

Lindenberg v Yeshiva Univ.

2024 NY Slip Op 32457(U)

July 11, 2024

Supreme Court, New York County

Docket Number: Index No. 161541/2019

Judge: Richard G. Latin

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BACKGROUND FACTS AND PROCEDURAL HISTORY

Yeshiva University has multiple dormitories, including Brookdale Residence Hall, which is located at 50 East 34th Street, between Madison and Park Avenues in Manhattan (NYSCEF Doc No. 74, Bryan affirmation, exhibit B, Randy Apfelbaum deposition tr at p. 8). Brookdale Residence Hall is a 20-story building with two elevators (*id.*, pp. 9-10). The building contains an elevator mechanical room that is kept locked and is not accessible to residents in the building, such as plaintiff (*id.*, pp. 14-15). If building staff or maintenance workers need access to the elevator mechanical room, they must request the key from either Yeshiva's security or facility departments (*id.*, p. 17).

In January 2019, Yeshiva contracted with Schindler to maintain and service its elevators (*id.*, p. 24). The contract states in pertinent part that Schindler must perform "complete maintenance" of the Yeshiva elevators to ensure that they operate in accordance with "performance standards and other criteria specified in this agreement 24 hours per day, seven (7) days per week except for scheduled preventative maintenance and safety test procedures by Yeshiva" (NYSCEF Doc No. 73, Bryan affirmation, exhibit A, Contract, p. 39). The contract required that Schindler conduct "scheduled inspections, checks and services to each of the vertical transportation systems and all their individual components" bi-weekly, monthly, quarterly, semi-annually, and annually and to conduct immediate service repairs/adjustments (*id.*, pp. 32-39). For each inspection, the contract lists what should be inspected at minimum.

Plaintiff testified that she was a student at Yeshiva University residing in Brookdale Residence Hall when the accident occurred in 2019 (NYSCEF Doc No. 84, Bryan affirmation, exhibit L, plaintiff's deposition tr at p. 20). She lived on the 7th Floor and used the elevators daily to access her dorm room (*id.*, p. 25). On May 22, 2019, at approximately 9:00 p.m., plaintiff was

using one of the two elevators to return to her dorm room when she became trapped inside (*id.*, pp. 29-30, 34). Plaintiff specifically testified that she entered the elevator from the lobby, while holding her coffee and phone, and pressed the seventh floor button (*id.*, p. 34). The elevator ascended and stopped on the fourth floor (*id.*). Plaintiff knew the elevator stopped on the fourth floor at that time because she saw the number four illuminated on the display screen. Plaintiff then pressed the button to open the door, but to no avail (*id.*). Instead, the elevator descended to the third floor with the “up button still blinking” (*id.*). Once the elevator was on the third floor, plaintiff pressed the emergency button (*id.*, p. 35). Plaintiff did not know at what speed the elevator travelled from the lobby to the fourth floor and then at what speed the elevator descended to the third floor (*id.*, pp. 35-36). Nor did she know how much time passed between these elevator stops (*id.*).

Plaintiff further testified that the elevator then fell from the third floor to the basement, but she did not know at what speed (*id.*, pp. 34, 38-39). Plaintiff described that as the elevator “fell” she held on to the elevator rails inside the car while also holding her coffee (*id.*, p. 40). She specifically testified that she went into a crouching position to brace herself for the fall (*id.*). Plaintiff did not hear any unusual noises coming from the elevator other than the noises “of the elevator falling” and “a crash” when the elevator reached the bottom (*id.*, pp. 55-57). She described this “crash” as an “extremely hard force that rattled the entire elevator with me in it” (*id.*, p. 57). Plaintiff maintained that she did not know whether she fell to on the ground at any point but remembered getting up from the ground (*id.*, pp. 41-42).

Although plaintiff pressed the emergency button when the elevator was on the third floor, a woman responded only after the elevator stopped completely (*id.*, p. 36). The woman told plaintiff that they were going to send help after plaintiff informed her that she was trapped in the

elevator (*id.*, p. 46). Plaintiff testified that when the elevator doors opened, she was standing up while still holding her coffee and her phone (*id.*, pp. 43-44). She realized the elevator car was in the basement only after the Fire Department pried the doors open and helped her climb out of the elevator car, which had come to a stop below the level of the basement floor (*id.*, pp. 39, 54). Plaintiff explained that she then went to her dorm room, where Yeshiva's security checked in with her and had her fill out an incident report (*id.*, pp. 59-60; *see also* NYSCEF Doc No. 75, Bryan affirmation, exhibit C, Incident Statement Form).

Plaintiff noted that no debris fell from the elevator at any point (NYSCEF Doc No. 84, p. 45). She did not remember whether she lost consciousness during the incident, but she testified that she had no bleeding, no pain, or any open wounds (*id.*, pp. 44, 49). Plaintiff did not ask for an ambulance immediately after exiting the elevator (*id.*, p. 58). She called for EMS, however, after she returned to her room (*id.*, pp. 58, 74-76; *see also* NYSCEF 74, pp. 48-49, 53-54). The EMS did not give plaintiff any diagnosis or treatment but recommended that she follow up with a doctor (NYSCEF Doc No. 84, plaintiff's deposition tr at pp. 74-75).

The day after the incident, plaintiff experienced only a headache (*id.*, p. 81). As time passed plaintiff testified that she felt very fatigued, tired, experienced headaches, back pain, neck pain, and had difficulty walking due to her balance (*id.*, pp. 84-85, 89). Doctors told plaintiff that she sustained these injuries from the effect of the elevator shaking and rattling while she was inside the elevator car (*id.*, p. 87). A doctor and a neurologist diagnosed plaintiff with a concussion (*id.*, pp. 90-98).

Plaintiff testified that prior to the incident she talked to her friends about Yeshiva's elevators and how they were out of operation regularly for maintenance (*id.*, p. 13). Plaintiff did not, however, hear of any complaints about the subject elevator free falling prior to the incident,

nor did she make any complaints to the university about the subject elevator (*id.*, pp. 211-213). Plaintiff also noted that prior to the incident, she did not experience any instances where the elevators in her dorm, including the subject elevator, either malfunctioned or stopped on a different floor than the one she had pressed (*id.*, pp. 213-214).

Randy Apfelbaum (“Apfelbaum”), the Chief Facilities Officer at Yeshiva, testified that Schindler and Yeshiva had an exclusive full-service contract to maintain and service Yeshiva’s elevators (NYSCEF Doc No. 74, Apfelbaum deposition tr at pp. 25, 28). Per Apfelbaum, “everything that had to do with the elevators, the elevator equipment and/or any equipment inside the elevator [mechanical] room, was solely the responsibility of Schindler” (*id.*, p. 25-26). The Yeshiva staff did not conduct any kind of maintenance on the Yeshiva elevators or the equipment in the elevator mechanical room at Brookdale Residence Hall (*id.*, p. 25). Apfelbaum further noted that the contract also required Schindler to routinely inspect and maintain the elevators on monthly basis (*id.*, pp. 28-29).

Per Apfelbaum, a free-fall “would be an uncontrolled descent” (*id.*, p. 46). He explained that it is impossible for an elevator to descend into a free-fall unless the cables are cut, which did not happen in this case (*id.*, pp. 67-68). Apfelbaum further testified on the issue of multiple student allegations, made in student newspapers at Yeshiva, regarding prior elevator incidents, including free-falling accidents (*id.*, pp. 67-69, 72, 74). The free-falling incidents discussed during Apfelbaum’s deposition, however, did not include the elevators at Brookdale Residence Hall, excluding plaintiff’s incident (*id.*). Apfelbaum testified that occasionally the subject elevator would shut down (*id.*, p. 39), and that no one reported plaintiff’s accident to him (*id.*, p. 70).

James Carroll (“Carroll”), Schindler’s elevator mechanic, was called to remove plaintiff from the elevator on the day of the incident (NYSCEF Doc No. 76, Bryan affirmation, exhibit D,

Carroll deposition tr at p.13). The Fire Department had already removed plaintiff from the elevator when Carroll arrived at the scene (*id.*, pp. 8-9). Carroll testified that upon inspecting the elevator mechanical room, he found that the subject elevator had a broken tachometer belt (“broken tachometer belt, or tach belt”). A tachometer is a small motor, located in the elevator mechanical room, that generates an electrical signal to the elevator controller, which is the computer that runs the elevator and indicates the elevator’s speed (*id.*, pp. 13-14, 20-21). A tach belt is a rubber belt that the subject elevator cannot operate without, and it connects the tachometer to the elevator motor to generate the electrical signal to the elevator controller (*id.*, pp. 20, 23, 33-35).

Carroll testified that a broken tach belt could not have caused the elevator to free fall from the third floor to the basement because the safety brake would have activated to stop the elevator’s descent one to two seconds after the tach belt broke (*id.*, pp. 33-37). The elevator “would [have] move[d] less than one foot” after the breakage of the tach belt (*id.*, pp. 33-37). The elevator would also not have had enough time to descend from the fourth floor to the third floor with a broken tach belt (*id.*, p. 33). Carroll further testified that the tach belt is visible and can be inspected but was not sure whether it is part of Schindler’s routine monthly preventative maintenance and inspections (*id.*, pp. 30, 47-48).

Carroll testified that he could not determine what caused the tach belt to break on the day of the incident and noted that there was no evidence that it was cut intentionally (*id.*, pp. 29, 36). Other than the broken tach belt, Carroll did not find anything else wrong with the subject elevator (*id.*, pp. 26-28, 34-35).

Carroll was questioned on how the subject elevator could have initially descended from the fourth floor to the third floor and then free-fall to the basement (*id.*, p. 35). Carroll did not believe that the accident happened as plaintiff testified because “a free fall cannot have happened” (*id.*, p.

36). As to plaintiff's testimony of feeling a free-fall during the accident, Carroll testified that plaintiff likely had a feeling of a free-fall due to the tach belt being loose or not properly working (*id.*, p. 35). He testified that such a condition of the tach belt might have caused the elevator to "oscillate or vibrate" (*id.*, pp. 35-37).

John Bonner ("Bonner"), who conducts elevator testing for Schindler, testified that the New York City Department of Buildings ("DOB") requires every elevator company to test elevators once a year for Category One tests and every five years for Category Five tests (NYSCEF Doc No. 80, Bryan affirmation, exhibit H, Bonner deposition tr at p. 7). Category One tests every safety switch on an elevator, and Category Five tests every safety switch and the weight capacity of an elevator (*id.*, pp. 7-8). These two types of tests are in addition to Schindler's routine monthly preventative inspections and maintenance of the elevators (*id.*, p. 9). An inspection company, employed by Yeshiva, witnesses Schindler's Category One and Category Five tests to ensure that the inspection is carried out properly (*id.*, pp. 10-11).

Bonner further testified that DOB provides Schindler with the inspection checklist of items it has to inspect, and when Bonner goes through this checklist, he makes notes and leaves them in the elevator mechanical room (*id.*, pp. 12-14). The inspection company hired by Yeshiva also generates a defect list that is provided to Yeshiva (*id.*, p. 18). Bonner testified that a tach belt is not included in the yearly inspection because it is not considered a part of the safety switches, but he was not sure whether it is included in the monthly preventative maintenance and inspections (*id.*, pp. 33, 43). Bonner further testified that elevator cars do not drop or free-fall unless an extreme condition exists, such as when the ropes holding the elevator fall off or there is too much weight in the elevator car (*id.*, p. 22). Bonner testified that even in extreme conditions, safety switches would make the elevator car stop "before it lands" (*id.*). Bonner conducted a Category One

inspection on the subject elevator on May 16, 2019 (NYSCEF Doc No. 74, p. 34), which was six days prior to the incident.

The records on Schindler's work on service calls for the subject elevator show that there were three service malfunctions between March 26, 2019 and May 22, 2019, requiring immediate repairs/adjustments by Schindler (NYSCEF Doc No. 82, Bryan affirmation, exhibit J, Schindler Service Operations Work Report (Service Call); *see also* NYSCEF Doc No. 82, Bryan affirmation, exhibit I, Location Site History Report). Out of those three malfunctions, two service calls occurred prior to plaintiff's incident, and they involved door malfunctions (*id.*). Plaintiff's incident was the only alleged free-fall incident (*id.*). The subject elevator was put back in service, after Schindler replaced its tach belt a day after the incident involving plaintiff (NYSCEF Doc No. 82).

Plaintiff commenced this case on November 27, 2019. The complaint asserts a single cause of action for negligence. After the parties exchanged discovery, plaintiff filed her note of issue on June 27, 2023. Defendants then filed the instant motion on August 28, 2023. Defendants rely, in part, on the service callback records and Carroll's testimony. Plaintiff then filed her opposition and cross-motion on October 9, 2023. Plaintiff submitted William Seymour's ("Seymour") affidavit in support of her opposition and cross-motion.

Seymour is an elevator consultant and an electrical engineer (NYSCEF Doc No. 91, Seymour aff). Seymour attests that although Schindler indicated that a broken tach belt was observed on the day of the incident, Schindler failed to conduct a root cause analysis on why the tach belt broke (*id.*, ¶ 37). Seymour avers that "[i]n the present instance, a tachometer was used to measure the rotational speed of the elevator hoist motor and provide this data to the elevator controller, which used it to calculate the actual speed of the elevator" (*id.*, ¶ 42). The subject elevator used "a rubberized tensioned belt, the tach belt, to couple the motor tachometer" (*id.*).

Seymour further attested that “[a] tach belt that has been properly installed” and that has operated reliably “over time does not just break without an external influence or stress . . . or degradation as a result of wear” (*id.*, ¶ 43). Seymour could not evaluate the broken tach belt in the case because it was not preserved (*id.*), but attests that if a tach belt breaks, the elevator loses track of its speed and will come to a stop, which can result in abrupt stops and entrapments (*id.*).

Seymour opined that plaintiff did not do anything to cause the subject incident, as she was merely a passenger (*id.*, ¶ 44). While Seymour agreed that a broken tach belt can cause an elevator to stop, he opined that in this case, the broken tach belt was not the cause of the accident because it does not explain why the elevator ascended to the fourth floor then stopped and changed direction (*id.*). Seymour opined that the tach belt broke due to the subject elevator’s sudden downward acceleration and abrupt stop, and emphasized that there is no evidence in the record to show that Schindler performed a root cause analysis as to why the elevator descended as described by plaintiff (*id.*).

DISCUSSION

A party moving for summary judgment under CPLR 3212 “must make 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

I. Defendants' Motion for Summary Judgment

As a preliminary matter, defendants argue that plaintiff's response to defendants' statement of facts fails to conform to 22 NYCRR 202.8-g. Specifically, defendants argue that plaintiff only offered a response to material facts nos. 3, 6, 9, 13 and 18, and therefore the court must accept as true the remaining facts. Defendants further argue that for the five material facts that plaintiff offers a response, she objects to those facts without citing to any evidence as required by 22 NYCRR 202.8-g (d).

When an opposing party does not submit a counter statement of each statement of fact made by the moving party, "the court ha[s] discretion under section 202.8-g (former [c]) to deem the assertions in [the moving party's] statement of material facts admitted, [but it is] not required to do so" (*On the Water Productions, LLC v Glynos*, 211 AD3d 1480, 1481 [4th Dept 2022] citing *Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022]). Here, in the exercise of its discretion the court declines to deem the facts offered by defendants admitted.

Turning to the remaining arguments on the motion, defendants failed to establish their prima facie burden on summary judgment. Defendants move for summary judgment on the grounds that they did not have actual or constructive notice of a defective condition. Defendants further argue that res ipsa loquitur does not apply because the cause of the accident was identified, which was the broken tach belt. Plaintiff argues that res ipsa loquitur applies because the cause of the accident is not known.

To prevail on a negligence claim, a plaintiff must demonstrate "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]).

A property owner has a “duty to passengers to maintain its building’s elevator[s] in a reasonably safe manner” (*Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011] [quotations and citations omitted]). To hold an owner liable for a dangerous condition in an elevator, there must be evidence that “they created or had actual or constructive notice of the allegedly hazardous condition” (*Rivera v Merrill Lynch/WFC/L/Inc.*, 84 AD3d 524, 525 [1st Dept 2011]; *see also Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-561 [1st Dept 2010]). “[T]o constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v American Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

The owner’s duty is nondelegable “despite having an exclusive maintenance and repair contract with an elevator company, [if the owner] fails to notify the elevator company about a known defect” (*Isaac*, 84 AD3d at 458). An elevator company that “agrees to maintain an elevator in safe operating condition may [also] 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” (*id.*).

Notice in elevator cases may be established from prior incidents involving the same subject elevator. “In order to establish notice based on prior accidents, plaintiff [is] required to produce evidence that the prior accidents were similar in nature to the accident alleged here and caused by the same or similar contributing factors” (*Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [1st Dept 2007]). Plaintiff has to also provide evidence that that such prior incidents involved the same elevator (*see Espinal v Trezechahn 1065 Ave. of Ams.s, LLC*, 94 AD3d 611, 613-614 [1st Dept 2012] [“The motion court incorrectly concluded that defendants had notice of the defect through previous incidents . . . [as there] was also no evidence that any of those incidents involved this

particular elevator . . . ”; “Although the motion court impermissibly converted plaintiff’s theory of liability from a runaway elevator to a mere entrapment, as indicated there was no evidence of prior entrapments involving this particular elevator”]).

Here, defendants established that they did not have actual notice of a prior free-falling incident or a prior broken tach belt incident related to subject elevator (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571 [1st Dept 2014] [“Defendant established prima facie that it did not have actual notice by presenting evidence that, before the accident, the department supervisor . . . was unaware of the alleged . . . condition and that the loss prevention officer had received no complaints about the area”]). Records of Schindler’s work in response to service calls on the subject elevator show two service malfunctions one month and two months prior to the incident (NYSCEF Doc No. 82; see also NYSCEF Doc No. 81). These two prior service malfunctions, however, involved the doors of the subject elevator, not a free-fall or a broken tach belt (*id.*). The prior malfunctions of the subject elevator thus did not provide defendants with actual notice of a free-fall or a broken tach belt because they do not appear to be similar in nature. There is also no evidence in the record that there were complaints that the subject elevator had prior incidents of free-falling or of a broken tach belt (*see Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011] [“plaintiff failed to produce evidence of a prior problem with the elevator that would have provided notice of the specific defect alleged”]; *see also Sanchez v 1067 Fifth Ave. Corp.*, 192 AD3d 521, 522 [1st Dept 2021]; *Colon v New York City Hous. Auth.*, 156 AD3d 406, 407 [1st Dept 2017]).

Defendants, however, failed to meet their prima facie burden of demonstrating that they lacked constructive notice of a broken tach belt. “To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was

last cleaned or inspected relative to the time when” the incident occurred (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008]). Defendants only submitted records of Schindler’s work in response to service calls related to the subject elevator. They did not, however, provide any records related to the routine inspections and preventive maintenance that Schindler was required to conduct on the subject elevator pursuant to defendants’ contract.

The contract between the defendants required Schindler to conduct inspections and maintenance of the subject elevator bi-weekly, monthly, quarterly, semi-annually, and annually, in addition to the immediate service repair work. In fact, Carroll, Apfelbaum and Bonner all testified that Schindler was required to conduct monthly preventative maintenance of the elevators. Yet, defendants submitted no evidence, whatsoever, regarding the preventative “maintenance and inspection history of the [the subject] elevator, either pre-or post-accident,” including any records related to the monthly preventative maintenance (*Stewart v World El. Co., Inc.*, 84 AD3d 491, 495 [1st Dept 2011]). Without the preventative maintenance records, defendants have failed to establish that they lacked constructive notice of a condition that could have caused the elevator to enter a free-fall or the tach belt to break.

As plaintiff argues, the inspection and maintenance history of the elevator in question is important to also show whether Schindler did in fact conduct the required preventative monthly maintenance. These records would also shed light on whether, in performing monthly maintenance, Schindler could have discovered the condition of the tach belt and corrected it prior to the incident. Factual questions thus exist as to whether Schindler “properly serviced” the tach belt, used reasonable care to discover and correct “a condition which it ought to have found” (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]), and whether Schindler was negligent in maintaining the elevator in question (*Bellucia v CF 620*, 172 AD3d 520, 522 [1st Dept 2019]).

Issues of fact also exist as to “whether the elevator even went into a ‘free fall,’” as alleged by plaintiff (*Shannon v New York Times Bldg., LLC*, 170 AD3d 600, 601 [1st Dept 2019]), raising an “issue of credibility” (*Villalba v New York El. and Elec. Corp., Inc.*, 127 AD3d 650, 650 [1st Dept 2015]).

“While generally credibility determinations are left to the trier of the facts, where testimony is ‘physically impossible [or] contrary to experience,’ it has no evidentiary value” (*Espinal*, 94 AD3d at 613). Defendants argue that plaintiff’s version of the accident is mechanically impossible. Specifically, defendants argue that while plaintiff testified that the elevator ascended to the fourth floor, descended to the third floor, and then free-fell to the basement, she also testified that she did not know what speed the elevator was travelling at any point. Defendants argue that plaintiff was also not aware that the elevator stopped in the basement until she exited.

Defendants use Carroll’s testimony to argue that the accident could not have occurred as plaintiff stated. Carroll testified that an actual free-fall could not have happened because he discovered a broken tach belt and no other defect after the accident. Carroll further noted that a broken tach belt would not have caused a free-fall because the safety brake would have stopped the elevator from moving within one to two seconds after the tach belt broke. Defendants also point to the records of Schindler’s work in response to service calls to show that that the subject elevator was functional a day after the incident once Schindler replaced the broken tach belt. They argue that if anything else was wrong with the subject elevator, replacing the broken tach belt would not have been sufficient for the elevator to work the next day. Defendants also point to plaintiff’s expert report stating that it is devoid of any explanation as to the possible cause of the accident or how the elevator could have malfunctioned as described by plaintiff.

Defendants' impossibility argument fails. While defendants presented some "evidence that the accident might not have occurred in the manner that plaintiff described [by pointing out to the brokage of the tach belt], plaintiff's testimony about how the accident occurred [is] sufficient to create an issue of fact" (*Lonigro v WFP Tower B. Co. L.P.*, 199 AD3d 573, 574 [1st Dept 2021]).

Finally, defendants argue that *res ipsa loquitur* does not apply because the cause of the accident was identified. "Res ipsa loquitur is not a separate theory of liability but merely 'a common-sense application of the probative value of circumstantial evidence'" (*Smith v Consolidated Edison Co. of N. Y., Inc.*, 104 AD3d 428, 428-429 [1st Dept 2013]). The doctrine of *res ipsa loquitur*, which may be invoked against a defendant, "allows the factfinder to infer negligence from the mere happening of an event where the plaintiff presents evidence (1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event" (*Miller v Schindler El. Corp.*, 308 AD2d 312, 313 [1st Dept 2003]). "The maxim may be invoked only where the 'circumstances of the case unexplained justify the inference of negligence,' otherwise there is no inference which a defendant is called on to rebut or explain" (*Manley v New York Tel. Co.*, 303 NY 18, 25 [1951]). *Res ipsa loquitur* does not apply when there is evidence identifying the cause of the accident (*Monroe v City of New York*, 67 AD2d 89, 97 [2d Dept 1979]).

Defendants' argument that *res ipsa loquitur* does not apply because the broken tach belt caused the accident fails. As stated *supra*, there is an issue of fact on whether the elevator dropped several floors as testified by plaintiff. If plaintiff's testimony is credited, the broken tach belt could not have been the cause of the accident as it would not explain why the elevator entered into a free-fall descent from the third floor or why the elevator came to a stop in the basement.

For all these reasons, defendants' motion for summary judgment is denied.

II. Plaintiff's Cross-Motion

In her cross-motion for summary judgment, plaintiff argues that defendants are liable because Schindler failed to correct an elevator condition that they would have discovered if they used reasonable care and that the doctrine of *res ipsa loquitur* applies. Plaintiff is also moving to dismiss Yeshiva's first affirmative defense and Schindler's third affirmative defense alleging plaintiff's comparative fault. Defendants argue that plaintiff was partly at fault because she failed to hold on to the handrails inside the elevator during the incident.

As a preliminary matter, defendants argue that plaintiff's cross-motion is untimely under this court's part rules, which require that a summary judgment motion be filed within 60 days of the filing of note of issue.¹ Plaintiff filed the note of issue on June 27, 2023, and served her cross-motion on October 9, 2023, well after the 60 days had passed. The court may consider an untimely cross-motion "even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion" (*Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]). Notwithstanding defendants' arguments, the court will consider plaintiff's cross-motion because defendants' motion seeks relief on similar grounds to that sought by plaintiff's cross-motion (*see Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 [1st Dept 2006]). In their motion for summary judgment, defendants argue that they lacked actual and constructive notice of a defective condition in the subject elevator and that *res ipsa loquitur* does not apply. Plaintiff argues that her cross-motion for summary judgment should be granted because Schindler should have discovered the alleged

¹ No dates for the filing of dispositive motions were set in the preliminary conference order in this case. Although rule 17 of the Rules of the Justices of the Supreme Court, Civil Branch, New York County provide that summary judgment motions shall be made within 120 days after the filing of the note of issue, defendants argue that this court's individual part rules apply.

defective conditions of the subject elevator through their routine preventative maintenance and inspections obligations pursuant to the contract, and that Yeshiva has a nondelegable duty to maintain the elevators in the residence hall. According to plaintiff, *res ipsa loquitur* applies and defendants' affirmative defense of plaintiff's culpable conduct fails. Considering the nearly identical relief sought by defendants, the court will consider plaintiff's "mirror image" cross-motion (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

As stated above, to invoke the doctrine of *res ipsa loquitur*, plaintiff must present evidence "(1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event" (*Miller v Schindler El. Corp.*, 308 AD2d 312, 313 [1st Dept 2003]).

"To rely on *res ipsa loquitur* a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the . . . conditions afford a rational basis for concluding that 'it is more likely than not' that the injury was caused by defendant's negligence"

(*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997] [citation omitted]).

Further, as "clarified by the Court of Appeals, the only instance when summary judgment must be granted to a plaintiff on a *res ipsa* theory is 'when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable'" (*Tora v GVP AG*, 31 AD3d 341, 342 [1st Dept 2006] [citation omitted]).

Here, plaintiff "failed to create an inescapable inference that the defendants were negligent" (*id.*). While "[a] free-fall or sudden drop of an elevator does not ordinarily happen in the absence of negligence," (*Colon v New York City Hous. Auth.*, 156 AD3d 406, 407 [1st Dept 2017]), there are "triable issues of fact [in this case] concerning whether the incident happened as

plaintiff stated” (*Ford v Campus Realty LLC*, 226 AD3d 405, 406 [1st Dept 2024]). Although it is undisputed that a broken tach belt will cause an elevator to stop, the parties disagree as to whether the accident happened as plaintiff testified. Specifically, the parties disagree on whether the subject elevator free-fell during the accident and whether the cause of the accident was identified. Plaintiff has not submitted any other evidence to corroborate her testimony that the subject elevator free-fell on the day of the accident.

Seymour’s report fails to resolve the issue of whether the incident occurred as plaintiff stated. Nor does it serve as supporting evidence on whether the subject elevator free-fall in the first place. While Seymour agreed that a tach belt breaking will cause an elevator to stop, he stated that the tach belt breaking does not explain why the subject elevator stopped, changed direction, and descended to the basement (NYSCEF Doc No. 91, Expert aff, pp. 10-11). Seymour thus concluded that the breakage of the tach belt was not the cause of the subject elevator’s “rapid downward acceleration.” Instead, Seymour believed that the breakage of the tach belt was a result and “an obvious symptom” of the subject elevator’s sudden acceleration and abrupt stop. Seymour’s opinion, however, relies on the assumption that the subject elevator descended in a free-fall on the day of the incident, which is an issue of contention between the parties. Plaintiff’s testimony thus raises an issue of credibility, as stated *supra*, which is generally left to the trier of facts to determine.

While plaintiff fails to meet her burden to show that *res ipsa loquitur* applies as to defendants’ liability, the record in the case shows that plaintiff did not contribute to the occurrence of the accident. Defendants argue that plaintiff was comparatively at fault for the happening of the accident because she held onto the handrails inside the elevator and was in a crouching position to brace for the free-fall. The evidence, however, does not establish that the subject elevator

malfunction had anything to do with plaintiff's actions. In fact, Carroll testified and Seymour averred that plaintiff could not have contributed to the malfunction that led to plaintiff's entrapment in the elevator (NYSCEF Doc No.76, p. 44; NYSCEF Doc No. 91, ¶44)

The factual issues that exist in this case, including the issue on whether the subject elevator free-fell on the day of the incident, precludes summary judgment in this case.

The court has considered the parties' remaining contentions and finds them unavailing.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Yeshiva University and Schindler Elevator Corporation against plaintiff Shifra Lindenberg is denied; and it is further

ORDERED that the part of plaintiff Shifra Lindenberg's cross-motion for summary judgment against defendants Yeshiva University and Schindler Elevator Corporation on the issue of said defendants' liability is denied; and it is further

ORDERED that the part of plaintiff Shifra Lindenberg's cross-motion for summary judgment dismissing defendants Yeshiva University's first affirmative defense and Schindler Elevator Corporation's third affirmative defense pleaded in their answers is granted, and Yeshiva University's first affirmative defense and Schindler Elevator Corporation's third affirmative defense of plaintiff's comparative fault are dismissed.

7/11/2024

DATE



RICHARD G. LATIN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: