

**Escolastico v Rigs Mgt. Co., LLC**

2023 NY Slip Op 31900(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 151960/2017

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. PAUL A. GOETZ **PART** **47**

*Justice*

-----X

ANGELA ESCOLASTICO,  
  
Plaintiff,

- v -

RIGS MANAGEMENT CO., LLC, MILBROOK PROPERTIES,  
LTD, ELTECH INDUSTRIES, INC.,  
  
Defendants.

-----X

RIGS MANAGEMENT CO., LLC, MILBROOK PROPERTIES,  
LTD  
  
Plaintiffs,

-against-

ELTECH INDUSTRIES, INC.

Defendant.

-----X

RIGS MANAGEMENT CO., LLC, MILBROOK PROPERTIES,  
LTD  
  
Plaintiffs,

-against-

GBOLAHAN OKUBADEJO, NEW JERSEY INSTITUTE FOR  
COMPREHENSIVE SPINE CARE, LLC

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 218, 220, 221, 223, 225, 226, 227, 228, 234, 235, 236, 237, 242

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 219, 222, 224, 229, 230, 231, 232, 233, 238, 239, 240, 241

were read on this motion to/for

JUDGMENT - SUMMARY

In this action to recover damages for a personal injury due to an alleged elevator malfunction at 590 West 174th Street, New York, New York 10033 (the building) on January 4, 2017, defendants Rigs Management Co., LLC (Rigs) and Milbrook Properties, LTD (Milbrook) move for summary judgment pursuant to CPLR § 3212 dismissing the complaint and all cross-claims against them as well as granting them conditional summary judgment on their cross-claim against defendant/third-party Eltech Industries, Inc. (Eltech) (Mot Seq No 007). Rigs and Milbrook argue that: (1) there is no evidence that Rigs or Milbrook created or had notice of a defective condition of the elevator; (2) *res ipsa loquitor* doctrine does not apply to the facts of this case although plaintiff did not assert *res ipsa loquitor* in her complaint; (3) the contractual indemnification provision between Milbrook and Eltech is not triggered because plaintiff does not plead *res ipsa loquitor*; (4) Eltech cannot assert common law indemnification against Rigs or Milbrook because Eltech cannot show plaintiff's alleged damages resulted from the negligence of Rigs or Milbrook; and, (5) Eltech owes Rigs and Milbrook common law indemnification by failing to maintain or repair the elevator or its component parts.

Plaintiff opposes the motion by responding that the maintenance service log, plaintiff's previous complaints to management, and her expert's testimony establish triable issues of fact as to whether defendants are liable for negligence and had actual or constructive notice of the defects alleged by plaintiff.

Defendant/third-party defendant Eltech opposes Rigs and Milbrook's motion and moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint and all cross-claims against it as well as granting it summary judgment on its claims for indemnification against Rigs and Milbrook (Mot Seq No 008). Eltech argues that: (1) there is no evidence that Eltech created or had notice of a defective condition of the elevator; (2) Eltech did not owe any duty of care to

the plaintiff; (3) *res ipsa loquitor* does not apply to the facts of this case although plaintiff did not assert *res ipsa loquitor* in her complaint; (4) Eltech is entitled to contractual indemnification from Rigs and Milbrook because the indemnification clause in their contract is triggered; and (5) all cross-claims and third-party claims against Eltech should be dismissed because the incident was not caused by the negligence of Eltech.

Plaintiff, Rigs, and Milbrook oppose the motion with the same reasoning proffered in Rigs and Milbrook's motion for summary judgment.

The motions are consolidated for disposition.

### **BACKGROUND**

Plaintiff Angela Escolastico, a tenant of the building, alleges that on January 4, 2017, she was injured while riding in the building's elevator (Plaintiff EBT, pp 25, 81-82, NYSCEF Doc No 171). At her first deposition, plaintiff described the incident as follows: "When I entered [the elevator], I punched the button number six. I felt like it went up a few floors, and then after that it stopped and then it did not move anymore. . . . It felt like it hit something, and then I was scared and began to cry" (*id.* at pp 92-93). Plaintiff added that when the elevator stopped, "because of a hard knock [she] fell down hard . . . on [her] knees" (*id.* at pp 96-97). After about ten to fifteen minutes, the elevator began to descend until it came to a sudden stop, allegedly "thr[owing plaintiff] to all different sides" against the elevator wall, causing her to hit her back and right shoulder (*id.* at p 106). At her second deposition, plaintiff recalled having a panic attack as the incident occurred and hitting her back, arm, and knee as the elevator came to a stop (*id.* at pp 173-74). Plaintiff also admitted to banging on the elevator door with either her fist or open hand (*id.* at p 202).

Eduart Betances, the superintendent of the building, testified that in the course of his work day he rides the elevator four or five times (Betances EBT, pp 15-16, 91, NYSCEF Doc No 172). He said that he never had an issue with the elevator dropping or falling, nor had he received complaints from tenants regarding such conditions with the elevator (*id.* at pp 163-64). He did recall a time the elevator got stuck between floors but stated that it occurred more than five years before plaintiff's incident (*id.* at p 82). On the date of plaintiff's incident, Betances was in the basement when he heard plaintiff calling out that she was stuck in the elevator and wanted the doors opened quickly (*id.* at pp 96-97). He heard the elevator alarm ringing as well (*id.* at p 103). When he went up to the lobby, Betances attempted, but could not open the exterior door (*id.* at pp 99-100). He could, however, see through the elevator window in the exterior door that the elevator car was at the lobby level and was not moving (*id.* at pp 152-53). When the Fire Department arrived and opened the elevator door using a special key, Betances testified that he saw plaintiff standing upright and still, not bleeding, crying, or appearing to be injured (*id.* at pp 110-13, 155-56). But once the doors opened, she threw herself onto the ground (*id.* at pp 112-13). Betances told Noelia Villacis, a maintenance coordinator for Milbrook, about the incident and was informed that the elevator maintenance company came that same day to check on the elevator and reportedly found no problem (*id.* at pp 114, 159-61). Villacis testified that she did not recall receiving any complaints involving the elevator dropping or shaking (Villacis EBT, pp 35-36, 58, 73-74, NYSCEF Doc No 173).

John Parvis, the field supervisor in the maintenance department of Eltech, the building's elevator maintenance company, testified that he assists mechanics with troubleshooting and was at the building two times prior to plaintiff's incident to replace the elevator drive (Parvis EBT, p 10-13, 22, 28 NYSCEF Doc No 174). The first time was in June 2016 and Parvis could not recall

the second time (*id.*). Rigoberto Castro, a former elevator mechanic for Eltech, testified that the elevator is a very slow one with a governor, which prevents the elevator from over-speeding (Castro EBT, pp 11-12, 157-58, NYSCEF Doc No 175). If the elevator began to over-speed, the governor would trip (*id.* at p 160). Castro testified that he never saw the governor trip and never had to reset it (*id.*).

Monthly maintenance records kept by Eltech show a couple references to issues with the door locks and do not mention any issues with over-speeding or sudden stops (NYSCEF Doc No 179).

### DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion 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.’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action.” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility.” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be

examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

#### *Notice / Impossibility*

Rigs, Milbrook, and Eltech seek summary judgment to dismiss plaintiff’s claims as against them on two grounds: (1) their liability cannot be established since they had no actual or constructive notice of a defect; and (2) it is impossible for the elevator to malfunction in the way described by plaintiff. Plaintiff responds that the maintenance service log for the elevator detailing shaking and jumping prior to plaintiff’s incident, plaintiff’s previous complaints to management about the elevator, and her expert’s testimony establish triable issues of fact as to whether defendants are liable for negligence and had actual or constructive notice of the shaking, over-speeding, and sudden stopping as alleged by plaintiff.

Rigs and Milbrook submitted an expert affidavit from Patrick J. McPartland, P.E., an electrical engineer and President of PM Engineering PLLC with a B.S. in electrical engineering from Polytechnic University, a license as a Professional Engineer in New York since 1997, and a certified private elevator inspector by both the City of New York and the American Society of Mechanical Engineers (McPartland Aff, NYSCEF Doc No 182, ¶ 1, pp 8-10).

McPartland states that “there is no set of variables that would have resulted in the elevator malfunctioning as plaintiff describes” (*id.* at ¶ 10). He elaborates that over-speeding in the way described by plaintiff is impossible because the elevator’s governor would trip and cause it to slow down (*id.* at ¶ 11). If the elevator over-spiced in the manner as claimed by plaintiff then

its' governor would have engaged resulting in the elevator descending at a normal speed to the lobby floor" (*id.* at ¶ 12). Nor could the elevator "move from side to side as there are no forces that can cause it to move sideways" (*id.*). Additionally, McPartland's review of Eltech's maintenance records found no indication of any "over-speeding, shaking, falling or bouncing" events of the elevator prior to the incident (*id.* at ¶ 13). Though McPartland acknowledges that the maintenance records do include a problem with the door lock on October 13, 2016, he opines "that this type of problem with the door locks can and does routinely occur in the absence of negligence on behalf of the building owner or manager" (*id.* at ¶¶ 14-15).

Eltech submitted an expert affidavit from Jon B. Halpern, P.E., an electrical engineer with a B.S. in electrical engineering from George Washington University and a M.S. in electrical engineering from Columbia University (Halpern Aff, ¶ 1, NYSCEF Doc No 235). Halpern concludes that since "the governor did not have to be re-set" following the incident, the elevator, therefore, "did not drop, fall or even over[-]speed" (*id.* at ¶ 16). Rather, "at the time of the incident, the elevator stopped in a safe and expeditious manner by removing power from the driving motor and brake in accordance with safety code" (*id.* at ¶ 17).

Plaintiff submitted an affidavit from Patrick A. Carrajat, who describes himself as an "elevator consultant" with a B.A. in History/Speech and M.A. in Constitutional Law from Long Island University (Carrajat Aff, pp 12-15, NYSCEF Doc No 226). Carrajat's only proffered credentials are previously "testif[y]ing] as an expert witness 120 times" in court and working as an elevator mechanic's helper during the summers of 1961 to 1963 (*id.* at p 14). Carrajat states that there is no allegation the governor was involved in this incident and that the "abrupt stop was caused by the elevator striking the roller lever on the 2<sup>nd</sup> or 3<sup>rd</sup> floor interlock causing an opening of the safety circuit" (*id.* at p 7). He also mentions that "[a]ll elevators are capable of

over-speeding and the governor does not slow the elevator, it brings it to an abrupt, uncontrolled stop” (*id.* at p 9). Carrajat also mentions that elevator bouncing can and does occur for various reasons, including the possibility of a drive issue (NYSCEF Doc No 240, p 8). Carrajat concludes that the “description of the [in]cident by the [p]laintiff is consistent with an abrupt, unanticipated stop when a part of the elevator, most likely the cam used to activate the interlocks struck an interlock release lever. . . . When the release roller returns to its normal position the elevator will resume operation without any outside intervention” (*id.* at ¶ 15).

“While issues of credibility are, except in rare cases, for the finder of fact to resolve, [a court] may find testimony to be utterly incredible as a matter of law when it is manifestly untrue, physically impossible, or contrary to common experience, and such testimony should be disregarded as being without evidentiary value.” (*Price v City of New York*, 172 AD3d 625, 629 [1st Dept 2019] [internal quotations and citations omitted]). Additionally, “fail[ing] to show a hypothesis from which a finding of negligence may be drawn, is, in the circumstances, fatal.” (*Williams v Port Auth. of New York & New Jersey*, 247 AD2d 296, 297 [1st Dept 1998]).

Here, Rigs, Milbrook, and Eltech have established, *prima facie*, that the elevator did not and could not have operated in the manner as alleged by plaintiff on January 4, 2017. McPartland and Halpern produced sufficient evidentiary support that if the elevator over-spied in the manner as claimed by plaintiff then its’ governor would have engaged resulting in the elevator descending at a normal speed to the lobby floor (NYSCEF Doc No 182, ¶¶ 11-12; NYSCEF Doc No 235, ¶¶ 15-17). Though Carrajat opines on his own version of the incidents his version does not merit consideration because of Carrajat’s lack of the necessary credentials to testify as an expert witness (*see Schechter v. 3320 Holding LLC*, 64 AD3d 446, 449-50 [1st Dept 2009], citing *Matott v Ward*, 48 NY2d 455, 459 [1979] [“For a witness to be qualified as an expert, the

witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable.”]). As in *Schechter v 3320 Holding LLC*, Carrajat’s affidavit “does not demonstrate that he is familiar with the laws, rules, regulations, and accepted customs and practices in the field of elevator maintenance” (*id.* at 450). Because plaintiff failed to demonstrate that Carrajat “is qualified to render a reliable opinion regarding the cause of the” alleged elevator defects, plaintiff “failed to raise a triable issue of fact with respect to the issue of” defendants’ alleged negligence (*id.*; see *Sarasky v Law Enf’t Training & Consulting Servs., Inc.*, 108 AD3d 401, 402 [1st Dept 2013] [“The expert affidavit submitted by plaintiff is not sufficient to raise an issue regarding” defendant’s negligence because “[t]he expert failed to elaborate on his experience or provide any information establishing that he is qualified to opine on this issue.”]; see also *Orr v Vornado Realty, L.P.*, 2022 WL 17633016, 2022 NY Slip Op 34204[U] [SC NY Co 2022]).

Even if plaintiff had made such a showing and Carrajat’s opinions were considered they still do not rebut Rigs’, Milbrook’s, and Eltech’s *prima facie* showing. There is no mention of the elevator dropping or suddenly stopping in the maintenance records (*see* NYSCEF Doc No 179), Betances testified he had not experienced nor received any complaints regarding such conditions prior to the incident (*see* NYSCEF Doc No 172, pp 163-64), and plaintiff’s testimony on its own does not sufficiently meet her burden as it is contradictory and not entirely clear as to how exactly she was injured (*see* NYSCEF Doc No 171).

Accordingly, based on McPartland’s affidavit, Halpern’s affidavit, and plaintiff’s failure to rebut defendants’ *prima facie* showing, summary judgment must be granted in favor of Rigs, Milbrook, and Eltech dismissing plaintiff’s claims as against them.

### *Indemnification*

Since plaintiff's claims as against Rigs, Milbrook, and Eltech will be dismissed, the motions of Rigs, Milbrook, and Eltech for summary judgment, pursuant to CPLR § 3212, seeking contractual and common-law indemnification from one another will be denied.

Based on the foregoing, it is hereby

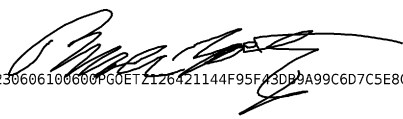
ORDERED that defendant Rigs' and Milbrook's motion for summary judgment dismissing the complaint as against them (Mot Seq No 007) is granted; and it is further

ORDERED that Rigs' and Milbrook's motion for summary judgment seeking indemnification as against Eltech (Mot Seq No 007) is denied; and it is further

ORDERED that defendant Eltech's motion for summary judgment dismissing the complaint as against it (Mot Seq No 008) is granted; and it is further

ORDERED that defendant Eltech's motion for summary judgment seeking indemnification as against Rigs and Milbrook (Mot Seq No 008) is denied; and it is further

ORDERED that the complaint, all cross-claims, and third-party claims are dismissed as against defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

  
20230606100600PG0ET2126421144F95F43D9A99C6D7C5E8C4BC

6/6/2023  
DATE

\_\_\_\_\_  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE