SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART35

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ANA POLANCO,

Plaintiff,

Index No.: 150446/13
DECISION/ORDER

-against-

PGREF II 60 WALL STREET, LP, PARAMOUNT GROUP INC., TAUNUS CORPORATION and OTIS ELEVATOR COMPANY ,

Defendants.

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PGREF II 60 WALL STREET, LP, PARAMOUNT GROUP INC. and TAUNUS CORPORATION,

Third-Party Plaintiffs,

-against-

OTIS ELEVATOR COMPANY and ABM JANITORIAL SERVICES, INC.

Third-Party Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

In this personal injury/negligence action, defendants/third-party plaintiffs PGREF II 60 Wall Street, LP (PGREF), Paramount Group Inc. (Paramount) and Taunus Corporation (Taunus; together, the building defendants) move for summary judgment to dismiss the complaint and partial summary judgment on the third-party complaint (motion sequence number 001). Third-party defendant ABM Janitorial Services, Inc. (ABM) moves separately for summary judgment to dismiss the third-party complaint and all of the cross-claims asserted against it (motion sequence number 003). For the following reasons, both motions are granted.

BACKGROUND

On March 26, 2012, plaintiff Ana Polanco (Polanco) was injured, during the course of her employment as a "cleaning matron" with ABM, while moving a wheeled cleaning cart into a service elevator on the 30th floor of a building (the building) located at 60 Wall Street in the County, City and State of New York. *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶ 3. PGREF is the building's owner of record, and Paramount is PGREF's corporate parent. *Id.*, ¶ 4. Taunus was a former corporate parent of the building's prior owner, and it currently has no interest in the building. *Id.* The building defendants further assert that PGREF has executed a triple net lease for the entire building with non-party tenant Deutsche Bank, AG (Deutsche Bank). Deutsche Bank's former facilities management company, non-party Jones Lange LaSalle (JLL),[1] contracted for cleaning services with ABM, and for elevator maintenance services with defendant/third-party defendant Otis Elevator Company (Otis). *Id.*

Polanco was first deposed on August 5, 2014. *See* notice of motion (motion sequence number 001), exhibit F. She stated that her accident occurred at approximately 8:30 a.m.on March 26, 2012. *Id.* at 22. Polanco specifically stated that she had gone to the building's 30th floor, after arriving an hour earlier, in order to retrieve a large four-wheeled plastic cart stocked with bathroom paper and soap that was kept in a closet there. *Id.* at 28-32, 56. Polanco also stated that she then intended to take the cart down the service elevator to perform her usual duties

[1] Deutsche Bank's current facilities management company, CBRE, is not a party to this action. *See* notice of motion (motion sequence number 001), exhibit I at 15.

cleaning and stocking the building's second through fifth-floor bathrooms. *Id.* Polanco next stated that she wheeled the cart to service elevator # 27 on the 30th floor, and attempted to push it inside, but could not do so because "the wheel got stuck." *Id.* at 33-35. Polanco specifically alleged that this happened both because the floor of the elevator was not level with the building's floor, but was approximately two inches higher, and because there was a gap of approximately the same size between the floor and the elevator. *Id.* at 39-40, 117-119, 122, 125. Polanco also specifically alleged that the middle wheels on the bottom of the cart got wedged in the gap between the building floor and the elevator floor. *Id.* at 46-49. Polanco claimed that misleveling had been happening in all of the building's two service elevators and one cargo elevator for at least six months prior to her accident, and that she had complained about it several times, both to her supervisor and to the building's elevator repair mechanics. *Id.* at 39, 45, 81-88, 91-93, 102-103. Polanco stated that, after the cart's wheels had remained stuck in the gap for approximately 15 minutes, while the elevator was beeping, she lifted the cart up to free it from the gap and pushed it into the elevator, but injured her back and neck in the process. *Id.* at 50, 53-54, 57-58, 75-76. Polanco finally stated that she then proceeded to the building's third floor to do her job, but had to stop at approximately 11:45 a.m. as a result of pain that she began to experience from her injuries. *Id.* at 61, 63-65. Polanco was deposed again on December 17, 2014 and May 19, 2015, at which times she gave substantially identical accounts of her accident, and also discussed the nature and extent of her injuries and subsequent medical treatment. *Id.*, exhibits G, H.

In addition to her deposition testimony, Polanco has presented an expert's report from elevator consultant Ronald Schloss (Schloss), who examined all of the pleadings, all of the paperwork submitted to the New York City Department of Buildings (DOB) regarding elevator #

27 (including inspection and violation reports), and all of the work orders and purchase orders relating to elevator # 27. *See* Sanchez affirmation in opposition (motion sequence number 001), exhibit A. Schloss concludes as follows:

> "In summary, my opinion to a reasonable degree of engineering certainty is that [Otis] did not provide the proper standard of care to the elevator despite [the fact] that they were contractually obligated to do so by the full maintenance contract with [JLL]. Their negligence caused the accident and the injuries to the plaintiff. The job of the maintenance company is to monitor and remedy the wear and tear of the equipment proactively before it becomes problematic and causes improper floor surfaces of the elevator car. Improper leveling and horizontal clearance ('the gap') is indicative of deficient maintenance of the landing and leveling mechanisms of the elevator. Weekly monitoring and adjustment of the leveling accuracy was also specifically spelled out in the maintenance agreement. The resident Otis mechanic admitted that he was not familiar with this provision of the contract. The elevator running clearances between car and corridors sills clearly violated ANSI/ASME A17.1 section 2.5.1.4.
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> "The property owner/manager has the non-delegable duty to assure that proper maintenance is being performed in compliance with the New York City Administrative Code and [Americans with Disabilities Act], and that the elevator operates safely. A modernization program was in progress for an extended period at the time of the incident, but for some inexplicable reason the problematic elevator # SE27 was not modernized until after the plaintiff was injured. The above inaction and delay by building management contributed to the injuries to [plaintiff]."

Id. The court notes that defendants have not submitted a contrary expert's report.

The building defendants were first deposed on November 18, 2015 via Deutsche Bank's "facilities services director" Robert Barriero (Barriero), who was produced by PGREF. *See* notice of motion (motion sequence number 001), exhibit I. Barriero first averred that: 1) Paramount is the building's owner; 2) Deutsche Bank is the building's net lessee; 3) JLL was Deutsche Bank's property management company at the time of Polanco's accident, and 4) JLL had contracted with (a) Otis for elevator maintenance, and (b) ABM for cleaning services. *Id.* at

13-19, 56-57, 63-71, 76, 81-82. Barriero then stated that JLL had no direct responsibility for the building's elevators, that Otis did, and that ABM was responsible for cleaning them. *Id.* at 23, 25, 81-82. Barriero also stated that ABM would initially report an incident involving an injury to one of its employees (such as Polanco) to JLL, which would thereafter report the incident to Deutsche Bank; however, Barriero denied having received any notice of Polanco's accident from JLL. *Id.* at 46-47. Barriero also denied having received any notices of violations or reports of other problems with the building's service elevators. *Id.* at 85, 94-95. Barriero further stated that, whenever Paramount was issued building violation notices by the New York City Department of Buildings (DOB), it would forward them to Deutsche Bank, which would then forward them to JLL to resolve. *Id.* at 72-74. Barriero finally stated that part of his job involved "walk-through inspections" of the building which sometimes involved riding in the building's elevators. *Id.* at 102-104.

Deutsche Bank became the building's sole occupant and tenant pursuant to a triple net lease with PGREF (the Deutsche Bank lease), dated June 6, 2007, under which the building's previous owner contemporaneously assigned all landlord's rights and responsibilities to PGREF. *See* notice of motion (motion sequence number 001), exhibit N. The relevant portions of the Deutsche Bank lease provide as follows:

> "Article 10 - Access
> * * *
> "10.02 Landlord [i.e., PGREF] and persons authorized by Landlord shall . . . have the right, at scheduled times to be mutually agreed to by the Tenant [i.e., Deutsche Bank] and Landlord (but not more frequently than once per calendar year) or in the case of an emergency, to enter and/or pass through the Premises to inspect the Premises. Landlord and persons authorized by Landlord shall also have access to the Premises to perform Landlord's Restoration Obligation and

Landlord's Taking Repair Obligation."[2]

Id.

The building defendants were deposed a second time on April 20, 2016 via Paramount's property manager, James L. Sammon (Sammon). *See* notice of motion (motion sequence number 001), exhibit L. Sammon acknowledged that PGREF is the building's title owner, but also stated that Paramount is PGREF's "owner" and "corporate parent." *Id.* at 21-24, 28. Sammon further stated that Paramount does not manage the building directly because of the triple net leasing arrangement with Deutsche Bank, but averred that Paramount did perform certain "administrative oversight" for the building. *Id.*, at 25-29, 40. Sammon explained that this "administrative oversight" includes only "processing storage invoices for property that [Paramount] has moved [out of the building], and coordinating administrative tours . . . for insurance or investors relations." *Id.* at 26-27, 32, 55. Sammon further noted that JLL was Deutsche Bank's property management company at the time of Polanco's accident, but that JLL had no relationship with Paramount. *Id.* at 34-35, 41-42, 51-52, 57. Sammon denied having received any complaints about the building's elevators or any notice of Polanco's accident. *Id.* at 38, 74. Sammon acknowledged that one Ralph DiRuggiero (DiRuggiero), Paramount's vice president of property management, was responsible for providing PGREF's "ownership entity" signature to Deutsche Bank on elevator modernization plans that Deutsche Bank submitted to the DOB for approval in 2012. *Id.* at 59-61. Sammon also acknowledged that DiRuggiero, again

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[2] The "Landlord's Restoration Obligation" and "Landlord's Taking Repair Obligation" are governed by Articles 18 and 19 of the Deutsche Bank lease, respectively. Both of these obligations appear to include elevator repair work; however, the former is only triggered in the event that the building is totally or partially destroyed by fire or other casualty, and the latter in the event of a "taking" of all or part of the building as a result of the government's exercise of eminent domain. Therefore, they are factually inapposite.

acting on behalf of PGREF, provided Deutsche Bank with the "ownership entity" signature on all of the other paperwork that Deutsche Bank submitted to the DOB, including yearly elevator inspection reports and elevator-related Building Code violations. *Id.* at 65-67. Sammon denied that Paramount was affiliated with Deutsche Bank in any way, however. *Id.* at 67.

Otis was deposed on March 16, 2016 via resident mechanic Steven Conneely (Conneely). *See* notice of motion (motion sequence number 001), exhibit J. Conneely averred that any DOB violation notices regarding the building's elevators would be issued to the building's "owners," and would later be passed down to him to act on. *Id.* at 23-28. He identified two such notices that were issued against the service elevator in which Polanco was injured (i.e., elevator # 27). *Id.* Conneely also identified separate inspection reports regarding the subject elevator that had been prepared in 2012, after its respective yearly inspections by the DOB and by Otis, although he denied having been present for either. *Id.* at 28-33, 52. Conneely further identified records of several service calls that Otis had received regarding elevator # 27 in 2011, shortly before Polanco' accident, which had resulted in Otis's having performed maintenance work on the elevator. *Id.* at 53-62. Conneely stated, though, that the existence of a gap between the building's floor and an elevator's floor would not constitute a reason to perform repair work or maintenance work on a service elevator, and denied having ever done such work on elevator # 27. *Id.* at 45-46, 107-108, 121. Conneely further identified records of other service calls regarding elevator # 27 in late 2011 and early 2012, after Polanco's accident. *Id.* at 63-76. Finally, Conneely denied having observed, or having received complaints about, any misleveling issues with respect to elevator # 27 in the six months prior to Polanco's accident. *Id.* at 92-93.

On January 1, 2012, Otis executed an elevator maintenance "service contractor

agreement" with JLL "for the benefit of " Deutsche Bank, as owner of the building (the Otis contract). *See* notice of motion (motion sequence number 001), exhibit P. The Otis contract states that Deutsche Bank is a "third party beneficiary," but provides that Otis is an "independent contractor" of JLL, and not an employee of either party. *Id.* The Otis contract is a full-service contract, and does not appear to contain any "right of re-entry" provisions. *Id.*

ABM was deposed on April 12, 2016 via project manager Dila Nikach (Nikach). *See* notice of motion (motion sequence number 001), exhibit K. Nikach stated that she became aware of Polanco's accident shortly after it occurred, when she was notified by a foreman, and then visited Polanco in the building's 34th floor nurse's office. *Id.* at 27-28. Nikach then stated that she thereafter filled out an incident report based on Polanco's account of the accident, which was complicated by the fact that she speaks English and Polanco speaks Spanish. *Id.* at 29-36. Nikach stated that she subsequently inspected elevator # 27 and did not find that it misleveled, and also denied ever having received any prior complaints about any of the building's elevators misleveling from any of ABM's employees. *Id.* at 44-46.

On April 27, 2004, ABM executed an elevator maintenance "service contractor agreement" with JLL "for the benefit of " Deutsche Bank, as owner of the building (the ABM contract). *See* notice of motion (motion sequence number 001), exhibit O. The ABM contract states that Deutsche Bank is a "third party beneficiary," but provides that ABM is an "independent contractor" employed by JLL. *Id.* The ABM contract does not appear to contain any "right of re-entry" provisions. *Id.*

Polanco originally commenced this action against the building defendants on January 7, 2013, and the building defendants originally answered on February 22, 2013. *See* notice of

motion (motion sequence number 003), exhibits B, C. Later, on May 7, 2013, Polanco filed an amended summons and complaint that also includes Otis as a prime defendant, and that sets forth one cause of action for negligence. *Id.*, exhibit I. Otis filed an answer to the amended complaint on May 13, 2013 that includes affirmative defenses and cross-claims against the building defendants for contribution and common-law indemnification. *Id.*, exhibit J. The building defendants filed an answer on May 30, 2013 that also includes affirmative defenses and cross-claims against Otis for: 1) contribution; 2) common-law indemnity; 3) contractual indemnity; and 4) breach of contract (failure to obtain insurance). *Id.*, exhibit K.

In the meantime, on March 5, 2013, the building defendants had filed a third-party complaint against ABM and Otis that sets forth causes of action for 1) common-law indemnity (against Otis); 2) contribution (against Otis); 3) contractual indemnity (against Otis); 4) breach of contract (against Otis); 5) contractual indemnity (against ABM); and 6) breach of contract (against ABM). *See* notice of motion (motion sequence number 003), exhibit D. On April 12, 2013, Otis filed an answer to the third-party complaint that includes affirmative defenses and cross-claims against ABM for indemnification and contribution. *Id.*, exhibit E. On April 17, 2013, ABM filed an answer to the third-party complaint that also includes affirmative defenses and cross-claims against Otis for: 1) contribution; 2) contractual indemnity; 3) common-law indemnity; 4) contractual indemnity; 5) breach of contract; and 6) primary negligence; and identical counterclaims against defendants for: 1) contribution; 2) contractual indemnity; 3) common-law indemnity; 4) contractual indemnity; 5) breach of contract; and 6) primary negligence. *Id.*, exhibit F.

Now before the court are the building defendants' motion for summary judgment to

dismiss the complaint and for partial summary judgment on two of its third-party claims (motion sequence number 001), and ABM's motion for summary judgment to dismiss the third-party complaint and all of the cross-claims asserted against it (motion sequence number 003).

DISCUSSION

Defendants' Motion (motion sequence number 001)

At the outset, the court takes note of the statement by Polanco's counsel that "Taunus can be let out of the case" (evidently in view of the facts that either Taunus no longer exists, or that it has no interest in the building). *See* Notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶ 26; same, exhibit T; Sanchez affirmation in opposition, ¶ 4. Whatever the justification, in view of Polanco's consent, the court grants so much of defendants' motion as seeks summary judgment dismissing the complaint and cross-claims as against Taunus.

The first branch of the building defendants' motion seeks summary judgment to dismiss Polanco's negligence claim against Paramount and PGREF. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*,

304 AD2d 340, 342 (1st Dept 2003). Here, the building defendants raise three arguments to support their summary judgment request.

The building defendants first seek dismissal as against Paramount, arguing that Paramount cannot "be held liable because [it] did not owe plaintiff a duty of care." *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶¶ 24-27. The building defendants specifically contend that Paramount "did not own, occupy, control or engage in special use of" the building. *Id.*, ¶ 25. Polanco responds that "there is substantial evidence that PGREF and Paramount continue to exercise some degree of control and operation over the elevators and would owe a duty to maintain the building's elevator in a reasonably safe manner." *See* Sanchez affirmation in opposition, ¶ 7. Polanco asserts that this evidence includes: 1) DOB inspection and compliance documents that PGREF and Paramount signed off on; 2) elevator renovation application papers that PGREF and Paramount submitted to DOB; 3) Deutsche Bank AG's lease with PGREF, which contains provisions that authorize PGREF to re-enter the property' and 4) the fact that Paramount's employee, Sammon, is tasked with the job of re-entering the building on PGREF's behalf to conduct elevator inspections. *Id.*, ¶¶ 6-7. The building defendants' reply papers do not address this factual evidence, but merely restate their legal argument that Paramount is a "non-owner, non-occupier" of the building. *See* Yapchanyk reply affirmation (motion sequence number 001), ¶ 5. The court finds that Polanco's argument is underdeveloped, but nonetheless persuasive.

In *Isaac v 1515 Macombs, LLC* (84 AD3d 457 [1st Dept 2011]), the Appellate Division, First Department, noted that:

"A property owner has a nondelegable duty to passengers to maintain its

> building's elevator in a reasonably safe manner and may be liable for elevator malfunctions or defects causing injury to a plaintiff about which it has constructive or actual notice, or where, despite having an exclusive maintenance and repair contract with an elevator company, it fails to notify the elevator company about a known defect. 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."

84 AD3d at 458 (internal citations and quotations omitted). In an earlier decision, the First Department also held that a building owner may be found liable in negligence for elevator-related injuries, even where it has conveyed its building to a tenant in a net lease (and that net lease provides the landlord with a right of reentry on the property for the purposes of inspection, but not repair), where the owner had constructive notice of the dangerous/defective elevator condition that caused the plaintiff's injury. *See Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86 (1st Dept 2002). In such a situation, the party seeking summary judgment bears the burden of proving, or disproving, the existence of said constructive notice. 295 AD2d at 91. The court will address the building defendants' "actual or constructive notice" argument in the next portion of this decision. For now, however, the *Bonifacio* holding is also instructive with respect to the building defendants' "out of possession landlord" argument.

In *Bonifacio*, the defendant/owner produced into evidence a triple net lease between a company that appeared to be a corporate affiliate of said defendant/owner and a second company designated as an "agent," under which the agent agreed to assume sole responsibility for the operation of the premises as if it were the owner. 295 AD2d at 87. Here, the building defendants have produced PGREF's triple net lease with Deutsche Bank, as well as Sammon's deposition testimony that Paramount has no relationship with Deutsche Bank. *See* notice of motion (motion

sequence number 001), exhibits L, N. However, Sammon also testified that, before Deutsche Bank submitted any elevator-related paperwork to the DOB, it had to first submit that paperwork to Paramount's vice president of property management (i.e., DiRuggiero) for an official "ownership entity" signature. *Id.*, exhibit L at 59-61, 65-67. These instances of a Paramount officer taking official corporate action on behalf of PGREF align with Sammon's other testimony that Paramount was both the "owner" and "corporate parent" of PGREF, and his statements that he was aware of Paramount having several hundred employees, but was unaware whether PGREF had any employees at all. *Id.*, exhibit L at 16-17, 21-24, 28. In *Bonifacio*, the defendant/owner moved for summary judgment to dismiss the plaintiff's negligence claim on the ground that it owed the plaintiff no duty of care, alleging that it had "completely parted with control of the building" via the triple net lease. 295 AD2d at 90. The First Department ruled against the defendant/owner, in part, because "[i]ts true position regarding the operations of the building is called into question by the unexplained connections among the former owner, the current owner, and the agent/lessee." *Id.* Similar "unexplained connections" exist in this case. Sammon's testimony indicates that Paramount may completely own and control PGREF. It also indicates that, despite having executed a triple net lease with PGREF and a facilities management contract with JLL,[3] Deutsche Bank still needed to submit its routine DOB paperwork to Paramount for signature on behalf of PGREF, instead of simply submitting the paperwork to PGREF. This inconsistent behavior calls into question Paramount's "true position regarding the operations of the building," as did the evidence that the First Department reviewed in *Bonifacio*. It also indicates an unresolved issue of fact on the matter, and compels the court to discount the

[3] JLL's facilities management contract was not produced in connection with the instant motions.

building defendants' contention that Paramount "did not own, occupy, control or engage in special use of" the building. Paramount might well be found to occupy such a position of control, which would, in turn, give rise to a legal duty of care. Therefore, the court rejects the building defendants' first summary judgment argument.

The building defendants next argue that "plaintiff's complaint against PGREF must be dismissed" because: 1) "plaintiff cannot demonstrate what defect caused her accident"; and 2) "PGREF received no notice of any malfunction regarding elevator # 27." *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶¶ 28-42. Regarding the former argument, the building defendants allege that Polanco's "testimony provided five different possibilities as to the defect" in elevator # 27 that caused her accident. *Id.*, ¶ 32. Normally, it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1st Dept 2002). Here, however, the building defendants argue that Polanco's testimony contains such inconsistent and contradictory accounts of her accident as to compel a fact-finder to engage in legally impermissible speculation about the proximate causation element of her negligence claim. *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶ 30. The building defendants cite the ruling of the Appellate Division, Second department, in *Vojvodic v City of New York* (148 AD3d 1086 [2d Dept 2017]) that:

> "A plaintiff's inability to identify the cause of his or her fall is fatal to a cause of action to recover damages for personal injuries because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation. Proximate cause may be established without direct evidence of causation by inference from the circumstances of the accident. However, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action."

148 AD3d at 1087 (internal citations omitted). Counsel for Polanco denies that she provided inconsistent testimony about the circumstances of her accident. *See* Sanchez affirmation in opposition (motion sequence number 001), ¶¶ 66-70. Counsel further notes that Polanco does not speak English, that she was deposed extensively on three separate occasions, and asserts that any alleged "inconsistencies" in her testimony are merely semantic creations of defendants' counsel. *Id.*, ¶¶ 68, 71. The building defendants' reply papers repeat their original argument that Polanco's testimony is insufficiently specific and invites speculation. *See* Yapchanyk reply affirmation/plaintiff (motion sequence number 001), ¶¶ 28-30. After reviewing that testimony, however, the court disagrees.

The building defendants' argument hinges on their attorney's contentions that "if the elevator floor was higher than the building floor . . . then there would be no gap," and that "the converse is true," because "if this was truly a misleveling case . . . plaintiff's pleaded causation . . . is also a nullity . . . if she intends on making this a claim of a 2 inch gap." *See* Yapchanyk reply affirmation/plaintiff (motion sequence number 001), ¶ 29. However, the building defendants do not present any evidence to support their insistence that Polanco must make this either/or choice in order to prove causation. This is fatal to their argument. Polanco testified that elevator # 27 both misleveled, and that there was a gap between it and the floor of the 30th floor hallway. *Id.*, exhibits F-H. Polanco also presented Schloss's expert report, which states that both conditions can occur simultaneously if there are simultaneous problems with an elevator's landing and leveling mechanisms. *See* Sanchez affirmation in opposition, exhibit A. The building defendants did not present any expert evidence to rebut this explanation, but instead chose to rely solely on their attorney's assertions. However, "[a]n attorney's affidavit is of no probative value

on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof." *Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 (1st Dept 1997). Therefore, the court discount's the building defendants' "speculation" argument as unsupported.

The building defendants also argue that PGREF (and, presumably, Paramount) "did not receive notice of any malfunction regarding elevator # 27." *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶¶ 33-42. The court previously observed that the buiilding defendants, as the moving parties, bear the burden of proof on this issue. *Bonifacio v 910-930 S. Blvd.*, 295 AD2d at 91. The building defendants are correct to note that they cannot be held liable for negligence absent proof that they either "created [or] had actual or constructive notice of the alleged defect in the elevator's doors or leveling system." *See e.g. San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 591 (1st Dept 2012). Here, the building defendants assert that "PGREF has no role in elevator maintenance at the building and regardless was never notified of any incidents or issues at elevator # 27," and that "the extent of PGREF's involvement with [the building] is to sign off on [DOB] paperwork." *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶ 36. The building defendants further aver that Sammon's testimony establishes that Deutsche Bank was the party with sole responsibility for elevator maintenance, and that it never received any complaints about, or notice of problems with, the elevator. *Id.*; exhibit L. The building defendants then conclude that this satisfies their burden of demonstrating lack of notice. *Id.* The court has reviewed the deposition testimony, and is satisfied that it discloses no evidence of either specific misleveling complaints about elevator #27, or of general misleveling complaints about any of the building's elevators. All of the witnesses denied having received or acted on such complaints prior to Polanco's

accident. As a result, the court finds that the building defendants have adequately established lack of actual or constructive notice of the alleged elevator defect. Polanco presents no factual evidence regarding such notice, but nevertheless raises two legal arguments in opposition to defendants' claim.

First, Polanco asserts that "notice is not required in an action based on a violation of the New York City Administrative Code (NYC Admin Code)." *See* Sanchez affirmation in opposition (motion sequence number 001), ¶ 55. This is incorrect. In *Juarez v Wavecrest Mgt. Team* (88 NY2d 628 [1996]), which Polanco cited to support her argument, the Court of Appeals expressly held as follows:

> "Under Local Law 1, lead-based paint constitutes a hazard when two conditions are present: first, lead in an amount exceeding the stated threshold and second, a child six years of age or under residing in the apartment. *Manifestly, neither Local Law 1 itself nor the regulations promulgated thereunder [i.e., NYC Admin Code provisions] expressly eliminate the common-law notice requirement as to either element.* To the contrary, the regulatory scheme explicitly provides for notice to the landlord of the presence of hazardous levels of lead-based paint in an apartment occupied by a child and allows the landlord an opportunity to remedy the condition after receiving notice. To be liable for injuries caused by the lead hazard, then, a landlord must have actual or constructive notice of both the hazardous lead condition and the residency of a child six years of age or younger."

88 NY2d at 646 (internal citations omitted and emphasis added). Thus, the Court made it clear that the burden of proving actual or constructive notice is *never* abrogated, although it may be supplanted, and the burden shifted, when the applicable regulatory scheme includes its own notice provisions. Here, Polanco cites NYC Admin Code § 27-983 as a basis for her claim, but does not allege that that portion of the Administrative Code includes any specific elevator-related notice provisions analogous to the ones discussed in *Juarez*. In addition, the court has reviewed that portion of the Administrative Code, and did not discover any. Therefore, the court rejects

Polanco's first opposition argument.

Polanco next argues that "the doctrine of res ipsa loquitur also requires the denial of" the building defendants' motion, regardless of whether or not they had notice of the alleged elevator defect. *See* Sanchez affirmation in opposition (motion sequence number 001), ¶¶ 58-64. Polanco correctly notes that there is "a long established jurisprudence in [the First Department] recognizing that elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur." *See Ezzard v One E. Riv. Place Realty Co.*, LLC, 129 AD3d 159, 163 (1st Dept 2015). The building defendants respond that courts will not apply the doctrine of res ipsa loquitur against building owners and management companies in elevator accident cases where those parties have "ceded all responsibility for the daily operation, repair and maintenance of the elevator to an outside company [via an] . . . exclusive service contract." *See Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 277 (1st Dept 2010). The building defendants assert that Otis's contract with JLL was such an exclusive service contract, and that its existence at the time of Polanco's injury bars her from basing her negligence claim on the doctrine of res ipsa loquitur. *See* Yapchanyk reply affirmation/plaintiff (motion sequence number 001), ¶¶ 14-16. The court notes that these are generalized legal arguments that do not sufficiently address the facts of this case.

The First Department holds that:

> "In order to submit a case to a trier of fact based on this theory of negligence [i.e., res ipsa loquitur], a plaintiff must establish that the event (1) was of a kind that ordinarily does not occur in the absence of someone's negligence; (2) [was] caused by an agency 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 276-277 (internal citations and quotations omitted). Here, it is clear that the first and third elements are present. It has already been observed that New York courts recognize that, ordinarily, "elevator malfunctions do not occur in the absence of negligence." *Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d at 163. Further, none of the parties to this action argues that Polanco herself committed any actions that would have affected the operation of elevator # 27. Thus, the applicability of the doctrine of res ipsa loquitur to Polanco's claim turns on the issue of "exclusive control."

Here, Polanco cites *Bonifacio* for the proposition that, if "a fact question exists as to whether the movants exercised control over the elevators, it is still possible that there is an inference of negligence on the part of the owner through the doctrine of res ipsa loquitur." *See* Sanchez affirmation in opposition (motion sequence number 001), ¶ 62. However, Polanco's reliance on *Bonifacio* is misplaced. The First Department's decision therein turned on the questionable nature and purpose of the triple net leasing arrangement that the defendant/landlord sought to introduce on the eve of trial. In *Bonifacio*, the record owner of the subject building was the named defendant/landlord "910-930 Southern Boulevard LLC." 295 AD2d at 87. This party sought to avoid liability in negligence to the injured plaintiff by claiming that it was an out-of-possession owner with no control over the premises. *Id.* To do so, it produced a triple net lease between another entity called "910 Southern Realty Corp.," which was designated as the building's owner, and a third entity called "Gun Hill Realty Co.," which was designated as an "agent" (with the sole responsibility for the operation of the premises). *Id.* The First Department noted the disparity between the names of the two entities that were alleged to be the building's owners, and also that the defendant/landlord had failed to disclose the triple net lease until the

litigation had progressed to a late stage. 295 AD2d at 90. The First Department expressed concern about the net leasing arrangement, and observed that:

> "None of the relied-upon cases hold, in as broad a manner as defendant suggests, that an owner of a multiple dwelling may rid itself of its obligations under Multiple Dwelling Law § 78 by the simple expedient of voluntarily leasing the building to another with a document that does not contain a right of reentry. Indeed, given the stringent and nondelegable nature of the duty imposed by section 78, it would be inappropriate to permit such a result."

Id. The Court further observed that "we should be vigilant in ensuring that an owner is not simply attempting to 'shift the burden and nullify the purposes of [Multiple Dwelling Law § 78] merely by the expedient of demonstrating the existence of a lease of the entire building.'" 295 AD2d at 90-91 (internal citations omitted). Finally, regarding the doctrine of res ipsa loquitur, the First Department concluded that:

> "[I]nasmuch as elevators do not ordinarily fall four floors in the absence of some negligence, and since a fact question exists as to whether the building was within the exclusive control of defendant through an agent, we cannot at this juncture exclude the possibility that an inference of negligence on the part of the owner may be permissible through the application of res ipsa loquitur."

295 AD2d at 91. Thus, it is clear that the First Department's willingness to consider the application of res ipsa loquitur in *Bonifacio* was based primarily on its concern that the defendant/landlord was attempting to improperly use a triple net lease with an agent under its control in order to avoid its non delegable duty to maintain the building. The Court expressly distinguished the facts of *Bonifacio* from those "in which an out-of-possession owner has . . . been held exempt from liability . . ., [all of which] involved properties where the legal arrangements irrefutably establish that the [owner] had no right or responsibility regarding the operations of the building itself." 295 AD2d at 89. Here, the court believes that Polanco's

reliance on *Bonifacio* is misplaced, because the facts of this case are of that latter variety.

First, although the court has expressed some reservation about the extent to which Paramount may exercise control over PGREF, there is no reason to doubt the authenticity of the triple net lease that PGREF entered into with Deutsche Bank, or to suspect that Deutsche Bank is a mere "agent" of Paramount. Second, even if the court were to entertain the possibility that Paramount and/or PGREF exercised some degree of control over Deutsche Bank, it is clear that Deutsche Bank divested itself of responsibility for building maintenance via its exclusive service agreement with JLL, and that JLL subsequently ceded all responsibility for elevator maintenance and repair to Otis. The court here observes that, even though it might be possible to question the extent of the authority that Deutsche Bank had reposed in JLL (since a copy of the contract between those parties was never produced), there is no doubt about the extent of the grant of responsibility from JLL to Otis. The Otis contract is plainly an exclusive elevator maintenance contract. *See* notice of motion (motion sequence number 001), exhibit O. The existence of such a contract obviates the uncertainty that prompted the First Department's holding in *Bonifacio*, and places this case inside the ambit of another line of appellate case law.

In particular, the court finds instructive that the portion of the First Department's *Singh* holding which discusses the "exclusive control" element of res ipsa loquitur. Therein, the Court noted that:

> "[The doctrine of] res ipsa loquitur 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. In addition, there was no exclusive maintenance contract between [the owner] and [the maintenance company]; rather [the maintenance company] performed work on the doors on an as-needed basis. We find that the fact that [the maintenance company] may have occasionally performed repair services on the sensor mechanism does not, as a

matter of law, remove the sensor from [the owner]'s exclusive control."

72 AD3d at 277 (internal citations omitted). In *Singh*, the owner of the subject building kept its own maintenance staff on the premises to perform certain functions, but the owner's managing agent had also contracted with an electric door company to perform periodic, as-needed, repairs on the building's doors (including the one which malfunctioned and caused the plaintiff's injury). 72 AD3d at 275. The First Department upheld the plaintiff's right to proceed against the owner on a theory of res ipsa loquitur, noting that there was an open issue of fact on the question of "exclusive control," because two sets of maintenance personnel had access to the subject door, and there was no exclusive service contract covering the door. 72 AD3d at 277. In this action, however, the facts do not present any such issue regarding "exclusive control." First, Barriero's and Sammon's deposition testimony both indicate that neither Paramount, PGREF nor Deutsche Bank has any elevator maintenance employees at the building. *See* notice of motion (motion sequence number 001), exhibits I, L. Indeed, PGREF does not appear to have any employees at all, while Paramount's employees work in a separate location performing "administrative oversight" functions. *Id.* Also, as was previously observed, Deutsche Bank and JLL had a building maintenance contract in effect at the time of Polanco's accident, and JLL had an exclusive elevator maintenance contract with Otis. *Id.*, exhibit P. The court finds that the facts that: 1) this case does not involve multiple maintenance staffs, but 2) does feature an exclusive elevator maintenance contract, mandates the opposite result from the one in *Singh*. Specifically, the court finds that Polanco may not rely on the doctrine of res ipsa loquitur as a basis for her negligence claim, because she has failed to demonstrate an issue of fact as to the "exclusive control" element of that doctrine. The foregoing evidence precludes the existence of such an

issue, as a matter of law. Therefore, the court rejects Polanco's res ipsa loquitur argument. Because the court has already determined that the building defendants adequately demonstrated an absence of actual or constructive knowledge about the allegedly defective condition of elevator # 27, the causation element of Polanco's negligence claim fails, as a matter of law. *See e.g. Gordon v American Museum of Natural History*, 67 NY2d 836, 836 (1986). Polanco cannot overcome this deficiency, because the law also precludes her from using the doctrine of res ipsa loquitur as an alternative means to establish an inference of negligence. As a result, the court must grant so much of the building defendants' motion as seeks summary judgment dismissing Polanco's complaint against Paramount and PGREF.

The second branch of the building defendants' motion seeks summary judgment on their third-party common-law and contractual indemnity claims against Otis, and their third-party contractual indemnity claim against ABM. *See* notice of motion (motion sequence number 001), Yapchanyk affirmation, ¶¶ 43-61. However, since the court has already dismissed Polanco's complaint as against the building defendants, they now have nothing to seek indemnity from Otis or ABM for. Therefore, the court denies this branch of the building defendants' motion as moot.

ABM's Motion (motion sequence number 003)

ABM's motion seeks summary judgment to dismiss defendants' third-party complaint, as well as Otis's third-party cross-claims against it for contribution and indemnification. The building defendants have submitted opposition to the motion, however Otis has not. Of specific note, the building defendants' opposition papers argue that "as a binding contract exists [between ABM and JLL] and ABM must indemnify PGREF [as a third-party beneficiary of that contract], then clearly ABM's motion must be denied . . . [because] the third-party complaint . . . is

obviously valid." *See* Yapchanyk affirmation in opposition (motion sequence number 003), ¶ 13. However, the building defendants' last assumption is flawed. Their third-party claims against ABM allege contractual indemnity and breach of contract. *Id.*, exhibit D (third-party complaint), ¶¶ 41-49. The contract at issue is ABM's contract with JLL. Briefly, the building defendants claim that this contract required ABM to indemnify PGREF against Polanco's negligence claim, and also required ABM to obtain liability insurance (which it purportedly failed to do). *Id.* The court is not satisfied with the building defendants' logic. The ABM contract named Deutsche Bank as a third-party beneficiary, but said nothing about PGREF. *Id.*, exhibit U (ABM contract). Further, the court has already dismissed Polanco's complaint as against the building defendants, which means that there are now no grounds to trigger the indemnity or insurance provisions of the ABM contract, assuming that PGREF had the standing to enforce them. Therefore, the court finds that the building defendants' third-party complaint is obviously *not* valid, despite their contrary assertion. Accordingly, the court grants the portion of ABM's motion that seeks summary judgment to dismiss the third-party complaint. The court also grants the portion of ABM's motion that seeks summary judgment to dismiss Otis's third-party cross-claims against it on default.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants PGREF II 60 Wall Street, LP, Paramount Group Inc. and Taunus Corporation (motion sequence number 001) is granted and the complaint is severed and dismissed as to said defendants with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill

of costs, but is continued as to the remaining defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant ABM Janitorial Services, Inc. (motion sequence number 003) is granted and the third-party complaint and third-party cross-claims are dismissed with costs and disbursements to said third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendants PGREF II 60 Wall Street, LP, Paramount Group Inc. and Taunus Corporation shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York
April 27, 2018

ENTER:

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.