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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

SILVIA SANCHEZ,

Plaintiff,

-against-

1067 FIFTH AVENUE CORP.,

Defendants

X

Index No: **301451/2013**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **13** read on this **motion to dismiss**

No On Calendar of **February 27, 2019**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 5, 9**
Answering Affidavit and Exhibits	**3, 6, 10, 11**
Replying Affidavit and Exhibits	**4, 7, 8, 12, 13**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**2**
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, American Elevator & Machine Corp., (American), moves pursuant to CPLR 3212 to dismiss the complaint and all cross-claims as against it. Co-defendants, 1067 Fifth Avenue Corp., (1067), and Douglas Elliman Property Management, (Elliman), move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims. John A. Van Deusen & Associates, Inc., (Van Deusen), move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims.

This action arose as a result of personal injuries sustained by plaintiff on October 5, 2012, when the service elevator doors closed on her right shoulder and the elevator moved to another floor with plaintiff's shoulder trapped in the door. 1067 owned the subject residential property. 1067 contracted with American six

months prior to plaintiff's injury, to maintain the service elevator and passenger elevator in the building and to modernize both of them once approval for the modernization was obtained. The modernization work was delayed because the building has landmark status and requires approval of the modernization before the work could begin. Elliman was the management company for the building. Van Deusen was an elevator consulting firm. Van Deusen inspected the subject elevator, and as a result of the inspection, made proposals for modernizing/upgrading the two elevators. Van Deusen was also witness to category 1 and 5 testing that was conducted by American.

Plaintiff testified that prior to her injuries she did not have any problems using the service elevator except when the service elevator was out of service.[1] The superintendent for the building, Michael McAvey, (McAvey), testified that he had never received any complaints about of the service elevator moving while the elevator door was not closed.[2] McAvey testified that after plaintiff's injury, he tested the elevator door by placing a wine bottle in the door to see if the elevator moved. After three or four attempts to make the service elevator work with the door propped ajar with a wine bottle, the elevator moved with the door open. McAvey further testified that he was not aware that it was possible for the elevator to move while the elevator door is propped open prior to plaintiff's injury.[3] Pagiel Garcia, (Garcia), the doorman at 1067's building, testified that prior to plaintiff's injuries, no one had complained to him about an accident on the service elevator.

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[1] Transcript, p. 44.
[2] Transcript, p. 33-34.
[3] Transcript, p. 89-91.

Garcia further testified that he was unaware that the service elevator could move with something propping open the elevator door.[4] Andrei Peck, (Peck), a trained elevator mechanic and electrical engineer was the project manager for the services provided by Van Deusen. Peck testified that he performed a survey of the subject elevator prior to plaintiff's injuries and made "sure that the elevator doesn't move if the slide door is open."[5] Peck further testified that if there was a problem with the gate switch during his survey, Van Deusen would have shut the elevator down.[6] John Kane, (Kane), a manager with 24 years of experience at American, testified that he "never [saw] an elevator where the door didn't close and the car move[d]."[7] Kane further testified that the elevator car is not supposed to move if the elevator door is not closed, "because we don't want anybody to get killed."[8]

> A property owner has a nondelegable duty to passengers to maintain its building's elevator in a reasonably safe manner (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Dykes v Starrett City, Inc.*, 74 AD3d 1015 [2010]) and may be liable for elevator malfunctions or defects causing injury to a plaintiff about which it has constructive or actual notice (*see Levine v City of New York*, 67 AD3d 510 [2009]), 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 (*see Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2006]). "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" (*Rogers v Dorchester Assoc.*, 32 NY2d at 559; *see Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882-883 [2010]).

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[4] Transcript, p. 43-44.
[5] Transcript, p. 148.
[6] Transcript, 169.
[7] Transcript, p. 79.
[8] Transcript, p. 80-81.

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> Defendants demonstrated their prima facie entitlement to summary judgment by showing that they did not have actual or constructive notice of an ongoing misleveling condition and did not fail to use reasonable care to correct a condition of which they should have been aware (*see Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [2007]; **2 *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713 [2005]). A representative of Chestnut testified at his deposition that in 2005 he did not observe any visible signs of damage to the elevators during his personal inspections and did not receive any complaints from tenants or building staff about misleveling; that no one had been injured in a building elevator prior to plaintiff's accident;
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> *(Isaac v. 1515 Macombs, LLC*, 84 A.D.3d 457, 458 [1st Dept 2011]).

In response to defendants' prima facie entitlement to summary judgment on the negligence cause of action, plaintiff submits a letter and curriculum vitae from an elevator consultant, John F. Mundt, (Mundt). The plaintiff's expert's report is inadmissible as it was not sworn to or affirmed. "Supreme Court properly found that Economos' report did not constitute admissible evidence, as it was not affirmed or sworn to and no specific reference was made thereto in his affidavit (*see Moon v Cortland Mem. Hosp.*, 27 AD3d 870, 871 [2006]; *Anderson v Persell*, 272 AD2d 733, 734 [2000]). Thus, absent an explanation for the failure to submit such report in admissible form, it should not be considered (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). (*Fallon v. Duffy*, 95 A.D.3d 1416, 1417 [3rd Dept 2012]).

However, with respect to plaintiff's res ipsa loquitur claim:

> "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" (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *see Hall v Barist El. Co.*, 25 AD3d 584, 585 [2006]). Centennial established, prima facie, that it had no actual or constructive notice of a defective condition in the subject elevator that might cause it to descend rapidly and stop abruptly (*see Carrasco v Millar El. Indus.*, 305 AD2d 353, 354 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact as to Centennial's actual or constructive notice of such defect (*id.*).
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> However, proof that the rapid descent and abrupt, misaligned stop of the elevator was an occurrence that would not ordinarily occur in the absence of negligence, that the maintenance and service of the elevator was within the exclusive control of Centennial, and that no act or negligence on the plaintiff's part contributed to the happening of the accident, is a basis for liability under the doctrine of res ipsa loquitur (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *Garrido v International Bus. Mach. Corp. [IBM]*, 38 AD3d 594, 596-597 [2007]). Here, Centennial did not negate the applicability of that doctrine.

Fyall v. Centennial Elevator Indus., Inc., 43 A.D.3d 1103, 1104 [2nd Dept 2007]).

Similarly, in the case at bar, with respect to the first element of res ipsa loquitur, there is evidence that the movement of an elevator when the door is propped open should not happen as that movement can be very dangerous to elevator passengers. With respect to the third element of res ipsa loquitur, there is no evidence that the elevator was capable of moving with the door propped open due to plaintiff's actions. With respect to the second element, exclusive control, multiple defendants may be in control of the elevator.

> With respect to the remaining element of exclusivity, the law is now well settled that this requirement is satisfied so long as it appears that the "negligence of which the thing speaks is probably that of defendant and not of another" (*Weeden v. Armor Elevator Co., supra,* 97 A.D.2d at 206, 468 N.Y.S.2d 898 quoting 2 Harper and James, Law of Torts, § 19.7, p. 1085). " 'Exclusivity' is a relative term, not an absolute." (*Id.; see also, Burgess v. Otis Elevator Co., supra,* 114 A.D.2d at 787, 495 N.Y.S.2d 376). **Thus, in elevator accident cases, *res ipsa* can be applied where more than one defendant is in a position to exercise control** (*see, Mallor v. Wolk Props.*, 63 Misc.2d 187, 191, 311 N.Y.S.2d 141).
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> *(Duke v. Duane Broad Co.,* 181 A.D.2d 589, 591, 581 N.Y.S.2d 767, 768–69 [1st Dept 1992]) (emphasis added).

American had a maintenance contract but had no control over the timing of the modernization of the service elevator, 1067 could have chosen to modernize the elevator sooner than later, and Van Deusen could have taken the elevator out of service The defendants were collectively in exclusive control of the elevator.

Van Deusen argues that it did not owe a duty to plaintiff under *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140 [2002]). However, the Court of Appeals in *Espinal* explained, '[w}e were careful to state, however, that tort liability may arise where "performance of contractual obligations has induced detrimental reliance on continued performance" and the defendant's failure to perform those obligations "positively or actively" works an injury upon the plaintiff (*id.*)." *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140 [2002]). Under the facts submitted on this motion, Plaintiff detrimentally relied on those responsible for the safe operation of the elevator herein. As noted above,

Van Deusen had the authority to remove the elevator from service if it was unsafe and, under the principle of res ipsa loquitur, could be held liable.

On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]). "It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." *(Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

Accordingly, defendants' motion and cross-motions are denied.

The foregoing constitutes the decision and order of the Court.

Dated: 6/14/2019

KENNETH L. THOMPSON JR., J.S.C.