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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 116811/2009

AKTER, SONIA

vs.

DENIS P. MULLARKEY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

e motion to/for _____

s _____ No(s). _____

_____ No(s). _____

_____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

motion ~~and cross-motion are~~ is decided in accordance with accompanying memorandum decision.

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/16/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19
----------X
SONIA AKTER,

Plaintiff,

Index No.: 116811/09
Submission Date: 11/9/2011

- against-

DENIS P. MULLARKEY, LLC,
and GOLDEN ELEVATOR CO., INC.,

DECISION AND ORDER

Defendants.
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For Plaintiff:	For Defendant Denis P. Mullarkey, LLC.:	For Defendant Golden Elevator Co., Inc.:
Kenneth L. Falk, Esq.	Gannon Lawrence & Rosenfarb	Camacho Mauro Mulholland, LLP
724 B Heritage Hills	100 William Street, 7th Floor	350 Fifth Avenue, Suite 5101
Somers, New York 10589	New York, NY 10038	New York, NY 10118

HON. SALIANN SCARPULLA, J.:

In this negligence action, plaintiff Sonia Akter ("Akter") sues to recover for injuries she allegedly sustained on July 31, 2009, when an elevator door closed on her left hand as she attempted to exit the elevator in the lobby of her building. By separate motions, defendant Denis P. Mullarkey, LLC ("Mullarkey"), the owner of the building, and defendant Golden Elevator Co., Inc. ("Golden"), an elevator service company, move for summary judgment dismissing the complaint, on the grounds that they had no notice of any alleged elevator defect, and that the doctrine of res ipsa loquitur does not apply. Defendants' motions are consolidated for purposes of their disposition.

At the outset, Akter concedes that she cannot establish that either defendant had prior notice of a defective elevator condition. At oral argument before me all parties agreed that the sole remaining issue is the application of res ipsa loquitur.

At all relevant times, Akter resided with her husband at 89-21 169th Street, apartment 6C, in Jamaica, Queens, a residential building owned by Mullarkey (the "building"). The six-story building has one elevator, which goes from the basement to the sixth floor. The elevator has two entrance doors, an outside "hoistway" door located on each floor, which swings open, and the elevator cab door, which slides open.

Pursuant to a contract with Mullarkey, Golden was responsible for maintaining and servicing the elevator equipment and repairing defective parts. Jose Vargas ("Vargas"), president of Golden, testified at his deposition that his employees performed maintenance on the elevator on a monthly basis. If problems with the elevator occurred between the monthly visits, the building superintendent called Golden and an employee was sent to the building. Golden also conducted an annual inspection, which is mandated by the New York City Department of Buildings.

Akter testified at her deposition that on the day of the accident, she entered the elevator on the sixth floor, and it traveled down to the first floor in the usual manner, without making any stops. When the elevator reached the first floor, the cab door opened half way and then stopped. Akter reached out her left hand to push open the outer door, but the cab door rapidly began to close, striking and trapping her hand. According to Akter, it happened so quickly that she could not get her hand out before the door struck

her left wrist, and bruised her left thumb. She pressed all the buttons in the elevator, including the alarm and emergency stop buttons, but nothing happened, and the door did not open. Akter's hand was stuck in the door for about 20 minutes, and before she could free it, the elevator moved up to the fifth floor, where a tenant had called it, and the cab door then opened. Akter's hand was bleeding, and the tenant who had called the elevator called 911 for her, and an ambulance took her to a hospital emergency room.

Akter testified that she has lived in the building for more than four years, and has never seen a similar problem with the elevator door. Akter also testified that other tenants had told her that there had previously been similar occurrences, but she could not identify who told her that, or when.

Erwin Calderon ("Calderon"), the building superintendent for Mullarkey, testified at his deposition that he learned about Akter's accident on the date that it happened, when he was leaving the building and saw an ambulance. After he spoke to Akter and her husband, Calderon brought the elevator down to the basement of the building, shut it down, and called Golden. Vargas then came to the building and checked the elevator, and informed Calderon that everything was working. Calderon testified that his only responsibility with respect to the elevator is to check that it is clean, although he also checks the alarm button on the elevator every week. The elevator has both an alarm button, which should sound when it is pulled, and an emergency stop button, which should open the elevator door when it is pulled. Calderon further testified that, in the six

months prior to Akter's accident, he received no complaints from tenants about the elevator, knew of no tenants who had problems with the door, and he personally experienced no problems with the elevator door.

Vargas testified that, on the date of Akter's accident, Calderon called him, and he went to the building to check the elevator. Vargas checked the doors on each floor of the building, and checked the cab door, by pressing the floor buttons and pushing the hoistway door on each floor. Vargas found that the elevator door closed and opened properly, thus he did not take the elevator out of service. He also conducted a pressure gauge check of the cab door, which showed that the door speed was normal.

Vargas explained that the cab door closes after the hoistway door closes and a floor button is pressed. According to Vargas, if the outer door is pulled open, the cab door will reopen, but otherwise, once the cab door starts to close, it does not stop, even if someone's hand, or body, is in the doorway, because the particular type of elevator in the building had no sensor or other mechanism to make the door retract. He also testified that if the cab door did not fully close, because, for example, a hand was caught in the door, the elevator could not move to a different floor, because a "gate switch" located on top of the door must make contact before the elevator can proceed, and the switch does not engage if the door is open more than about one-quarter of an inch.

Vargas testified that the gate switch was not checked during the monthly visits, but was checked annually, by putting the car between floors and using a "jumper" to see if it

made contact properly. Vargas also testified that, on July 31, 2009, the date of the accident, he checked the gate switch, the interlock, the leveling, the door speed, and the machine room, and found that everything was normal and in working order. In an affidavit submitted in support of Golden's motion, Vargas also attests that Golden was not aware of any cab door malfunctions prior to July 31, 2009, and did not discover any such malfunctions during inspections prior to July 31, 2009.

The records do show that, following an annual inspection of the elevator conducted on June 15, 2009, the Department of Buildings reported that the results of the inspection were unsatisfactory, noting, in particular, that "smoke hole covers; light guards" were unsatisfactory. Vargas testified that the codes on the report indicate that there was a problem with a plate on the floor of the machine room, which had nothing to do with the elevator itself or the cab door.

Discussion

Under the doctrine of res ipsa loquitur, "[w]here the actual or specific cause of an accident is unknown, . . . a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it." *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494 (1997) (citations omitted); *see Abbott v. Page Airways, Inc.*, 23 N.Y.2d 502, 510 (1969). "The rule simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence." *Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219,

226 (1986); *see States v. Lourdes Hosp.*, 100 N.Y.2d 208, 211 (2003); *Kambat*, 89 N.Y.2d at 494. "Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence . . . and the jury may – but is not required to – draw the permissible inference." *Dermatossian*, 67 N.Y.2d at 226 (citations omitted). "In those cases where 'conflicting inferences may be drawn, choice of inference must be made by the jury.'" *Kambat*, 89 N.Y.2d at 495, quoting *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 118 (1941).

To rely on the theory of res ipsa loquitur, a plaintiff must establish the following 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." *Dermatossian*, 67 N.Y.2d at 226 (internal quotation marks and citation omitted); *see Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 209 (2006); *Corcoran v. Banner Super Mkt., Inc.*, 19 N.Y.2d 425, 430 (1967), *mod on remittitur* 21 N.Y.2d 793 (1968).

Here, defendants argue that Akter cannot satisfy the three conditions for the application of res ipsa loquitur. Although they do not argue that Akter contributed to the accident in any way, they argue that Akter has not demonstrated that the accident was one

that would not ordinarily occur in the absence of negligence, or that defendants had exclusive control over the elevator.

As to the first element, the erratic behavior of the elevator cab door, and the movement of the elevator with the cab door open, "was neither an ordinary nor a natural experience." *Weeden v. Armor El. Co.*, 97 A.D.2d 197, 205 (2d Dep't 1983). Akter's injuries, therefore, "occurred as a result of the precise kind of event that should not occur if an elevator functions properly." *Allen v. Woods Mgt. Co.*, 86 A.D.2d 530, 531 (1st Dep't 1982) (plaintiff's arm caught in elevator door, and elevator then descended from ninth to first floor). By Vargas' own testimony, the elevator cab door did not have a retracting mechanism, but the gate switch mechanism should have prevented the elevator from moving if the cab door was partially open. Although Vargas testified that he had no notice of a prior defective condition, and his inspection of the elevator following the accident revealed nothing wrong with the elevator, "plaintiff's testimony to the effect that a malfunction actually occurred, is sufficient to create a triable issue of fact." *Miller v Schindler El. Corp.*, 308 A.D.2d 312, 313 (1st Dep't 2003); *see Stewart v. World El. Co.*, 84 A.D.3d 491, 496 (1st Dep't 2011).

Golden, notably, has offered no explanation for the elevator malfunction, and has produced no evidence to establish as a matter of law that the accident was one that would ordinarily occur even in the absence of negligence. *See Pavon v. Rudin*, 254 A.D.2d 143, 146 (1st Dep't 1998) (defendant offered no evidence to support inference of some other

possible cause, such as manufacturing design defect); *Finocchio v. Crest Hollow Club at Woodbury, Inc.*, 184 A.D.2d 491, 493 (2d Dep't 1992) (same); *Silberman v. Lazarowitz*, 130 A.D.2d 736, 737 (2d Dep't 1987) (citation omitted) (unexplained fall of glass shelves required defendants to come forward with an explanation as to its cause); *compare Cilinger v. Arditi Realty Corp.*, 77 A.D.3d 880, 881 (2d Dep't 2010) (Fire Dept. inspector determined that child's foot, caught in elevator door, was so small that door could close enough for door and gate switch to make contact); *see also Abbott*, 23 N.Y.2d at 513 ("proof of the specific cause of the plaintiff's injury is *unnecessary* to support an inference of the defendant's negligence in a *res ipsa* case") (emphasis in original).

Further, while courts have found, under some circumstances, that the voluntary actions of an elevator passenger struck by a closing elevator door could have affected the happening of the accident, *see e.g. Feblot v. New York Times Co.*, 32 N.Y.2d 486, 495-496 (1973); *Graham v. Wohl*, 283 A.D.2d 261 (1st Dept 2001), here there is no evidence that any act by Akter contributed to the elevator malfunction.

With respect to the exclusive control requirement, courts generally do not apply this requirement "as a fixed, mechanical or rigid rule." *Dermatossian*, 67 N.Y.2d at 227; *see Feblot*, 32 N.Y.2d at 496; *Mejia v. New York City Tr. Auth.*, 291 A.D.2d 225, 227 (1st Dep't 2002). Rather, the requirement is met when the evidence provides "a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it." *Dermatossian*, 67 N.Y.2d at 227

(internal quotation marks and citations omitted); *see Kambat*, 89 N.Y.2d at 494-495. "It is not necessary for plaintiff to rule out all other possible causes, only to show that they are less likely." *Pavon*, 254 A.D.2d at 145; *see Crawford v. City of New York*, 53 A.D.3d 462, 464 (1st Dep't 2008); *DiRoma v. Mutual of Am. Life Ins. Co.*, 17 A.D.3d 119, 121 (1st Dep't 2005); *Mejia*, 291 A.D.2d at 227; *Rountree v. Manhattan & Bronx Surface Tr. Operating Auth.*, 261 A.D.2d 324, 327 (1st Dep't 1999).

Courts also have clarified that exclusive control of the injury-causing instrumentality refers to control of "the specific mechanism that malfunctioned." *Pavon*, 254 A.D.2d at 146. That is, "[t]he appropriate target of inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached." *Id.* (pivot hinge of door, not door itself, was instrumentality in exclusive control of defendant); *see Singh v. United Cerebral Palsy of N.Y. City, Inc.*, 72 A.D.3d 272, 277-278 (1st Dep't 2010) (device controlling elevator door, out of public's access, was instrumentality at issue); *Ianotta v. Tishman Speyer Props., Inc.*, 46 A.D.3d 297, 299 (1st Dep't 2007) (same). Therefore, "[c]ontrol of the internal workings of an object satisfies the 'exclusive control' element." *Crawford*, 53 A.D.3d at 465.

In this case, the mechanisms regulating the elevator door were within the exclusive control of Golden, as shown by its service contract with Mullarkey. The contract required Golden to periodically inspect and perform routine maintenance and repairs on the

elevator and its parts, and provided for all repair and maintenance to be performed by Golden. Thus, Golden's control of the service and maintenance of the elevator satisfies the exclusive control element. *See Devito v. Centennial El. Indus., Inc.*, 90 A.D.3d 595, 596 (2d Dep't 2011); *Gutierrez v. Broad Fin. Ctr., LLC*, 84 A.D.3d 648, 649 (1st Dep't 2011); *Stewart*, 84 A.D.3d at 496; *Weeden*, 97 A.D.2d at 207; *cf. McMurray v. P.S. El., Inc.*, 224 A.D.2d 668, 669 (2d Dep't 1996) (no exclusive control where no contract for routine inspection and maintenance).

Moreover, Golden's argument that it is entitled to summary judgment because Akter has failed to prove that the elements of res ipsa loquitur have been satisfied, misconstrues the parties' burdens on a summary judgment motion. While Akter retains the ultimate burden of proving negligence, *see Weeden*, 97 A.D.2d at 204, to prevail on a motion for summary judgment, the movant must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad*, 64 N.Y.2d at 853; *see Ayotte v. Gervaiso*, 81 N.Y.2d 1062, 1063 (1993); *Alvarez*, 68 N.Y.2d at 324. Further, a moving defendant's burden on a motion for summary judgment cannot be satisfied merely by pointing out gaps in the

plaintiff's case. *See Sabalza v. Salgado*, 85 A.D.3d 436, 437-438 (1st Dep't 2011); *Shafi v. Motta*, 73 A.D.3d 729, 730 (2d Dep't 2010); *Totten v. Cumberland Farms, Inc.*, 57 A.D.3d 653, 654 (2d Dep't 2008); *Peskin v. New York City Tr. Auth.*, 304 A.D.2d 634, 634 (2d Dep't 2003).

Defendants also argue that the court should not consider the affidavit of Akter's expert, Patrick Carrajat, because she did not disclose him until after the note of issue was filed. Although some courts have rejected a party's expert affidavit when it was not submitted until its opposition to a summary judgment motion, *see e.g. Kopeloff v. Arctic Cat, Inc.*, 84 A.D.3d 890 (2d Dep't 2011), "CPLR 3101 (d) (1) (i) does not . . . mandate that a party be precluded from proffering expert testimony merely because . . . [it is untimely], unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party." *Hernandez-Vega v. Zwanger-Pesiri Radiology Group*, 39 A.D.3d 710, 710-711 (2d Dep't 2007) (internal quotation marks and citation omitted); *see Browne v. Smith*, 65 A.D.3d 996, 997 (2d Dep't 2009).

Nonetheless, as defendants correctly contend, Carrajat's affidavit if filled with speculation, and he presents conclusions without any factual basis. Thus, whether Carrajat was timely disclosed or not, the affidavit is without probative value. *See Martin v. Kone, Inc.*, 2012 WL 1123746, *1, 2012 NY App Div LEXIS 2493, *2 (1st Dept 2012); *Eliasberg v. Memorial Sloan-Kettering Cancer Ctr.*, 79 A.D.3d 628, 628 (1st Dep't 2010); *Parris v. Port of N.Y. Auth.*, 47 A.D.3d 460, 461 (1st Dep't 2008).

Even without considering Carrajat's affidavit, however, and even in the absence of actual or constructive notice, Golden has failed to eliminate triable issues of fact as to the applicability of the doctrine of res ipsa loquitur claim. *See Fiermonti v. Otis El. Co.*, 2012 WL 1109423, *1, 2012 NY App Div LEXIS 2423, *3 (2d Dept 2012); *Gutierrez*, 84 A.D.3d at 649; *Tyndale v. St. Francis Hosp.*, 65 A.D.3d 1133, 1133 (2d Dep't 2009); *Miller*, 308 A.D.2d at 313; *see also Stewart*, 84 A.D.3d at 495 (even if defendant made prima facie showing, plaintiff's testimony raised triable issues of fact); *Williams v. Swissotel New York, Inc.*, 152 A.D.2d 457, 458 (1st Dep't 1989) (even without expert witness, plaintiff's testimony alone is sufficient to support application of res ipsa loquitur).

In contrast, Mullarkey has demonstrated that it did not have exclusive possession of the elevator door and its mechanisms. While Mullarkey retained ownership of the elevator, it had no role in inspecting, maintaining or repairing the elevator. As Calderon testified, without dispute, his only responsibility was to ensure that the elevator was clean, and, while he checked the emergency and alarm buttons on a regular basis, whenever there was a problem with the elevator, he shut it down and contacted Golden. By the terms of the elevator service contract, Golden ceded all responsibility for maintenance and repair of the elevator equipment and parts to Golden. Thus, the res ipsa claim does not survive as against Mullarkey. *See Hodges v. Royal Realty Corp.*, 42 A.D.3d 350, 352 (1st Dep't 2007).

In accordance with the foregoing, it is hereby

ORDERED that defendant Denis P. Mullarkey, LLC's motion for summary judgment dismissing the complaint is granted, the complaint and all cross-claims are dismissed as against it, the action is severed as against defendant Denis P. Mullarkey, LLC and the Clerk of the Court is directed to enter judgment dismissing the complaint as against it, and the action shall continue as to the remaining defendant; and it is further

ORDERED that defendant Golden Elevator Co., Inc.'s motion for summary judgment dismissing the complaint and all cross-claims against it is denied.

Dated: New York, New York
April 16, 2012

ENTER:

Saliann Scarpulla, J.S.C.

FILED

APR 19 2012

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