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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:
IAS PART 59

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QAMILE SELIMI,

Plaintiff,

-against-

Index No. 113823/11

TRIZECHAHN ONE NY PLAZA, LLC d/b/a ONE NY PLAZA CO., LLC, NEW YORK ELEVATOR AND ELECTRICAL CORP., THYSSENKRUPP ELEVATOR CORP., AMERICON CONSTRUCTION, INC., and LIMITED INTERIOR GROUP CORP.,

Action No. 1

Defendants.

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TRIZECHAHN ONE NY PLAZA, LLC d/b/a ONE NY PLAZA CO., LLC,

Third-Party Plaintiff,

TP Index No. 590881/12

-against-

AMERICON CONSTRUCTION, INC.,

Third-Party Defendant.

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FILED
AUG 15 2018
COUNTY CLERK'S OFFICE
NEW YORK

AMERICON CONSTRUCTION, INC.,

Second Third-Party Plaintiff,

Third-Party Index No. 590667/13

-against-

LIMITED INTERIOR GROUP CORP.,

Second Third Party Defendant.

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LIMITED INTERIOR GROUP CORP.,

Third Third-Party Plaintiff,

Third TP Index No. 595183/15

-against-

W5 GROUP LLC d/b/a WALDORF DEMOLITION,

Third Third-Party Defendant.

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WESTPORT INSURANCE CORPORATION, as subrogee of ONE NY PLAZA CO., LLC,

Third-Party Plaintiff,

Index No. 155741/12

-against-

FRIED, FRANK, HARRIS SHRIVER & JACOBSON LLP, AMERICON CONSTRUCTION INC., and LIMITED INTERIOR GROUP CORP.,

Action No. 2

Defendants.

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LIMITED INTERIOR GROUP CORP.,

Third- Party Plaintiff,

TP Index No. 590894/13

-against-

NEW YORK ELEVATOR AND ELECTRICAL CORP., and THYSSENKRUPP ELEVATOR CORP.,

Third-Party Defendant,

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LIMITED INTERIOR GROUP CORP.,

Second Third-Party Plaintiff

TP Index No. 595183/15

-against-

W5 GROUP LLC d/b/a WALDORF DEMOLITION,

Second Third-Party Defendant.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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QAMILE SELIMI,

Plaintiff,

-against-

Index No. 101711/14

W5 GROUP LLC c/b/a WALDORF DEMOLITION,

Defendant.

Action No. 3

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ORDER

IT IS HEREBY,

ORDERED that the motion of plaintiff Qamile Selimi for a trial preference (motion sequence no. 012) is as plaintiff has reached the age of 70 years and in the interest of justice; and it is further

ORDERED that, within 20 days of service of this order with notice of entry, the attorneys for plaintiff shall file, with proof of service, a copy of this order with the Clerk of the Trial Support Office, who is hereby directed to place this case on the trial calender at the head of such calendar except for actions in which a preference was previously granted; and it is further

ORDERED that the motion of defendant/third party plaintiff Americon Construction, Inc. for summary judgment (motion sequence no. 013) is granted to the extent that all claims and cross claims brought against it by plaintiff and defendant Thyssenkrupp

Elevator Corp. are hereby dismissed and such motion is otherwise denied; and it is further

ORDERED that the motion of defendant Thyssenkrupp Elevator Corp. for summary judgment (motion sequence no. 014) is denied; and it is further

ORDERED that the motion of defendant/third party plaintiff Limited Interior Group Corp. for summary judgment (motion sequence no. 015) is denied.

DECISION

In the interest of judicial economy, the following motions shall be consolidated.

Plaintiff Qamile Selimi moves for a special trial preference pursuant to CPLR 3403 (a) (4) (motion sequence no. 012).

Defendant/ Third-party plaintiff Americon Construction, Inc. (Americon) moves for summary judgment dismissing the complaint and all cross claims brought against it (motion sequence no. 013).

Defendant Thyssenkrupp Elevator Corp. (Thyssenkrupp) moves for summary judgment dismissing the complaint and all cross claims brought against it (motion sequence no. 014).

Defendant/Third-party Plaintiff Limited Interior Group Corp. (Limited) moves for summary judgment dismissing the complaint and all cross claims brought against it (motion sequence no. 015).

Statement of Facts

In this personal injury action, plaintiff alleges that she sustained physical and psychological injuries as a result of an elevator accident.

The complaint states as follows:

On the evening of November 2, 2011, plaintiff, whose employer, non-party American Building Maintenance, designated as the operator of one of the elevators, was in the premises owned by defendant/third party plaintiff Trizechahn One NY Plaza, LLC d/b/a One NY Plaza Co., LLC., (Trizechahn), located at One New York Plaza, New York, New York (the premises).

At the time of the accident, interior demolition work was taking place on certain floors at the premises, which work was under the supervision of Americon, the general contractor for the project. Limited and third-party defendant W5 Group LLC d/b/a Waldorf Demolition (Waldorf) were Americon's subcontractors. Thyssenkrupp was the elevator repair company under contract with Trizechahn.

Plaintiff claims that an accident occurred due to a defective condition of the elevator that she was operating, and that defendants are liable for her injuries arising out of their negligence.

Motion Sequence Number 12

Plaintiff moves for a special trial preference based on her

age and in the interest of justice, pursuant to CPLR 3403(a)(4), which permits the application of a preference for a party who has reached the age of seventy (70) years. She submits proof, in the form of a passport, that she is 70 years of age at this time.

In opposition, Thyssekrupp contends that plaintiff has not sought a preference simultaneously with serving a note of issue, as the CPLR usually requires. Thyssekrupp states that the note of issue and certificate of readiness were filed on June 30, 2017 and that plaintiff's motion is untimely.

The court acknowledges that the note of issue has already been filed. However, the court has discretion in making such a determination. Here, plaintiff is also seeking a preference in the interest of justice. Plaintiff has alleged serious injuries and has, so far, endured over six years of litigation. No prejudice in this action would be suffered by any of the defendants by the granting of such motion. Therefore, in an exercise of reasonable discretion, this court shall grant plaintiff the special trial preference.

Motion Sequence Numbers 13, 14, 15

Motion Sequence Numbers 13, 14, and 15 are serial applications for summary judgment brought by each moving defendant.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to

existence of factual issues" (Birnbaum v Hyman, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]'"(People v Grasso, 50 AD3d 535, 545 [1st Dept 2008]).

"Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material 00issues of facts in dispute and thus that it is entitled to judgment as a matter of law" (Flores v City of New York, 29 AD03d 356, 358 [1st Dept 2006]). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues precluding the granting of summary judgment" (Id).

Motion Sequence Number 13

The first moving defendant is Americon, the general contractor for the demolition project occurring at the premises. According to its papers, Americon was hired to do a buildout for its client, a tenant of the premises, Fried, Frank, Harris, Shriver & Jacobson LLP (Fried, Frank), which is a defendant in Action No. 2. Fried Frank's premises are comprised of floors 22, 23 and 24.

The accident occurred after midnight on November 2, 2011 at

the loading dock level in the basement of the premises. Americon's subcontractor Limited was performing demolition work at that time, using freight elevators to transport demolition material from the Fried, Frank floors to the lower levels. Plaintiff was operating one of the elevators at the time.

The doors of the elevators allegedly had a long history of not closing all the way, due to the wind effects from the building, which is located at the southernmost tip of Manhattan.

Americon claims that a Limited employee, who noticed that the subject elevator failed to move as the door was not closed, had tried to close the door while plaintiff was inside. The outer door of the elevator was unhinged, which led to the accident. Americon states that at the time of the accident, one of its employees was sweeping on the 22nd through 24th floors, but was not present at the loading dock. Americon claims to have regularly worked on the premises from 7:00 am to 3:30 pm.

While not contending that Limited was negligent in its conduct at that time, and asserting its other subcontractor, Waldorf, was working there, Americon seeks dismissal on the grounds that it did not supervise Limited at the time, did not control the means and methods of Limited's work, was not involved with the elevator, and did not perform any work at the area of the accident.

Americon relies on the deposition testimony of its project

supervisor at the time of the accident. Americon's project supervisor testified that he was not present at the time of the accident and that there was only one Americon employee there at that time. He confirmed that Limited was a demolition subcontractor which entered into a contract with Americon, claimed not to have instructed Limited employees as to their performance in the project, and not to have been aware of the condition of the elevators prior to the accident. Americon contends that its contractual obligations did not extend beyond the floors involved in the project, and that the loading zone on the lower level was not part of the project site. Pointing out that plaintiff has not opposed its motion, Americon argues that Limited, as subcontractor, maintained its independence in its work performance at the premises. Americon contends that should its motion be denied, its cross claims against Thyssenkrup must be maintained.

Trizechahn and Thyssenkrup oppose the motion. Trizechahn argues that as the building owner, it was involved with Americon's contract with Fried, Frank, its tenant, which contract specifically provides that Americon was to procure insurance for Trizechahn for the duration of the project, and to indemnify Trizechahn for the actions and omissions of its subcontractors, including Limited. Trizechahn argues that, in the event that Limited is found liable for the accident, Americon would owe

indemnification to it. As a result, at least with respect to its cross claims, Trizechahn argues that Americon's motion should be denied.

Thyssenkrup contends that there remains an issue of fact concerning Americon's supervision of Limited's work and Americon's overall performance. According to Thyssenkrup, Americon's contract with Fried, Frank provided that Americon was obligated to keep the premises safe with respect to the project. Thyssenkrup argues that Americon was required to make building requests to the owner in order for Limited to utilize the elevators there. Thyssenkrup also argues that Americon, pursuant to its contract with Fried, Frank, was to have a full-time superintendent at the premises while work was being performed. Moreover, Thyssenkrup contends that Americon was contractually obligated to take safety precautions for the safety of workers and other persons within the area of the project.

Thus, argues Thyssenkrup, Americon has not demonstrated that it fulfilled its contractual obligations, which requires denial of its motion for summary judgment.

ANALYSIS of AMERICON'S LIABILITY

It is settled that, while one who hires an independent contractor generally will not be liable for the contractor's negligence, an exception exists where the employer has a nondelegable duty to ensure the work is safely performed (see

Ehrenberg v Regier, 142 AD3d 765, 766 [1st Dept 2016]). "A nondelegable duty may be imposed by regulation or statute, or when the respcnsibility is so important to the community that the employer should not be permitted to transfer to another [citation omitted]" (Lopez v Allied Amusement Shows, Inc., 82 AD3d 519, 520 [1st Dept 2011]).

Article 13 of Americon's contract with Fried, Frank provides for the protection of rights, persons and property. Article 13.1 provides that Amerion, as contractor, will at all times take every reasonable precaution against accidents that may cause injuries to persons or damage to property. Elsewhere, Article 13 refers to Americon's responsibility for maintaining and supervising safety precautions and programs in connection with the project, and for designating a project safety representative to monitor the compliance of all safety laws.

Article 6.6 of the contract provides that Americon employ a full-time project manager and two full-time superintendents to be in charge of the work, devoting their full time at the project site during the time the work is performed. It is noted that on the night of the accident, there was no manager or superintendent at the premises. As confirmed by Americon's project manager in his deposition, the only employee of Americon present was a sweeper, and the other workers were employed by the subcontractors.

Americon argues that its responsibility in the project did not extend beyond the three floors which constituted the project site. The site of the accident was on the lowest levels of the premises and was allegedly the responsibility of the building owner. While Limited was involved with the elevator at a lower level, it had also been involved with removing demolition material from the project site and transferring the material as part of its performance. Article 13.7 (a) provides that Americon is responsible for seeing that the subcontractors comply with the article's requirements.

The court finds that whether Americon fulfilled its contractual obligations to provide for a safe premises at the time of the accident is not determinative of whether the direct complaint against it should be dismissed. In any event, such obligations are owed to Fried, Frank, the other party to the contract, and Trizechahn, as an indemnitee to the contract. Americon owes no duty to plaintiff or Thyssenkrupp, who are not parties to the contract. Nor have the opposing defendants come forward with any evidence that raises an issue of fact that any action of Americon fits within one of the exceptions for contractor liability to a third person, who suffers injury in tort, under Espinal v Melville Snow Contrs, Inc, (98 NY2d 136 [2002]), and its progeny. The court shall therefore grant partial summary judgment to Americon with respect to plaintiff's

and Thyssenkrupp's claims and cross claims, respectively, against it.

To the extent that Americon seeks dismissal of Trizechahn's indemnification claim, such motion shall be denied on the ground that there are issues of fact whether Limited, Americon's subcontractor was negligent and whether such negligence caused plaintiff's injuries (see motion sequence number 15), and therefore the question of Americon's obligation to indemnify Trizechahn for any negligence on the part of Limited, as set forth in its contract with Fried, Frank cannot now be determined.

Motion Sequence Number 14

The second moving defendant is Thyssenkrupp, which had a contract with Trizechahn to maintain and repair the building's elevators.

Thyssenkrupp seeks summary judgment dismissing the complaint and all cross claims brought against it. As evidence, Thyssenkrupp submits a video of the accident, which was in the possession of Trizechahn; an affirmation by its counsel; deposition testimony from (1) plaintiff, (2) Limited's director of operations, (3) a Thyssenkrupp mechanic, (4) a property manager of Trizechahn, and (5) an engineer working for Trizechahn at the time of the accident; as well as affidavits from (5) another Thyssenkrupp mechanic, (6) an expert, (7) Thyssenkrupp's account manager, and (8) Thyssenkrupp's maintenance supervisor.

Thyssenkrupp's counsel refers to the accident video, obtained from surveillance cameras both inside the elevator and in the hallway immediately outside the elevators. The footage depicts some events prior to the accident as well as the accident itself.

The premises had three freight elevators, #45, #46 and #47.

Plaintiff was operating elevator #46 on the night in question. The subcontractors were transporting demolition debris in carts from the floors of the work site to the loading dock located at the lower levels.

Plaintiff operated the elevator for a half-hour without incident.

Prior to a Limited worker approaching the elevator, the presence of wind was effecting the movement of the elevator doors.

As noted by Thyssenkrupp's expert, the freight elevators are equipped with two sets of doors. The first are referred to as car doors, which are connected to the elevators and travel with the elevators throughout the shaft or hoistway. The second are hoistway doors, which are at the floor openings at each floor throughout the building.

The Limited worker, who identified by Limited's director of operations in his deposition testimony, pushed the hoistway door of plaintiff's elevator at the lower level while outside the

elevator. After the door was closed, the elevator descended without a problem. When the elevator reached a lower level, that same Limited worker continued to push the hoistway door at the upper level. When the elevator started to ascend, the subject hoistway door was allegedly protruding into the elevator shaft. The elevator struck the bottom of the hoistway door protruding into the shaft, in turn causing the hoistway door to protrude into the neighboring shaft of elevator #47. While elevator #47 was descending in its shaft, it collided with the dislodged door of elevator #46, causing elevator #46 to abruptly stop, and resulting in the accident.

Thyssenkrupp states that it was aware that the freight elevators at the lower levels were subject to a wind condition when the loading dock doors were open, creating difficulty for the elevator doors to close. Thyssenkrupp contends that, though it was common for freight personnel to push on the elevator doors to ensure a closed and locked position, this was an improper procedure. The proper procedure, according to Thyssenkrupp, was to close the loading dock doors. Thyssenkrupp argues that the Limited employee acted improperly when he attempted to close the hoistway door by pressing it with his hands.

Thyssenkrupp sets forth the following grounds for dismissal from this action: the hoistway door in question could not have been pushed by the Limited worker without first having been

dislodged as a result of a more substantial striking of the hoistway door by, for example, a demolition dumpster, close in time prior to the accident, as this has happened on previous occasions; had the damage to the hoistway door panel occurred other than just prior to the accident, the damage would have clearly manifested itself, resulting in the shutdown of the subject elevator; improper repair made by Thyssenkrupp in the days before the accident would have manifested itself by affecting the functioning of the elevator prior to the accident; on the morning before the accident, Thyssenkrupp's mechanic performed maintenance work to the subject elevator and, in his affidavit and deposition testimony, stated that, based upon his use and inspection, the hoistway doors of the subject elevator were in safe and proper operating condition at the time; furthermore, plaintiff operated the elevator for a half-hour prior to the accident without a problem; and, finally, Thyssenkrupp was paid by Trizechahn without objection for the repairs performed to the subject elevator as a result of the accident, because that work was beyond the scope of Thyssenkrupp's contractual obligations, and thus it would not have been paid for the repairs if the accident was the result of its improper maintenance or repair of the elevator.

An affidavit from Thyssenkrupp's mechanic states that he was employed as a mechanic by Thyssenkrupp when, on October 28, 2011,

he received a call from Trizechahn indicating that people were stuck on elevator #46, the subject elevator at the premises. Such mechanic provides proof that he was notified on that date, although he states that he has no specific recollection of the call. He does assert that, based upon his custom and practice, he ascertained that the elevator doors were dislodged at a lower level. As proper procedure, such mechanic, after removing the passengers from the elevator, would check that the doors were on safely and securely in place, with proper clearances, and that the elevator and its hoistway and car doors were running properly.

An affidavit from another Thyssenkrupp mechanic explains that, as an employee of Thyssenkrupp, he prepared service tickets that related to his maintenance work for Trizechahn. He refers to the other mechanic's prior repair work on October 28, 2011 as it related to the hoistway door of the subject elevator. He then refers to a regular shift of routine maintenance he performed on November 1, 2011. His service ticket noted "freight maint 46 repair C level doors and lock." Such mechanic claims that the entry indicates that he performed maintenance on the three freight elevators, including elevator #46. This work included cleaning the door locks and inspecting the sills at the bottom of the hoistway doors. Such mechanic states that he worked an extra shift on that day, and was at the premises from 7:00 am until

2:00 am on November 2, 2011. He asserts that, had there been any issues with respect to the hoistway, he would have observed them during the course of his maintenance activities and would have made a specific notation on his service ticket. After he heard of the accident, he concluded that the elevator doors were stuck in some manner after his service was performed, and he remains certain that the doors were properly affixed after he completed his work.

The affidavit from Thyssenkrupp's mechanic expert, an elevator consultant, affirms the positions of both Thyssenkrupp's mechanics as to the condition of the elevator and the cause of the accident. Thyssenkrupp further states that its contract with Trizechahn does not hold it responsible for maintenance or repair work on certain components such as hoistway doors and frames. Nor does the contract place any responsibility for any repairs necessitated by vandalism, abuse or misuse upon Thyssenkrupp. Under the contract, if such an event occurred, Trizechahn would agree to compensate Thyssenkrupp for the resulting work. The deposition testimony of Trizechahn's property manager states that, if it was determined that Thyssenkrupp performed improper maintenance resulting in necessary repairs which fell outside of the scope of its contract, Thyssenkrupp would not be compensated for the work.

Thyssenkrupp contends that it acted in accordance with its

contract and was compensated by Trizechahn. Thyssenkrupp argues that since the commencement of this suit, Trizechahn has reversed its initial position on Thyssenkrupp, previously claiming that Thyssenkrupp was not negligent. Thus, Thyssenkrupp seeks a dismissal of Trizechahn's cross claims against it.

Thyssenkrupp relies on the testimony and affidavits of its mechanics for its motion. Thyssenkrupp's expert generally affirms their statements in his affidavit. Regarding Limited's first mechanic, he affirmed that he responded to a call to service the subject elevator several days prior to the day of the accident. While he did not recall the details of the incident, which occurred on October 28, 2011, he relied on the issued service ticket. Without going into much specifics, he essentially asserts that he performed his job based on the custom and practice of his profession.

In his deposition testimony, Thyssenkrupp's other mechanic also used terms such as standard procedure and custom to describe how he performed maintenance on the elevator doors. He was not aware of what work was actually performed in the October 28, 2011 repair. He also discusses his maintenance work on the day of November 2, 2011, but it was general in nature. His affidavit is also lacking in specifics about the nature of his maintenance work.

The affidavit of Thyssenkrupp's expert mechanic concludes

that the accident was due to some force striking the fast speed hoistway door panel of elevator #46 during the course of the debris removal by the subcontractors. He also concludes that the Limited employee's efforts to push the hoistway door shut caused the door to protrude into the elevator shaft, which added to the problem. He opines that the cause of the accident was misuse of the elevator equipment at that time, without any fault on Thyssenkrupp's part, due to any improper maintenance or repair work done prior to the time of the accident.

Plaintiff, Limited and Trizechahn oppose Thyssenkrupp's motion.

Plaintiff cites the following evidence as raising questions of fact on the issue of Thyssenkrupp's liability: Thyssenkrupp's actual knowledge of the wind impact on the closing of doors on the lower level of the premises for years prior to the accident; Thyssenkrupp's actual knowledge that it was common practice for people to push on the hoistway doors on the lower levels in order to close them; Thyssenkrupp's failure to propose or take action to compensate for the wind effect on the doors at the lower level, and strengthen the door's resistance to lateral force given the knowledge that people pushed the doors closed repeatedly and the resultant damage; Thyssenkrupp's failure to properly inspect or maintain the doors before returning the subject elevator to use prior to the accident; that the subject

elevator was operable for a period of time after Thyssenkrupp claims that it sustained an impact, since plaintiff can be seen on the accident video operating the elevator between floors and loading passengers and construction debris after the impact presumably occurred off camera; the force that applied to the hoistway door by the Limited worker was not sufficient to dislodge a properly installed, adjusted and maintained door absent a substantial external impact, of which there is no evidence; and the mechanic's inability to push the door off its track, had the hoistway doors been hung properly and the gibs and/or fire retainer in proper condition and position.

In his report, plaintiff's expert avers that Thyssenkrup's first mechanic has contradictions in his testimony and affidavit. For example, after the accident, such mechanic, upon his examination, stated that the front gib of the damaged door was bent and the fire retainer was intact. In his affidavit, he states that the gibs were bent and there was no mention of the fire retainer. Plaintiff's asserts that if the fire retainer were intact, the door should not have loosened, as it apparently did, in the shaft.

In response to the conclusion of Thyssenkrupp expert conclusions, plaintiff's and Limited's expert conclude that proper preventive maintenance by Thyssenkrupp was not performed prior to the accident. Plaintiff's expert opines that

Thyssenkrupp's first mechanic, in his work to install the door panel on October 28, 2011, did not install the panel at the correct depth to properly penetrate in the bottom sill. He concludes that the door was not properly adjusted to hang lower at the upper track hangar adjustment, and this was a cause of the resultant accident. Limited's expert concludes that Thyssenkrupp did not test the structural integrity of the doors after each repair, and as there were numerous repairs as a result of some kind of external force, it is reasonable that the overall structural integrity was compromised.

Plaintiff's expert dismisses Thyssenkrupp's mechanic and expert's theory that the force of some cart or dumpster striking the door, caused a dislodging of the door, as unsubstantiated, stating that such an incident is not shown in the accident video or sustained by other evidence.

Plaintiff's contention is that the bottom of the hoistway door was dislodged, or not secured, which ultimately led to the collision between the two elevators.

Plaintiff also argues that the court ought to apply an adverse inference against Thyssenkrupp arising from the subsequent destruction of the hoistway doors after the accident. Relying on deposition testimony from the representative of subrogee Westport in its separate lawsuit against some of the defendants, plaintiff contends that Thyssenkrupp and/or its

subcontractor EDI, destroyed the doors, preventing the parties of this action to inspect and examine them as part of their litigation. Plaintiff seeks a penalty against Thyssenkrupp on the grounds of spoliation of such evidence.

In addition, plaintiff argues that the evidence submitted by Thyssenkrupp is not admissible because it is based on hearsay or out of court statements. She contends that some of the statements made by the mechanics are not based on personal observation but on vague claims of custom and practice.

Limited also opposes the motion, arguing that there are questions of fact indicating improper maintenance by Thyssenkrupp. Limited submits its own expert affidavit. According to Limited, subrogee Westport's representative relied upon the expertise and experience of Limited's expert to conclude that had proper preventive maintenance been done on elevator #46 on or after October 28, 2011, the accident would have been averted. Subrogee Westport's representative avers that the accident stemmed from the disengaged gibs at the bottom of the elevator door, causing the fast door panel to protrude inwards after the elevator descended to the lower levels. He concludes that any person pushing the door closed could not have displaced the lower portion of the door panel unless the penetration of the gibs did not comply with the code requirements of 1/4 inches. He avers that the proper penetration of the door should have been

confirmed by Thyssenkrupp when repairs were conducted on October 28, 2011.

Limited also argues that Thyssenkrupp had constructive notice of the wind condition, labeled "the chimney effect", which effected the elevator doors. Thyssenkrupp did admit that for years it was aware that the open doors on the loading dock were the main source to this chimney effect, but failed to correct the problem because it claimed that it was not its duty to take any preventive or corrective measures related to that matter. Limited argues that Thyssenkrupp had an obligation to take implement such measures.

Limited also argues that Thyssenkrupp had notice of continual breakdowns in the elevators on the premises over the years, which occurred prior to the accident. Limited contends that there is an issue of fact as to whether Thyssenkrupp has responded to these regular malfunctions with proper or reasonable maintenance or repair, specifically malfunctions of the elevator doors.

Trizechahn opposes the motion, claiming that, pursuant to their contract, Thyssenkrupp shall indemnify Trizechahn in the event of negligence on Thyssenkrupp's part. Trizechahn argues that the records provided by Thyssenkrupp with regard to elevator repairs are incomplete, raising questions as to whether such repairs were adequate. As for Thyssenkrupp's assertion that,

because it was not billed for damages, it could not be liable. Trizechahn states that there are numerous examples of Thyssenkrupp repairing damages caused by others and not billing Trizechahn for the repairs. In addition, Trizechahn argues that the conclusions of Limited's expert raises a question of fact as to Thyssenkrupp's negligence. Finally, Trizechahn contends that there are questions of fact whether both earlier improper repairs by Thyssenkrupp and Limited's subsequent actions were substantial factors in causing plaintiff's injuries.

ANALYSIS as to the WHETHER THYSSENKRUP SHOULD BE PENALIZED FOR ALLEGED FAILURE TO PRESERVE HOISTWAY DOOR

Plaintiff claims that the door was destroyed by Thyssenkrupp or a subcontractor of Thyssenkrupp. Her expert affirms that the loss of the door prevents an adequate examination or inspection by plaintiff of the cause of the accident. In her opposition papers, plaintiff contends that the door would have been significant physical evidence, and its loss is detrimental to her attempt to uncover the causes of the accident.

According to Thyssenkrupp, the door was replaced by another door as part of the repair work conducted by its employees in the aftermath of the accident. Thyssenkrupp does not admit to having disposed of or destroyed the door, notwithstanding that it argues that plaintiff has failed to demonstrate that it should be subjected to spoliation sanctions.

The court notes that plaintiff has not cross-moved for

affirmative relief, i.e. spoliation sanctions. The court agrees with Thyssenkrup that, at this point, plaintiff has not come forward with evidence that Thyssenkrupp destroyed or otherwise disposed of the door. While Thyssenkrupp has not disclosed the fate of the door, other than that it was replaced, plaintiff has not, in any event, shown that it ever sought discovery as to the whereabouts of the hoistway door, i.e. "an opportunity to inspect [same]." (see Elmaleh v Vrooom, 160 AD3d 557 [1st Dept 2018]).

ANALYSIS of THYSSENKRUPP'S LIABILITY

The court finds that whether Thyssenkrupp performed a reasonable repair and/or maintenance on the subject elevator prior to the time of the accident is not conclusive on the question of its responsibility and, moreover the opposing papers raise an issue of fact.

While the matter of the aforesaid chimney effect, as described by Limited, had an effect on the elevators, the owner Trizechahn had a non-delegable duty with respect to the condition of the premises. On the other hand, the opposing parties raise an issue of fact whether Thyssenkrupp caused or created a dangerous condition with the hoistway doors in performing its work under its contract to service the elevators. While Thyssenkrupp claims that Trizechahn paid for its services, and apparently accepted the performance without question, such does not establish as a matter of law that the work with respect

to the gibs and fire retainer was not negligently performed giving rise to a dangerous condition. The opposing parties have raised issues of fact with respect to Thyssenkrupp's evidence that it provided the proper standard of care in its servicing and inspection of the hoistway doors (see Casey v New York Elevator & Elec. Corp., 82 AD3d 639, 640 [1st Dept, 2011]); see also Kawka v 135-5536th Realty, LLC, 139 AD3d 667 [2d Dept. 2016]); Abato v Millar Elevator Service Co., 298 AD2d 884 [4th Dept 2002]; and Lettiere v Nameloc Estates, Inc., 53 AD2d 899, 901 [2d Dept 1978]. They likewise raised factual issues with respect to Thyssenkrupp's alternative theory that a cart or other object impacted on the doors, resulting in structural damage, as the proximate cause of plaintiff's injuries.

MOTION SEQUENCE NO. 015

The last moving defendant is Limited, the subcontractor of the demolition project, whose employee was on the premises while plaintiff was operating the subject elevator. Limited does not deny that its worker closed the elevator's hoistway door with his hands or that the door was dislodged, resulting in a condition that created a collision between two adjacent elevators. Limited argues that its employee's efforts was insufficient to cause the door to malfunction. Limited claims that such action as taken by its employee was common among workers and personnel there, due to the wind conditions in the

lower levels. Limited contends that, nevertheless, such actions would not result in the dislodging of the doors. Finally, Limited argues that it owed no duty to plaintiff; nor, Limited contends, did it have a duty to maintain the premises in a safe condition, and that such responsibility rested upon Thyssenkrupp and Trizechahn, which were aware of the ongoing elevator disorders and failed to maintain properly functioning elevators at the time of the accident.

Limited cites the report of subrogee Westport's representative, which concludes that a properly adjusted elevator door would be able to withstand 250 pounds of pressure without coming out of its track. On that basis, Limited argues that the action of its employee were not a substantial factor in causing plaintiff's injuries, and that it is entitled to summary judgment.

Finally, citing the Espinal exceptions to the general rule that a party's contractual obligations, standing alone, will not give rise to liability in favor of third parties, Limited argues that it neither launched a force or instrument of harm, nor caused plaintiff to detrimentally rely on its continued performance, nor entirely displaced a contracting party's duty to maintain a safe premises (Espinal, supra).

Plaintiff, Thyssenkrupp and Trizenchahn oppose the motion. Plaintiff argues that there is an issue of fact regarding the

Limited worker's negligence within the scope of his employment with Limited. According to plaintiff, when Limited's worker chose to assist plaintiff in closing the elevator door, he was under a duty to exercise ordinary care under the circumstances. Plaintiff contends that the evidence raises an issue of fact whether such employees' having pushed the door with excessive force, or pushed the dislodged door into the elevator shaft, was a substantial factor in causing injury to her.

Plaintiff also disputes Limited's denial of proximate cause, pointing out that there is evidence that such employee's actions was one of several causes contributing to the accident, and for such negligence Limited would be vicariously liable.

Thyssenkrupp argues that in the opinion of its mechanic, and its expert, Limited would be at least partially responsible for the accident by pushing the door, and knocking the door off of its track. Thyssenkrupp repeats its assertion that there is circumstantial evidence that Limited struck the doors with its carts or dumpsters, which occurred regularly on the premises.

Finally, Trizenchahn argues that there are questions as to Limited's actions, as to whether its employee had dislodged the door or pushed it into the shaft prior to the collision with the other elevator.

ANALYSIS OF LIMITED'S LIABILITY

The elements of a negligence cause of action against a

defendant is that defendant owes a duty of care to the plaintiff, and defendant breached such duty, which was a substantial factor in causing (proximate cause of) plaintiff's injury (see Medinas v MILT Holdings LLC, 131 AD3d 121, 126 [1st Dept 2015]).

Limited cites Espinal, supra, for the proposition that, as Americon's subcontractor, it owned no duty to plaintiff.

However, as the Court of Appeals stated in Espinal, a party who enters into a contract to render services may be liable in tort to a third party, where the contracting party fails to exercise reasonable care in performing his duties, and thereby launches a force or instrument of harm.

Limited, along with Thyssenkrupp, argues that its employee, by his own efforts, lacked the strength to dislodge the door in a way that caused it to eventually protrude towards the elevator shaft, and that some other act or force was the primary cause of this dislodging.

However, questions of fact are raised as to that assertion whether the Limited employee did indeed launch an instrumentality of harm in manually moving the hoistway doors, from which a tort duty would stems (see Altamirano v Door Automation Corp., 48 AD3d 308 [1st Dept 2008]).

Limited does not deny that one of its employees manually closed the hoistway door on the lower level next to plaintiff's

elevator prior to the accident. Limited asserts that accident was not caused by the actions of its employee but resulted from faulty maintenance or repair of the elevator.

On the other hand, Thyssenkrupp, by its expert and others, denies any responsibility for the condition of the door and claims that a force like a dumpster in the possession of Limited caused the dislodging some time after the elevator was operating in a normal manner.

As the foregoing arguments raises issues of fact involving questions of credibility and dueling expert opinions, this court shall deny Limited's motion for summary judgment.

ENTER

Dated: August 14, 2018

J.S.C.
DEBRA A. JAMES