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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59
Justice

DORINDA DRAKE,

Plaintiff,

- v -

107-145 WEST 135TH STREET ASSOCIATES, OP PROPERTY MANAGEMENT, LLC, UNITED STATES ELEVATOR INC,

Defendants.

Index No.: 104885/08
Motion Date: 10/25/11
Motion Seq. No.: 002
Motion Cal. No.:

The following papers, numbered 1 to 4 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/-Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The motion of defendants 107-145 West 135th Street Associates and OP Property Management, LLC for summary judgment dismissing the complaint shall be denied.

Defendants 107-145 West 135th Street Associates (West 135) and OP Property Management, LLC (OP) (together, moving defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against them and for summary judgment on their cross claim asserted as against co-defendant United States Elevator Inc. (USE).

This action arises out of an accident that occurred on

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

This action arises out of an accident that occurred on February 5, 2008, where plaintiff alleges that, as she entered the elevator at the premises owned by West 135 and managed by OP, an object fell from an elevator shaft, striking her on the shoulder. Moving defendants argue that the complaint should be dismissed as against them because there is no evidence that they either created or had actual or constructive notice of any allegedly dangerous condition that caused plaintiff's injuries, and that any liability for plaintiff's injuries is the responsibility of co-defendant USE.

At her examination before trial, plaintiff testified that, in the month prior to her accident, she complained about the elevator shaking and the elevator doors not always being operative, and that five days before her accident she complained that the elevator was not working. She stated that the condition that allegedly caused her accident was not apparent until she heard a "whooshing" sound "less than a second" before the object struck her. The accident was witnessed by the building's porter, who testified that he too never heard anything, such as a rattling sound, prior to the incident. Nor was he aware of any pieces falling out of the elevator prior to the date of the accident. Neither he, the building superintendent nor any of the other building porters

ever performed any repairs on the elevator.

The moving defendants assert that they contracted with USE to perform routine service and repairs for the elevators on the premises, on a month-to-month basis, while USE was performing under a contract for the modernization and repair of the elevators on the premises. However the court notes that as argued by USE, the contract appended to the moving papers was between OP and United Elevator Company of Weymouth, Massachusetts (UEC Weymouth), a nonparty to this action, and stated that the work to be performed thereunder was "Elevator Modernization/Modification." The movants have produced no written contract between themselves and USE. The incident occurred while UEC Weymouth was under contract for the modernization of the elevators.

William Smith, the CEO of USE, acknowledged at his deposition that USE was onsite, performing work under its agreement with UEC Weymouth to fulfill UEC Weymouth's general construction services contract and the month-to-month maintenance and repair agreement, through the date of the accident. Smith's testimony was based, in part, on work tickets that show that USE was performing maintenance on the elevator that is the subject of this litigation five days and one day prior to the accident. In addition, Smith stated that

the building superintendent had a key to the elevator machine room located above the elevator shaft, which was not USE's property. He stated under oath that the elevator had previously been shut down because of vandalism. Smith testified that USE's maintenance work on the elevator was sporadic because of nonpayment, and that USE eventually left the project because of nonpayment.

Smith identified the piece that allegedly fell on plaintiff as a fascia, or dust cover, that is used to protect the elevator door equipment from people sticking their hands in the shaft door equipment, which includes the track and lock of the elevator. Smith further averred that, during his career as an elevator technician, he had only seen a fascia dislodge during a traumatic door wreck, wherein a significant force would impact the door. According to Smith, the fascia is normally installed by the company that originally installs the elevator.

In their cross-claim, moving defendants West 135 and OP seek conditional indemnification from USE, alleging that USE was responsible for control and maintenance of the elevator and that there is no evidence that the moving defendants had any notice of the allegedly dangerous condition.

It is moving defendants' position that the only evidence

adduced is that they routinely cleaned the interior of the elevator, had no notice of any dangerous condition regarding the elevator, and relied on USE to take proper care of the elevator. Moving defendants assert that, hence, the complaint should be dismissed as against them or, in the alternative, since their only liability could be vicarious, that they should be granted conditional summary judgment on their cross-claim for contractual indemnification asserted as against USE.

In opposition, plaintiff submits an affidavit in which she avers that there were always problems with the elevator, such as it not working, shaking when moving, and not being level with the floors. Plaintiff argues that, pursuant to Multiple Dwelling Law § 78, owners of multiple dwelling buildings, such as the one in which the accident occurred, are required to keep the building in good repair, which is a non-delegable duty. It is argued that USE was never contracted by moving defendants to perform any maintenance or renovation work on the elevators, but that their contract was with UEC Weymouth, the nonparty. Further, plaintiff contends that moving defendants' maintenance of the elevator was sporadic, because of its failure to pay USE, and that, therefore, moving defendants failed to fulfill their non-delegable duties under Multiple Dwelling Law § 78. Moreover, plaintiff argues that

because employees of the moving defendants retained keys to the room above the elevator shaft, cleaned the interior of the elevator, and received tenant complaints about the elevator, the moving defendants never relinquished complete control of the elevator to USE. Finally, it is asserted that the doctrine of *res ipsa loquitur* applies to the facts here and raises an issue of fact that necessitates a trial.

USE also opposes the motion arguing that contractual indemnification against it should be denied because there was never a contract between it and moving defendants, asserting that its agreement was only an oral one with UEC Weymouth. USE further points to testimony that there was vandalism connected with the elevator, that the elevator shaft was used by tenants as a garbage disposal, and that USE did not have exclusive control over the elevator. Finally, USE argues that the fascia simply cannot become unconnected and fall, because it is affixed to the elevator shaft with bolts and locking tabs, and so, if the fascia did fall because of some trauma to the building or was purposely tampered with, moving defendants cannot escape liability.

In reply, moving defendants West 135 and OP cite the testimony of Smith that USE was at the premises on a month-to-month basis and, therefore, was at the premises more than on a

merely sporadic basis. They argue that any testimony regarding garbage and vandalism is mere hearsay and insufficient to evidence moving defendants' retention or control over the elevator. In addition they assert that it is not refuted that a technician from USE was servicing the elevator a day before the accident, and therefore, it is argued, they met their obligations under Multiple Dwelling Law § 78 and are entitled to summary judgment.

That branch of moving defendants' motion seeking summary judgment dismissing the complaint as asserted against them is denied.

> The owner of a multiple dwelling owes a duty to persons on its premises to maintain them in a reasonably safe condition (Multiple Dwelling Law § 78). This duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another.

Mas v Two Bridges Associates, 75 NY2d 680, 687 (1990); *Weiss v City of New York*, 16 AD3d 680 (2d Dept 2005). This duty, which pursuant to Multiple Dwelling Law § 78, is non-delegable, has been held to apply to the owner's managing agent as well as to the owner. *See generally Flaherty v Fox House Condominium*, 299 AD2d 448 (2d Dept 2002).

The court concurs with moving defendants that the law requires in order to prevail on a theory of liability as

against building owners and managers under the Multiple Dwelling Law § 78, an injured plaintiff must present evidence that the owner and/or manager had actual or constructive notice of defects or complaints. *Bonifacio v 910-930 Southern Boulevard LLC*, 295 AD2d 86 (1st Dept 2002); *see also Bauerlein v Salvation Army*, 74 AD3d 851 (2d Dept 2010). As stated by the court in *Aquino v Kuczinski, Vila & Associates, P.C.*, 39 AD3d 216, 219 (1st Dept 2007) (internal citations omitted):

> In order to hold a landowner liable for a dangerous condition on its premises, a plaintiff must demonstrate that the defendant either created, or had actual or constructive notice of the hazardous condition which precipitated the injury. However, notice alone is not enough; the plaintiff must also show that defendant had 'a sufficient opportunity, within the exercise of reasonable care, to remedy the situation' after receiving such notice.

Moving defendants are correct that the record at bar is devoid of any evidence that moving defendants created the dangerous condition. Similarly as to notice, despite the fact that multiple complaints had been made regarding the condition of the elevator prior to the accident, none of the complaints involved loose or falling parts, the condition that caused plaintiff's injuries. To raise an issue of fact of actual or constructive notice, there must be evidence that moving defendants knew or should have known of the particular condition that caused the injury, and a general awareness of a

dangerous condition is insufficient. *Flores v Langsam Property Services Corp.*, 63 AD3d 502 (1st Dept), *affd* 13 NY3d 811 (2009); *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 (1994); *Gordon, supra*.

However, even though the moving defendants have established on this record that they neither created, nor had actual or constructive knowledge of the defective condition which caused plaintiff's injury, they may still be held liable to plaintiff under the doctrine of res ipsa loquitur.

> Submission of a case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Ebanks v New York City Transit Authority, 70 NY2d 621, 623 (1987); *see also Bazne v Port Authority of New York and New Jersey*, 61 AD3d 583 (1st Dept 2009)(alleged malfunction of an escalator).

The testimony of Smith, defendant USE's principal, that the fascia would have been initially installed by the original elevator installation company and that only a "traumatic door wreck" involving a significant impact or force would dislodge the fascia raises an issue with respect to the first prong of

the res ipsa loquitur doctrine.

As for the second prong, the moving defendants contend that they have established prima facie that they lacked exclusive control of the elevator, citing the testimony of Smith, the superintendent and porters, about USE's and UEC Weymouth's service of the elevator. They also cite the testimony about unknown persons vandalizing and throwing refuse into the elevator, and in general, the use of the elevator by members of the public and the other tenants of the building.

Such evidence does not diminish the moving defendants' non-delegable duty with respect to maintenance of the building, including its elevator. Nor does their retention of non-party UEC Weymouth to perform repair work on the elevator deprive them of exclusive control. *See Hisen v 754 Fifth Ave Assoc, LP,* 23 Misc3d 1114(A), 2009 NY Slip Op 50773(U), *5 citing *Dowling v 257 Assoc,* 235 AD2d 293 (1st Dept 1997); *Potthast v Metro-North RR Co,* 400 F3d 143, 154 (2d Cir 2005) (stating that, because "a defendant cannot disclaim responsibility by contracting out non-delegable duties, the introduction of independent contractors in lieu of employees does not change the calculus for evaluating res ipsa loquitur claims involving exclusive control").

Nor does the fact that many people, other than moving defendants' employees, used the elevator obviate the moving defendants' "'non delegable duty'" to provide such persons with a "reasonably safe means of ingress and egress" (*LoGuidice v Silverstein Props., Inc*, 48 AD3d 286 [1st Dept 2008]; *Hisen, supra*). The fact that many people used the elevator does not, by itself, make this analogous to *Ebanks, supra*, where the Court of Appeals held the res ipsa loquitur doctrine inapplicable finding that the plaintiff offered no evidence that defendant Transit Authority had exclusive control of the space between the escalator steps and sidewalls. Unlike in *Eubanks, supra*, at 298, where plaintiff did not refute evidence that approximately 10,000 persons passed the escalator weekly, who either through an act of vandalism or the catching of a hand truck may have created the gap, the evidence here is that the dislodged fascia could only have happened through the application of enough traumatic force that would have wrecked the elevator door. As held in *Pavon v Rudin* (254 AD2d 43 [1st Dept 1998]), the question of exclusive control turns on whether the public generally handled the instrumentality that caused the accident, there the defective pivot hinge, rather than the larger object to which it was attached, the hair salon door. Here the

instrumentality of the accident was not the elevator itself, which was used by the plaintiff and other tenants, but rather the fascia or dust cover which would have been installed by the original installing elevator company and was not handled by the public or tenants. Though there is testimony that third parties placed garbage and otherwise vandalized the elevator, there was no evidence that any such persons had handled or tampered with the fascia by applying traumatic force so as to dislodge it.

Based on the foregoing, that portion of moving defendants' motion seeking summary judgment dismissing the complaint as asserted against them is denied.

That branch of moving defendants' motion seeking summary judgment granting them conditional contractual or common law indemnification from USE shall be denied. As to contractual indemnification, because there is no contract between moving defendants and USE wherein USE agrees to indemnify moving defendants, moving defendants are not entitled to contractual indemnification. In the case of common law indemnification, summary judgment on the cross-claim is not warranted because even assuming the moving defendants have established that they are free from active negligence, they have not sustained their burden to establish prima facie that USE was negligent and

summary judgment on the cross-claim is not warranted because even assuming the moving defendants have established that they are free from active negligence, they have not sustained their burden to establish prima facie that USE was negligent and that its negligence contributed to the accident. *Rogers v Dorchester*, 32 NY2d 553 (1973).

Accordingly, it is

ORDERED that the branch of 107-145 West 135th Street Associates and OP Management, LLC's motion for summary judgment dismissing the complaint as asserted against them is denied; and it is further

ORDERED that the branch of 107-145 West 135th Street Associates and OP Management, LLC's motion seeking summary judgment granting them conditional contractual indemnification from United States Elevator Inc. is denied; and it is further

ORDERED that the parties are directed to attend a pre-trial conference at IAS Part 59, at Room 103, 71 Thomas Street, New York, NY 10013 on April 24, 2012, at 2:30 P.M.

This is the decision and order of the court.

Dated: March 23, 2012 ENTER:

DEBRA A. JAMES J.S.C.