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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

LIRIM DAUTAJ, x

Plaintiff,

-against-

ALLIANCE ELEVATOR COMPANY, UNITEC ELEVATOR COMPANY and 84-06 109th STREET,

x

Index Number 10947 2010

Motion Date April 12, 2012

Motion Cal. Number 9

Motion Seq. No. 5

The following papers numbered 1 to 30 read on this motion by defendant Alliance Elevator Company, Inc., sued herein as Alliance Elevator Company (Alliance) for summary judgment dismissing plaintiff's complaint and defendant 84-06 109th Street, LLC's (Owner) cross claims for breach of contract, obligation of warranty, and indemnification.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-21
Answering Affidavits - Exhibits	22-27
Reply Affidavits	28-30

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover for personal injuries plaintiff Lirim Dautaj (plaintiff) allegedly sustained on November 17, 2009. Plaintiff has alleged that while he was a passenger in an elevator cab on premises located at 84-06 109 Street, in the County of Queens, a portion of the elevator cab's ceiling collapsed and fell onto him. Owner owned the premises at the time of the incident and Alliance was an elevator service contractor which

had and agreement with Owner to service portions of the subject elevator for a period which included the date of the incident.

Alliance has moved for summary judgment dismissing plaintiff's complaint and has argued that it did not owe or breach a duty to plaintiff because its service agreement with Owner specifically excluded any maintenance of the elevator cab and because plaintiff was not a third-party beneficiary to its agreement with Owner. It has also argued that its performance of its duties pursuant to said service agreement did not cause of contribute to the happening of the accident. "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" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). "Generally, a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a non-contracting third party" (*Bienaime v Reyer*, 41 AD3d 400, 403 [2007]). However, there are "three situations in which 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: (1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 Contrs.*, 98 NY2d at 140 [internal quotes and citations omitted]).

In support of its motion, Alliance has relied upon, inter alia, plaintiff's deposition testimony, the testimony and affidavit of Kenver Sumner (Sumner), an employee of Alliance, doing business as non-party Unitec Elevator Company; the testimony of non-party Tina Massimiano (Massimiano), a witness to the accident; the affidavits of Benjamin Schwartz (Schwartz), an employee of non-party Metropolitan Property Services, Inc., Owner's manager of the subject premises, and Thomas Davies (Davies), an elevator consultant. Alliance has also relied upon a copy of its service agreement with Owner, dated August 2, 1983, and the testimony and affidavit of Joseph Marrero (Marrero), its superintendent.

Schwartz stated in his affidavit that the unmodified 1983 elevator maintenance agreement was in effect on the date of plaintiff's accident. That agreement provided, in relevant part, that it did not include any work involving the "hatchway entrances, hatchway entrance finish, cab, cab finish, cab flooring." It further provided that Alliance "[did] not assume any management or control over any part of the equipment except during periods of work when [its] employees actually take direct charge of equipment."

Plaintiff testified that while he was a passenger in the elevator at the subject premises, when the elevator came to a stop of the fourth floor, the escape hatch and debris from the ceiling of the elevator fell onto him, striking his head, neck, shoulders, and back, and propelling him out of the elevator onto the ground of the fourth floor. Marrero testified that Sumner was working on the elevator at the subject premises on behalf of Alliance on the date of the incident and that he could complete his work without going onto the roof of the elevator cab.

Sumner testified that he was an elevator maintenance mechanic, that he serviced the subject elevator on the date of the accident, and that his work on that date involved work on parts of the elevator which were outside the elevator, above the roof of cab. Sumner further testified that in the process of completing his work, he did not step onto the top of the elevator cab, where the escape hatch was located between him and the site of his work, and that he was waiting for the elevator on the fifth floor when he heard the accident and rushed down to the fourth floor to see what was happening. Davies inspected the subject elevator and stated in his affidavit that Sumner would have been able to complete his work without stepping on the roof of the elevator. However, Massimiano testified that she witnessed the accident, that she was only able to observe the escape hatch and debris fall from the ceiling onto plaintiff before putting her head down in order to protect herself, that she heard the sound of tools falling, and that she observed tools in the vicinity of the accident on the fourth floor.

Massimiano's and Sumner's conflicting testimony have raised issues of fact that must be resolved by a trier of fact, including whether tools fell onto plaintiff from the ceiling of the elevator cab and whether Sumner's work on the roof of the elevator may have proximately caused or contributed to the accident. Therefore, Alliance has failed to satisfy its prima facie burden of demonstrating that no triable issues of fact exist, at least, as to whether it exercised reasonable care in the performance of its duties under its service agreement with Owner and whether it may have launched a force or instrument of harm in the performance of those duties (*see Bienaime v Reyer*, 41 AD3d at 403). As such, the opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see e.g. Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1029 [2009]).

In any event, in opposition, plaintiff and Owner have raised a triable issue of fact through the affidavits of Patrick Carrajat (Carrajat), plaintiff's expert, an elevator and escalator consultant, and William Meyer (Meyer), Owner's expert, a professional engineer. Carrajat and Meyer both examined the subject elevator along with reviewing, among other things, Sumner's deposition testimony. While Meyer concluded that it was highly improbable that Sumner performed his work without coming into contact with the roof of the elevator, Carrajat concluded that it was, in fact, impossible for Sumner to have avoided coming into contact with the roof of the elevator in order to perform the tasks he testified to completing. Thus, Alliance is not entitled to the dismissal of plaintiff's complaint.

Alliance has also moved for summary judgment dismissing the third-party claim against it for common-law indemnification. In light of the above determination, since no finding has been made with respect to Alliance's liability, if any, with respect to the subject accident, it would be premature for this court to make a finding on the cross claim against Alliance for common-law indemnification (*see Brennan v R.C. Dolner, Inc.*, 14 AD3d 639 [2005]; *see generally Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 705 [2007]). Therefore, Alliance is not entitled to summary relief on this branch of its motion.

Turning next to Owner's cross claim for contractual indemnification, Alliance has moved for summary judgment dismissing it. Since "[t]he right to contractual indemnification depends upon the specific language of the contract" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2009] [internal quotes and citation omitted]), and Alliance has demonstrated that the service agreement in the instant matter did not contain an indemnification provision, it has satisfied its burden on this branch of its motion. In opposition, plaintiff and Owner have failed to point to any evidence to raise an issue of fact. Therefore, Alliance is entitled to the dismissal of the cross claim for contractual indemnification.

Alliance has moved for summary judgment dismissing Owner's cross-claim for breach of contract. While Alliance has presumed in its papers that this claim intended as a claim for breach of contract to procure insurance, nothing in the pleadings suggests such a limitation of this cross claim. Alliance has failed to otherwise point to sufficient evidence to affirmatively establish that it fulfilled all of its obligations under the service agreement with Owner (*c.f. Yonkers Ave. Dodge, Inc. v BZ Results, LLC*, 95 AD3d 774 [2012]). Therefore, Alliance has failed to satisfy its initial burden on this branch of its motion and the opposition papers need not be considered (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Alliance has also moved for summary judgment dismissing Owner's cross-claim for obligation of warranty. "No warranty attaches to the performance of a service" (*Aegis Prods. v Arriflex Corp. of Am.*, 25 AD2d 639 [1966]; *see Town of Poughkeepsie v Espie*, 41 AD3d 701, 706 [2007], *lv dismissed* 9 NY3d 1003 [2007]). Since Alliance's evidence has demonstrated that its agreement with Owner was to provide a service and, in opposition, no issue of fact has been raised, Alliance is entitled to the dismissal of this cross claim.

Accordingly, the branches of Alliance's motion for summary judgment dismissing Owner's cross claims for contractual indemnification and obligation of warranty are granted and the motion is denied in all other respects.

Dated: June 22, 2012

J.S.C.