

NEW YORK SUPREME COURT - COUNTY OF BRONX

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

ANABEL CARCANA

Index №. **0306172/2009**

-against-

Hon..**FERNANDO TAPIA** ,

1366 WHITE PLAINS ROAD ASSOCIATES, LLC.,UNIVERSAL MANAGEMENT AGENCY and ELTECH INDUSTRIES

Justice.

1366 WHITE PLAINS ROAD ASSOCIATES, LLC., UNIVERSAL MANAGEMENT AGENCY ,

-against-

ELTECH INDUSTRIES, INC.,

----------X

The following papers numbered 1 to _____ Read on this motion, SUMMARY JUDGMENT DEFENDANT Noticed on **November 4, 2011** and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Respectfully Referred to: _____

Dated: _____

See attached Decision

Copies were forwarded to all parties

Dated: 12 / 13 / 2013

Hon._____

FERNANDO TAPIA, J.S.C.

 FILED Jan 06 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ANABEL CARCANA,

Plaintiff,

Index No. 306172/09

-against-

Hon. Fernando Tapia

1366 WHITE PLAINS ROAD ASSOCIATES, LLC., UNIVERSAL MANAGEMENT AGENCY and ELTECH INDUSTRIES

Defendants.

1366 WHITE PLAINS ROAD ASSOCIATES, LLC., UNIVERSAL MANAGEMENT AGENCY,

Third-Party Plaintiffs,

-against-

ELTECH INDUSTRIES, INC.,

Third-Party Defendants.

DECISION AND ORDER

Plaintiff originally commenced this negligence action against defendants, 1366 White Plains Road Associates, LLC. ("1366"), and Universal Management Agency ("Universal"), seeking to recover damages for injuries sustained after she tripped and fell when entering a misleveled elevator in her apartment building located at 1366 White Plains Road. Thereafter, defendants initiated a third-party action against elevator maintenance company, Eltech Industries, Inc. ("Eltech"), alleging that any injuries sustained by plaintiff due to a misleveled elevator resulted from Eltech's negligence in performing its elevator maintenance duties pursuant to a contract between Eltech and Universal. As a result of the impleader, plaintiff amended the complaint to include Eltech as a direct defendant.

Eltech now moves for summary judgment as a matter of law dismissing plaintiff's claims on the grounds that it was not on notice of any misleveling problem with the elevator. Eltech also seeks dismissal of the third party action initiated by 1366 and Universal as it did not have exclusive control of the elevator in question. Eltech further contends that dismissal of the third party action is warranted as neither 1366, Universal, nor plaintiff have opposed that branch of Eltech's motion.

Eltech's motion for summary judgment is **GRANTED** as to the third party action and **DENIED** as to plaintiff's claims in accordance with the reasoning below.

Summary Judgment

One of the recognized purposes of a summary judgment motion is to determine if any material issues of fact exist. (*Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 [1st Dept 1976]). Where there is any doubt as to the existence of a material issue of fact, a motion for summary judgment must be denied. (*Id.*; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to eliminate any material issues of fact regarding the claims being assailed. (*Winegrad v. New York Univ. Med. Ctr*, 64 NY2d 851[1985]). A summary judgment motion must be supported by an affidavit that contains a recitation of material facts and it must also show that either no defense to the action exists or that the defense presented is meritless. (CPLR § 3212[b]). It is because summary judgment is such a drastic remedy that it's proponent must meet such a high burden. *(Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]).

In deciding a motion for summary judgment, the court's primary function is issue finding,

not issue determination. *(Stilman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957] *rearg denied* 3 NY2d 941 [1957].) The court's function takes on an added dimension in those instances where, as here, neither the plaintiff nor the defendant dispute the material facts of the claim but reasonable inferences may be drawn from those undisputed facts, inescapably giving rise to triable issues of fact. (*See Gerard v. Inglese*, 11 AD2d 381, 382 [2nd Dept 1960]).

In those instances where contrary inferences may be reasonably drawn from undisputed facts, the issues are not for determination by a judge on motion but rather for the finders of fact to decide on trial. (*Id.* at 382). The trier of fact may, in certain circumstances, infer negligence *merely from the happening of an event and the defendants relation to it* even where some of the circumstances of the accident are known as long as the actual or specific cause of the accident remains unknown. *(See Kambat v. St. Francis Hosp.*, 89 NY2d 489, 494 [1997]).

Such an inference of negligence is permitted under the doctrine of res ipsa loquiter, which is not a separate theory of liability but rather a "common sense application of the probative value of circumstantial evidence." *(Abbott v. Page Airways, Inc.*, 23 NY2d 502, 512 [1969] citing *Galbraith v. Busch*, 267 NY 230, 235 [1935]). In other words, res ipsa loquiter permits a fact-finder to infer negligence from the circumstances of the occurrence. (*Kambat v. St. Francis Hosp.*, 89 NY2d at 495, *supra*). Thus, even where no material issue of fact exists, conflicting inferences of negligence drawn from those undisputed facts create triable issues of fact that cannot be decided on a motion for summary judgment. (*Id.*). In such instances, the court's recourse is to deny the motion and remit the matter to the triers of fact.

Res Ipsa Loquiter Precludes Summary Judgment

In this matter, it is undisputed that plaintiff tripped and fell as she entered a misleveled

elevator in her apartment building. Defendant Eltech contends that since it had no notice of any alleged misleveling condition of the elevator, its motion for summary judgment should be granted. According to Eltech, the lack of any evidence of notice, either actual or constructive, reduces plaintiff's case to one of rank, raw speculation.

Notwithstanding Eltech's contentions, notice of a defect may be inferred under the doctrine of res ipsa loquiter without the plaintiff offering any evidence of actual or constructive notice. (*Dittiger v. Isal Realty Corporation*, 290 NY 492, 496 [1943]; *Parsons v. State*, 31 AD2d 596 [3rd Dept 1968].) However, the doctrine of res ipsa loquiter "may be invoked only where the unexplained circumstances of the case justify the inference of negligence." (*See Breese v. Hertz Corp*, 25 AD2d 621, 622 [1st Dept, 1966] citing 1 NYPJI note 2:65.)

In order for the doctrine of res ipsa loquiter to apply, the following three elements must be established:1) the event must be a kind which ordinarily does not occur in the absence of negligence; 2) the event must be caused by an agency or instrumentality within the exclusive control of the defendant; and 3) the event must not have been due to any voluntary action or contribution on the part of the plaintiff. (*States v. Lourdes Hosp.*, 100 NY2d 208, 212 [2003] *rearg denied* 100 NY2d 577 [2003]). Once plaintiff satisfies the burden of proof on these three elements, the res ipsa loquiter doctrine "has the effect of creating a prima facie case of negligence sufficient for submission to the jury" and permits the jury to infer negligence from the mere fact of the occurrence. (*See Dermatossian v. New York City Tr. Auth.*, 67 NY2d 219, 226 [1976]).

In this matter, all three elements have been established. First, plaintiff was caused to fall and injure herself as a result of an alleged misleveled elevator. (Carcana tr at 2, lines 9-17). Plaintiff testified that during the time she lived in the building, she had noticed that the elevator car was not

level with the floor of the building more than ten times. (*Id.* at 32, line 23-25; at 33, lines 2-11). Therefore, plaintiff's testimony regarding the height differential of the elevator with the basement floor coupled with her testimony that she had notified the building supervisor of the misleveling on several different occasions, supports an inference of negligence against Eltech for causing her injury. (*See Kambat v. St. Francis Hosp.*, 89 NY2d at 494, *supra* [It is enough that the evidence supporting the elements of res ipsa loquiter afford a rational basis for concluding "it was more likely than not," that the injury was caused by defendant's negligence]; *See also* PJI 2:65 commentaries p 379).

Regarding the second element, the fact that defendants Eltech and Universal shared control over the care and maintenance of the elevator in question is of no avail as a defense to Eltech. Although there must be a connection between a defendant's exclusive control of the instrumentality that caused the incident and the injury that resulted from that instrumentality, it is not necessary that there be a single person in control of the instrumentality for res ipsa loquitur to apply. *(Crawford v. New York*, 53 AD3d 462 [1st Dept 2008]; *Wen-Yu Chang v. F.W. Woolworth Co.*, 196 AD2d 708[1st Dept 1993]). This is especially true in elevator accident cases where, as here, both the owner of the building and the elevator maintenance company have "exclusive control" over the elevator in question. *(See Myron v. Millar El. Indus.*, 182 AD2d 558, 559 (1st Dept 1992) citing *Duke v. Broad Co.*, 181 AD2d 589 [1st Dept 1992] ("in elevator accident cases, res ipsa can be applied where multiple defendants are in a position to exercise control"); *DiPilato v. H. Park Cent. Hotel, LLC.*, 17 AD3d 191, 192 [1st Dept 2005](holding that the trial court erroneously concluded that the doctrine of res ipsa loquiter was inapplicable to negligence claim because neither of the defendants had exclusive control of the elevator in question even though defendants had shared control.); *See*

also Singh v. United Cerebral Palsy of New York City, Inc., 72 AD3d 272 [1st Dept 2010](res ipsa applicable against owner where automatic door maintenance company did not have exclusive contract); *But see Hodges v. Royal Realty Corp.* 42 AD3d 350 [1st Dept 2007] (the doctrine of res ipsa loquiter is inapplicable where the building owner has ceded *all* responsibility for the daily operation, maintenance, and repair of an elevator to an outside company)).

Furthermore, the defendants' shared control over the safe operation of the elevator imposes no additional burden upon the plaintiff to specify each defendant's role in causing the elevator's misleveling. Indeed, where a number of defendants are in control and the circumstances are such that the doctrine of res ipsa loquitur would otherwise be applicable, it is for the defendants to explain their conduct. (*See Schroeder v. City & County Sav. Bank of Albany*, 293 NY 370, 374 [1944] *rearg denied* 293 NY 764 [1944]).The doctrine of res ipsa loquiter, however, may not be invoked unless there is some evidence to enable the jury to identify the perpetrator of the wrong. (*See Corcoran v. Banner Super Mkt*, 19 NY2d 425, 431 [1967]).

In this matter, both Universal and Eltech had control over the elevator in question pursuant to a maintenance contract. The relevant portion of the contract reads:

> "In view of the type of equipment and conditions under which it operates, the Owner, *except when any agent, employee, or servant of the Company is actually working on and in control of the equipment*, retains all responsibility for maintaining the leveling operation of the cars at floor landings, and the operation of car doors, hatchway doors, and their locking and operating devises, and for all legal liability for injury or death to any person or damage to any property caused by the failure of the Owner in respect of such maintenance. However, the Company will inspect, repair, and adjust car leveling devises and automatic operators and locking devises for car and/or shaftway doors on its regular inspections."(*See* Jones aff , exhibit N, ¶ 10)(emphasis added).

It is clear from the plain language of the contract provision that both Universal ("Owner"),

and Eltech ("Company") exercised exclusive control over the maintenance of the subject elevator at different times. Pursuant to the contract, Universal was responsible for maintaining the elevator, except when Eltech was "working on and in control of the equipment" and during Eltech's regular inspections.

Additionally, the fact that the elevator may have been used by the public does not in any way undermine plaintiff's contention that defendants had exclusive control over the component of the elevator that caused it to mislevel. Courts have held that the "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." *(Pavon v. Rudin*, 254 AD2d 143, 146 [1st Dept 1998]; *Singh v. United Cerebral Palsy of New York City, Inc* 72 Ad3d 272, *supra* (res ipsa available against owner where malfunctioning motion sensor located on top of the automatic swinging door, since public unlikely to contact it)).

In this matter, Eltech's elevator technician, Phillip Bryan, testified at his deposition that two elevator components control whether the elevator stops level with the floor – the IP tape guide and the normal. Mr. Bryan testified that the IP tape guide is a magnet located on top of the elevator that controls the level at which the floor of the elevator car stops in relation to the building floor. (Bryan tr at 29-30). Mr. Bryan testified that if there were any leveling problems, he might have to adjust the magnet. (*Id.* at 29, lines 6-7, 13-15). He also testified that another component, the normal, which is a switch in the elevator shaft, could explain why the elevator misleveled with the basement floor. (*Id.* at 58, lines 18-24; at 59, line 4). In order to determine if the normal is working properly, Mr. Bryan testified that he would have to go on top of the elevator and determine if the elevator is hitting the switch too early. (*Id.* at 59, lines 19-23).

Mr. Bryan also testified that the elevator located at 1366 is a veer voltage elevator, which is more precise at stopping at the correct floor. (*Id.* at 89, lines 20-24). Such an elevator, he opined, could mislevel due to the magnet, a bad IP unit, or improper elevator maintenance. (*Id.* at 90, lines 3-14). He also testified that a misleveling could also be due to just plain wear and tear. (*Id.* at 91, lines 2-5).

Thus, it is apparent from Byran's testimony that the two components in question, the IP tape guide and the normal, given where they are located, were not designed to come into contact with the public. Furthermore, based on the maintenance contract between Eltech and Universal and Mr. Bryan's deposition testimony, it is wholly possible for a jury to find either or both of the defendants as the cause of plaintiff's accident.

Turning to the last element of res ipsa, the fact that plaintiff was not looking down as she entered the elevator immediately before her toe hit the misleveled portion of the elevator , does not preclude the application of the res ipsa loquitur doctrine in this matter (Carcana tr at 22, lines 9-11). In cases where res ipsa loquitur is invoked, comparative negligence and causal relationship are matters of consideration for the trier of fact. *(Burgess v. Otis El. Co.* 114 AD2d 784 [1st Dept 1985] (jury properly charged with res ipsa loquitur where plaintiff having no control over the misleveling of elevator was held partially at fault); *see also Sirgiano v. Otis El. Co.* 118 AD2d 920 [3rd Dept 1986] (res ipsa loquitur held properly charged; plaintiff held 45% at fault); *Lianopoulos v. Church of Our Savior*, 111 AD2d 908 [2nd Dept 1985] (res ipsa loquitur charged against plaintiff and defendant, and both were found at fault)).

Conclusion

Thus, this Court finds that a prima face case of negligence under the doctrine of res ipsa loquiter has been established. As a result, this Court cannot find that Eltech has demonstrated entitlement to summary judgment as a matter of law against plaintiff. The doctrine of res ipsa loquitur is a form of circumstantial evidence that does not create a presumption of negligence but rather a permissible inference of negligence. (*Morejon v. Rais Constr. Co.* 7 NY3d 203 [2006]). In cases where conflicting inferences may be drawn, as in the instant matter, the choice of inference must be made by the jury. *States v. Lourdes* 100 NY2d 208, *supra*; *Kambat v. St. Francis Hosp.*, 89 NY2d 489, *supra*).

This Court does find, however, that as neither the third-party plaintiff nor plaintiff have opposed that part of Eltech's motion seeking dismissal of the third-party complaint, that part of Eltech's motion for summary judgment is granted. Accordingly, it is

ORDERED that defendant Eltech's motion for summary judgment against plaintiff is **DENIED**; and it is further

ORDERED that defendant Eltech's motion for summary judgment against third-party plaintiffs, 1366 and Universal, is **GRANTED**.

This Constitutes the Decision and Order of the Court.

Dated: December 13, 2013
Bronx, NY

Hon. Fernando Tapia, J.S.C.