To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOSE DAVID CRESPO,

DECISION & ORDER

Plaintiff,

Index No.:57250/2017
Sequence Nos. 1& 2

-against-

YRL ASSOCIATES, L.P., OTIS ELEVATOR COMPANY, and YONKERS RACING CORPORATION,

Defendants

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 39-124[1], were read in connection with the motion for summary judgment of defendants YRL Associates, L.P. ("YRL"), and Yonkers Racing Corporation ("YRC"), which seeks an order dismissing plaintiff's complaint pursuant to CPLR 3212, and to dismiss cross-claims of co-defendant Otis Elevator Company("Otis"); and the motion for summary judgment by Otis, and to dismiss all cross claims as against it (Seq 2).

Plaintiff commenced this action to recover personal injuries as a result of an accident allegedly caused by a door strike in an elevator on June 7, 2015, at the Empire City Casino located in Yonkers.

NOW based upon the foregoing, the motions are decided as follows:

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[1]All references to documents will be cited by the NYSCEF Document Number.

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Here, plaintiff claims that on June 7, 2015, while working in the housekeeping department for YRC, plaintiff struck his head on the freight elevator gate at the Empire City Casino. Plaintiff refused medical attention and remained on duty. Plaintiff had been working for YRC for about five years in the housekeeping department. The incident was captured by two casino surveillance cameras. Plaintiff made a claim for Worker's Compensation benefits. After a hearing on April 8, 2016, Workers Compensation Law Judge, Gail Watson, awarded plaintiff certain benefits relating to his claimed head injury, but found that plaintiff's other claimed injuries were not related to the accident.

According to plaintiff, the doors to the elevator would remain open so long as someone was passing through the sensors, however, once one was no longer passing anything through, a "whistle" would go off for approximately two to five seconds before the doors would begin to close and would continue until the doors closed completely (Plaintiff's Tr. Doc No. 47 at pgs 40-41). Plaintiff testified that he didn't notice whether the gate to the elevator started to close at any point prior to his accident. As he approached the freight elevator "something" hit his head that he "supposed" was the gate (Doc No. 47 at pg 38). He did not state whether the whistle or buzzer went off, but he did not hear it immediately prior to his accident.

Plaintiff testified that he had made prior complaints regarding the warning buzzer not sounding, specifically two complaints and both were made in close succession approximately a year prior the incident. After he made the second complaint, he saw Otis shut down the elevator to make repairs, after which he never had a problem with the warning buzzer not sounding (Doc No. 47 at pg 50). Plaintiff had used the freight elevator to go from the basement to the first floor

before his accident on the date of the accident and recalled the warning buzzer was working at that time (Doc No 47 at pg 132).

Anthony Caragine testified that he worked for Empire Casino in or about August 2012, as a housekeeping supervisor. He testified that although the freight elevator had signs posted stating that no passengers were to ride in the freight elevator and that it was for freight only, the Casino required its employees to use the elevator in the course of performing their duties. A warning bell would sound for approximately ten seconds before the doors to the freight elevator started to close and continued until the doors are completely close. There is an electronic sensor or "eye" which would detect obstructions to the closing freight elevator . Once an obstruction was detected, the gate would stop coming down and go back up. After watching the video clip of the incident, he believes that the elevator gate came to a compete stop before plaintiff's head comes into contact with it, and that it was the elevator gate, not the outer elevator door, which came into contact with plaintiff's head. As the garbage can went over the threshold of the freight elevator, the elevator gate re-opened, or went back up (Doc No. 48, pg 167).

According to Caragine, Otis was responsible for inspecting, maintaining and repairing the elevators at the Casino. Cargine was not aware of any complaints or issues with the freight elevator, and was not aware of any accidents involving the freight elevator prior to the subject accident.

Dominick Confreda testified that he has been employed as a mechanic with Otis repairing and maintaining elevators for approximately 15 years, and was assigned to service the elevators at the Casino since 2010. He would be alerted through an app; perform monthly preventative maintenance; and fix any issues that he observed while he was performing maintenance and

repairs. Confreda reviewed the maintenance records for the freight elevator for a year prior to the date of the accident, and there were no prior issues with the gate closing or the door detectors identified. The only service call relating to the safety buzzer indicating the door closing was not operating, was on January 22, 2015, six month prior to the accident. At that time this issue was addressed. Routine maintenance including inspection of the freight elevator occurred each month and no issues with the buzzer, door detector, or the gate closing were noted or complained of. The last inspection occurred exactly thirty days prior to the date of the accident on May 7, 2015. There was also a service call back on May 11, 2015, the issue was the gate switch was causing the gate and doors to remain closed and caused the freight elevator to become intermittently stuck. (Confreda Tr. Doc Nos. 81&82)

Edwin Rodriguez testified that he has worked for Otis for over 15 years servicing elevators, and has been an elevator mechanic for over 26 years. As for the January 22, 2015, repair, he confirmed that it was for the warning sound that alerts that the gate is closing. He did not remember this repair, but he detailed the procedure he would follow to address the issue. He did testify that if the system is working properly, the gate will stop and re-open when the beam is breached; if it is not working properly the gate will continue to close without stopping or reversing. (Rodriguez Tr Doc No. 85).

In support of its motion, YRC argues that the claims against it are barred by the Section 11 exclusivity provision of the Workers Compensation Law, which prohibits a negligence action by an employee agaisnt his employer, whetther or not the employer caused the claimed injury (DeSpigna v Lutheran Med. Ctr. Parking, 170AD2d 645 [2d Dept 1991]).

YRL argue that plaintiff cannot maintain an action against it, as it is the out of possession owner/lessor of the land. YRL did not own, occupy or lease the improvements (like the freight elevator) when plaintiff walked into the elevator. YRL had no obligation to inspect, maintain repair or replace anything on the property including any improvements like the freight elevator within the casino building. YRC not YRL actually owned the freight elevator. Under the ground lease it was solely YRC which undertook responsibility to inspect, maintain, repair and replace the improvements, including the freight elevator. YRL had literally no control over the freight elevator.

In oppositon, plaintiff argues that YRL and YRC are liable to plaitniff for their failure to maintain the property in safe conditon and under the doctrine of res ipsa loquitor. YRC owned the building and improvements including the freight elevator, and YRL was the owner of the land which was leased to YRC.

Plaintiff further argues that there are triable issues as to whether YRC was actually plaintiff's employer on the date of the accident as the Worker Compensation Notice of Decision dated April 8, 2016, and the Memorandum of Board Panel Decision issued on September 4, 2016, both named Brian Boru of Westchester Inc, as plaintiff's employer. The carrier and the policy holder had ample opportunity to correct these purported errors at both hearing, the first before Judge Watson and the second before the Board, but failed to do so. In reply, YRC submits the W-2 Wage and Tax Statement for 2015, which lists plaintiff's employer as "Yonkers Racing Corporation, 810 Yonkers Avenue. (Doc No 117). In addition, YRC's attorney explains that Brian Boru was the food and beverage vendor at Empire City Casino and a separate legal entity. Plaintiff himself tesfied that he worked for YRC, as did plaintiff's supervisor.

Additionally, Plaintiff's W-2 forms, paychecks and personnel file all confirm that he was employed by YRC.

A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer; such determination is generally a question of fact, with a special employee being "as one who is transferred for a limited time of whatever duration to the service of another" (Schramm v Cold Spring Harbor Lab., 17 AD3d 661, 662 [2d Dept 2005]). Principal factors include: "who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business. The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work" (Schramm v Cold Spring Harbor Lab., 17 AD3d at 662.

From this record, genuine issue of material fact as to whether plaintiff was an employee of YRL. The court cannot ignore that the Workers Compensation Board viewed another entity beside YRL, as plaintiff's employee, and it appears no party challenged such assertion. On the face of Judge Gail Watson's Notice of Decision, and in the Memorandum of Decision ,the Employer is clearly marked as "Brian Boru of Westchester Inc. (WCB Notice of Decision Doc Nos. 41&42).

In addition, YRC's argument that it is clear from YRC's contract with Otis that YRC relied upon and contracted with Otis to inspect, maintain and repair the elevators at Empire City Casino, which might be true. However, in this court's view, there are also questions of fact as to

the delegation of duties and YRC's duty to maintain its elevators, certainly having a duty to notify Otis of problems.

Turning next to YRL role in plaintiff's accident, YRL argues that it was merely an out of possession owner of the raw land. The evidence produced by YRL was true and accurate copies of legal documents on file with the Westchester County Clerk, Division of Land Records, including deeds and leases and business records introduced through the sworn affidavit (testimony) of a custodian with personal knowledge, YRC's Chief Financial Officer Joel Daum. YRC and YRL contend that YRL was the out of possession owner/lessor of the Raw land and YRC was the lessee with sole ownership of the improvements including the freight elevator pursuant to the terms of the ground Lease.

The record shows that the Lease dated June 15, 1972, originally was between YRL Land Corporation as Lessor, and YRC, as lessor, through assignments becoming between YRL, and YRC, (*see* Lease, Doc No. 67). In Article 6 of the Ground Lease, Section 6.02 provides that "Lessor shall not be required to furnish any services or facilities or to make any repairs or alterations to the Land or the Improvements, and Lessee hereby assumes the full and sole responsibility for the condition, operation, repair, replacement , maintenance and management of the Improvements and the land. " (Doc No. 67 at pg 10). The Lease does provide that Lessor is authorized to enter the Land or the improvements at all reasonable times during usual business hours for the purpose of inspecting same.

In light of the foregoing, YRL established its entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord which had no duty to maintain or repair the elevator (Valenti v 400 Carlls Path Realty Corp., 52 AD3d 696 [2d Dept 2008]).

An out-of-possession landlord's duty to repair a dangerous condition on leased premises "is imposed by statute or regulation, by contract, or by a course of conduct" (Lee v Second Ave. Vill. Partners, LLC, 100 AD3d 601, 602 [2d Dept 2012]). An out-of-possession landlord is generally not responsible for injuries that occur on its premises "unless it has retained control over the premises or is contractually obligated to maintain or repair the alleged hazard" (Deerr'Matos v Ulysses Upp, LLC, 52 AD3d 645 [2d Dept 2008]).

Under the circumstances, YRL establishes, prima facie, that it was an out-of-possession landlord which is the owner of the raw land, and not the Improvement, it had no obligation to inspect, manage, maintain, repair or replace the freight elevator. In opposition, plaintiff failed to raise a triable issue of fact, by merely accusing YRL of not meeting its burden.

Turning next to Otis' motion for summary judgment, Otis asserts that the freight elevator did not malfunction and therefore there was no unreasonably dangerous or defective condition. Otis believes on the basis of the testimony of the experienced Otis mechanics and the video, establishes that the elevator was operating properly at the time of the accident.

Otis also argues that it was not negligent and had neither actual nor constructive notice of any allegedly defective condition. There is no evidence that Otis had notice of any prior problem or complaint involving either the door detectors, the gate itself, or the warning sound/buzzer. Otis performed periodic routine preventable maintenance on a regular basis. Mr. Confreda recalled performing routine maintenance each month for a full year prior to the alleged accident, with the exception that one or two within the maintenance records were proffered by other mechanics. This maintenance included inspecting the door detectors, checking the audible buzzer and the opening and closing of the gate to ensure each was in proper working order. Otis

maintains the following: To the extent that plaintiff claims that the buzzer was not working, Otis maintains that the detectors were working. Additionally, if there was no buzzer, it does not explain why plaintiff did not see the door closing for two seconds before running his head into a retracting door. Otis argues that plaintiff cannot establish that there was any issue with the warning buzzer, as he could not recall if the buzzer warning that the doors were going to close was working but believed he did not hear it. The video demonstrates that the door began to close a full second prior to plaintiff attempting to enter the elevator and before plaintiff began looking down. When plaintiff and/or his garbage can crossed the threshold of the elevator and thereby, interrupted the beams of the Lambda detector device, the gate stopped descending and began re-opening within less than a second, or immediately. Thereafter, plaintiff who was now looking down and moving swiftly into the elevator without pausing despite the obvious gate closing ran his head into the bottom of the ascending gate.

The court viewed the video. The freight elevator door was open as plaintiff was wheeling the garbage bin in front of him toward the elevator. As he approached the freight elevator, he was looking down at the floor, and at the wheels of the trash can. As plaintiff neared the elevator threshold, the elevator door quicky descended, which the court interpreted as leaving him 2 options–stop abruptly and not to enter, or quickly duck and enter the elevator. Plaintiff's split second decision was not unlike accelerating through a yellow traffic light, and the door was descending simultaneously as he walked into it, striking him in the head. However, it is also plausible that a finder of fact might not believe that plaintiff had any opportunity to duck or stop as the court saw it. It is unclear whether Plaintiff maintains that the audible alarm (buzzer) failed to go off, or if plaintiff had no warning that the gate was about to close.

Plaintiff argues that Otis summary judgment must be denied because Otis failed to maintain records and because the witnesses it provided had no personal knowledge regarding inspection, maintenance and repair of freight elevator.

Plaintiff's expert elevator consultant, Patrick A. Carrajat, reviewed the parties' deposition testimony, photographs, pleadings, video of the accident. The expert described the freight elevator as manufactured by Otis; with a geared overhead traction elevator fitted with vertically bi-parting door at each landing and a metal mesh gate which rides with the elevator. The gate and doors operate sequentially with the gate closing first followed by the bi-parting doors. (Affidavit of Patrick Carrajat, Doc No. 108).

Plaintiff's expert concluded that the failure of the detector edge was rooted in the failure of Otis to properly clean, adjust, examine and test the function of the detector; Otis failed to perform any testing of the gate closing speed and functionality of the soft edge on the bottom of the gate contributed to the severity of the impact on plaintiff's head; the buzzer did not function and failed to provide plaintiff with a warning that the gate was about to close (Doc No. 108).

"To invoke the doctrine of res ipsa loquitur, the event (1) must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) must not have been due to any voluntary action or contribution on the part of the plaintiff (Gaspard v Barkly Coverage Corp., 65 AD3d 1188, 1189 [2d Dept 2009]).

Applying these principals, Otis established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of a defective condition in the elevator that would cause the gate to drop However, in opposition,

plaintiff raised a triable issue of fact in connection with the applicability of the doctrine of res ipsa loquitur. Proof that the sudden closing of the elevator door or gate 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 Otis, and that no act or negligence on the injured plaintiff's part contributed to the happening of the accident, is a basis for liability under the doctrine of res ipsa loquitur (Fiermonti v Otis Elevator Co., 94 AD3d 691, 692 [2d Dept 2012)

This record is replete with evidence to raise a triable issue of fact as to whether Otis had notice of the defect that caused plaintiff's accident.

In conclusion, Otis established its prima facie entitlement to judgment as a matter of law, but plaintiff raised triable issue of fact as to the liability of company under the doctrine of res ipsa loquitur.

All matters not specifically addressed are herewith denied.

This constitutes the Decision and Order of the Court.

Accordingly, it is hereby

ORDERED, that motion Seq 1 is granted to the extent that summary judgment is granted to YRL, thus, the complaint, and all cross-claims are dismissed as against YRL, but denied otherwise; and it is further

ORDERED, that the summary judgment Motion Seq 2 by Otis is denied; and it is further

ORDERED, that the remaining parties are directed to appear in the Settlement Conference Part on August 20, 2019 at 9:15 A.M., in CourtRoom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: **July 5 , 2019**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF