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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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David Saunders,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 302306/2009

J.P.Z. Realty, LLC, The Trustees of Columbia University in the City of New York, and Warren Elevator Service Company, Inc.,

Defendants.

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Hon. Howard H. Sherman, J.S.C.:

Plaintiff moves for partial summary judgment in his favor on the issue of liability. By separate motion, defendant Warren Elevator Service Company, Inc. ("Warren") moves for summary judgment dismissing all claims and cross-claims against it. Defendant J.P.Z. Realty LLC ("J.P.Z.") cross-moves for summary judgment dismissing all claims and cross-claims against it. Plaintiff cross-moves for partial summary judgment in his favor on the issue of liability.[1] The foregoing motions and cross-motions are consolidated for disposition herein.[2]

On August 11, 2008, at approximately 10:00 AM, in a warehouse located at 3247 Broadway in New York County, plaintiff was struck by the "vertical rise gate" ("vertical rise gate" or "gate") of a manually operated freight elevator, which fell from above, striking plaintiff's head. It is undisputed that the outer freight elevator doors were made of two metal panels, which simultaneously retracted into the floor or ceiling when a strap was pulled manually by the elevator operator. The single, interior gate opened manually by lifting up, and closed by

[1] This "second" motion raises the doctrine of *res ipsa loquitur*.
[2] In an order dated May 3, 2011, the action was dismissed as to defendant The Trustees of Columbia University in the City of New York. (Torres, J.)

pulling downward; a system comprised of a chain attached to counterweights allowed the door to remain in place when elevated.

Plaintiff was an employee of non-party Despatch Moving and Storage ("Despatch"), which was the sole lessee of the building.[3] According to the plaintiff's deposition testimony, on the day of the accident a Despatch employee named "Earl" was operating the elevator.[4] Over the course of approximately 40 minutes immediately prior to the accident, plaintiff had taken the elevator to the fifth floor, seventh, and tenth floors, without incident. As plaintiff was exiting the elevator on the first floor, however, "the gate they [sic] just come out of nowhere and broke apart . . . knocked me unconscious." [5]

Warren's deposition witness Kenneth Seiferth testified there was no written contract between Warren and J.P.Z. J.P.Z. and Warren had only an oral agreement to oil and service the machine and motor, and lubricate the guiderails and counterweight rails. There was no agreement to inspect the gate or chain. Warren serviced the elevator on an as needed basis, made repairs on an "as needed" basis. The cause of the accident was a broken chain, which had been attached to a counterweight system, allowing the gate to be lifted up and remain in position. Seifert also testified that Warren did not "service" the chain or vertical rise gate.

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[3] J.P.Z.'s deposition witness Peter Zuhusky testified that plaintiff worked for Despatch, and that the entire building was leased to Despatch. The same principals own J.P.Z. and Despatch.

[4] Non-party witness Earl Kelly, an employee of defendant Despatch, was deposed. He stated that at no time did he have any difficulty opening the gate on the date of the accident. The accident occurred after he had existed the elevator, and he did not observe the gate strike the plaintiff. He described the chain that failed as similar to the chain on a bicycle. He further testified that he was primarily responsible for operating the elevator, but that other dispatch employees operated it in his absence.

[5] Plaintiff heard no unusual noises when Earl opened the doors on the first floor immediately prior to the accident, nor did he hear any unusual noises before being struck.

Plaintiff's motion for partial summary judgment

Plaintiff argues that under the N.Y.C. Administrative Code, periodic elevator inspections must be performed. In fact, Warren performed a "Mandated Private Elevator Inspection" on March 21, 20008 (which the elevator failed for reasons unrelated to the gate), and later performed a "two year test" on July 17, 2008. Plaintiff maintains that industry standards and regulations required that the chain be inspected at the time of these mandatory elevator inspections. Plaintiff's expert Patrick J. McPartland states:

> "... Warren admits that they did not ever inspect the interior gate and chain...which is a plain violation of [American Society of Mechanical Engineer's Safety Code for Elevators and Escalators] and that after the chain broke causing this accident, they replaced the entire chain rather than just the master link...demonstrating that the entire chain was defective and worn as opposed to just the master link breaking. Because the chain could not wear in such a short period of time from Warren's last service less than a month before the accident, if Warren had inspected the interior gate and chain as required by the regulations, it would have revealed to a reasonable degree of engineering certainty that the chain was worn and defective and should have been replaced prior to this accident which would have prevented the accident."

Consequently, plaintiff asserts that Warren is liable because it agreed to inspect the elevator, and did so negligently, in that Warren failed to inspect the chain assembly.

With respect to J.P.Z., plaintiff observes that the lease between J.P.Z. and Despatch provides that J.P.Z. could enter the premises at reasonable times to effectuate repairs that are reasonable and necessary, or to comply with any laws, regulations or directions of governmental authorities. Citing *Guzman v. Haven Plaza Housing Dev. Fund Co.* (69 N.Y.2d 559, 563, 509 N.E.2d 51, 51, 516 N.Y.S.2d 451, 451 [1987] [the owner of a leased commercial building covered by the New York City Administrative Code which has no obligation for repairing or maintaining the premises but retains the right to reenter and inspect and to make needed repairs

at tenant's expense may be held responsible for injuries due to a defect in the premises]), plaintiff argues that J.P.Z. is liable for failing to maintain the elevator.

In opposition, Warren argues that material issues of fact exist. Warren maintains that the accident could have been caused by misuse of the elevator. In support of this argument, Seiferth testified that unidentified Warren employees were told that the gate was "slammed up," causing the chain to break. As to Warren's purported admissions that Warren never inspected the chain assembly, Warren argues that plaintiff has misread and misconstrued the Seiferth's testimony, in that Seiferth did not testify that Warren failed to inspect the chain.

As to plaintiff's expert, McPartland, Warren observes that McPartland did not inspect the chain,[6] and that his surmise that the chain was "deteriorated" is speculative and unsupported by actual evidence.

J.P.Z. argues, in opposition to plaintiffs motion, that it had no notice of any defect in the chain, and that it did not violate any requirement to obtain elevator inspections, as the elevators were in fact tested, as required by the N.Y.C. Administrative Code.

Defendant Warren's Motion for Summary Judgment

By separate motion, Warren moves for summary judgment dismissing the complaint and all cross-claims against it. Warren argues that it did not have notice of the any defect in the elevator chain, nor did it cause the defective condition, citing, inter alia, *Santoni v. Bertelsmann Prop.* (21 A.D.3d 712, 714-715, 800 N.Y.S.2d 676, 679 [1st Dept. 2005] [plaintiffs failed to raise a triable issue of fact as to notice or negligent inspection and maintenance].) Lastly,

[6] It is not contested that Warren's employees discarded the chain.

Warren argues that the elements of *res ipsa loquitur* were not satisfied, as Warren was not in exclusive control of the gate.

Defendant J.P.Z. cross-moves for summary judgment in its favor dismissing the complaint and all cross-claims against it. Prior to the accident, there were no incidents relating to the vertical rise gate or the chain mechanism. J.P.Z. did not maintain or operate the elevator, or supervise any of Despatch's employees, and the elevator maintenance bills were paid by Despatch.

Plaintiff cross-moves for summary judgment as to liability in his favor, repeating many of the same arguments that were raised on plaintiff's prior, separate motion. Plaintiff additionally argues that plaintiff is entitled to judgment based on *res ipsa loquitur*; that the allegations that the gate was damaged due to misuse are based on hearsay.

Analysis

Initially, the court observes that the defendants did not cross-move for summary judgment in response to plaintiff's prior motion, but instead, Warren moved separately for summary judgment, and co-defendant J.P.Z. made an improper cross-motion. (*Kershaw v Hospital for Special Surgery*, 114 A.D.3d 75, 88, 978 N.Y.S.2d 13, 23 [1st Dept. 2013 [a cross motion is an improper vehicle for seeking relief from a nonmoving party].) Plaintiff then cross-moved for summary judgment, in effect making a second motion for summary judgment. Although two motions by plaintiff are pending, in view of the fact that the motions are largely duplicative, and that there is manifestly no prejudice to any party, the court will address all of the arguments raised on the merits.

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition that precipitated the injury. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994].) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

Plaintiff's motion and cross-motion for summary judgment

Plaintiff is not entitled to partial summary judgment as to liability.

As to J.P.Z., plaintiff has not established that J.P.Z. caused, created, or had notice of any defect or issue with the vertical lift gate. This point is more fully discussed *below* in connection with J.P.Z.'s motion for summary judgment.

As to Warren, the evidence shows that it did not have a full service contract that would cast Warren in liability for failing to maintain the elevator. An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge, or failure to use reasonable care to discover and correct a condition which it ought to have found, but only when, pursuant to contract, the elevator company has assumed "exclusive control" of the elevator at the time of the accident. (*Casey v New York El. & Elec. Corp.*, 82 A.D.3d 639, 920 N.Y.S.2d 308 [1st Dept. 2011] [no

duty can be imparted by a "piecemeal oral contract"].) Warren has demonstrated prima facie that it did not have "exclusive control" of the elevator.

Warren has also shown that the elements of *res ipsa loquitur* were not satisfied as to it. (*McMurray v. P.S. Elevator*, 224 A.D.2d 668, 670, 638 N.Y.S.2d 720, 720 [2d Dept. 1996] [defendant elevator contractor was not charged with the duty of continued maintenance of the freight elevator, it was error to instruct the jury that it could circumstantially infer negligent maintenance and repair under the doctrine of *res ipsa loquitur*].) "The doctrine of res ipsa loquitur has frequently been applied in cases involving elevator malfunctions, including those involving doors which unexpectedly closed upon and injured plaintiffs while attempting to enter and exit an elevator." (*Barkley v Plaza Realty Invs. Inc.*, 149 A.D.3d 74, 77, 49 N.Y.S.3d 105, 107 [1st Dept. 2017] [citations omitted].) "[T]he doctrine of res ipsa loquitur can be applied even when more than one defendant is in a position to exercise exclusive control." (*DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 A.D.3d 191, 795 N.Y.S.2d 518 [1st Dept. 2005] [applying the doctrine to both the hotel owner and elevator company that maintained elevator].)

Res ipsa loquitur is an evidentiary doctrine which permits the inference of negligence to be drawn from the circumstances of the occurrence when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and (3) the event was not caused by the plaintiff's actions. (*Dermatossian v New York City Tr. Auth.*, 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 501 N.Y.S.2d 784 [1986]).

Here, the gate was <u>not</u> in the exclusive control of the defendants, because non-party Despatch's employees operated the mechanism and had direct contact with the gate, lifting and closing the gate on a daily basis. (*Douglas v. Kingston Income Partners '87*, 2 A.D.3d 1079,

1081, 770 N.Y.S.2d 153, 156 [3d Dept. 2003] [*res ipsa loquitur* did not apply because plaintiff, his coworkers or any other user of the elevator could access the interlock device from inside the elevator].) Accordingly, the element of exclusive control has not been satisfied.

The crux of plaintiff's argument that Warren performed a negligent inspection is that Warren's deposition witness Seiferth admitted that Warren failed to inspect the chain. Assuming that a reasonable inspection would have included an examination of the chain, it is not clear that Warren failed to inspect the chain. Warren's employee Seiferth testified that Warren did not "service" or "work on" the chain prior to the accident. Despite plaintiff's repeated representations that Seiferth admitted that it did not inspect the chain, there was no admission that the chain was not inspected – only that it was not serviced or worked on. Moreover, for the reasons stated below in connection with Warren's separate motion for summary judgment, Warren cannot be liable under the facts of this case for negligent inspection.

The prior repairs and conditions found on the elevator did not relate to the gate or the chain mechanism. (*Ianotta v. Tishman Speyer Props., Inc.*, 46 A.D.3d 297, 298, 852 N.Y.S.2d 27, 28 [1st Dept. 2007] [plaintiff failed to raise an issue of fact as to whether defendants had notice of the alleged defective condition of the elevator in which she was injured, as prior incidents were not of a similar nature to the accident giving rise to accident].)

Further, issues of fact exist as to causation. Plaintiff has not established as a matter of law that a visual inspection of the chain would have revealed a defect. In this regard, it is noted that plaintiff's expert never examined the chain, and thus his opinion is not based on facts that the chain was worn or deteriorated. The expert's conclusion that the chain was deteriorated rests in part on the speculative assumption that the chain was deteriorated because the entire chain was replaced. However, there may be many reasons why Warren would have installed an entirely

new chain after the old chain broke, not the least of which would be that it might have been more prudent to replace the whole chain even if only part of it had failed. Further, the expert assumes without explication that a chain would always show visible signs of being worn before it was about to snap, but he did not establish the reasonableness of this underlying assumption. It may be that a chain will fail even though there are no visible defects. "[O]pinion evidence must be based on facts in the record or personally known to the witness" (*Samuel v Aroneau*, 270 A.D.2d 474, 475, 704 N.Y.S.2d 652 [2000], *lv denied* 95 N.Y.2d 761, 737 N.E.2d 953, 714 N.Y.S.2d 711 [2000], citing *Cassano v Hagstrom*, 5 N.Y.2d 643, 159 N.E.2d 348, 187 N.Y.S.2d 1 [1959]; see also, *Santoni v. Bertelsmann Prop.*, 21 A.D.3d 712, 714-715, 800 N.Y.S.2d 676, 679 [1st Dept. 2005] [plaintiffs failed to raise a triable issue of fact as to notice or negligent inspection and maintenance; plaintiffs' expert's opinion failed to raise a triable issue of fact as there is no evidence in the record, beyond the expert's speculation, of any carbon build-up on the elevator sensors].)

Defendant J.P.Z.'s cross-motion for summary judgment

Defendant J.P.Z. has established an unrebutted, prima facie case that it was free from any liability for the happening of the accident. There is no evidence that J.P.Z. created any condition, or had any prior notice of any condition relating to the vertical rise gate or the chain mechanism. Plaintiff himself, who was employed at the premises for five years prior to the accident, testified at his deposition that no one had experienced any problem with the gate during his tenure as a Despatch employee. Even if there were cogent, nonhearsay evidence (which there is not) that a Despatch employee had lifted the gate with excessive force causing it to break, there is no evidence that J.P.Z. had notice of any such conduct. Similarly, if Despatch

employees had operated the elevator by holding the exterior doors open, there is no evidence that this practice caused any fault with the vertical rise gate. Nor is J.P.Z. liable in *respondeat superior* for the conduct of the employees of Despatch.

Plaintiff argues that J.P.Z. is liable for failing to maintain the premises under *Guzman v. Haven Plaza Housing Dev. Fund Co.* (69 N.Y.2d 559, 563, 509 N.E.2d 51, 51, 516 N.Y.S.2d 451, 451 [1987].) A building owner, as an out-of-possession owner, may be charged with constructive notice of defects in those parts of the building into which it has authority to enter. (*See, e.g.*, *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d at 565-566, *supra*; *Juarez by Juarez v. Wavecrest Mgmt. Team*, 88 N.Y.2d 628, 647, 672 N.E.2d 135, 143, 649 N.Y.S.2d 115, 123 [1996].) Here, however, there is no showing that any defect in the chain mechanism could have been discovered by J.P.Z. Further, an out-of-possession landlord which retained the right to reenter the premises for repairs and inspections cannot be held liable under a theory of constructive notice in the absence of a "significant structural or design defect that is contrary to a specific statutory safety provision." (*Belotserkovskaya v. Cafe "Natalie"*, 300 A.D.2d 521, 522, 752 N.Y.S.2d 554, 555 [2d Dept. 2002].) There is no showing that the chain, even if defective, would constitute a structural defect. (*Caiazzo v. Angelone*, 236 A.D.2d 351, 352, 653 N.Y.S.2d 644, 645 [2d Dept. 1997] [plaintiffs failed to show that the incident was the result of the defendant's violation of a specific elevator safety provision].)

Plaintiff also seeks to rely on the doctrine of *res ipsa loquitur*. To establish the defendant's liability on the basis of *res ipsa loquitur*, the plaintiff is not required to demonstrate that a prior similar incident had occurred. (*Perry v Kone, Inc.*, 147 A.D.3d 1091, 1093, 49 N.Y.S.3d 696, 699 [2017].) Here, as is noted above, and for the same reasons that the doctrine

does not apply as to Warren, the gate was not in the exclusive control of the defendants, because non-party Despatch's employees operated the mechanism.

Warren's motion for summary judgment

As indicated above, it appears that plaintiff is attempting to hold Warren liable on the basis of a negligent inspection. It is true that in at least one case, the First Department held that "even in the absence of a contract, an elevator company can be liable in tort, where it negligently services and/or inspects an elevator." (*Casey v New York El. & Elec. Corp.*, *supra*, 82 A.D.3d at 640.) If a cause of action in negligent inspection were viable, this court would hold that there exist issues of fact as to whether Warren inspected the elevator's vertical lift gate, and in particular, the chain mechanism.

The holding in *Casey*, however, that an elevator contractor can be liable for negligent repair in the absence of a full service contract, was later overruled by *Medinas v MILT Holdings LLC* (131 A.D.3d 121, 13 N.Y.S.3d 81 [1st Dept. 2015].) In that case, plaintiff was injured when the freight elevator he was using to transport a vehicle suddenly descended in "free fall" for three stories before hitting the ground. The freight elevator had received an "Unsatisfactory" rating on annual inspections in 2004 through 2008, no inspection was done in 2009, and that although the inspection performed by defendant elevator contractor on January 14, 2010 deemed the elevator "Satisfactory," a "Cease Use" violation had been issued on November 1, 2009, which had required that the elevator be removed from service until all violating conditions had been corrected and a reinspection performed. Plaintiff asserted that the defendant elevator contractor's failure to remove the elevator from service after recognizing that it needed immediate

replacement was a competent producing cause of the accident and a departure from standard industry practice. The First Department held:

> "However, in view of *Espinal*, which post-dated the authorities on which *Casey* relied, although it predated *Casey* itself, we are unwilling to apply the rule recited in *Casey* to the extent it allows a claim of negligent repair or inspection against an elevator repair contractor by a nonparty to its contract in the absence of a showing that by the work it performed, it "launched a force of harm" by creating or exacerbating an unsafe condition. We perceive no evidence that could create a triable issue as to whether The Elevator Man, in its inspection or its work, "created or exacerbated a dangerous condition" (*Espinal*, 98 NY2d at 142; *Stiver* at 257). Rather, plaintiff's expert essentially asserts that The Elevator Man failed to diagnose and correct an allegedly dangerous condition.
>
> "Finally, res ipsa is not applicable to this case, because plaintiff is unable to establish the necessary element of "exclusive control" (*see Hodges v Royal Realty Corp.*, 42 AD3d 350, 352, 839 NYS2d 499 [1st Dept 2007])." (*Medinas v MILT Holdings LLC, supra*, 131 A.D.3d 121, 127-128.)

Here, defendant Warren did not service the gate and chain mechanism, and indeed, may not have even inspected it. It is undisputed that Warren did not assume exclusive control of the elevator. Under these circumstances, even assuming that Warren was negligent in failing to inspect the gate and repair or replace the chain mechanism prior to the accident, under *Medinas*, Warren cannot be liable as it did not "launch and instrument of harm."

Conclusions

Accordingly, it is

ORDERED that plaintiff's motion and cross-motion seeking partial summary judgment as to liability are denied, and it is

ORDERED defendant J.P.Z.'s motion for summary judgment is granted, and all claims and cross-claims against it are hereby dismissed, and it is

ORDERED that defendant Warren's motion for summary judgment is granted, and all claims and cross-claims against it are hereby dismissed, and it is

ORDERED that the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: 3/26, 2018

Hon. Howard H. Sherman, J.S.C.