SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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JUDITH PIROUZ,

Plaintiff,

- v -

1515 BROADWAY OWNER LLC,TRANSEL ELEVATOR & ELECTRONIC INC.

Defendant.

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INDEX NO. 152878/2017

MOTION DATE 03/14/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

This is an action for personal injuries allegedly sustained by plaintiff, on June 12, 2016, at the Minskoff Theater, located at 200 West 45th Street, New York, New York, while exiting, the front of house elevator (Elevator No. 38) which she alleges was misleveled. 1515 Broadway Owner LLC (Owner) was the owner and landlord of the premises at the time of the incident. Transel Elevator & Electronic Inc. (TEI) was the company that maintained and repaired the elevator pursuant to a contract with Owner.

PENDING MOTION

On December 15, 2022, defendants moved for summary judgment. On March 14, 2023, the motion was fully briefed and marked submitted and the court reserved decision. For the reasons stated below, the motion is denied.

ALLEGED FACTS

Plaintiff was employed by the Minskoff Theater as an usher from 2005 through the date of the subject incident on June 12, 2016. Plaintiff was 67 years old at the time of the incident.

The subject incident occurred while plaintiff was at work in the elevator by the ticket takers box office. Plaintiff was leaving the theater as her shift was just ending, at approximately 4:30 pm, when the incident occurred. Plaintiff entered the elevator on the mezzanine floor to go down to the lobby. There was no one else in the elevator. As the elevator approached the lobby, plaintiff alleges its suddenly went up and down. The door opened and plaintiff stepped out and fell.

When she stepped out of the elevator the floor of the lobby was not there. Two ticket takers came to help her while she was on the floor. After she fell, plaintiff saw that the elevator floor was approximately eighteen to twenty inches above the lobby floor. The incident was reported to plaintiff's supervisor soon after it occurred. Plaintiff left the theater and walked directly to Urgent Care where she was diagnosed with a fractured patella.

In 2016 TEI did not maintain an office at the premises, but they typically had employees on site five days a week. Michael Fornito (Fornito), a TEI employee performs weekly maintenance on the elevators which includes visual inspections, cleaning, watching the operation of the elevator to see how it performs and adjusting the equipment if necessary. The weekly maintenance is typically done on a Monday when the theatre is dark.

Fornito received a complaint about mislevling because of plaintiff's accident. Fornito did not take the elevator out of service because he had not been advised that anyone had been injured. The following Monday he inspected the elevator and the equipment and found they

were in good working order. The elevator was being used on that date for construction in the bathrooms.

Fornito testified that the relays on the controller are the mechanisms that permit the elevator to land flush with the ground or the floor when it arrives. Fornito stated this elevator could mis-level or land out-of-alignment with the floor if there were contact failures, a failed or a broken part, relay, or switch. A contact failure means not making contact due to dirt, debris, or normal wear and tear that can cause build-up on the contacts. This elevator is open to the environment meaning it is not a sealed contact so a contact failure could cause the elevator to not level properly.

Fornito testified that if the elevator is not in alignment upon landing and is at least 18 to 20 inches from the ground, the doors would not open, as even if the elevator doors could possibly open, the hall door would never open because it's too far away from the mechanical mechanism to open the door. Fornito stated the elevator floor could not be more than three inches from the ground in either direction or the doors would not open. The last time Fornito checked the operation and maintenance on Elevator No. 38 before June 12, 2016, was on June 6, 2016, at which time there were no issues with the elevator.

In the time frame leading up to the incident, there were two prior complaints about the elevator misleveling, on January 11 and January 28 of 2016. On each occasion, following the repairs, the elevator was placed back into service.

Further, Category 1 and Category 5 testing and inspection was performed on the subject elevator on March 28, 2016, roughly two and a half months before the subject accident occurred. The elevator passed the Category 5 inspection without any deficiencies, but the Category 1

testing noted some deficiencies with Elevator No. 38; however, none of them were related to a leveling issue.

Defendants also submit an expert affidavit pursuant to which the expert opines to a reasonable degree of engineering certainty that no failure to maintain the subject elevator caused or contributed to the subject elevator mis-leveling and that there was not any prior notice of a leveling issue.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to

determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Defendants Have Failed to Meet Their Prima Facie Burden

Based on defendants' own moving papers there were two prior misleveling complaints in regard to the elevator in the January 2016, or within 6 months of the incident. Additionally, the elevator was scheduled for modernization, and TIE was responsible for all inspections and maintenance.

The First Department has found that where a building manager testified that there were prior misleveling complaints, coupled with the defendants' undertaking to perform all inspections and maintenance, the evidence was sufficient for the jury to infer negligence. *Burgess v. Otis Elevator Co.*, 114 A.D.2d 784, 785 (1st Dept. 1985).

In *Dzidowska v. Related Companies, LP*, 157 A.D.3d 447, 447-48, (1st Dept. 2018), the Court found that defendants had notice of a recurring misleveling problem with the elevator based on prior similar incidents shown in the building's logbook and service records. Similarly, here defendants submit evidence of two prior similar incidents of misleveling of the subject elevator.

Defendants here argue that they performed service in response to the prior complaints, however, the Court in *Dzidowska* found that "servicing of the elevator in response to those prior complaints raises an issue of fact as to notice." *Id., see also, Ardolaj v. Two Broadway Land Co.*, 276 A.D.2d 264, 265 (1st Dept. 2000).

Defendants also submit proof that the elevator was required to be replaced as part of a modernization project. In *Dykes v. Starrett City, Inc.*, 74 A.D.3d 1015, 1016, 904 N.Y.S.2d 465, 466 (1st Dept. 2010), defendants summary judgment motion was denied because the subject

elevator was scheduled to be replaced and there were prior complaints of problems with the elevator. The Court in *Dykes* held that negligence in the maintenance of an elevator may be inferred from evidence of prior malfunctions.

Assuming Arguendo the Forgoing Did Not Constitute Notice
The Motion As to TIE would Still be Denied Under Res Ipsa Loquitur

To invoke the doctrine of *res ipsa loquitur*, the event: must be of a kind which ordinarily does not occur in the absence of someone's negligence; and must be caused by an agency or instrumentality within the exclusive control of the defendant; and must not have been due to any voluntary action or contribution on part of the plaintiff. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 (1997). Here, all three factors are present.

Appellate Courts have routinely found that misleveling does not happen in the absence of negligence. In *Gutierrez v. Broad Financial Center*, 84 A.D.3d 648 (1st Dept. 2011), the Court found that the record presented a viable negligence claim under the doctrine of *res ipsa loquitur* because "the alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence" and the defendant had exclusive control over the inspection, maintenance and repair of the subject elevator. As held by the Appellate Division, First Department:

> We have a long established jurisprudence in this Department recognizing that elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur (*see e.g. Gutierrez v. Broad Fin. Ctr., LLC*, 84 A.D.3d at 649, 924 N.Y.S.2d 333 ["the record presents a viable negligence claim as against Schindler under the doctrine of res ipsa loquitur. The alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence"]; *Dubec v. New York City Hous. Auth.*, 39 A.D.3d 410, 412, 834 N.Y.S.2d 165 [1st Dept.2007] [in a case based upon a disputed issue of whether an elevator had misleveled, we held that "[t]he court properly charged the doctrine of res ipsa loquitur" notwithstanding that a retrial was required on other grounds]; *Mogilansky v. 250 Broadway Assoc. Corp.*, 29 A.D.3d 374, 817 N.Y.S.2d 214 [1st Dept.2006] [where motion court improperly granted the defendant summary judgment, the plaintiff should be allowed to develop elevator malfunction case under res ipsa loquitur doctrine]; *Miller v. Schindler El. Corp.*, 308 A.D.2d at 313, 763 N.Y.S.2d 826 [denial of summary judgment dismissing the complaint was upheld based on res ipsa loquitur and the plaintiff's testimony that the elevator malfunctioned when she

> pushed the button to go to the basement, "which testimony must be treated as true on defendant's motion for summary judgment"]; *Ardolaj v. Two Broadway Land Co.*, 276 A.D.2d 264, 714 N.Y.S.2d 12 [1st Dept.2000] [doctrine of res ipsa loquitur available to the plaintiff at trial based on evidence of elevator misleveling]; *Dickman v. Stewart Tenants Corp.*, 221 A.D.2d 158, 633 N.Y.S.2d 35 [1st Dept.1995] [the defendant's negligence for elevator misleveling established through the application of res ipsa loquitur]; *Burgess v. Otis El. Co.*, 114 A.D.2d 784, 786, 495 N.Y.S.2d 376 [1st Dept.1985] [jury verdict for the plaintiff in elevator case upheld under doctrine of res ipsa loquitur because misleveling "was an event of a kind which would not ordinarily occur in the absence of negligence"], affd. 69 N.Y.2d 623, 624, 511 N.Y.S.2d 227, 503 N.E.2d 692 [1986]).

Ezzard v One East River Place Realty Co., LLC 129 AD3d 159, 163 (1st Dept, 2015).

It is undisputed that TIE was responsible for maintenance and service of the elevator and the record is devoid of any evidence that plaintiff did anything to contribute to causing the elevator to mislevel. Based on the foregoing, even in the absence of notice liability could be established at trial as to TIE.

CONCLUSION

WHEREFOR it is hereby:

ORDERED that defendants' motion for summary judgment is denied in its entirety; and it is further

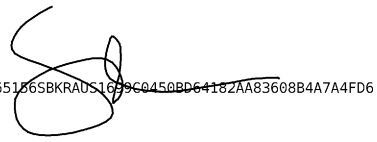
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this court will retain jurisdiction over the trial of this matter and the parties are to appear for a virtual pretrial conference on Monday April 17, 2023 at 2:30 pm at which time the court will set a trial date; and it is further

ORDERED that this constitutes the decision and order of this court.



3/30/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE