At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the ~~31st day of December~~, ~~2020~~. 5th January 2021 (PF)

P R E S E N T:

HON. PAMELA L. FISHER,
Justice.

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KEYRA RENA MITCHELL,
Plaintiff,

- against - Index No. 511746/18

FULTON 2000 PARTNERS, L.P., 460 FULTON OWNER LLC, NEXT GENERATION FULTON LLC, 464 RETAIL, INC., & MCGLYNN, HAYS & CO., INC.,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	54-62, 64 70-79 81-92
Opposing Affidavits (Affirmations)	93-98 101-106, 117 109-114, 119
Reply Affidavits (Affirmations)	121 124-127

Upon the foregoing papers in this personal injury action, defendant McGlynn, Hays & Co., Inc. (McGlynn) moves, in motion (mot.) sequence (seq.) three, for summary judgment granting it dismissal of plaintiff's complaint and any and all cross claims; defendant 460 Fulton Owner LLC (460 Fulton) moves, in mot. seq. four, pursuant to CPLR 3212, for summary judgment granting it dismissal of the action and permitting it to refile the instant motion after all discovery owed by plaintiff is complete; and defendants Fulton 2000 Partners, L.P. (Fulton 2000), Next Generation Fulton LLC (Next Generation) and 464 Retail, Inc. (464 Retail) move, in mot. seq. five, pursuant to CPLR

3212, for summary judgment granting them dismissal of plaintiff's complaint and all cross claims.

Background and Procedural History

Plaintiff alleges she was personally injured on August 25, 2016 when struck, in the course of her employment, by a falling ceiling and/or light fixture in a store elevator of her former employer, nonparty Modell's Sporting Goods (Modell's), at 464-466 Fulton Street in Brooklyn. Plaintiff alleges she was carrying mops and buckets in the elevator with three other employees when the incident occurred. The Modell's store occupied four floors within the subject location and had an elevator that traveled between the second and fourth floors. Plaintiff testified that she and her coworkers intended to return the mops and pails, which had been used for cleaning up, to the fourth floor. She alleges that, when the elevator started ascending from the second floor, one of the light fixture coverings, a metal grid covering the elevator's ceiling lights, dropped and struck her head and left thumb. The stick light bulbs, she claims, remained affixed to the elevator's ceiling during the incident. Plaintiff also alleges that defendants owned, maintained, managed, inspected, serviced, operated and/or controlled 464-466 Fulton Street including the automatic, self-operated elevator located therein.[1]

On June 7, 2018, plaintiff commenced the instant action, all defendants subsequently answered with cross claims, discovery and motion practice then occurred

[1] More specifically, portions of the premises at 464-466 Fulton Street, a/k/a Fulton Mall were leased by Fulton 2000 and 460 Fulton to Next Generation and portions of the premises at 464-466 Fulton Street were leased to 464 Retail. Next Generation, in turn, subleased floors 2 through 5 of 464-466 Fulton Street to Modell's, its subtenant, who hired McGlynn to inspect and maintain the elevator discussed herein.

and plaintiff eventually filed a note of issue and certificate of readiness on May 15, 2020 thereby indicating that discovery was complete.[2] These motions have ensued.

Defendant McGlynn's Arguments

Defendant McGlynn contracted with Modell's to service the elevator. It argues, in mot. seq. three, that claims and cross claims against it should be dismissed because it owed no duty to plaintiff, and no evidence was offered that it had notice before the incident that the subject light fixture and its covering were allegedly defective. McGlynn states that it did not own, control, repair, maintain or bear responsibility for the elevator's ceiling light fixture or the metal grid covering the fixture which allegedly caused plaintiff's injuries. It asserts that Modell's, plaintiff's employer and sole tenant of the portion of the premises where the elevator was located, was responsible for repairing and maintaining the light fixtures inside the elevator cab.

Further, McGlynn argues that it had a limited "oil-and-grease" contract with Modell's as to the premises' elevator but had no contractual obligations nor exercised control over light bulbs or the grid covering the lights on the elevator cab's ceiling. McGlynn avers that the testimony of Gerard Carlucci, its signatory to the contract with Modell's, established that nothing in the contract required or authorized McGlynn to change or check the lights in the elevator cab or touch or adjust the grid covering the light

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[2]460 Fulton sought, in mot. seq. two, to vacate the note of issue and remove the case from the trial calendar, but a September 21, 2020 order issued by the Hon. Lawrence Knipel denied that relief and instead directed plaintiff to respond to July 18, 2019 demands of 460 Fulton and to its demand for an incident report by October 21, 2020, all of which plaintiff thereafter filed on September 30, 2020 (*see* NYSCEF Doc No. 129).

fixture. McGlynn further argues that its records for the subject elevator do not reflect that it has worked or performed any work relating to the light fixtures.

Plaintiff, McGlynn claims, has failed to make a prima facie negligence showing. First, the purported lack of a contractual obligation, as above mentioned, according to McGlynn means it owes plaintiff no duty and cannot be liable for the alleged injury. McGlynn alternatively claims that plaintiff has made no showing that McGlynn created or exacerbated a dangerous condition or had actual or constructive knowledge of such condition. Rather, records show, McGlynn alleges, no complaints concerning the light fixture before the incident and no work by McGlynn relating to the light fixtures.

In addition, McGlynn argues that plaintiff cannot rely on res ipsa loquitur to infer negligence because plaintiff cannot clearly show what caused her injuries, and therefore, has *not* eliminated all reasonably possible accident causes other than defendant's negligence. In other words, McGlynn argues that plaintiff presents no evidentiary fact establishing negligence which she or any cross-claiming defendant may use.

McGlynn concurrently argues, in its opposing affirmation to codefendants' summary judgment motions, that it should be permitted to pursue contribution and indemnification claims against the codefendants if its summary judgment motion fails. A stricter test, McGlynn contends, governs denying a summary judgment motion to dismiss a cross claim than to dismiss the main complaint. McGlynn also argues that codefendant owners owed a nondelegable duty to plaintiff as to the overall safety of the premises. No evidence, it believes, would supersede codefendant owners' nondelegable duty to keep the premises and facilities reasonably safe.

460 Fulton's Arguments

460 Fulton, one of the property landlords of the Modell's store, argues, in support of its motion, that plaintiff's note of issue was improper because discovery was allegedly outstanding. 460 Fulton argues that it should be permitted to refile the instant motion upon receipt of outstanding discovery related to the issue of liability. The presently submitted evidence, 460 Fulton contends, demonstrates that plaintiff's employer, Modell's, was responsible for repairing and maintaining the interior ceiling of the elevator and that plaintiff testified to this effect. 460 Fulton further asserts that other testimony herein confirmed that Modell's installed the elevator where the incident occurred, that the elevator's installation, maintenance and condition was Modell's responsibility, pursuant to its premises lease, and that there were no complaints about the elevator ceiling before the incident.

Next, 460 Fulton argues that Modell's lease required Modell's to keep the premises in good working condition and that Modell's was responsible for all nonstructural items on the premises. It submits that plaintiff has not demonstrated, as required, that movant or any other defendant created an allegedly dangerous or defective condition or had actual or constructive notice of such condition. The absence or lack of complaints or previous problems with the light fixture, according to 460 Fulton, establishes there was no notice to defendants and, consequently, no prima facie showing of negligence.

Lastly, plaintiff cannot rely on res ipsa loquitur, 460 Fulton argues, where the condition could have occurred in the absence of negligence, plaintiff caused or

contributed to her injury or the condition was not within 460 Fulton's or any other codefendant's exclusive control. 460 Fulton, in other words, claims that res ipsa loquitor is inapplicable as plaintiff cannot show with certainty what caused her injuries and has not eliminated within reason all possible causes of the accident other than defendants' negligence.

Remaining Defendants' Arguments

Remaining codefendants/landlords, Fulton 2000, Next Generation and 464 Retail also contend, in support of their motion, that plaintiff's claims must be dismissed because Modell's was obligated to maintain and repair the subject elevator. They note that plaintiff's complaint and bill of particulars allege that they failed to maintain and repair the subject elevator. However, these codefendants also assert that the terms and conditions of their lease with Modell's relieves them of the obligation to maintain and repair the structural portions of the premises. They highlight that the lease indisputably required Modell's to maintain and repair the elevator, and the admissible evidence presented does not support plaintiff's claim that they were responsible for maintaining the elevator.

Additionally, these codefendants assert that plaintiff's claims must also be dismissed because they had no actual or constructive notice of any defective condition in the elevator, and no proof shows that any of them created the condition that allegedly caused the accident. More specifically, they submit that nothing in the record indicates there was a problem with the ceiling grid fixture for someone to have noticed and

repaired it before the accident or that plaintiff has presented evidence that the condition existed for a sufficient period of time to constitute constructive notice.

Lastly, these codefendants argue that plaintiff cannot rely on res ipsa loquitor to infer their negligence because she has failed to show that the incident could not have occurred in the absence of negligence, that she did not cause or contribute to her injury, and that the condition was within these codefendants' exclusive control. These codefendants view the uncontroverted evidence as demonstrating that they did not exclusively control either the store premises or the elevator where the incident occurred. They note in this regard that both the general public and Modell's employees used the elevator.

Plaintiff's Opposition Arguments

Plaintiff presents her collective opposing arguments to mot. seqs. three, four and five in her counsel's three identical affirmations (*see* NYSCEF Doc Nos. 93, 101 and 109, each dated September 14, 2020 and filed September 18, 2020). These affirmations argue that Modell's workers' compensation liability to plaintiff does not prevent holding each defendant separately liable; that moving defendant or defendants in each summary judgment motion has (or have) failed to satisfy the initial summary judgment burden to warrant plaintiff's need to oppose, as no evidence has been offered identifying when the elevator was last inspected before the accident occurred; that plaintiff nonetheless has raised triable factual issues precluding summary judgment through her own deposition testimony and the deposition testimony of McGlynn's president, Gerard Carlucci, who acknowledged that his company's contractual duties included inspecting the entire

elevator and advising Modell's of any observed defective conditions; that all defendants had a nondelegable duty to maintain the elevator; that plaintiff was not obligated to prove notice as defendants have collectively failed to keep or submit records showing when the elevator was last inspected before the accident; and that applying the res ipsa loquitur doctrine makes defendants liable for negligence.

Defendants' Replies

McGlynn's reply affirmation in further support of its summary judgment motion views plaintiff's opposition as failing to present a material factual question sufficient to defeat this summary judgment motion. McGlynn reiterates that it did not owe a legal duty to plaintiff as to the light fixture, that such argument does not violate CPLR 1601, which seeks to limit a defendant's liability to the plaintiff to the defendant's proportionate fault, and that plaintiff misconstrues that section herein. It further argues that plaintiff failed to address its argument of not owing a legal duty to plaintiff under applicable case law. McGlynn also asserts that plaintiff took language out of context from its Modell's contract and incorrectly suggests that it was responsible for the grid covering the light fixture inside the elevator. It regards plaintiff as conflating specific maintenance contractual obligations with a purported duty to inspect and maintain the entire elevator and all its parts. McGlynn further argues that plaintiff cannot rely on the res ipsa loquitur doctrine because that doctrine cannot be invoked where there is no evidence that it was negligent or where the subject condition was not within its exclusive control.

460 Fulton, along with the remaining defendant landlords, argue, in reply, that plaintiff's opposition misrepresents material facts regarding each movant's role as well as testimony in this case. More specifically, 460 Fulton claims that plaintiff misrepresents it as the managing agent, fails to demonstrate proof in the record that it holds such position, and overlooks that Meir Waks, the witness who testified on behalf of all the codefendants, other than defendant McGlynn, stated that Next Generation was the management agent for the subject premises. Also, 460 Fulton notes that plaintiff's testimony was consistent with Mr. Waks' testimony that, if a light bulb needed to be replaced, plaintiff's employer, Modell's, would replace it pursuant to the existing lease.

Plaintiff's own testimony, 460 Fulton further notes, fully supports its motion. She, herself stated in this regard that she had never made complaints about the ceiling grid or grate fixture, was unaware of anyone else having complained about the fixture and was aware that her employer was both responsible for repairing and maintaining the elevator's interior ceiling and for changing the elevator's light bulbs. 460 Fulton cites Modell's lease as demonstrating that it cannot be held liable for the alleged incident and that Modell's was required to keep the premises in good and working order and was responsible for all nonstructural items on the premises.

Additionally, 460 Fulton avers that plaintiff's counsel misapplies the law concerning the incident when that counsel claims that defendants must provide proof of the last date the elevator was inspected to then examine whether defendant had actual or constructive notice of the condition. 460 Fulton criticizes this analysis because it fails to

first address the initial question as to which party is responsible for the elevator; ignores, in its view, uncontroverted evidence showing that Modell's, plaintiff's employer bore such responsibility; that 460 Fulton's interest in the premises did not include the portion Modell's rented as 460 Fulton had no control over that portion;[3] and thus plaintiff's analysis fails to show that 460 Fulton owed a duty to plaintiff. In addition, 460 Fulton submits that, contrary to plaintiff's claim, movants have collectively demonstrated that the elevator was free from defect as there were no prior complaints concerning its condition.

460 Fulton reiterates in its reply that plaintiff cannot rely on res ipsa loquitur to infer 460 Fulton's alleged negligence because plaintiff has failed to establish that this type of incident does not ordinarily occur unless negligence occurred and that the light fixture covering was within 460 Fulton's exclusive control. Put differently, 460 Fulton views res ipsa loquitor as inapplicable because plaintiff's injury could have occurred in the absence of negligence and the light fixture covering was not within its exclusive control. Lastly, 460 Fulton asserts that it is entitled to court-ordered discovery and the opportunity to resubmit the instant motion when additional discovery is provided.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary

[3]460 Fulton references records maintained by the New York City Finance Department in its Automated City Registration System (i.e. ACRIS) to show that other codefendants had control over that area (*see* Lessor Consent, Estoppel Agreement and Amendment of Lease (NYSCEF Doc No. 125, annexed as exhibit A to reply affirmation of 460 Fulton's counsel).

judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010]). If it is determined that the movant has made such showing, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Gensuale Campanelli & Assoc., P.C.,* 126 AD3d 936, 937 [2d Dept 2015] quoting *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]).

McGlynn recognizes plaintiff's allegations that she was injured in the course of her employment at Modell's when a metal grid covering a ceiling light fixture fell in an elevator that McGlynn contractually serviced for Modell's. McGlynn presents that contract, which its president, Gerard Carlucci characterizes as an "oil and grease" contract, to support its position that it was only responsible for maintaining the elevator and not the metal grid covering the ceiling lights, nor the ceiling lights themselves.

The contract and testimony appear to establish McGlynn's prima facie case, but disputed material factual issues nonetheless exist necessitating a trial. McGlynn's two-page letter contract itself is not titled "oil and grease agreement"; rather, it provides that there is "a monthly service of the elevator, including oiling and cleaning the machines, motor and controller, greasing or oiling bearings and guides; [and] making necessary minor adjustments." In addition, it states that "[s]hould our inspection reveal any need ... of repairs or of materials, a report will be sent, specifying the net cost of same" (NYSCEF Doc. No. 61, annexed as exhibit G to McGlynn's mot. seq. three moving

papers). The statement of "a monthly service of the elevator" is broad; the scope of the work McGlynn was contracted to perform is at least arguably ambiguous; and according to Mr. Carlucci, McGlynn's president, the elevator inspection maintenance requirements included both notifying Modell's of *any observed defective* conditions so that Modell's could decide whether to fix them (*see* Carlucci tr at 21, lines 6-13, annexed as exhibit F to McGlynn's mot. seq. three moving papers) and *looking around to see if everything was in order* (*id.* at 39, line 21 through 40, line 2). There is no language in the contract that excludes a specific service to the elevator, no prohibition to providing service not specifically listed and the service included making necessary minor unspecified adjustments.

The records provided by McGlynn do not provide a complete view of McGlynn's work as they do not fully describe the specific work that was done in the six-month period before the incident. For example, a March 11, 2016 work ticket stated in part, "Monthly maintenance, made adjustment where needed" (*id.* at 51, lines 9-10; NYSCEF Doc No. 62, at 5). Also, some of the work tickets for the six months preceding the incident are unclear, not fully legible or partially redacted. The billing dispatch statement is limited and brief in its information consisting of two sparsely filled pages (*id.* at 13-14). More importantly, McGlynn has not provided records for a period longer than just six months before the incident to more completely demonstrate the contract's implementation and operation. The evidence McGlynn provided and the existing record do not foreclose plaintiff's claim, do not unequivocally show a duty was not owed to plaintiff and do not negate that McGlynn may have been negligent or contributorily

negligent in fulfilling its duties related to the elevator. Indeed, the Appellate Division Second Department in *Roserie v Alexander's Kings Plaza, LLC*, 171 AD3d 822, 823 [2019], quoting the Court of Appeals in *Rogers v. Dorchester Assoc.*, 32 NY2d 553, 559 [1973] has recognized that "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."[4]

Here, a dispute exists concerning the scope of the contractual terms and the value and weight of the evidence concerning liability. McGlynn's performance of its contractual responsibilities as to the elevator presents a factual issue for the trier of facts, who could find that McGlynn used or failed to use reasonable care in inspecting and maintaining it. Consequently, McGlynn's summary judgment motion, mot. seq. three, to dismiss plaintiff's claims and codefendants' cross claims warrants denial.

460 Fulton's summary judgment motion must also be denied as it fails to provide sufficient evidence to overcome the principle that real property owners have a duty to keep their property reasonably safe for people foreseeably on the premises (*see Peralta v. Henriquez*, 100 NY2d 139, 144 [2003]; *Cupo v. Karfunkel*, 1 AD3d 48, 51 [2d Dept. 2003]). The Court of Appeals has held that the duty of owners to keep their property safe is a nondelegable duty stating that "[a] landowner must act as a reasonable man in

[4] This quotation from the Court of Appeals 1973 *Rogers* decision in the Appellate Division Second Department's 2019 *Roserie* opinion, 17 years after *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002], suggests that the Appellate Division Second Department regards the *Rogers* case as enduring in recognizing a duty to a passenger in an elevator maintenance setting and not needing an Espinal analysis, and, in any event, is arguably controlling in this jurisdiction.

maintaining his property in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v. Miller*, 40 NY2d 233 [1976]). In addition, the Appellate Division Second Department in *Dykes v Starrett City, Inc.,* 74 AD3d 1015, 1016 [2010] has also recognized that "the property owner continues to owe a nondelegable duty to elevator passengers to maintain its buildings' elevators in a reasonably safe manner." Liability in a negligence action is generally predicated on a party's ownership, occupancy, control or special use of the subject property (*see Wagner v Grinnell Hous. Dev. Fund Corp.,* 260 AD2d 265, 266 [1st Dept 1999], *lv denied* 99 NY2d 502 [2002] ["(Owner's) duty to maintain the premises extends to elevator repair (citations omitted) which remains nondelegable as between the building owner and the injured party, despite any contractual delegation of maintenance obligations by the owner to another party *(Mas v Two Bridges Assocs.,* 75 NY2d 680 [1990]; *Camaj v East 52nd Partners*, (215 AD2d 150, 151 [1st Dept 1995])"]).

Plaintiff alleges that the defendants owned, maintained, managed, inspected, serviced, operated and/or controlled 464-466 Fulton Street, including the automatic, self-operated elevator located therein. Here, the submitted evidence shows that each defendant either has an ownership interest in the property or acted in a capacity of a landlord agent regarding the property. Consequently, the ownership duties follow the codefendants and rental of the premises to Modell's does not necessarily relieve 460 Fulton and the codefendants of their nondelegable duties to the rented premises.

460 Fulton and the codefendants' claim that they lacked notice does not preclude plaintiff from maintaining this action as such issue is factual and in dispute as is whether the injury alleged was caused simply from changing, failing to change, adjusting or failing to adjust a light fixture cover or whether some other factor contributed to the alleged injuries. Plaintiff argues that defendants all had a nondelegable duty to inspect and continued to have access to the premises. Here, too 460 Fulton and the codefendants, like McGlynn, have failed to provide sufficient records to show when the elevator was last inspected *as to the metal grid covering the ceiling lights* to pursue a lack of actual or constructive notice claim. Consequently, dismissing the action is not required as the factual disputes herein are inappropriately resolved in a summary judgment motion. Whether codefendants, even more specifically, had constructive notice or should have had notice of the condition is not decisively determined by these summary judgment motions. Hence, 460 Fulton and the codefendants have failed to provide sufficient evidence to prevent a trial in this case.

The branch of the motion by defendant/landlord 460 Fulton, mot. seq. four, seeking summary judgment therefore should be denied. For the same reasons, the summary judgment motion of codefendants, Fulton 2000, Next Generation and 464 Retail, mot. seq. five, to dismiss plaintiff's complaint and all cross claims also warrants denial.

Further, the branch of 460 Fulton's motion to permit it to refile for summary judgment after all discovery plaintiff owed is complete, pursuant to its earlier motion, mot. seq. two, to vacate the note of issue and compel further discovery, is denied. Justice Knipel's September 21, 2020 order denied 460 Fulton's motion to vacate the note of issue, directed plaintiff to respond to defendants' July 18, 2019 demands and provide an incident report by October 21, 2020 (*see* n 2). The record demonstrates that, on September 30, 2020, plaintiff filed the demanded information (*id.*). Consequently, the branch of 460 Fulton's motion to permit it to refile the instant motion is denied.

Lastly, plaintiff cannot rely on res ipsa loquitur to infer negligence in this case. Plaintiff cannot show with certainty what caused her injuries and has not eliminated within reason all possible causes of the accident other than defendants' negligence.

The court has considered the parties' remaining contentions and finds them unavailing. All relief not expressly granted herein is denied. Accordingly, it is

ORDERED that defendant McGlynn's motion, motion sequence three, for summary judgment to dismiss plaintiff's claims and any and all cross claims is denied; and it is further

ORDERED that the branch of defendant 460 Fulton's motion, mot. seq. four, for summary judgment, is denied; and it is further

ORDERED that the branch of defendant 460 Fulton's motion, to permit it to refile for summary judgment after all discovery plaintiff owed is complete, is denied, and it is further

ORDERED that the combined motion by defendants Fulton 2000, Next Generation and 464 Retail, mot. seq. five, for an order granting summary judgment dismissing plaintiff's complaint and all cross claims is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. PAMELA L. FISHER