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

PRESENT: DEBRA A. JAMES PART 59
Justice

NATICHA RUIZ-HERNANDEZ,
Plaintiff,

-v-

TPE NWI GENERAL,
Defendant.

Index No.: 117068/07
Motion Date: 12/23/11
Motion Seq. No.: 02
Motion Cal. No.: _____

TPE NWI GENERAL,
Third-Party Plaintiff,

-v-

GUARDSMAN ELEVATOR CO., INC.,
Third-Party Defendant.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this action to recover for injuries plaintiff Naticha Ruiz-Hernandez claims to have suffered in an elevator accident, defendant TPE NWI General (TPE) moves for summary judgment dismissing the complaint. Third-party defendant Guardsman Elevator Co., Inc. (Guardsman) moves for summary judgment

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

dismissing the third-party complaint.

On June 27, 2007 in a building known as 32-38 West 111th Street, New York, New York, plaintiff was allegedly injured when an elevator in which she was riding, shook, and then dropped, causing plaintiff to be lifted off of her feet and fall. Plaintiff does not know how far the elevator fell. After the alleged fall, the elevator continued up to plaintiff's floor, where plaintiff exited the elevator.

TPE is the owner of the premises, while Guardsman is the elevator repair company TPE contracted with to provide monthly maintenance on the elevator and to make any necessary repairs. Guardsman was also on call to come to the premises if summoned about a particular problem. There is no written contract between TPE and Guardsman.

Guardsman had been called to the premises in the month previous to plaintiff's accident to replace a relay on the elevator, identified as an IP8300 relay. According to Guardsman's witness, Robert Cummins (Cummins), the IP8300 relay "is a landing control system. It is the subcomponent that controls floor stops and direction selection." Guardsman was called on June 27, 2007, apparently sometime soon after

plaintiff's accident,[1] to replace the relay again, which it did the next day.

Cummins testifies that an IP8300 relay can be "burnt out" by "low voltage", and that low voltage can be caused by a "spike of very hot weather." TPE and Guardsman apparently claim that Con Edison caused a "brownout" on the day in question, because of the hot weather, and the brownout was the cause of the low voltage that may have affected the IP8300 relay on the day of plaintiff's accident. Thus, TPE faults Con Edison with the condition contributing to plaintiff's accident;[2] a burnt-out relay, caused by the actions of a third party.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing Winegrad v New York University Medical Center, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of

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[1]Plaintiff claims that her accident occurred about 5:00 P.M. Cummins claims that the call came into Guardsman's answering service at 5:15 P.M.

[2]TPE and Guardsman do not concede that there was an accident.

fact.'" People v Grasso, 50 AD3d 535, 545 (1st Dept 2008), quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Gross v Amalgamated Housing Corporation, 298 AD2d 224 (1st Dept 2002).

"Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property." Lopez v Allied Amusement Shows, Inc., 83 AD3d 519, 519 (1st Dept 2011). A landowner may be found liable in tort if a party suffers an injury due to "'an allegedly defective condition upon property,'" if it is determined that "'the landowner affirmatively created the condition or had actual or constructive notice of its existence [citation omitted].'" Spindell v Town of Hempstead, 92 AD3d 669, 2012 NY Slip Op 00951, *2 (2d Dept 2012); see also Pintor v 122 Water Realty, LLC, 90 AD3d 449 (1st Dept 2011). "Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident." Atashi v Fred-Doug 117 LLC, 87 AD3d 455, 456 (1st Dept 2011). "In order to constitute constructive notice, a defect must be visible and apparent for a sufficient length of time to permit the defendant's employees to discover and remedy it." Id., citing Gordon v American Museum of Natural History, 67 NY2d 836 (1986).

In the present case, there is no evidence that TPE caused the burnt relay which may have contributed to plaintiff's accident. However, there is some question about whether it had actual or constructive notice of a defective relay.

TPE denies any knowledge of a defective condition. However, its repair company, Guardsman, admits that the IP8300 relay could burn out during low-voltage episodes. In addition, plaintiff's expert states that the weather reports for the day of the accident show that a blackout did occur but that such was not the result of excessive electrical overload on The Con Ed grid, i.e. there was no brownout which results when there is a power cutback by the utility to prevent a blackout. The expert further notes that the superintendent's memo book for the building contained entries related to the elevator on the day of the accident, but they do not indicate any low voltage problems on that day. He opined that within a reasonable degree of mechanical certainty, the malfunction or series of malfunctions that occurred on June 27, 2007 on the elevator were not due to any reduction in voltage in the building. The expert also stated that one of the records of third party defendant Guardsman indicated that the IP8300 relay was failing over a month prior to the accident. Such constitutes evidence that TPE had knowledge of the defect knowledge: a relay which could not withstand low voltage, and that had failed in the past, and would be expected to fail in the

future, during ordinary brownout events. There is, therefore, a question of actual or constructive notice on TPE's part, and likewise whether Guardsman also may be charged with notice of the potential for relay failure during brownouts.

Even if there was no question of notice, there is an issue of fact in this case based on the doctrine of res ipsa loquitur. As a first argument, TPE suggests that res ipsa loquitur can never be applied in the absence of an initial showing of notice. However, cases in both the Appellate Division, First Department, and the Appellate Division, Second Department, demonstrate otherwise, finding that the inference of negligence created by the doctrine may call for the denial of a motion for summary judgment even where the possibility of notice has not otherwise been established. See Devito v Centennial Elevator Industries, Inc., 90 AD3d 595 (2d Dept 2011); Singh v United Cerebral Palsy N.Y. City, Inc., 72 AD3d 272 (1st Dept 2010); Ianotta v Tishman Speyer Properties, Inc., 46 AD3d 297 (1st Dept 2007); Fyall v Centennial Elevator Industries, Inc., 43 AD3d 1103 (2d Dept 2007). Thus, plaintiff may proceed on a theory of res ipsa loquitur.

Res ipsa loquitur creates an inference of negligence under certain circumstances. Dermatossian v New York City Transit Authority, 67 NY2d 219 (1986). Under this doctrine, an action may proceed to the trier of fact if it is established that the

accident "(1) was of a kind that 'ordinarily does not occur in the absence of someone's negligence; (2) [was] caused by an agent or instrumentality within the exclusive control of the defendant; [and] (3) [was not] due to any voluntary action or contribution on the part of the plaintiff.'" Singh v United Cerebral Palsy of N.Y. City, Inc., 72 AD3d at 277, quoting Morejon v Rais Construction Company, 7 NY3d 203, 209 (2006).

To the extent that TPE addresses the res ipsa loquitur argument, TPE claims that the second element, exclusive control, is missing, because of the alleged interference of Con Edison's brownout with the IP8300 relay. TPE argues that the there is only evidence, if at all, that the accident was the fault of Con Edison, who caused a nondefective part on the elevator, the IP8300 relay, to be "made defective" by providing low voltage. As such, TPE denies having exclusive control of the elevator.

This court finds that there is a question of fact as to whether res ipsa loquitur provides a presumption of negligence. As to the first requirement for a showing of res ipsa loquitur, this court finds that the accident in question is "an event of the kind which would not ordinarily occur in the absence of negligence." Burgess v Otis Elevator Company, 114 AD2d 784, 786 (1st Dept 1985), affd 69 NY2d 623 (1986).

TPE claims that it was not in exclusive control of the relay because any problem was caused not by TPE, but by Con Edison.

This position ignores the reality that the relay, which ought to be functioning at all times, was in the exclusive control of TPE and/or Guardsman.

TPE's claim that it "never claimed to maintain the elevator, let alone exclusively maintain the elevator", does not defeat a res ipsa loquitur argument. "[R]es ipsa loquitor does not require sole physical access to the instrumentality causing the injury and can be applied in situations where more than one defendant could have exercised exclusive control." Singh v United Cerebral Palsy of N.Y. City, Inc., 72 AD3d at 277. The evidence shows that Guardsman came to the premises monthly and as needed. There is no evidence that TPE ceded all responsibility for the elevator to Guardsman; the elevator remained within TPE's control, as owner of the premises. Id.

TPE's reliance on cases involving escalators, in which exclusive control is often found lacking, is untenable. In such cases, it is acknowledged that the public has access to the workings of escalators. See Parris v Port of N.Y. Authority, 47 AD3d 460, 461 (1st Dept 2008) (escalator "subject to extensive public contact on a daily basis"); Birdsall v Montgomery Ward & Co., 109 AD2d 969 (3d Dept 1985), affd 65 NY2d 913 (1985) (escalator malfunctioning attributable to debris on escalator). This is not the case with elevators, where the inner workings of the machine are not generally within the public sphere.

of notice of a dangerous condition with the elevator, that is, a propensity of the elevator to fall. However, as specified previously, Guardsman had access to the elevator, and knowledge of the alleged relay problem during low-voltage events. Further, res ipsa loquitur applies as a valid theory of negligence, based on Guardsman's access to the elevator, and its admission that it had recently changed the IP8300 rely. Issues of fact exist.

As a result of the foregoing, this court finds that there is a question of fact as to whether TPE had actual or constructive notice of a defect in the IP8300 relay. Further, there are questions of fact as to whether an inference of negligence exists, based on the application of the doctrine of res ipsa loquitur to the facts. As a result, both the motion of TPE, and that of Guardsman, are denied.

Accordingly, it is

ORDERED that the motion brought by defendant TPE NWI General for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion brought by third-party defendant Guardsman Elevator Co., Inc. for summary judgment dismissing the third-party complaint is denied.

This is the decision and order of the court.

Dated: April 12, 2012

ENTER

DEBRA A. JAMES