At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of June, 2020.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

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MONICA MORACA,

Plaintiff,

Index No. 518630/2016

- against -

Mot. Seq. Nos. 14 & 16

125 WEST 55TH STREET REALTY CO., LLC., WATERMAN PROPERTIES, LLC. AND FUJITEC AMERICA INC.,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	220, 232, 237, 239, 249, 250, 275
Opposing Affidavits (Affirmations)	258, 259, 262, 272, 283, 284
Affidavits (Affirmations) in Reply	269, 270, 277, 278, 279, 280

Upon the foregoing papers, Defendants 125 West 55th Street Realty, Co., LLC. (West) and Waterman Properties, LLC. (Waterman), move (motion sequence number 14) for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing

all claims and cross claims against them. Defendant Fujitec America Inc. (Fujitec) moves (motion sequence number 16) for an order pursuant to CPLR 3212, granting it summary judgment and dismissing all claims and cross claims against it.[1]

Background and Factual Allegations

Plaintiff Monica Moraca (Moraca or Plaintiff) sustained personal injuries as a result of a trip and fall while exiting elevator no. 6 (the subject elevator) at 125 West 55th Street, New York, New York (the Premises) on June 29, 2016. Surveillance video submitted by Waterman and West shows Moraca entering the subject elevator and apparently pressing her floor number on the buttons located to the left side of the elevator door. A few seconds later, Moraca is seen apparently pressing elevator buttons to the right side of the door multiple times. The elevator then opens and Moraca trips while stepping from the elevator onto the floor are fronting the subject elevator. In the video, the floor of the elevator car appears to be some inches below the floor of the elevator landing.

West purportedly owns the Premises and Waterman is the managing agent for West. Waterman, on behalf of West, contracted with Fujitec to provide full-service elevator maintenance at the Premises.[2] Fujitec was to provide constant and complete

[1]Pursuant to the court's January 29, 2020 order, Fujitec withdrew its previously filed summary judgment motion, MS 15, and the court hereby decides Fujitec's summary judgment motion in MS 16. In addition, while West and Waterman move to dismiss any cross claims against them, Fujitec's answer to the amended complaint does not assert a cross claim against Waterman or West.

[2] The Service Contractor Agreement states that it is made and entered into by and between West "c/o" Waterman and Fujitec. However, the contract is signed by Waterman as managing agent on behalf of owner West, and it is also evident from the record that Waterman entered into the

preventative maintenance on all ten elevators in the building at a minimum of three hours per elevator per month, as well as emergency call back service for elevator malfunctions. Fujitec also agreed to indemnify and hold harmless Waterman and West from all claims, including bodily injury claims arising out of or resulting from, in whole or in part, any of Fujitec's acts or omissions.

Moraca purportedly worked on the eighth floor as payroll manager for Katz Media Group (Katz). She testified that as she stepped into the subject elevator and pressed the eighth floor button, the door closed and the elevator began to ascend, then stopped and began bouncing in a jerking motion between the lobby and the second floor about 15 times. Moraca testified that she spoke to someone at the front desk of the building through the elevator intercom, who told her to "hold on." While Moraca did not recall whether the individual identified himself, she believed him to be "Anthony," an employee who worked at the front desk. Plaintiff testified that Anthony told her to calm down and that he would attempt to bring her to the second floor so she could get off the elevator. Moraca testified that the elevator bouncing stopped before the elevator doors opened.

Moraca also testified that she worked in the building for 20 years, often used the subject elevator, and had experienced the elevator bouncing previously. On those occasions, she made verbal complaints to the facilities department at Katz but denied making any written complaints to Katz. According to Moraca, Katz allegedly told her that they would look into it. Moraca denied complaining to anyone other than her employer about the subject elevator. When she got to her office after the incident,

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contract on behalf of West.

Moraca sent an email to the head of Katz human resources describing the incident, and also reported the accident to her supervisor. She stated that approximately an hour later, an "engineer from the building" came upstairs to inquire whether she wanted an ambulance or to be taken to the hospital. She apparently declined that offer. Plaintiff also states that she spoke to Waterman's property manager, Stephen Mykytiuk (Mykytiuk), but did not notify Fujitec or complain to anyone else about the incident.

In his affidavit, Mykytiuk avers that on October 1, 2014, "Defendants" entered into a service contractor agreement with non-party Universal Protection Service, LLC (Universal), from October 1, 2014 to September 30, 2017, for Universal to provide building security services, including building reception duties, at the subject building.[3] Mykytiuk states that "Anthony Levya," a Universal employee, was working the front desk on the morning of Plaintiff's accident. Mykytiuk attests that the front desk is automatically notified that an elevator is out of service by the Elevator Management System (EMS), a standalone computer at the lobby desk that monitors the elevators' location and status, and that the front desk then notifies Fujitec of any elevator service

[3] Mykytiuk's affidavit, dated July 31, 2018, submitted in support of West and Waterman's instant motion (NYSCEF No. 232), was also previously submitted in support of West and Waterman's prior summary judgment motion made in mot. seq. 10 (NYSCEF No. 128), which the court denied with leave to renew (*see* January 22, 2019 order, NYSCEF No. 187). In the prior motion, also annexed as an exhibit to the instant motion (NYSCEF No. 236), West and Waterman allegedly included the contract between West and/or Waterman and Universal as an exhibit, and claimed that due to privacy concerns, the contract was emailed directly to the parties rather than electronically filed (NYSCEF No. 111, ¶ 15). However, the court is not in possession of the contract and it is unclear whether this document was ever actually submitted to the court. Therefore, the court cannot determine whether it was West, Waterman or both of the entities that executed the contract with Universal.

issue. At his deposition, Mykytiuk testified that pursuant to Waterman's contract with Fujitec, personnel manning the building's front desk were trained to move the elevator up and down to different floors or to "park an elevator" – meaning to take an elevator out of service or move it to a particular floor – through a series of drop down commands on the EMS system. According to Mykytiuk, both Waterman and Universal employees were trained to use that EMS system in order to monitor and operate the elevators.

Mykytiuk testified that Anthony left a voicemail for him after the incident involving Moraca but they never spoke, and Mykytiuk was not aware of whether or not Anthony or anyone else used the EMS system to move the subject elevator while Moraca was inside. Mykytiuk also testified that at the time of the incident, there would have potentially been another person, other than Anthony, working at the front desk lobby area where the elevator computer was located, a receptionist for McRory, another building tenant. Mykytiuk did not recall whether anyone from Fujitec ever told him that they either parked or moved the elevator during the incident. Mykytiuk acknowledged that there was no audio recording of Moraca and Anthony's conversation during the incident.

Mykytiuk further testified that Fujitec had a 24-hour call back number for emergencies and that all elevator maintenance or repair complaints would be logged. He stated that if a tenant had issues or complaints regarding elevators, the tenant was directed to contact the Waterman management office, not Fujitec. West was then required to notify Fujitec of elevator issues by a dispatch number provided by Fujitec, kept at the lobby desk. He indicated that Fujitec maintained complaint reports in in electronic form, brought to monthly meetings with Mykytiuk, and discussed line by line. He further

stated that the monthly maintenance reports contained the name of the person calling in a complaint, the complainant's telephone number, the complaint, and the resolution, and specified it the mechanic's name and corrective action taken.

Mykytiuk testified that he had previously witnessed elevator misleveling two to three times, of two to three inches, but does not recall which elevator. On those occasions, Fujitec was notified via their emergency callback number. Mykytiuk denied awareness as to whether the subject elevator had experienced previous misleveling, and testified that he did not know how or why the elevator misleveled on the subject occasion.

After the incident, Robert Fitzgerald (Fitzgerald), a Fujitec elevator maintenance employee, apparently informed Mykytiuk that the subject elevator had an issue with the door. A repair ticket for the subject elevator prepared after the incident stated: "clean adjust door locks, replace lift arm bushings as needed, adjust re-leveling speed slower test RTS." Mykytiuk suggested that the subject elevator misleveling was preventable because it was a direct result of Fujitec's improper maintenance.

Fitzgerald testified that he serviced the subject elevator on the date of the incident and cleaned and adjusted the door locks. Fitzgerald agreed that the subject elevator misleveled during the incident with Moraca. According to Fitzgerald, misleveling of more than half an inch is not a normal occurrence in a modern elevator. He testified that in the six-month period before the accident, there were three service calls made to the subject elevator. However, in his affidavit, Fitzgerald attests that he was unaware of any prior complaints about the subject elevator jerking, bouncing or

misleveling, and did not encounter any jerking, bouncing or misleveling of the subject elevator during any of his inspections. A summary of maintenance and repair tickets for the elevators from November 25, 2015 and June 29, 2016, submitted by Fujitec, shows that there were no complaints made about the subject elevator jerking, bouncing or misleveling and that these issues were not observed during routine maintenance.

Parties' Contentions

West and Waterman contend that Plaintiff has failed to set forth any evidence attributing any alleged malfunction of the subject elevator to them. They allege that they neither created nor exacerbated any condition or defect, which Moraca herself has not identified, that allegedly caused the subject elevator to malfunction. They assert that they did not have actual or constructive notice of any issue, including bouncing, jerking or misleveling, concerning the subject elevator. In that regard, West and Waterman contend that Fujitec was contractually given exclusive responsibility for maintaining and servicing the elevators at the Premises, and there is no basis to impute any notice received by Fujitec to them. West and Waterman further argue that they cannot be held liable for failing to notify Fujitec of any defects, because there is no evidence that they themselves were ever notified of any complaints or defects regarding the subject elevator prior to the accident and that any complaints would have been directly submitted to Fujitec pursuant to contract. In addition, West and Waterman contend that the doctrine of *res ipsa loquitur* is inapplicable and does not permit Plaintiff to recover against them, as the subject elevator was not within their exclusive control.

Fujitec likewise contends that it they did not create any dangerous condition or

have actual or constructive notice of any issues such as bouncing, jerking or misleveling of the subject elevator prior to Moraca's accident. In this regard, Fujitec alleges that it did not receive any complaints about bouncing, jerking or misleveling between November 29, 2015 and June 29, 2016. Fujitec asserts that West and Waterman contracted with it for the limited purpose of performing elevator maintenance, and thus it had no common law duty of care to Plaintiff, as Plaintiff was not a party to the contract.

With respect to Plaintiff's *res ipsa loquitur* theory, Fujitec contends that Plaintiff has failed to demonstrate that Fujitec was negligent or that the subject elevator was in its exclusive control. Fujitec argues that Plaintiff has also failed to demonstrate that she did not contribute to the accident, as she is seen in the surveillance video pressing the elevator buttons several times. Fujitec further asserts that elevator jerking, bouncing or misleveling ordinarily can occur in the absence of negligence.

In response to West and Waterman, Fujitec contends that they have failed to demonstrate that they lacked actual or constructive notice, or that any complaints submitted to Fujitec would not have gone through them first. Fujitec argues that while it serviced the elevator, it would not know about an elevator problem unless it was first reported to Fujitec by West and Waterman.

In support of its arguments, Fujitec's expert, Jon Halpern (Halpern), opines that misleveling can occur on a properly maintained elevator in the absence of negligence as a spontaneous failure of a solid-state device that controls leveling. According to Halpern, this may occur without prior notice of impending failure. Contrary to Moraca's expert opinion, *infra*, Halpern opines that the June 11, 2015 DOB inspection revealed a single

deficiency, a malfunctioning hoistway restrictor, and that the condition was ultimately repaired over nine months prior to Moraca's accident. According to Halpern, the door restrictor is designed to prevent doors from opening if the elevator is more than 18 inches from the landing, not three inches as stated by Plaintiff's expert. Halpern alleges that the door restrictor would not have any effect on the leveling of the subject elevator and would not prevent the doors from opening if the elevator was three inches from the landing. Halpern further opines that Fujitec maintained the subject elevator in accordance with industry standards, that at no time prior to the accident was the elevator misleveled, that there is no evidence that any prior inspection provided any notice of misleveling, and the likely cause of the incident is spontaneous failure of the level down system.

Plaintiff contends that the subject elevator misleveling seen on the surveillance video evidences a malfunctioning elevator. Plaintiff argues that Defendants were on notice of the malfunction because the DOB found the subject elevator "unsatisfactory" in 2015, and had the door restrictor been properly repaired, the subject elevator would not have misleveled. Plaintiff also asserts that Defendants were negligent in allowing the elevator to fall into disrepair by failing to correct ordinary wear and tear, and that Defendants' service records do not indicate what preventative measures were taken to monitor wear and tear or prevent misleveling.

Plaintiff further contends that the *res ipsa loquitor* doctrine applies and precludes summary judgment. Specifically, Plaintiff argues that Defendants cannot dispute the surveillance video showing that misleveling occurred. Plaintiff also asserts that

Mykytiuk is not an expert, and that his affidavit is self-serving and should not be given any weight. Likewise, Plaintiff argues that Fitzgerald's self-serving affidavit should be disregarded and his statement that he is unaware of any prior misleveling problems is contradicted by his deposition testimony. Plaintiff further contends that both Waterman and West and Fujitec had exclusive control of the elevator, and that the doctrine of *res ipsa loquitor* applies in such cases. Plaintiff asserts that she did not have to plead *res ipsa loquitur*, since it is not a separate theory of liability but rather a common sense application of the probative value of circumstantial evidence.

In response to Fujitec's argument, Plaintiff contends that Fujitec owed Plaintiff a duty of care because the contract between Fujitec and West/Waterman was comprehensive and conferred exclusive responsibility for elevator service and maintenance to Fujitec.

In support of her arguments, Plaintiff submits an affidavit from her expert, Patrick Carrajat (Carrajat), who states that the industry standard for modern elevators, such as the subject elevator, is that they are designed to arrive and remain level by no more than plus or minus one-half inch. Carrajat opines that the subject elevator substantially misleveled at the second floor, that the misleveling was the proximate cause of Moraca's injuries, and that Moraca did not contribute to or cause the accident. Carrajat further opines that a three-inch misleveling does not occur on a properly maintained elevator absent negligent maintenance, inspection or repair of the elevator. Carrajat notes that the New York City Department of Buildings (DOB) inspected the subject elevator on June 11, 2015 and again on July 21, 2016, after the incident, and found it unsatisfactory both times. In

particular, the door restrictor on the subject elevator was found to be "inoperative" on both occasions. Carrajat concludes that the door restrictor, if working properly, would have prevented the doors from opening when the subject elevator misleveled. By contrast, a non-working door restrictor would allow the doors to open with the elevator misleveled by up to 12 inches or more.

Discussion

A party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this *prima facie* showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the non-moving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019];

Emigrant Bank v Drimmer, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

A property owner has a non-delegable duty to passengers on its elevator to maintain its elevator in a reasonably safe manner and can be held liable for injury due to a defective elevator where the property owner has actual or constructive notice of the defect or when it fails to notify the elevator company which has the maintenance and repair contract about a known defect (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Hussey v Hilton Worldwide, Inc.*, 164 AD3d 482, 483 [2d Dept 2018]; *Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 766 [2d Dept 2017]; *Cilinger v Aditi Realty Corp.*, 77 AD3d 880, 882 [2d Dept 2010]).

A Defendant property owner moving for summary judgment meets its *prima facie* burden by negating a single essential element of the cause of action (*see Nunez v Chase Manhattan Bank*, 155 AD3d 641, 643 [2d Dept 2017]). Thus, a Defendant owner meets its *prima facie* burden by demonstrating that it neither created nor had actual or constructive notice of the elevator defect that allegedly caused Plaintiff's accident (*see*

Hussey, 164 AD3d at 483-484; *Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2d Dept 2006]). In opposition, a Plaintiff may raise a triable issue of fact by submitting affidavits of witnesses who have frequently observed the elevator to mislevel in the months prior to the accident (*see Oxenfeldt*, 30 AD3d at 392), thus creating a question of fact as to whether the Plaintiff's injury was caused by the alleged misleveling (*see Ardolaj v Two Broadway Land Co.*, 276 AD2d 264, 265 [1st Dept 2000]).

While an elevator company's contractual obligation, standing alone, generally does not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Dautaj v Alliance Elevator Co.*, 110 AD3d 839, 840 [2d Dept 2013]), "[a]n 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*, 32 NY2d at 559; *see also Hussey*, 164 AD3d at 483-484; *Daconta v Otis El. Co.*, 165 AD3d 753, 753 [2d Dept 2018]; *Goodwin*, 156 AD3d at 766; *Little v Kone, Inc.*, 139 AD3d 678, 679 [2d Dept 2016]). "However, this duty is limited to cases where the elevator company has assumed exclusive control of the elevator at the time of the accident pursuant to contract" (*Kawka v 135-55 35th Realty, LLC*, 139 AD3d 677, 678 [2d Dept 2016]). An elevator contractor may be liable: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[e]s a force or instrument of harm; (2) where the Plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the Premises

safely" (*Espinal*, 98 NY2d at 140 [citations and internal quotation marks omitted]).

In the instant matter, West and Waterman have failed to meet their *prima facie* burden of demonstrating that they did not have actual or constructive notice of a defect in the subject elevator (*see Palladino v New York City Housing Authority*, 173 AD3d 1196, 1196 [2d Dept 2019]; *Hussey*, 164 AD3d at 483-484). While Waterman's managing agent, Mykytiuk, testified that he previously witnessed elevator misleveling in the building, he could not recall which elevator misleveled, and thus could not affirmatively exclude the subject elevator from those prior instances of misleveling. If, for the sake of argument, Mykytiuk as the property manager had witnessed the subject elevator misleveling, notice of the defect would also have been imputed to West due to its relationship with Waterman.

In addition, West and Waterman have not met their burden of demonstrating that they did not create the defect that caused the subject elevator to mislevel, or that they did not inadvertently mislevel the elevator in the process of parking it in response to Moraca's intercom request for assistance (*id.*). Although Moraca testified that she believed she spoke to Anthony at the front desk and that he told her that he would attempt to park the subject elevator on the second floor, on this record, there is no evidence that it was actually Anthony who parked the elevator. In this regard: (1) there was no audio recording of Moraca's conversation with the lobby attendant to assist in identifying the attendant; (2) the parties did not provide either an affidavit or testimony from Anthony as to his role, if any, in the incident; (3) Mykytiuk acknowledged there may have been another receptionist employed by another building tenant manning the front desk at the

time of the incident; and (4) the evidence demonstrates that both Waterman and Universal employees utilized the EMS system located at the front desk to monitor and move the elevators. Even if Anthony did park the elevator in a negligent manner, this does not end the inquiry, since there is a question of fact as to whether his negligence may be imputed to Waterman and/or West due to either or both Defendants' contract with Universal to provide building security services. Since this contract was not provided to the court, the court cannot determine which of the "Defendants" was a signatory to the contract, or the extent of control the signatory held over Universal, in light of the fact that Universal personnel had authority to park an elevator without first calling Fujitec. As these are open material questions of fact, neither West nor Waterman is entitled to summary judgment.

Likewise, Fujitec is not entitled to summary judgment, as it has failed to demonstrate that it was free of fault (*see Rogers*, 32 NY2d at 559; *Hussey*, 164 AD3d at 483-484; *Daconta*, 165 AD3d at 753; *Goodwin*, 156 AD3d at 766). Fujitec was contractually obligated to maintain the buildings elevators in working order, and Plaintiff's expert affidavit raises a question as to whether a properly functioning door restrictor would have prevented the subject elevator from opening if it mislevels. Fujitec's expert's affidavit that misleveling may occur in a properly maintained elevator in the absence of negligence is conclusory (*see Daconta*, 165 AD3d at 754), particularly in light of the fact that Fujitec's mechanic, Fitzgerald, repaired the elevator on the day of the incident, a fact which lends support to Plaintiff's expert's opinion that the elevator malfunctioned. Fitzgerald was therefore also in a position to ascertain the nature of the

elevator's malfunctioning. Therefore, triable issues of material fact as to whether Fujitec properly maintained and serviced the elevator prior to the occurrence preclude summary judgment in its favor.

Moreover, as a factual question exists with regard to whether the elevator misleveled due to negligent parking, a mechanical defect, or some other reason, the doctrine of *res ipsa loquitur* may not be discounted at this stage of the litigation. *Res ipsa loquitur* applies to occurrences where, as here, the actual specific cause of an accident is unknown (*see James v Wormuth*, 21 NY3d 540, 546 [2013]). The doctrine permits an inference of negligence based upon the mere occurrence where a Plaintiff has proffered evidence that: (1) the occurrence is not one that ordinarily happens in the absence of negligence; (2) the occurrence is caused by an instrumentality or agency within the Defendant's exclusive control; and (3) Plaintiff did not contribute to the occurrence (*id.*; *see also States v Lourdes Hosp.*, 100 NY2d 208, 211 [2003]; *Ezzard,* 129 AD3d at 162). *Res ipsa loquitur* does not create a presumption of negligence but is a rule of circumstantial evidence that allows a fact finder to infer negligence (*see Ezzard*, 129 AD3d at 162). A party may rebut the inference by presenting different facts or otherwise arguing that the inference should not apply under the particular circumstances (*id.*). When the doctrine is applied, notice of the defect is inferred and the Plaintiff need not offer evidence of actual or constructive notice in order to proceed (*see Ezzard*, 129 AD3d at 162; *Gurevich v Queens Parke Realty Corp.*, 12 AD3d 566, 567 [2d Dept 2004]; *Ardolaj*, 276 AD2d 264). Plaintiff is also not required to demonstrate that a similar prior defect, such as elevator misleveling, occurred (*see Perry v Kone, Inc.*, 147 AD3d 1091,

1093 [2d Dept 2017] [Plaintiff injured when she was riding an elevator that misleveled by two or three inches and she fell while attempting to exit]).

Here, as the cause of the misleveling is unknown and the parties propose different theories as to the cause of the occurrence, there is an issue of fact about whether the occurrence would have taken place but for Defendants' negligence (*see e.g. Fiermonti v Otis El. Co.,* 94 AD3d 691 [2d Dept 2012] [question of fact as to whether *res ipsa loquitur* applies where elevator in which Plaintiff was riding suddenly dropped eight to 12 inches as Plaintiff attempted to step out of elevator while pushing a dolly]; *Devito v Centennial El. Indus., Inc.,* 90 AD3d 595 [2d Dept 2011] [*res ipsa loquitur* applied where Plaintiff sustained injury while riding in an elevator that twice descended rapidly, shook, and came to an abrupt stop and was misleveled, where Plaintiff submitted evidence that rapid descent, shaking, and abrupt, misaligned stop of the elevator would not ordinarily occur absent negligence]; *Fyall v Centennial El. Indus.*, 43 AD3d 1103 [2d Dept 2007] [issue of fact as to whether elevator that Plaintiff was riding in that stopped at another floor, and shook and vibrated and ultimately misaligned would not ordinarily occur in absence of negligent elevator maintenance]; *Carrasco v Millar El. Indus.,* 305 AD2d 353 [2d Dept 2003] [issue of fact existed as to whether elevator, which stopped at another floor, and shook and vibrated, ultimately trapping Plaintiff for an hour, would not have malfunctioned had due care been exercised in its maintenance]).

Conclusion

Accordingly, it is

ORDERED that the branch of Defendants' West's and Waterman's motion (motion sequence number 14) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all claims and cross claims against them (to the extent such cross claims exist) is denied; and it is further

ORDERED that Defendant Fujitec's motion (motion sequence number 16) for an order pursuant to CPLR 3212, granting it summary judgment and dismissing all claims and cross claims against it is denied.

This constitutes the decision and order of the court.

ENTER:

CARL J. LANDICINO J.S.C.

KINGS COUNTY CLERK
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