At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December 2023.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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DUALEX SOTO,

Plaintiff,

-against-

THE CITY OF NEW YORK, THYSSENKRUPP ELEVATORS CORPORATION, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION and APPLE INDUSTRIAL DEVELOPMENT CORPORATION,

Defendants.

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Index No. 9784/2014

MS #9, MS #10 & MS #11

Decision and Order

The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	26-42, 43-53, 79, 85-86
Cross-motions Affidavits (Affirmations) and Exhibits	69
Answering Affidavit (Affirmation)	59-68, 70-77, 80-84, 87-90, 91-99
Reply Affidavit (Affirmation)	100-103, 104-105, 106-107
Supplemental Affidavit (Affirmation)	

In the underlying action, Plaintiff alleges that he was struck by a closing elevator gate while unloading freight. He argues that Defendants were negligent because the elevator did not have an active door open button, that the siren and strobe light did not properly operate, and that the light curtain did not prevent the gate from striking him.

Defendant THYSSENKRUPP ELEVATORS CORPORATION (TKE) and Defendants CITY OF NEW YORK and NEW YORK CITY ECONOMIC DEVELOPMENT

CORPORATION (CITY) both move to dismiss the complaint and the cross-claims against them.

Plaintiff moves for leave to amend his Bill of Particulars as to Defendant TKE and Third-Party Defendant LIQUID 8 TECHNOLOGIES INC. (LIQUID 8).

Defendant TKE had a contact with Defendant CITY to service and maintain the elevators and had an employee on site. Defendant CITY was the owner of the building and the elevator.

The elevator was equipment with a warning siren, a waring strobe light, and a light curtain designed to stop the gate from closing if the light beam was blocked. The elevator also had a door hold button that was not hooked up at the time of the accident. Plaintiff alleges that they were instructed to keep the door open by placing an object to block the beam of the light curtain.

A video of the accident shows the Plaintiff backing up while unloading freight and the elevator gate coming down and striking him. The video also shows a warning strobe light flashing. The video did not have sound, so it does not indicate whether the siren sounded.

Defendant TKE argues that Plaintiff's action should be dismissed because he cannot identify a specific defect with the elevator and because TKE had no notice of any defect.

However, Plaintiff has demonstrated that there are questions of fact which preclude the granting of summary judgment. Plaintiff testified that he did not hear the siren sound. Further, Steven Demino of TKE testified that the video shows the strobe light going on only two and half seconds before the gate started to close and that the light was supposed to go on five seconds before the gate started to close.

Further, Plaintiff's expert alleges that the gate was able to strike him because the light curtain was installed on the outside of the elevator.

While Plaintiff has not identified the specific cause of the malfunction, other than the placement of the light curtain, he has presented evidence of three malfunctions. First, that the siren did not sound, second that the strobe light did not go on five seconds before the gate went down, and third that the light curtain failed to stop the door from hitting him.

Plaintiff testified the only way to hold the elevator gate and door open was to block the light curtain sensor and that sometimes the sensor would not work.

It is for a trier of fact to determine whether the allegations are true or not, but assuming for the purposes of this motion that they are true, they are sufficient to support an inference of negligence pursuant to the doctrine of res ipsa loquitur (*Ianotta v. Tishman Speyer Properties, Inc.*, 46 AD3d 297, [1st Dept 2007]; *Barkley v. Plaza Realty Investors, Inc.*, 149 AD3d 74 [1st Dept 2017]).

The fact that Plaintiff was backing up while exiting may go to his comparable negligence, but does not alter the fact that the light curtain, which was supposed to stop the gate from closing if a person broke the beam of light, was so placed that it failed to do so.

Defendant TKE also failed to demonstrate that there is no question that it did not have notice of problems with the siren, the strobe light, or the light curtain. The maintenance records for the elevator produced by TKE only indicate the time spent on maintenance but not what work was done or what conditions were found. They do not indicate whether there were any problems with the siren, strobe light or light curtain. In light of the lack of detail in the maintenance records, Defendant TKE cannot demonstrate that it did not have notice.

Defendant CITY also moves for summary judgment dismissing the complaint and for summary judgment on its cross-claim for contractual indemnification against Third-Party Defendant LIQUID 8, Plaintiff's employer.

Defendant CITY has demonstrated good cause for filing its motion one day past the 60-day deadline for filing summary judgement motions, in that its counsel was out of the office during the deadline to file the motion due to close contact with a Covid positive individual.

Plaintiff alleges that Defendant CITY, as owner, created a dangerous condition by deciding not to have the door hold button on the elevator activated. While no evidence was presented that a door hold button was required by regulation, the lease between the CITY and Plaintiff's employer required that workers use the door hold button as the method to keep the gate open while loading or unloading freight.

Also, although it is not clear from the record how long a door hold button would have kept the gate open, it is Defendant CITY's burden in seeking summary judgment to demonstrate that the door hold button would not have prevented the accident. It is up to a trier of fact to determine based on all the facts and circumstances surrounding the operation of the elevator whether it was negligent not to have had the door hold button activated.

Defendants raised objections to Plaintiffs allegations concerning the siren, the strobe light, the light curtain, and the door hold button on the grounds that Plaintiff did not raise them in his original Bill of Particulars or before the filing of the Note of Issue.

Plaintiff did not serve a Bill of Particulars on Defendant CITY until August 17, 2023. Plaintiff had served a Bill of Particulars on Defendants TKE and LIQUID 8 before the Note of Issue, but it did not identify the specific allegations concerning the siren, strobe light, light curtain, and door hold button.

Plaintiff seeks to amend the Bill of Particulars served on Defendants TKE and LIQUID 8 to include information obtained during discovery.

"Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay" (*Rodriguez v. Panjo*, 81 AD3d 805 [2nd Dept 2011]; *Alomia v. New York City Tr. Auth.*, 292 AD2d 403, 406 [2002]; *see Worthen-Caldwell v. Special Touch Home Care Servs., Inc.*, 78 AD3d 822 [2010]).

Mere lateness is not a barrier to amendment, but it will preclude amendment if it is coupled with significant prejudice to the other side (*Worthen-Caldwell v. Special Touch Home Care Servs., Inc.*, 78 AD3d at 822).

While Plaintiff has delayed in seeking to amend the Bill of Particulars as to Defendant TKE and in serving the Bill of Particulars on Defendant CITY, any prejudice caused by the delay can be remedied by striking the Note of Issue and allowing Defendants to conduct further discovery.

Defendant CITY's motion for summary judgment on its claim against Third-Party Defendant LIQUID 8 for contractual indemnification must be denied at this point as premature. First, it has not yet been determined whether the CITY was negligent in failing to have the door hold button activated. Second, the relevant portion of the indemnification clause in the contract, 7(b)(1), required LIQUID 8 to indemnify the CITY for any liability "arising from any occurrence in, on or about the Premises (except to the extent resulting solely from the willful misconduct or negligent acts or omissions of Landlord, its agents, employees or contractors)".

Thus, where the injury is caused solely by the negligence of Defendant CITY or one of its contractors, such as Defendant TKE, there is no obligation to indemnify. Here, not

only has it not been determined whether either Defendant CITY or Defendant TKE was negligent, it has also not been determined whether Plaintiff was also negligent. If it was determined that Plaintiff was not comparatively negligent and that only Defendant CITY and/or Defendant TKE was negligent, then the accident would fall within the exception to Third-Party Defendant LIQUID 8's indemnity obligation.

WHEREFORE, it is hereby ORDERED that Defendant TKE's motion is denied; and it is further,

ORDERED, that Defendant CITY's motion is denied; and it is further,

ORDERED, that Plaintiff's motion is granted; and it is further,

ORDERED, that the Note of Issue is stricken and Defendants may conduct further discovery; and it is further,

ORDERED, that Plaintiff shall file a Note of Issue by June 28, 2024.

E N T E R:

JSC