SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** 17
Justice

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LOUIS A. MALDONADO,

Plaintiff,

- v -

EXCEL ELEVATOR & ESCALATOR, CORP., MAYORE ESTATES LLC, 80 LAFAYETTE ASSOCIATES LLC,

Defendants.

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MAYORE ESTATES LLC AND 80 LAFAYETTE ASSOCIATES LLC

Third-Party Plaintiffs,

-against-

CENTURY 21, INC.

Third-Party Defendant.

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INDEX NO. 157308/2020

MOTION DATE 04/28/2023, 04/28/2023

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 73, 75, 77, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 105, 106, 107, 108, 109, 113

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 76, 78, 79, 80, 81, 82, 83, 84, 93, 97, 98, 99, 100, 101, 102, 103, 104, 110, 111, 112, 114, 115

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

In this action to recover damages for personal injuries, plaintiff Louis A. Maldonado ("plaintiff") alleges that on October 24, 2019, he was injured in the basement of Century 21 located at 22 Cortlandt St, New York, New York, when he was struck on the head by a freight elevator gate. Thereafter, plaintiff commenced this action against defendants/third-party plaintiffs Mayore Estates LLC and 80 Lafayette Associates, LLC, the building owners (collectively referred to as

"Mayore"), and defendant Excel Elevator & Escalator, Corp. ("Excel"), the elevator company retained to service and maintain the elevator by third-party defendant Century 21, who has defaulted in the action.

In motion sequence number 002, Mayore moves for an order pursuant to CPLR 3212 (i) dismissing plaintiff's complaint, (ii) granting it summary judgment on the grounds of common law and contractual indemnification against Century 21, and (iii) granting it summary judgment on its claim for common law indemnification against Excel. In motion sequence number 003, Excel moves for an order pursuant to CPLR 3212 (i) dismissing plaintiff's complaint, (ii) dismissing the crossclaims by Mayore against it, and/or (iii) striking Mayore's answer for failing to preserve evidence in this case.

The motions are consolidated for disposition herein. Upon the foregoing cited papers and after hearing oral arguments on October 24, 2023, and February 7, 2024, both motions are denied in their entirety.

I. Factual Background

Plaintiff testified that on October 24, 2019, he was allegedly involved in an accident while working for Century 21 as a stock manager (NY St Cts Elec Filing [NYSCEF] Doc No. 50, tr at 19). Plaintiff's duties included managing a staff who were responsible to put away the stock that came off trucks to the stock rooms in the basement (*id.* at 20, 25). Plaintiff oversaw the basement and subbasement (*id.* at 35). The building had four freight elevators (*id.* at 27). The freight elevator involved in the accident was car number 16 (*id.*). Plaintiff described the freight elevator having big green bi-parting metal doors that met in the middle, the top door would rise up and the lower door would retract downward (*id.* at 39-40). Three to four seconds after the outer doors open completely, the inner [gate] retracts up (*id.* at 42). Prior to his accident, plaintiff noticed that when

the inner gate begins to close, a bell would sound. Plaintiff testified, however, that he could hardly hear the bell at all (*id.* at 44). It takes approximately three to four seconds for the inner [gate] to close (*id.* at 47).

Plaintiff testified that he would press the designated button to make the elevator move between the floors (*id.* at 46). At the time of the accident, plaintiff was holding the button to the elevator located on the right side of the elevator, to call the elevator to the floor (*id.* at 37-38). Once the elevator arrived, the outer bi-parting doors opened three to four seconds later. Thereafter, the inner gate began to move upwards, and three to four seconds later it was fully opened (*id.* at 60). When the inner gate was in an open position, plaintiff proceeded to take a step to enter the elevator, and the inner gate hit his head (*id.* at 62-63). Plaintiff testified he never went into the elevator (*id.* at 62-63). Plaintiff testified that prior to the accident, he was standing outside the door holding the button while one of his team members was putting two pallets in the elevator (*id.* at 65). When the team member finished putting the pallets in the elevator, plaintiff released his finger off the button to go into the elevator, and the gate came down right away (*id.*). After the gate hit plaintiff's head, it retracted back upwards (*id.* at 77). Plaintiff testified that he did not hear the bell as the inner gate came down (*id.* at 74).

Plaintiff testified that he was not provided with any training on operating the freight elevators (*id.* at 28). He did not recall whether there were any written instructions about the operation of the elevator near the receiving dock or otherwise within any part of the building occupied by Century 21 (*id.* at 67-68). Plaintiff recalls that he previously complained to Kevin Powers, the operations manager, regarding the sound of the bell of car number 16 (*id.* at 47-48). Plaintiff also complained to Matthew, who was previously his supervisor (*id.* at 49).

Shmaya Glick ("Glick"), the property manager for Mayore, testified that his duties included handling all operations and construction, and maintaining tenant interactions (NYSCEF Doc No. 52 at 7). According to Glick, Century 21, the tenant, was responsible for repairs and maintenance of all the elevators in Century 21 (*id.* at 9-10). Century 21 installed the freight elevators in 2010 for its exclusive use, and the building owner did not have any duties concerning the freight elevators (*id* at 10). Glick testified that prior to the accident, he was never made aware of any operational difficulties with the freight elevator (*id.* at 12). Mayore received no notification of a problem with the gate of the elevator (*id.* at 16). In 2019, Mayore had no day-to-day maintenance or management role except for structural and air-conditioning repairs. All other maintenance, operation and repairs, including to the elevators in their space was Century 21's right and responsibility (NYSCEF Doc No. 55 ¶ 6). In 2019, Mayore did not have permission or the ability to enter Century 21's elevators unless there was an emergency (*id.* ¶ 7).

The Lease

In pertinent parts, the lease between Mayore and Century 21 provides that the tenant may at its own expense and without obtaining the landlord's consent, make non-structural alterations, additions, and changes in the premises (NYSCEF Doc No. 53). Article 16 requires the building owner to make repairs to the interior of the building which may be of a structural nature and to the heating plant, and the air conditioning equipment (*id.*). Article 38 defines non-structural alternations to include the making of openings in floors for the installation of elevators (*id.*).

The Preventive Maintenance Agreement

The Preventive Maintenance Agreement ("agreement") between Century 21 and Excel provides that Excel will on a monthly basis examine, lubricate, adjust, and as needed repair or replace components for hydraulic elevators and traction elevators, which include door operating

devices, door protection devices, and alarm bells. The freight elevator in question, numbered 1F5330, is contained in the agreement as one of the elevators to be maintained by Excel (*see* NYSCEF Doc No. 54).

II. Discussion

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[F]ailure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Ayotte*, 81 NY2d at 1063 [internal quotation marks and citation omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see also American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]). "On a summary judgment motion, 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]).

A. Mayore's Summary Judgment Motion (Motion sequence 002).

Parties' Contentions

Mayore contends that it did not owe a duty to plaintiff as Excel and Century 21 were responsible for the maintenance and repair of the elevators in the Century 21 space (NYSCEF Doc No. 42, Memorandum of Law in Support of Maureen E. Peknic, Esq. [memo] at 3). Mayore relies on the agreement between Excel and Century 21, which includes the subject freight elevator as one of the elevators to be maintained by Excel (*id.*). It further contends that it has no day-to-day maintenance or management role in the Century 21 space, except for structural and air conditioning repairs (*id.* at 4). Furthermore, Mayore argues that it did not cause or create or have actual notice of the alleged condition with the elevator (*id.* at 6). Mayore relies on the lease, which states Century 21 was responsible to repair and maintain the elevators in its space (*id.*). As to Mayore's claims for contractual indemnification, it argues that pursuant to the lease, Century 21 shall indemnify the landlord for claims arising out of any alleged personal injury occurring on the premises (NYSCEF Doc No. 42. at 9). Lastly, Mayore argues that Century 21 and Excel owe Mayore common law indemnification as they were the active tortfeasors in causing plaintiff's alleged incident (*id.* at 10-11).

In opposition, plaintiff contends that Mayore had a nondelegable duty of care which included providing a safe freight elevator free from hazards and defects (NYSCEF Doc No. 89, Memorandum of Law in Opposition of Andrew Latos, Esq. [opp memo] at 3). Additionally, plaintiff argues that Mayore had a duty of care that was voluntarily assumed for the structural portions of the building and that Mayore failed to offer any evidence that the elevator was not a structural portion of the building (*id.* at 4). Second, plaintiff argues that there is a triable issue of fact as to whether the owner is vicariously liable, based on its nondelegable duty, for any

negligence on the part of Excel as a contractor (*id.* at 6). Third, plaintiff argues that there is a triable issue of fact as to whether the owner had notice of the alleged condition, because Glick's lack of awareness does not show that the owner did not in fact receive any notice (*id.* at 7). Additionally, Mayore has not shown that the inspections by the building engineers did not include the freight elevators (*id.* at 7-8). Lastly, plaintiff contends that a triable issue of fact exists as to whether plaintiff was in the elevator when the gate fell onto his head (*id.* at 9).

Plaintiff submits the affidavit of William Seymour, an elevator consultant, who opined that according to the ASME standards, the gate should have remained open a minimum of five seconds with an audible warning alarm (NYSCEF Doc No. 87 at 8). Seymour further opines that there is evidence of a defect/malfunction of the elevator based on the lack of a properly functioning light curtain fitted to the elevator. Seymour further opines that the gate can be seen to initiate closing 2 seconds after plaintiff released the hold button rather than the 5 seconds required by the Code (*id.*). According to Seymour, one proximate cause of plaintiff's accident was the elevator car gate commencing to close too soon after plaintiff released the button that had been holding the gate open (*id.* at 9). Further, Seymour contends that

> "A second proximate cause of the plaintiff's accident was that if, as defendants claim, there was a properly installed and functioning safety light curtain across the entrance then, after plaintiff released the button in the hallway, the gate should have remained held open until such time as the pallet jack was completely clear of the view of such light curtain at which point the gate should have waited at least 5 seconds, with a continuous audible alarm sounding, before commencing to close thus giving plaintiff ample time to safely board the elevator" (*id.* at 10).

On the issue of indemnification, Excel argues in opposition that Mayore is not entitled to common law indemnification because Mayore failed to establish it was not negligent, and it had a non-delegable duty to keep the property reasonably safe. Further, Mayore failed to show that Excel

was negligent because the elevator worked as it was designed to (NYSCEF Doc No. 94, Memorandum of Law in Opposition of Shahnewaz Khan, Esq. [opp memo] ¶¶ 6-7, 9).

On the issue of whether the elevator is structural, Mayore contends that (i) the lease does not include the elevator or any component of the elevator, including the bell or infrared sensor; (ii) the elevator is not substantial to the premises to amount to as a structure; and (iii) Century 21 installed the elevator after it took possession of the building (NYSCEF Doc No. 113, Supplemental Memorandum of Maureen E. Peknic, Esq. [supp memo] at 2-3). The elevator did not change the building's characteristic appearance or alter the nature of the leased space (*id.* at 3). Additionally, the lease is unambiguous and Article 38 states that the making of openings in floors for installations of escalators shall be deemed nonstructural alterations (*id.* at 5).

In his supplemental opposition, plaintiff takes the position that the elevator is a structural part of the building as it is fixed to the building, constitutes a substantial portion of the premises, and cannot be removed without the consent of the building owner (NYSCEF Doc No. 107, Supplemental Memorandum in Opposition of Andrew Latos, Esq. [supp opp] at 2). Furthermore, Plaintiff argues that the building owner did not offer any expert testimony regarding the elevator's nonstructural nature (*id.* at 3). Plaintiff further argues that the elevator's inner gate and the defective warning bell were part of the elevator structure given that the components that make an elevator car functional are structural (*id.* at 4-5).

Analysis

A building owner, as an out-of-possession owner, may be charged with constructive notice of defects in those parts of the building into which it has authority to enter (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987]). Here, Mayore has established that it is an out-of-possession landlord through its submission of the lease, the agreement, and Glick's

deposition testimony (*see Estrella v Rex Realty of Conn., Inc.*, 188 AD3d 562, 562 [1st Dept 2020]). "[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*Gronksi v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012] [citations omitted]). "Control is both a question of law and of fact" (*id.*). As an out-of-possession landlord, the building owner can only be found liable if it either has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision (*see Henry v Hamilton Equities, Inc.*, 161 AD3d 418, 418-419 [1st Dept 2018], *affd* 34 NY3d 136 [2019]). Thus, even if an out-of-possession landlord has constructive notice of a defect, "it could only be found liable if the defect that caused plaintiff's accident was a significant structural or design defect that was contrary to a specific statutory safety provision" (*Marie D. v Roman Catholic Church of the Sacred Heart*, 161 AD3d 448, 448 [1st Dept 2018] [internal quotation marks and citations omitted]). Mayore failed to sufficiently establish that its duty to maintain the premises in a reasonably safe condition did not extend to the elevator repair, which "remains nondelegable as between the owner and an injured party despite any contractual delegations of maintenance obligations by the owner to another party" (*see Paez v 1610 St. Nicholas Ave. L.P.*, 103 AD3d 553, 554 [1st Dept 2013], citing *Wagner v Grinnell Hous. Dev. Fund Corp.*, 260 AD2d 265, 266 [1st Dept 1999], *lv denied* 99 NY2d 502 [2002] [a lengthy cable allowed the elevator compartment to rise too high which proximately caused the injury, and the defect was deemed structural]; *see also McGilloway v Block 1289 Assoc.*, 266 AD2d 35, 35 [1st Dept 1999], *lv dismissed* 94 NY2d 915 [2000] [absence of a slow-down limit switch on the elevator, which caused plaintiff's injury, constituted a structural or design defect]). Mayore failed to submit any expert testimony regarding the structural nature of the bell

and the infrared sensor (*see Andersen v Park Ctr. Assoc.*, 250 AD2d 473 [1st Dept 1998] ["Expert testimony is only required when information would be beyond the ordinary knowledge and experience of the trier of fact"] [citations omitted]). Nor does Mayore cite any persuasive authority to conclusively establish, as a matter of law, that components of the elevator, such as the alarm and the infrared sensor are not structural. Based on the foregoing, summary judgment is not warranted as there is a material issue of fact (*see Forrest*, 3 NY3d at 315).

Since Mayore did not meet its prima facie burden of proof, its motion for summary judgment dismissing the complaint is denied without the need to consider the adequacy of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]).

The branches of Mayore's motion which were for summary judgment on its claims for contractual indemnification against Century 21 and Excel, and common law indemnification from Excel are denied. A party seeking contractual indemnification must prove itself free from negligence (*see Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]. Since Mayore failed to establish its freedom from negligence, it failed to establish its prima facie entitlement to judgment for contractual indemnification (*see Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008] [affirming denial of owner's summary judgment motion on contractual indemnification claim against tenants where issues of fact existed concerning owner's negligence]). Similarly, Mayore's motion for summary judgment on its common-law indemnification claim as against excel is denied because Mayore did not establish its own freedom from negligence (*see Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 444 [1st Dept 2022]).

B. Excel's Summary Judgment Motion (Motion sequence 003)

Parties' Contentions

Excel first contends that it neither created a dangerous condition nor was on notice of a dangerous condition (NYSCEF Doc No. 59, Memorandum of Law in Support of Stuart D. Schwartz, Esq. [memo] at 3). Excel relies on plaintiff's testimony that he used the elevator daily and never had any issues, nor did he make any complaints to the elevator maintenance staff (*id.* at 4). Second, Excel argues that it is entitled to summary judgment because there is no evidence that there was any defect with the elevator that caused or contributed to the alleged accident (*id.* at 6). Excel relies on the affidavit of Robert Belcher, the former Service Manager for Excel, who attested that the elevator entrance door's protective edges are designed to operate in safe mode and any failure of the system shuts the system down and prevents the gate and doors from closing (NYSCEF Doc No. 95). Excel argues that plaintiff testified that he had not moved past the gap between the elevator shaft doors and cab gate, which is allegedly supported by the video. Belcher oversaw the field operations at the time of plaintiff's alleged accident and is familiar with the number 16 elevator (*see id.*). Belcher stated that the elevator entrances were equipped with a "protective light curtain" system that emits a set of beams across the entrance to the elevator, and if the beams were blocked, the system would stop the gate and the door closing sequence and reopen the doors (*id.* ¶ 4). Belcher reviewed Excel's records and confirmed that Excel was at the building performing routine maintenance service on October 15, 2019, and was not called to address or correct any gate related problems, or any issues involving the safety related door or gate equipment as a result of the subject incident (*id.*). Belcher reviewed the surveillance video and noted that the gate was already closing as plaintiff approached with no portion of plaintiff's body inside the elevator before he was struck (*id.* ¶ 5). In Belcher's opinion, the elevator gate and the

protective safety edge worked as designed and intended and there was no malfunction of the equipment that contributed to the accident. Rather, Belcher opined that the incident appeared to have been caused by user error (*id.* ¶ 6).

Regarding the branch of its motion for spoliation of evidence, Excel argues that it contacted Mayore's counsel in 2022 to gain access to the building to inspect the elevator once COVID restrictions were lifted. Excel was notified that the elevator equipment had been altered and was no longer in the same condition, and they did not receive any notice of the changes (NYSCEF Doc No. 58, Affirmation in Support of Stuart D. Schwartz, Esq. [aff] at 9).

In opposition, plaintiff argues that summary judgment is precluded by the doctrine of res ipsa loquitur, given that (i) the accident would not have occurred absent negligence and plaintiff testified that the inner gate was fully opened, and (ii) maintenance and service of the elevator was within the exclusive control of Excel (NYSCEF Doc No. 83, Memorandum of Law in Opposition of Andrew Latos, Esq. [opp memo] at 2-4). Secondly, he argues that Excel had prior notice of the issue with the subject door given that on October 12, 2019, it undertook a door repair to the elevator based on a work order.[1] Plaintiff alleges that Excel's representative testified that the technician did not fix the problem or put the elevator back into service for another reason (*id.* at 5). Third, plaintiff contends that a triable issue of fact exists as to whether plaintiff was in the elevator when the gate fell onto his head (*id.* at 8). Plaintiff relies on Seymour's affidavit in support.

In opposition to the branch of Excel's motion for spoliation, Mayore argues that it was under no obligation to preserve the freight elevator, and Excel did not serve a notice to preserve the freight elevator at any time (NYSCEF Doc No. 100, Memorandum of Law in Opposition of Maureen E. Peknic, Esq. [opp memo] at 2). Mayore notified the parties that the elevator cabs and

[1] A copy of the work order shows the problem with the freight elevator was a door repair, and the work description is redacted (NYSCEF Doc No. 72 at 49-52).

doors would be available for inspection. However, plaintiff's counsel advised that plaintiff did not require an inspection of the subject elevator (*id.* at 3). Mayore further argues the freight elevator was not destroyed with a culpable state of mind because Century 21 was in bankruptcy, and gave back the upper floors where the elevator shaft and machines were located, and the area was being turned from a retail store back to office space (*id.* at 4). Mayore offered the parties an inspection of the actual nonoperational door itself. Mayore argues that an inspection of the elevator is not relevant to whether the building owner had a duty to plaintiff (*id.* at 5).

In reply, Excel contends that res ipsa loquitor is inapplicable because plaintiff cannot show what caused his injuries as plaintiff ran into the elevator when the gate was halfway closed, and plaintiff failed to demonstrate Excel had exclusive control of the elevator (NYSCEF Doc No. 97, Memorandum in reply of Shahnewaz Khan, Esq. [reply memo], at 2-4).

On the issue of notice, Excel takes the position that the work ticket references repairs to the door and not the car gate in question, and the work ticket must be specific as to the defect in question to constitute actual or constructive notice (NYSCEF Doc No. 114, Supplemental Memorandum of Law in Support of Shahnewaz Khan [supp memo] at 4). In opposition, plaintiff argues that regular maintenance can equate to constructive notice. Excel has failed to show that issues with the safety features would not have been detectable through testing or were remote from the area of repair (NYSCEF Doc No. 110, Supplemental Memorandum of Law in Opposition of Andrew Latos, Esq. [supp opp] at 11-12]).

Analysis

"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" (*Rogers v*

Dorchester Assoc., 32 NY2d 553, 559 [1973] [citations omitted]). An elevator company seeking summary judgment must submit sufficient evidence that it lacked actual or constructive notice of the defect and that it did not fail to use reasonable care to correct any such condition (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]). Excel's evidence is insufficient to establish, prima facie, that it did not have actual or constructive notice of the condition that caused the elevator's gate to close without adequate warning. Excel made an insufficient showing that it used reasonable care to discover and correct the defective condition of the elevator [bell] and sensor (*see Merrick v Macerich Co.*, 223 AD3d 530, 532 [1st Dept 2024]). There is no evidence that Excel ever inspected the gate or that any defect would not have been discoverable upon a reasonable inspection (*see Blake v City of Albany*, 48 NY2d 875, 877 [1979] ["[a] negligent failure to discover a condition that should have been discovered can be no less a breach of due care than a failure to respond to actual notice . . ."]). Excel is not entitled to summary judgment as there is no evidence regarding the maintenance and inspection history of the elevator (*see Stewart v World El. Co., Inc.*, 84 AD3d 491, 495 [1st Dept 2011] [defendants failed to meet burden as they submitted almost no evidence regarding elevator's maintenance and inspection history]). Additionally, the conflicting expert affidavits as to whether the elevator was chronically defective or free from defects create a triable issue of fact (*see Lowman v Consolidated Edison Co. of N.Y., Inc.*, 220 AD3d 510, 511 [1st Dept 2023]; *Mable v 384 E. Assoc., LLC*, 175 AD3d 1127, 1128 [1st Dept 2019] [conflicting expert affidavits regarding potential causes of elevator malfunction precluded summary judgment]).

It is not necessary to consider plaintiff's res ipsa loquitur argument as there is a material issue of fact that there are two defendants that could maintain and repair the elevator (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006] [stating that the second element of a successful res

ipsa loquitur claim includes exclusive control of the defective instrument]). Since Excel did not meet its prima facie burden of proof, its motion for summary judgment dismissing the complaint is denied without the need to consider the adequacy of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]).

Finally, addressing Excel's motion for a remedy for Mayore's alleged spoliation of the evidence, Excel has failed to make a prima facie case for this relief. "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support the claim or defense" (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks and citations omitted]. Here, Excel failed to annex any demand upon counsel for Mayore to preserve the subject elevator (*see Amaris v Sharp Elecs. Corp.*, 304 AD2d 457, 457 [1st Dept 2003] [notice creates a duty on the party of the party in possession and control of the evidence to see that it is preserved]). Additionally, Excel has failed to establish that Mayore had an obligation to preserve the elevator, or that its unavailability is prejudicial to its case (*see Harry Winston, Inc. v Eclipse Jewelry, Corp.*, 215 AD3d 421, 423 [1st Dept 2023]).

Based on the foregoing, Excel's motion for summary judgment is denied in its entirety.

The parties' remaining contentions either are without merit or need not be reached in light of this Court's determination.

Accordingly, it is hereby

ORDERED that defendants/third-party plaintiffs Mayore Estates LLC and 80 Lafayette Associates LLC's motion for summary judgment (mot seq # 002) pursuant to CPLR 3212 is denied in its entirety; and it is further

ORDERED that defendant Excel Elevator & Escalator, Corp.'s motion for summary judgment (mot seq # 003) pursuant to CPLR 3212 is denied.

3/12/2025
DATE

SHLOMO S. HAGLER, 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