SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER **PART** 08

Justice

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INDEX NO. 159599/2020

LEONARDO ARIAS,

Plaintiff,

MOTION DATE 03/20/2024, 03/22/2024

- v -

MOTION SEQ. NO. 005 006

GS 800 6TH LLC, GREYSTAR, FUJITEC AMERICA, INC.

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 135, 136, 137, 138, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 155, 156, 157, 158, 159, 160

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 152, 153, 154

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

This is a personal injury action arising from an allegedly mis-leveled elevator. There are two motion sequences before the court which are hereby consolidated for the court's consideration and disposition in this single decision and order. In motion sequence 5, defendant Fujitec America, Inc. (Fujitec) moves for summary judgment dismissing the complaint and any crossclaims. Defendants GS 800 6th LLC (GS) and Greystar partially oppose the motion to the extent Fujitec seeks dismissal of their crossclaims, and plaintiff cross-moves for summary judgment on liability. Defendants oppose plaintiff's cross-motion on the merits, as well as argue that it is untimely.

In motion sequence 6, GS and Greystar move for summary judgment on their crossclaim for contractual indemnification against Fujitec and for dismissal of all crossclaims against them asserted by Fujitec. Fujitec opposes that motion.

Issue has been joined and the motions-in-chief were timely brought after note of issue was filed (see order dated December 13, 2023). Therefore, summary judgment relief is available as to the defendants. The court must consider, however, whether plaintiff's cross-motion for summary judgment is untimely, and further, whether the court may consider it.

Note of issue was filed on September 18, 2023. Defense counsel thereafter moved to vacate the note of issue, arguing that discovery was not complete, and alternatively to extend the deadline to file summary judgment motions. Plaintiff's counsel conceded in opposition to that motion that discovery was not complete (*see i.e.* NYSCEF Document Number 79, ¶ 3). Another discovery motion was made, and after a conference with the court, the court extended the deadline to file summary judgment motions to March 22, 2024, on consent of the parties (*see* Order dated December 13, 2024). Both motions-in-chief were filed on or before March 22, 2024, but plaintiff's cross-motion was only filed on May 10, 2024.

Plaintiff's cross-motion is thus untimely. *Brill v. City of New York* (2 NY3d 648 2004) announced the now-longstanding rule that the movant on an untimely motion for summary judgment must demonstrate "good cause for the delay in making the motion". However, the court may consider an untimely cross-motion for summary judgment made, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought in the cross-motion (*see Filannino v. Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]).

Plaintiff's counsel does not argue that there is good cause for the untimely cross-motion, but rather, that the cross-motion "directly address issues that have already been placed before this Court – namely the liability of Defendants Greystar and Fujitec for this elevator mis-leveling accident." The court agrees with plaintiff's counsel in part. Only Fujitec has raised the issue of

its own liability in its motion-in-chief. Therefore, plaintiff's request for relief against the remaining co-defendants must be denied as untimely since they did not seek nearly identical relief.

Finally, Fujitec's counsel argues that the court should not consider plaintiff's cross-motion because on April 9, 2024, the parties executed a stipulation adjourning the return date for the motions-in-chief to May 20, 2024 with no reference to plaintiff making a cross-motion and the cross-motion, filed on May 10, 2024 with a return date for June 11, 2024, is grossly untimely. It is of no moment, since plaintiff has failed to eliminate all triable issues of fact on this record.

The court now turns to the parties' substantive arguments. Plaintiff's accident occurred on June 26, 2020, at the building located at 800 Sixth Avenue where plaintiff resides. GS owns the building and Greystar is the property manager. Fujitec, which is in the business of manufacturing, inspecting and repairing elevators, manufactured the elevators at the building. Further, Fujitec entered into an agreement with GS in 2019 to repair and maintain the elevators at the building.

Plaintiff testified at his deposition that when the elevator arrived at the Sky Deck level the following occurred: "I was there. I hit the button. The elevator door opened. Took a few steps, my right foot hit the elevator, like the uneven part. I tripped, twisted my ankle, fell on my back and hip area on the right side." Plaintiff claims to have observed the mis-leveling condition in the months prior to his accident, and allegedly informed one of the porters who worked at the building about the condition. Plaintiff also took pictures of the elevator depicting a height differential between the cab and the floor which have been provided to the court.

Plaintiff argues that the defendants admit they had actual notice of the recurring mis-leveling condition with the subject elevator, and they further admit that the elevator mis-leveling

condition was a tripping hazard requiring immediate correction. However, plaintiff asserts that "due to a contract dispute between the defendants as to who would bear the cost of the repair, nothing was done to fix the problem prior to the plaintiff's fall." Plaintiff also argues that the defendants should be held liable under the doctrine of *res ipsa loquitor.* Finally, plaintiff has submitted an elevator consultant's affidavit opining as to how the defendants could have remedied the underlying condition and further, "that a properly maintained elevator will not mis-level at a height of 2 to 3 inches above the level of the floor in the absence of negligence in the maintenance, inspection and repair of the elevator."

Applicable standard

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

As the court already held, plaintiff may not now seek relief against defendants GS and Greystar. The court will therefore only consider plaintiff's request for summary judgment against

Fujitec, which argues that it lacked control over as well as notice of the mis-leveling condition and that the contract between it and Greystar does not give rise to a duty of care owed toward Plaintiff, a non-party to that contract. Both arguments fail for the reasons that follow. While the defendants dispute whether they had notice of a dangerous condition, as opposed to a minor mis-leveling condition concerning the elevator, there is certainly sufficient facts and testimony on this record to raise a triable issue of fact on the question of whether Fujitec had notice of the specific condition which caused plaintiff's accident. Further, there is a dispute as to the cause of the mis-leveling: whether it was a maintenance issue that Fujitec was responsible to repair or whether the mis-leveled elevator was the result of building settlement.

A party who enters into a contract to render services may assume a duty of care to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of their duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). Plaintiff argues that two of the *Espinal* scenarios apply here: that Fujitec launched a force or instrument of harm and that plaintiff detrimentally relied upon Fujitec's performance under the subject contract.

"An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (*Cilinger v Arditi Realty Corp.* 77 AD3d 880 [2d Dept 2010] citing *Rogers v Dorchester Assoc.*, 32 NY2d 553 [1973]; *see also Isaac v. 1515 Macombs, LLC*, 84 AD3d 457 [1st Dept 2011]). As the court already stated, there is a triable issue of fact on the issue of notice and a reasonable

factfinder could further conclude that Fujitec was responsible to repair the mis-leveling condition. Accordingly, Fujitec's motion for summary judgment dismissing plaintiff's complaint is denied. In light of this result, the court declines to consider plaintiff's detrimental reliance argument.

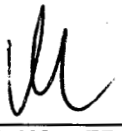
Plaintiff is not, however, entitled to summary judgment against Fujitec. There is a dispute as to what mis-leveling condition Fujitec (and for that matter, the remaining defendants) had notice of: whether it was "minor" as some defendants' witnesses testified or as significant as the condition which caused plaintiff's accident. Moreover, while plaintiff may rely on the doctrine of *res ipsa loquitor* against multiple defendants, this nonetheless presents a fact question as to which defendants should be held liable (*see i.e. Frank v. Smith*, 127 AD3d 1301 *citing Schmidt v. Buffalo Gen. Hosp.*, 278 AD2d 827 *lv. denied* 96 NY2d 710 [2001] ["In a multiple defendant action in which a plaintiff relies on the theory of *res ipsa loquitur*, a plaintiff is not required to identify the negligent actor"]).

As for the crossclaims, defendants' motions are denied as well. Contrary to GS and Greystar's contention, the fact question regarding what caused the mis-leveling, whether it was an elevator malfunction or building mis-leveling, is outcome determinative as to whether Fujitec is contractually obligated to defend and indemnify its codefendants in this matter. Further, there is testimony that the defendants' dispute reached the issue of who would pay for the repairs, Fujitec or GS/Greystar, and "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a … landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

Accordingly, it is hereby

ORDERED that the parties' motions and cross-motion for summary judgment are denied in their entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.



10/11/2024
DATE

LYNN R. KOTLER, J.S.C.

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