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 17th day of April, 2024.

P R E S E N T:

HON. INGRID JOSEPH
Justice.

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GILBERT ALEMAN,

Plaintiff,

-against-

Index No.: 514908/2018

NORMAN 268 REALTY, LLC, BROADWAY STUDIO ANTHONY ARGENTO d/b/a BROADWAY STUDIO, BROADWAY STAGES, LTD., MESQUITE PRODUCTIONS, INC., and EASTERN ELEVATOR COMPANY, INC.,

DECISION & ORDER

Defendants.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	81-98,99-121,144-165,166-184
Opposing Affidavits (Affirmations)	185-186,187-194,195-202,203-210,211-218,219-221,226-230, 231-232
Affidavits/ Affirmations in Reply	237-238,239-242,243-246,247-248,250-251

Upon the foregoing papers, defendants Eastern Elevator Company, Inc. (Eastern), Mesquite Productions, Inc. (Mesquite) and Norman 268 Realty, LLC (Norman) each separately moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and any and all cross-claims as asserted against each defendant under motion sequence 2, 3 and 4, respectively. Norman also moves, under mot. seq. 4, for an order, pursuant to CPLR 3212, granting summary judgment in its favor under its contractual and common-law indemnification cross-claims against defendants Broadway Studio (Studio), Broadway Stages, Ltd. (Stages), Mesquite, and Eastern. Finally, defendants Studio, Anthony Argento d/b/a

Broadway Studio (Mr. Argento), and Stages (collectively, Broadway defendants) move, in mot. seq. 5, for an order granting summary judgment dismissing plaintiff's complaint and any and all cross-claims asserted against them.[1]

On October 6, 2016, plaintiff Gilbert Aleman sustained various injuries while riding in a freight elevator in a building located at 268 Norman Avenue in Brooklyn, New York (the building). The building was owned by Norman and leased to Stages. Stages, in turn, subleased a portion of the building to Mesquite pursuant to a rental agreement. On or about July 1, 2016, Stages and Norman entered into a written maintenance agreement with Eastern whereby Eastern agreed to maintain and service elevators in the building. At his deposition, Mr. Argento, a principal of Stages, testified that Eastern would inspect the elevators in the building on a monthly basis and would also make any necessary repairs if contacted by him. At the time of the accident, plaintiff was employed by non-party Entertainment Partners (EP), which was a "payroll company" that provided payroll services and Workers' Compensation administration to individuals working in the entertainment industry, including television series production. Prior to the accident, plaintiff and several other EP employees were hired out of their union hall by Mesquite to work as the wardrobe crew/costumers on a television streaming series that Mesquite was producing known as "Sneaky Pete" (the series). Among these individuals was Tom Stokes, who supervised plaintiff and the rest of the wardrobe crew working on the series.

On the day of the accident, plaintiff was assigned the task of transporting wheeled racks of costumes from a truck outside the building to the second floor of the premises, where the costumes were unloaded and placed in storage containers by other members of the wardrobe crew. According to plaintiff's affidavit, he used the building's passenger elevator while transporting the racks to the second floor. At the time of the accident, plaintiff wheeled three empty racks into a freight elevator on the second floor of the building with the intention of taking the racks up to the third floor. The freight elevator in question had manually operated doors comprised of counterbalanced lower and upper panels that moved in unison when the doors were closed whereby the lower panel rose and the upper panel descended until the two panels met in the center. According to plaintiff, after he moved the empty racks onto the elevator, he attempted to close the doors by grabbing a metal handle on the outside of the upper door panel with his right hand and

[1] Mr. Argento manages Stages and owns Studio. At his deposition, Mr. Argento testified that Studio is no longer an active corporation.

pulling down while holding his left arm and hand at his side. Plaintiff testified that as he pulled down on the top panel, "the bottom door sprung up unexpectedly and crushed my [left index finger]" between the top and bottom panels of the door when they met in the center. When asked how it was that his left index finger became caught between the two door panels as he pulled down on the top panel with his right hand, plaintiff testified: "I don't know. It got caught on that door that came up from the bottom. It is a small tight elevator, and three racks inside. I was close to that door."

In his affidavit, plaintiff states that while he had consistently used the passenger elevator during his work in the building, he had never used, or been given any instructions on the operation of, the freight elevator prior to the time of the accident. Plaintiff further states in his affidavit that the only handle on the elevator was the one he grabbed with his right hand on the outside of the top door panel and that there was no strap or other device, either inside or outside of the elevator, that could have been used to close the doors.[2]

During his deposition, Mr. Stokes was asked if there were any problems with the doors of the freight elevator, to which he responded "[t]hey seemed to be weighted weirdly, like they closed very quickly, like they were off weight." Mr. Stokes also testified that this condition existed prior to the accident date. Furthermore, in contrast to plaintiff, Mr. Stokes testified that members of the wardrobe crew, including plaintiff, used the freight elevator on numerous occasions prior to the accident and only used the passenger elevator if the freight elevator was out of service. However, David Acosta, who was employed by Studio as the building superintendent, and Mr. Argento both testified that tenants were not permitted to use the freight elevator and if the freight elevator was needed by a tenant, Mr. Acosta would operate the elevator. Mr. Stokes further testified that there was a strap attached to the inside of the top door panel that was used to close the doors of the freight elevator. Similarly, Mr. Acosta testified that there was a 32 inch-long canvass strap affixed to the inside top door panel that could be used to close the doors from inside the elevator. In addition, Frank DiTomasso, who is one of Eastern's owners and a mechanic who serviced the subject freight elevator, testified that there was a canvas strap attached to the inside of the top door panel which was pulled in order to close the doors.

[2] Plaintiff was not directly asked during his deposition if he had used the freight elevator prior to the accident or whether there was a strap inside or outside the elevator that could be used to close the doors.

By summons and complaint dated July 16, 2018, plaintiff commenced the instant action against Norman, the Broadway defendants, Eastern, and Mesquite alleging that the injuries he sustained in the freight elevator were caused by their negligence. The complaint also stated that plaintiff was relying upon the doctrine of res ipsa loquitur. Thereafter, the defendants interposed answers in which they asserted various cross-claims against each other. Discovery is now complete and the instant motions are before the court.

Mesquite moves for, among other things, summary judgment dismissing plaintiff's claims against it. In so-moving, Mesquite maintains that it was plaintiff's special employer and, as such, plaintiff's claims against it are barred by the exclusive remedy provisions set forth in Workers' Compensation Law §§ 11 and 29 (6). Mesquite contends that plaintiff's general employer EP merely provided payroll support services for plaintiff and paid his Workers' Compensation insurance premiums. Mesquite also maintains that it supervised and controlled all aspects of plaintiff's work, as well as the work of all of the other EP employees while they worked on the series. In support of these contentions, Mesquite submits an affidavit by Richard Morgan, EP's Director for Workers' Compensation. Among other things, Mr. Morgan states that EP's production company clients (such as Mesquite) select the EP employees that they desire to work for them and set all their pay rates, schedules, work hours and duty assignments. Mr. Morgan also acknowledged that EP's clients supervise EP's workers, control the conditions of their production set work, and have the authority to terminate their employment. Mr. Morgan further states that, in contrast, the only services provided by EP were handling the payroll of the EP workers and managing their Workers' Compensation coverage. Finally, Mr. Morgan states that plaintiff filed a Workers' Compensation claim with EP in connection with the accident and received Workers' Compensation benefits from EP's carrier.

In further support of its motion, Mesquite submits an affidavit by John Morrissey, a Senior Vice President of Production for Mesquite's parent company, Sony Pictures Entertainment. As was the case with Mr. Morgan, Mr. Morrissey states in his affidavit that EP provided payroll services and Workers' Compensation administration for workers (including plaintiff) who were temporarily hired out to television production companies (such as Mesquite) and other businesses in the entertainment industry. Mr. Morrissey further states that:

> "EP was not involved in directing the day-to-day work of [plaintiff] or any other Mesquite employees on the [s]eries. EP did not exercise any control as to when, where, or how [plaintiff] or any other Mesquite employees were to perform their

> job functions. EP did not exercise authority or control over [plaintiff's] workplace, working conditions, equipment or the duties he was to perform. Rather, Mesquite exercised sole control over [plaintiff's] workplace, the duties he was requested to perform and all aspects of his employment while he was employed on the [s]eries."

In addition to Mr. Morrissey and Mr. Morgan's affidavits, Mesquite submits various work documents including a "Start Form," a "Crew Deal Memo," an I-9 form used to verify employment eligibility with the Department of Homeland Security, and union documents, all of which list Mesquite as plaintiff's employer. Finally, Mesquite submits a copy of plaintiff's own deposition testimony, wherein he stated that EP is only a payroll company and that Mesquite was the only entity that gave him direction and told him what to do while working on the series.

In opposition to Mesquite's motion, plaintiff initially notes that ordinarily, the determination of special employment status is a question of fact for the jury to determine. Plaintiff further notes that plaintiff's supervisor, Mr. Stokes, testified that, although plaintiff performed work for Mesquite, he was employed by EP. Under the circumstances, plaintiff maintains that there is an issue of fact as to whether plaintiff was a special employee of Mesquite.

Broadway defendants also oppose Mesquite's motion for summary judgment dismissing plaintiff's claims as asserted against it. Broadway defendants argue that there are issues of fact as to whether Mesquite was plaintiff's special employer. Broadway defendants also note that they never had an opportunity to cross examine Mr. Morrissey or Mr. Morgan since Mesquite never identified them as potential witnesses whom Broadway defendants could subpoena.

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2nd Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2nd Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore*, 172 AD2d 600 [2d Dept. 1991]).

It is well established that the party moving 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 (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107

AD3d 977 [2d Dept 2013]). Once 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 establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

"The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to special employers" (*Mauro v Zorn Realties, Inc*, 206 AD3d 645, 647 [2022]). "[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]; *Fajardo v Mainco Elev. & Elec. Corp.*, 143 AD3d 759, 763-764 [2016]). "While 'a person's categorization as a special employee is usually a question of fact …the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issues of fact'" (*Rodriguez v 27-11 49th Avenue Realty, LLC*, 222 AD3d 1013, 1014 [2023], quoting *Thompson*, 78 NY2d at 557-558). "'Many factors are weighted in deciding whether a special employment relationship exists, and generally no single one is decisive . . . Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or general employer's business … [but] [t]he most significant factor is who controls and directs, the details and ultimate result of the employee's work'" (*Chiloyan v Chiloyan*, 170 AD3d 943, 945 [2019], quoting *Munion v Trustees of Columbia Univ. in City of N.Y.*, 120 AD3d 779, 780 [2014]).

Here, the uncontroverted evidence before the court, including Mr. Morgan and Mr. Morrissey's affidavits, as well as plaintiff's own deposition testimony, demonstrates that plaintiff's work was directed and controlled solely by Mesquite while he worked on the series. The court notes that Mesquite furnished plaintiff with the equipment he used while working on the series, determined his work hours and pay rate, assigned him his duties, and had the authority to terminate his employment on the series. Finally, the evidence demonstrates that the work plaintiff performed on the series was solely for Mesquite's benefit. In contrast, the only roles maintained by EP, while plaintiff worked on the series, were the payment of his wages and administration of his Workers'

Compensation benefits. As previously noted, the Court of Appeals, as well as the Appellate Division, Second Department, have specifically held that standing alone, these two factors are insufficient to defeat an employers' claim that it is plaintiff's special employer (*Thompson*, 78 NY2d at 557-558; *Fajardo*, 143 AD3d 763-764). Finally, Broadway defendants' mere hope that they would uncover evidence raising a triable issue of fact regarding plaintiff's special employee status if only they had been given an opportunity to cross examine Mr. Morrissey and Mr. Morgan is an insufficient basis to deny Mesquite's motion (*Gil v Frisna*, 223, AD3d 878, 879 [2024]). Under the circumstances, plaintiff's claims against Mesquite are barred under Workers' Compensation Law §§ 11 and 29 (6) and Mesquite's motion for summary judgment dismissing plaintiff's complaint is granted.

Plaintiff's complaint reveals that plaintiff intends to rely upon the doctrine of res ipsa loquitur. The issue of whether this doctrine is applicable concerns the negligence claims asserted against all the remaining defendants. Thus, the court will address this matter prior to addressing their individual summary judgment motions. The defendants maintain that the doctrine of res ipsa loquitur is inapplicable since they were not in exclusive control of the elevator doors because the accident occurred when plaintiff himself closed the doors on his left index finger. For the same reason, the defendants argue that the accident was caused by plaintiff's own voluntary actions. In opposition to these arguments, plaintiff maintains that res ipsa loquitur applies in this case since the accident, which involved the sudden closing of the doors at a high rate of speed, would not ordinarily occur in the absence of negligence. In addition, plaintiff argues that the subject elevator was in the exclusive control of the defendants and that his own voluntary actions did not contribute to the accident.

The doctrine of res ipsa loquitur "concerns circumstantial evidence which allows, but does not require, the fact finder to infer that the defendant was negligent" (*Simmons v Neuman*, 50 AD3d 666, 667 [2008]). "For the doctrine of res ipsa loquitur to apply, a plaintiff must establish three conditions: first, the event must be of a kind that ordinarily does not occur in the absence of negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the party of the plaintiff" (*Bicchetti v Toyota*, 217 AD3d 743, 744 [2023] [internal quotation marks omitted]).

Under the circumstances of this case, res ipsa loquitur is not applicable. The elevator doors that crushed plaintiff's left index finger did not unexpectedly or inexplicably close. Rather, they closed when plaintiff attempted to manually close them when his left hand was not clear. Thus, it is possible that his "injury was caused by [his] own voluntary actions, notwithstanding that the door closed on [him] quickly" (*Graham v Wohl*, 283 AD2d 261, 261 [2002]). Furthermore, it cannot be said that the defendants had exclusive control over the manner in which the doors closed. In particular, plaintiff, who manually closed the doors, "had as much, if indeed not more, control over the operation of the doors of the elevator than [the defendants] did because [he] was the one who activated the mechanism which controlled their operation" (*Feblot v New York Times Co.*, 32 NY2d 486, 496 [1973]).

Eastern moves, in part, for summary judgment dismissing plaintiff's claims against it. In support of its motion, Eastern contends that the uncontroverted evidence before the court establishes that plaintiff's accident was not caused by any negligence on its part. Eastern argues that it did not owe plaintiff a duty of care. Eastern further argues that even if it did owe plaintiff a duty of care, it did not breach this duty inasmuch as (1) the elevator was not defective, (2) Eastern did not have notice of any defective condition involving the elevator, and (3) any alleged defective condition was not the proximate cause of the accident.

In support of its argument that it did not owe plaintiff a duty of care, Eastern initially points out that under the Court of Appeals' ruling in *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]) and its progeny, a contractor, such as Eastern, only owes a non-contracting third-party, such as plaintiff, a duty of care when: (1) the contractor failed to exercise reasonable care and thereby launches a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the contracting party; or (3) the contracting party has completely replaced the other party's duty to maintain a safe premises. Here, Eastern maintains that there is no evidence that it created or exacerbated any dangerous condition involving the freight elevator. In support of this claim, Eastern notes that both Mr. DiTomasso and Mr. Argento testified that they never received any complaints regarding the doors of the freight elevator prior to the accident. In addition, Eastern points out that the freight elevator was inspected by the City of New York in March of 2016, and February of 2017 and no violations were issued. Finally, Eastern notes that on September 27, 2016, less than ten days before the accident, a "Category 5" test and inspection was performed on the subject elevator which found that the elevator was satisfactory. Thus,

Eastern maintains that it is clear that it did not launch any instrument of harm with respect to the freight elevator or its doors. Eastern also argues that there is no allegation, let alone support, for any argument that plaintiff detrimentally relied on the continued performance of Eastern's maintenance services. Finally, Eastern contends that it did not entirely displace the owner's duty to maintain the freight elevator in a safe condition since the service contract contained specific exclusions of service. Under the circumstances, Eastern argues that it did not owe plaintiff a duty of care with respect to the freight elevator.

In further support of its motion, Eastern argues that, even if it did owe plaintiff a duty of care with respect to the subject elevator, it did not breach this duty. In particular, Eastern maintains that there is no evidence that the freight elevator was defective based on the fact that it was inspected both before and after the accident, including the Category 5 inspection that took place less than ten days before the accident, and each time the elevator passed inspection. In further support of this argument, Eastern submits an expert affidavit by Gregory DeCola, a certified elevator inspector. In this vein, Mr. DeCola states that he inspected the subject freight elevator on May 24, 2021 and found nothing defective in the condition or operation of the elevator car doors.

Eastern also contends that, even if there was some defect in the freight elevator that caused the accident, it did not have notice of this defect. In support of this contention, Eastern again notes that both Mr. DiTomasso and Mr. Argento testified that they did not receive any complaints about the freight elevator or its doors prior to the accident. Eastern further notes that both plaintiff and Mr. Stokes testified that they did not register any complaints regarding the elevator prior to the accident.

In opposition to Eastern's motion, plaintiff maintains that Eastern did owe him a duty of care with respect to the freight elevator and its doors since all three *Espinal* exceptions are applicable in this case. Specifically, plaintiff argues that Eastern unleashed a force of harm by creating a dangerous condition in failing to install a proper strap inside the elevator that could be used to close the doors without putting the operator at risk of having his or her fingers crushed by the doors. Further, plaintiff contends that he did detrimentally rely upon Eastern's duties to inspect, maintain, and repair the subject elevator. Finally, plaintiff argues that Eastern entirely displaced its co-defendants' duty to inspect, maintain, and repair the freight elevator.

Plaintiff notes that, under the maintenance agreement that Eastern entered into with Norman and Stages, Eastern was responsible for the inspection, maintenance and repair of the

freight elevator. According to plaintiff, Eastern breached this duty to maintain, inspect, and repair the subject elevator and was responsible for the accident. In particular, plaintiff argues that Eastern was negligent in failing to install a proper pull strap on the inside top panel of the elevator that would have enabled him to close the doors while keeping his hands at a safe distance. Plaintiff further argues that Eastern was negligent in failing to install a safety astragal that would prevent crush injuries when the doors to the freight elevator closed. Finally, plaintiff argues that Eastern was negligent in failing to provide an elevator operator who was trained to operate the manually closed doors of the freight elevator.

In support of these contentions, plaintiff submits an expert affidavit by Patrick A. Carrajat, an elevator and escalator consultant. Mr. Carrajat maintains that the freight elevator was not in compliance with A17.1 ASME Code § 2.11.12.4.3 (adopted by the Building Laws of New York) which requires that the elevator doors be equipped with a "nonshearing, and noncrushing [safety astragal] of either the meeting or overlapping type [that] shall be provided on the upper panel to close the distance between the rigid door sections when in contact with the stops. This member shall allow a minimum compressible clearance of 20 mm." Mr. Carrajat further maintains that, had there been a safety astragal on the upper door as required by this regulation, plaintiff's finger would not have been crushed and that, as the party responsible for maintaining the freight elevator, Eastern had a duty to ensure that these devices were installed on the freight elevator doors. Mr. Carrajat also contends that Eastern violated A17.1 ASME "Rule 110,12h (1) and (2)" in failing to ensure that the freight elevator was equipped with a pull strap on the inside top door that would have enabled plaintiff to close the doors while standing at a safe distance when the top and bottom panels came together.[3] According to Mr. Carrajat, had such a safety strap been provided, it would have prevented the accident. Finally, Mr. Carrajat contends that Eastern violated New York City Administrative Code § 27-1005 in failing to provide an elevator operator to operate the freight elevator. Mr. Carrajat notes that this regulation requires that "[e]very power driven passenger elevator and freight elevator with a rise of more than one story, except automatic operation and continuous pressure elevators ... shall be in charge of a designated competent operator." Mr. Carrajat contends that the freight elevator was subject to this regulation requiring an elevator

[3] Although Mr. Carrajat claims that "Rule 110, 12h (a)(1) and (2)" are contained in ASME Code Section A17.1, he has failed to attach a copy of this regulation to his affirmation. Further, the court could find no such regulation within the Building Laws or the New York City Administrative Code.

operator because it was not an automatic operations elevator. Mr. Carrajat also points to the undisputed fact that no elevator operator was provided.

In reply to plaintiff's opposition papers, Eastern submits another expert affidavit by Mr. DeCola in which he states that ASME Code Section 2.11.12.4.3 (which requires safety astragals) does not apply to the subject freight elevator which was installed decades prior to the enactment of this regulation in 2016. Mr. DeCola notes that there is no ASME Code Section which requires that safety astragals be retrofitted to elevators installed prior to the enactment ASME Code Section 2.11.12.4.3. Eastern also maintains that it cannot be held liable for the lack of a pull strap and elevator operator since there was nothing in the service agreement which required that it provide an operator or install a pull strap.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Alpha/Omega concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1282 [2021] [internal quotation marks omitted]). "An elevator company which agrees to maintain an elevator in a 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" (*Fajardo*, 143 AD3d at 762 [internal quotation marks omitted]). "Further, a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons where the contracting party has entirely displaced the other party's duty of safe maintenance concerning, for instance, a passenger elevator" (*Barnes v Astoria Fed. Sav. and Loan Assoc.*, 220 AD3d 725, 726 [2023] [internal quotation marks omitted]).

In this case, the service agreement between Eastern, Norman, and Stages required that Eastern maintain, service, and periodically inspect the freight elevator. Furthermore, Stages' witness Mr. Argento testified that if there were any problems with the freight elevator, he would contact Eastern to make any necessary repairs and Studio's witness Mr. Acosta testified that Eastern inspected the freight elevator once a month and replaced the pull strap on several occasions. In addition, although the service contract excluded certain work, maintaining the safe operation of the doors was not among these exclusions. Under the circumstances, Eastern has failed to demonstrate, as a matter of law, that it did not owe plaintiff a duty of care with respect to the maintenance, inspection, and servicing of the subject elevator doors (*Barnes*, 220 AD3d at 727;

Carter v Nouveau Indus. Inc., 187 AD3d 702, 703 [2020]; *Fajardo*, 143 AD3d at 762-763). However, contrary to plaintiff's claims, Eastern did not owe plaintiff a duty to provide an elevator operator under New York City Administrative Code § 27-1005. This regulation did not apply to the freight elevator involved in the accident. Additionally, there is nothing within the service contract that obligated Eastern to provide an elevator operator.

Turning to the issue of whether Eastern breached a duty of care with regard to the inspection, maintenance and repair of the subject elevator's doors, there is no merit to plaintiff's contention that the freight elevator was in violation of ASME Code Section 2.11.12.4.3. This regulation, which requires safety astragals on certain elevator doors, was enacted long after the subject elevator was installed. Further, plaintiff's expert has failed to point to any ASME provisions which require that safety astragals be retrofitted to old elevators. Moreover, it is undisputed that the subject elevator passed several inspections both prior to and after the accident, which would not have occurred if safety astragals were required as alleged by plaintiff's expert.

The court will now discuss the issue of whether the alleged lack of a pull strap in combination with the alleged unbalanced/rapidly closing doors constituted a defect or dangerous condition that proximately caused the accident. Crediting plaintiff's claim that the subject elevator lacked a pull strap at the time of the accident, it cannot be said, as a matter of law, that subject freight elevator was free of defects. In particular, plaintiff testified and states in his affidavit that he could only close the doors by pulling on a metal handle on the outside of the top door panel, which necessitated that he stand in close proximity to the rapidly closing doors, thereby exposing his hands and fingers to being crushed by the two panels when they came together.

However, Eastern has made a prima facie showing that it lacked actual or constructive notice of this alleged dangerous condition and that it did not fail to use reasonable care to correct this condition. In particular, Mr. DiTomasso testified that Eastern conducted a comprehensive "CAT 5" inspection of the elevator less than 10 days prior to the accident and that at the time the test was conducted, the doors were properly weighted and the inside upper door panel was equipped with a pull strap. Moreover, plaintiff, Mr. Stokes, and Mr. Acosta all testified that they did not make or receive any complaints about the lack of a pull strap or weighting of the doors at any time prior to the accident. Similarly, Mr. DiTomasso testified that Eastern did not receive any complaints regarding these issues prior to the accident, including the 10-day period between the inspection and the accident (*Lanzillo v 3 World Trade Ctr., LLC*, 195 AD3d 907, 908 [2021];

Goodwin v Guardian Life Ins. Co. of Am., 156 AD3d 765, 766-767 [2017]); *Karian v G&L Realty, LLC*, 32 AD3d 261, 262 [2006]). Under the circumstances, the burden shifts to plaintiff to raise a triable issue of fact as to whether Eastern had notice of the alleged defective conditions involving the freight elevator door and plaintiff has failed to meet this burden. Accordingly, Eastern's motion for summary judgment dismissing plaintiff's complaint against it is granted.

Norman and Broadway defendants separately move for, inter alia, summary judgment dismissing plaintiff's complaint against them. In support of its motion, Norman maintains that it did not owe plaintiff a duty of care with respect to the freight elevator because Eastern was solely responsible for maintaining and repairing the elevator. Norman further argues that, even if it did owe plaintiff a duty of care, there was no defect with the freight elevator for which it may be held responsible. Norman notes that the subject elevator passed an inspection less than ten days prior to the accident. Further, Norman submits an affidavit by William Meyer, a certified licensed professional engineer of elevator systems who inspected the elevator on May 24, 2021. Among other things, Mr. Meyer states that the elevator had a pull strap on the interior top panel of the doors, that there are no applicable code requirements for the provision of warning or instructions for the subject elevator, that there is no applicable code requirement that the elevator be retrofitted with a nonsheering astragal on its door, and that there is no requirement in any applicable code or standard requiring that Norman provide a designated elevator operator for the freight elevator.

In opposition to Norman's summary judgment motion, plaintiff maintains that contrary to Norman's argument, as the building's owner, it had a non-delegable duty to maintain the subject freight elevator in a safe condition. Plaintiff also argues that Norman failed to meet its prima facie burden in moving for summary judgment by demonstrating that the elevator was free of defects. In support of this contention, plaintiff relies upon Mr. Carrajat's expert affidavit indicating that the subject elevator was defective in that it lacked a pull strap and safety astragal and that Norman was responsible for providing an elevator operator.

In support of their motion for summary judgment, Broadway defendants contend that plaintiff cannot demonstrate that a defect or dangerous condition existed on the subject freight elevator that proximately caused his injuries. In support of this contention, Broadway defendants point out that the freight elevator passed a comprehensive "CAT 5" inspection less than ten days before the accident. Broadway defendants further point out that Mr. DiTomasso testified that there were no defects with the freight elevator when the test was conducted including mis-weighted

doors or the lack of a pull strap. In further support of their motion, Broadway defendants rely upon the aforementioned expert affidavit by Mr. Meyer. As a final matter, Broadway defendants argue that, even if there was a defect with the freight elevator, it lacked actual or constructive notice of this defect. In support of this contention, Broadway defendants note that both plaintiff and Mr. Stokes testified that they never made any complaint about the freight elevator doors. Broadway defendants also contend that both Mr. Argento and Mr. Acosta testified that they never received any complaints regarding the elevator and Mr. Acosta further testified that he never observed the pull strap missing from the elevator, including on the day of the accident.

In opposition to Broadway defendants' summary judgment motion, plaintiff argues that these movants failed to meet their prima facie duty by demonstrating that the subject elevator was free of defects. Plaintiff also argues that the elevator was defective and that, as the tenants who sublet a portion of the building to Mesquite, Broadway defendants were responsible for maintaining the elevator in a safe condition. Finally, plaintiff relies upon Mr. Carrajat's expert affidavit in arguing that Broadway defendants breached this duty.

In reply to plaintiff's opposition papers, Broadway defendants and Norman both maintain that the court should not consider Mr. Carrajat's affidavit. In support of this contention, these defendants point to unpublished lower court decisions, as well as an Appellate Division, First Department ruling, in which Mr. Carrajat was found to be unqualified as an expert and/or his opinion was disregarded by the court (*Haynes v Estate of Goldman*, 62 AD2d 519, 521 [2009]). Norman and Broadway defendants also submit an expert reply affidavit by Mr. Meyer in which he states, (as did Eastern's expert Mr. DeCola) that the ASME Code provision cited by Mr. Carrajat regarding safety astragals is inapplicable inasmuch as that regulation was enacted decades after the elevator was installed and there are no code provisions requiring that the elevator be retrofitted with a safety astragal. Mr. Meyer notes that the freight elevator passed numerous inspections without any mention of the absence of a safety astragal. In addition, Mr. Meyer states that there is no code provision requiring that the doors be equipped with a pull strap and, in any event, this is not a safety measure as the sole purpose of the strap is to provide a means of closing the door that is reachable by most people. Finally, Mr. Meyer states that there was no requirement that an elevator operator be provided. Mr. Meyer notes that Mr. DiTomasso testified that the subject elevator had a "constant pressure push button" that was confirmed during a site inspection. According to Mr. Meyer, constant pressure operation is also called "continuous pressure

operation" which is a mode of operation in which the elevator car moves only when pressure is applied to the up or down button and stops when pressure is released. Mr. Meyer further notes that continuous pressure operation elevators are specifically exempted from the requirement under New York City Administrative Code § 27-1005 to provide an elevator operator.

The Court finds that there is no merit to Norman's contention that it did not owe plaintiff a duty of care because Eastern was solely responsible for maintaining the freight elevator. In particular, "[a] property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect, or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect" (*Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 [2017], [citations omitted]).[4]

Turning to the issue of whether there was a defect with the freight elevator, the court has already ruled that the elevator was not defective due to the lack of a safety astragal since the ASME code provision which plaintiff relies upon in support of this claim did not apply to the freight elevator, which was installed decades before the code provision was enacted. Further, contrary to plaintiff's claim, the lack of an elevator operator did not constitute a defect for which Norman or Broadway defendants may be held liable. New York City Administrative Code § 27-1005 specifically exempts "automatic and continuous pressure elevators" from the requirement that an elevator operator be provided. Here, both Mr. Meyer's reply affidavit and Mr. DiTomasso's deposition testimony indicate that the subject freight elevator was a continuous pressure elevator. Further, although Mr. Carrajat claims that the subject elevator was not automatic since the doors had to be opened manually, he fails to state that the elevator was not a continuous pressure elevator.

With respect to the issue of whether or not Broadway defendants and Norman may be held liable due to the alleged lack of a pull strap inside the elevator, as previously noted, there is conflicting evidence regarding this issue and the court has already determined that there is an issue of fact regarding whether the alleged lack of a pull strap in combination with the rapidly closing doors constituted a defect or dangerous condition. However, as was the case with Eastern, Broadway defendants and Norman have made a prima facie showing that they lacked actual or constructive notice of this condition. Plaintiff and Mr. Stokes both testified that they never made any complaints regarding the doors of the freight elevator. Further, Mr. Acosta, Mr. Argento, and

[4] Broadway defendants do not argue that they didn't owe plaintiff a duty of care with respect to the freight elevator.

Mr. DiTomasso all testified that they never received any complaints regarding the doors prior to the accident. In addition, Mr. Acosta, who operated the freight elevator on a regular basis in his capacity as the building superintendent, testified that the strap "has always been there." Moreover, when directly asked if "at any point in time on October 6, 2016 and prior thereto, did you enter the freight elevator and notice that the strap was missing?," Mr. Acosta responded "no." Thus, assuming that the strap had somehow detached itself from the door prior to the accident, the evidence demonstrates that Norman and Broadway defendants lacked actual or constructive notice of this condition and plaintiff has failed to point to any evidence sufficient to raise a triable issue of fact in this regard (*Lanzillo*, 195 AD3d at 908; *Goodwin*, 156 AD3d at 766-767; *Tucci v Starrett City, Inc.*, 97 AD3d 811, 822 [2012]; *Santoni v Bertelsmann Prop., Inc*, 21 AD3d 712, 714 [2005]). Accordingly, Norman and Broadway defendants' respective motions for summary judgment are granted.

Mesquite, Eastern, Norman, and Broadway defendants all separately move for summary judgment dismissing all common-law indemnification cross-claims as asserted against each of them. In so-moving, Eastern, Norman, and Broadway defendants each contends that there is no basis for any common-law indemnification claims asserted against them inasmuch as the underlying accident was not caused by any negligence on their part. In support of its motion for summary judgment dismissing all common-law indemnification claims against it, Mesquite argues that all such claims are barred under Workers' Compensation Law § 11 since it was plaintiff's special employer and he did not sustain a grave injury as defined under the statute.

"A party can establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action for common-law indemnification, arising out of a workplace injury, asserted against it by establishing that it was not negligent, and that it did not have the [ability] to direct, supervise, or control the work giving rise to the injury"(*Council on Foreign Relations, Inc. v ABC Interiors Unlimited, Inc.*, 189 AD3d 1168, 1168 [2020]). Here, the court has already determined that Eastern, Norman, and Broadway defendants were not negligent. Further, it is undisputed that Eastern, Norman, and Broadway defendants did not exercise any control or supervision over plaintiff's work. Accordingly, those branches of Eastern, Norman, and Broadway defendants' respective motions which seek summary judgment dismissing all common-law indemnification claims as asserted against each of them are granted.

The Court next addresses the common-law indemnification cross claims asserted against Mesquite. It is well-settled that Workers' Compensation Law § 11 bars all common-law indemnification claims against special employers unless the plaintiff sustained a grave injury as defined under the statute (*Carey v Toy Indus. Assoc.*, 216 AD3d 404, 406 [2023]). Here, the court has already determined that Mesquite was plaintiff's special employer and it is undisputed that plaintiff did not suffer a grave injury[5]. Accordingly, that branch of Mesquite's motion which seeks summary judgment dismissing all common-law indemnification cross-claims against it is granted.

Norman also moves, in mot. Seq. 4, for summary judgment under its contractual indemnification cross-claims against Eastern, Mesquite, and Broadway defendants. In support of its motion for contractual indemnification against Broadway defendants, Norman points to a clause in the lease agreement between the parties which states:

> "[Stages] shall keep, save and hold harmless [Norman] from any and all damages, liabilities, claims, suits, demands, judgments, costs and expenses (including reasonable attorney's fees and disbursements incurred in the defense of any action or proceeding) to which [Norman] may be subject or suffer by reason of anything whatsoever arising from or out of the occupancy of the premises by [Stages] [or] arising under this Lease."

In support of its motion for contractual indemnity against Mesquite, Norman relies on an indemnification clause in a rental agreement between Mesquite and Stages. Finally, in support of its motion for contractual indemnity against Eastern, Norman cites to certain language in the maintenance agreement between Eastern, Norman, and Stages.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). The obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3de 925, 930 [2009]). Finally, a party seeking contractual indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; General Obligations Law § 5-322.1).

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[5] Under Workers Compensation Law § 11, a grave injury is defined as one or more of the following: "Death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

There is no language in the maintenance agreement which obligates Eastern to indemnify Norman, or any other party. In addition, although there is an indemnification clause in the rental agreement between Mesquite and Stages, Norman was not a party to or mentioned in the agreement and the only party that Mesquite agreed to indemnify was Stages. Accordingly, those branches of Norman's motion for summary judgment under its contractual indemnification claim against Eastern and Mesquite is denied and Eastern and Mesquite's respective motions to dismiss these cross-claims are granted.[6]

In examining Norman's contractual indemnification claim against Stages, the indemnification clause in the lease agreement between the parties is broad and requires that Stages indemnify Norman for all claims arising out of Stages occupancy of the building or the lease. Here, plaintiff's accident arose out Stage's occupancy of the building and the lease since plaintiff was working for Stage's sublessee (i.e. Mesquite) at the time of the accident. Further, the clause is fully enforceable since the court has already determined that the accident was not caused by Norman's negligence. Accordingly, Norman's motion for summary judgment under its contractual indemnification claim is granted as against Stages and Stage's motion for summary judgment dismissing this cross claim is denied.[7]

Mesquite also moves, in mot. seq. 3, for summary judgment dismissing Stages' contractual indemnification cross-claim against it. In support of this branch of its motion, Mesquite notes that under the rental agreement[8] it entered with Stages, Mesquite is only obligated to indemnify Stages for claims arising out of its own negligence, its breach of the rental agreement, its failure to comply with local, state, or federal law, or the negligent acts of its contractors, licensees, agents or invitees. Mesquite further notes that in Stages' tender letter seeking contractual indemnification against it, Stages sought indemnification based upon plaintiff's own negligence. However, according to

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[6] Given the absence of any language in the elevator maintenance agreement requiring Eastern to indemnify another party, it is clear that there is no basis for any of the contractual indemnification cross-claims asserted against Eastern.

[7] Since the court has dismissed plaintiff's claims against Norman, Stage's obligation to indemnify Norman will be limited to attorney's fees and legal costs.

[8] The rental agreement provides that "[Mesquite] shall indemnify [Stages] and hold harmless its officers, directors, agents . . . from and against any and all third-party claims, fines, or penalties and any and all liability arising from loss, damage, or injury to persons or property . . . in any manner arising out of or incident to: (1) [Mesquite's] negligent acts or willful misconduct; (2) any breach by [Mesquite] of any provision of this Agreement; (3) [Mesquite's] noncompliance with any applicable federal, state or local laws or regulations; (4) the negligent acts or willful misconduct of [Mesquite's] contractors, licensees, agents, or invitees; and (5) theft by [Mesquite] or [Mesquite] contractors . . ."

Mesquite, under relevant caselaw, a plaintiff's comparative negligence cannot serve as "negligence" to trigger an indemnification claim against the plaintiff's employer.

In opposition to this branch of Mesquite's motion, Broadway defendants maintain that, aside from plaintiff's comparative negligence, there are issues of fact as to whether Mesquite's own negligence played a role in the accident. In support of this argument, Broadway defendants note that Mr. Acosta specifically testified that the building's tenants, including Mesquite, were specifically instructed that they were not allowed to operate the freight elevator and that if they needed to use the elevator, there were to contact him so that he could operate the elevator. In addition, Broadway defendants note that both plaintiff and Mr. Stokes testified that they were never told that they were not allowed to operate the freight elevator and they never received instructions on how to operate the apparatus. Accordingly, Broadway defendants argue that there are issues of fact regarding whether Mesquite was negligent in failing to instruct its employees on the proper use and protocol associated with the freight elevator. Broadway defendants further contend that this raises triable issues of fact as to whether Mesquite's obligation to indemnify was triggered.

The Appellate Division, Second Department held in *Arrendal v Trizechahn Corp.*, (98 AD3d 701 [2012]) that the comparative negligence of the plaintiff did not trigger his employer's obligation to indemnify the defendant/third-party plaintiff notwithstanding the fact that the employer agreed to indemnify the defendant/third-party plaintiff for claims arising out of its employees' negligence. In so ruling, the court noted, "[c]onsidering that the comparative negligence of . . . the [plaintiff/employee] . . . would actually reduce loss and damages, if any, attributable to [the defendant/third-party plaintiff], it does not reasonably appear that the parties intended that the clause of the lease's indemnification provision dealing with [an employee's] negligence would be triggered in the event of a finding of such comparative fault" (*id.* at 703). Thus, plaintiff's alleged comparative negligence in this case, if any, may not serve as a trigger for Mesquite's obligation to indemnify Stages.

However, there are triable issues of fact as to whether Mesquite's negligence outside of plaintiff's comparative fault played a role in the accident. Mr. Acosta testified that tenants were notified that they were not permitted to operate the freight elevator, presumably because the doors had to be opened and closed manually. However, both Mr. Stokes and plaintiff testified that this information was never relayed to them. Thus, there is an issue of fact as to whether the accident

was caused by Mesquite's negligent failure to notify its employees not to use the freight elevator. Furthermore, as noted above, Mesquite's obligation to indemnify may also be triggered by claims arising out of its breach of the rental agreement. Here, Mesquite has failed to make a prima facie showing that the accident was not caused by its breach of the agreement. Under paragraph 6 of the agreement, Mesquite agreed "not to use portions of [the building] not included in [the agreement] for filming or otherwise without [Stages'] prior permission." Notably, the freight elevator is not listed as one of the areas that Mesquite was permitted to use under paragraph 1 of the agreement. Accordingly, that branch of Mesquite's motion which seeks summary judgment dismissing Stage's contractual indemnification cross-claim against it is denied.

Thus, it is hereby

ORDERED, that Eastern's motion, in mot. seq. 2, for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it is granted; and it is further

ORDERED, that those branches of Mesquite's motion, in mot. seq. 3, which seek summary judgment dismissing plaintiff's complaint, all common-law indemnification cross-claims asserted against it, and Norman's contractual indemnification cross-claim against it are granted. That branch of Mesquite's motion which seeks summary judgment dismissing Stage's contractual indemnification cross-claim against it is denied; and it is further

ORDERED; that those branches of Norman's motion, in mot. seq. 4, which seek summary judgment dismissing plaintiff's complaint and all cross claims asserted against it are granted. Those branches of Norman's motion which seek summary judgment under its contractual indemnification cross- claims against Eastern and Mesquite are denied. That branch of Norman's motion which seeks summary judgment under its contractual indemnification cross-claim against Stages is granted; and it is

ORDERED, that those branches of Broadway defendants' motion, in mot seq. 5, which seek summary judgment dismissing plaintiff's complaint and all common-law indemnification cross-claims against it are granted. That branch of Broadway defendant's motion which seeks summary judgment dismissing Norman's contractual indemnification cross-claim against it is denied.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice