a dangerous condition. They also argue that they were not obligated to take the elevator out of service before the incident as there was no complaint of loud noise, improper deceleration, or abrupt stopping. The building defendants argue that there is no evidence that they were aware of any complaints or issues with the solenoid valves or pins before the incident and that it would have been impossible for them to have had notice of such issues because they exclusively relied on Schindler to handle all elevator maintenance.

Further, they argue that the affidavit of plaintiff's expert, Mr. Carrajat, is speculative and lacks a foundation in that he does not identify the facts that support his opinions, never visited the accident site, and does not account for Schindler's sole responsibility for the maintenance of the elevator.

The building defendants argue, for the first time in their reply, that res ipsa loquitur is unavailable here because Schindler had exclusive control of elevator #18 and performed all of the maintenance. They assert that they had nothing to do with maintaining the elevators and they entirely relied on Schindler for elevator maintenance. They note that plaintiff's pleadings fail to assert that res ipsa loquitur applies and argue that the doctrine is inapplicable because the incident's cause is known. Additionally, they argue that the maintenance contract was comprehensive and establishes Schindler's exclusive control in that Schindler provided a resident mechanic and was solely tasked with correcting any elevator issues. They assert that they are entitled to common law indemnification against Schindler if plaintiff's claims remain. In a sur-reply, they submit a copy of the applicable preventive maintenance contract with Schindler (*see* NYSCEF Doc. No. 80). The court authorized the sur-reply as the contract originally filed pertained to a different building.

Discussion

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material factual issues (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Failure to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062,

1063 [1993]). If the movant makes a prima facie showing, the burden then shifts to the opposing party to establish with admissible proof the existence of a material issue of fact (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

"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] [internal citations and quotation marks omitted]). The court must view the evidence "in the light most favorable to the non-moving party" (*see Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted]). Denial of the motion is required "where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2d Dept 2010] [internal quotation marks and citations omitted]).

The Building Defendants' Motion

A property owner and its manager have a nondelegable duty to visitors to maintain their building's elevator in a reasonably safe condition, and can be held liable for injuries caused by a defective elevator where they have "actual or constructive notice of the defect or when [they] fail[] to notify the elevator company which has the maintenance and repair contract about a known defect" (*Hussey v Hilton Worldwide, Inc.*, 164 AD3d 482, 483 [2d Dept 2018], *lv denied* 32 NY2d 911 [2018], quoting *Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 [2d Dept 2017]; *see also Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2d Dept 2010]). A defendant property owner moving for summary judgment can make its prima facie case by negating an essential element of the

cause of action (*see Nunez v Chase Manhattan Bank*, 155 AD3d 641, 643 [2d Dept 2017]). Thus, a defendant owner can meet its burden by demonstrating that their elevator maintenance company had assumed exclusive control of the elevator and that the owner 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]).

An elevator maintenance 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 El. Co.*, 110 AD3d 839, 840 [2d Dept 2013]); however, "[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 v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *see also Daconta v Otis El. Co.*, 165 AD3d 753, 753 [2d Dept 2018]; *Hussey*, 164 AD3d at 483-484; *Goodwin*, 156 AD3d at 766; *Little v Kone, Inc.*, 139 AD3d 678, 679 [2d Dept 2016]). "[T]his 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]). Such an elevator contractor may be liable where it has entirely displaced the owner's duty to maintain the premises safely (*see Espinal*, 98 NY2d at 140). The building defendants have not established that this was the case here.

Here, the building defendants do not establish their prima facie entitlement to summary judgment by eliminating all material issues of fact as to whether they had notice of, or created, the allegedly dangerous condition. Viewing the evidence in the light most favorable to the plaintiff, the evidence demonstrates that there was some unexplained issue with elevator #18 about one hour prior to the incident. Specifically, the logbook indicates that elevator #18 "is unavailable at this time *until further notice*" (NYSCEF Doc. No. 64 [emphasis added]). Thus, there are issues of fact as to whether the building defendants had actual or constructive notice of the dangerous condition, or whether they breached their nondelegable duty to plaintiff in failing to take the elevator out of service at that time.

They also fail to eliminate all issues of fact as to whether they were responsible for elevator #18's operation and maintenance despite the comprehensive maintenance contract with Schindler. The building defendants' evidence establishes that they employed a property manager, Mr. Hamilton, who was responsible for having the elevators inspected, including elevator #18, at least once a week to ensure their proper operation as well as to conduct/oversee a monthly "firemen's test" that included running the elevators up and down.

As the property owner and manager, the building defendants had a continuing duty to ensure elevator #18 was reasonably free of hazards. It is undisputed that there was a malfunction, new parts were ordered, and the elevator was repaired. They argue that the defective pin was not discoverable in the slowdown solenoid valve that did not close properly; however, their evidence demonstrates that the malfunction was discovered upon

inspection and was fixed. Thus, there are issues of fact as to whether such malfunction was discoverable before the incident with adequate inspection and maintenance and whether the appropriate level of maintenance was provided, as well as whether Schindler had properly performed the inspections, maintenance, and repairs.

The building defendants do not contend until their reply submissions that the doctrine of res ipsa loquitor is inapplicable here. First, the court notes that the building defendants' argument that plaintiff cannot prevail under the doctrine of res ipsa loquitur because she did not raise such a claim in her complaint is without merit. Res ipsa loquitor is an evidentiary theory, not a cause of action (*Martinez v City of New York*, 292 AD2d 349 [2d Dept 2002]). In any event, they do not eliminate all factual issues as to whether they may be liable under that doctrine or demonstrate that the doctrine has no application here. Contrary to their contentions, the defect which caused the incident is known, and they have not established that the injury is of a kind that *does* ordinarily occur in the absence of negligence or that the plaintiff's own voluntary actions caused the incident to occur.

Further, the building defendants' submissions are insufficient to prove that they kept their property reasonably safe (*see Peralta v Henriquez*, 100 NY2d 139, 144 [2003]; *Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept. 2003]). The Court of Appeals has held that the duty of owners to keep their property safe is a nondelegable duty, stating that "[a] landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v. Miller*, 40

NY2d 233, 241 [1976]; *see also Dykes v Starrett City, Inc.,* 74 AD3d 1015, 1016 [2d Dept 2010] [recognizing that a "property owner continues to owe a nondelegable duty to elevator passengers to maintain its buildings' elevators in a reasonably safe manner"]). It is undisputed that the building defendants were the owner and manager of the property. Consequently, ownership duties apply to the building defendants, and their contract with Schindler does not relieve them of their nondelegable duty to keep the premises safe for visitors.

Even if the building defendants had made a prima facie showing of entitlement to summary judgment, plaintiff's expert's affidavit raises triable issues of fact as to whether the building defendants had actual constructive or notice of the dangerous condition, requiring denial of this motion.

Schindler's Motion

Schindler does not meet its burden to demonstrate prima facie entitlement to summary judgment, either. Schindler's submissions do not establish that it lacked actual or constructive notice of, or didn't create, the dangerous condition. Even if the work tickets submitted by Schindler establish that it adequately inspected and maintained the subject elevator, those records and Mr. Swaine's testimony demonstrate that it responded to a service request for elevator #18 about two weeks before the incident when the elevator was taken out of service because it was "not responding." On January 17, 2017, the subject elevator was repaired, and the work ticket indicates that hydraulic fluid was leaking and seven "Victaulic fittings" were replaced. Further, Schindler's evidence does not eliminate all issues of fact as to whether it should have discovered the defective

pin/valve prior to the incident and its records do not show that the malfunctioning valve(s) were ever inspected, serviced, or replaced prior to the plaintiff's incident.

There is no dispute that Schindler's contract with the building defendants was comprehensive for full service, and that the defect and its repair was covered by the contract. Schindler's evidence also fails to eliminate all questions of fact as to whether it exercised reasonable care in maintaining elevator #18 free of hazards. Likewise, Schindler does not establish that the doctrine of res ipsa loquitor is inapplicable here.

In *Roserie v Alexander's Kings Plaza, LLC*, 171 AD3d 822, 823 [2019], quoting the Court of Appeals in *Rogers*, 32 NY2d at 559, the Appellate Division stated 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."[3] Even if Schindler had established prima facie entitlement to summary judgment, plaintiff's submissions – including plaintiff's expert's affidavit – create issues of fact as to whether Schindler adequately performed its contractual responsibilities and used reasonable care in inspecting and maintaining the elevator. Plaintiff's expert further raises issues of fact as to whether Schindler had actual or constructive notice of the dangerous condition, or whether it created the dangerous condition. Specifically, plaintiff's expert opines that the incident may have resulted from a failure to properly

[3] This quotation from the Court of Appeals 1973 *Rogers* decision in the Appellate Division Second Department's 2019 *Roserie* decision, issued 17 years after *Espinal*, 98 NY2d 136 [2002], suggests that the Second Department regards the *Rogers* case as enduring, in that it recognizes a duty to a passenger in an elevator maintenance setting, not needing an *Espinal* analysis, and as arguably controlling in such cases in this jurisdiction.

insufficient to establish that the incident was caused solely by an undetectable pin failure. Among other things, this is supported by the fact that Schindler replaced *multiple* valves, not just the one in which the pin failed, when it repaired the subject elevator after the incident.

Consequently, none of the defendants have established their prima facie entitlement to summary judgment dismissing the complaint as against it as a matter of law.

Accordingly, it is

ORDERED that Schindler's summary judgment motion, mot. seq. 2, seeking an order dismissing the complaint and any cross claims asserted against it, is denied; and it is further

ORDERED that the building defendants' summary judgment motion, mot. seq. 3, seeking an order dismissing plaintiff's complaint as against them, is also denied; and it is further

ORDERED that any other relief requested in either motion is denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.