SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART 58**

Justice

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DAVID MERRICK,

Plaintiff,

- v -

MACERICH COMPANY, MACERICH MANAGEMENT COMPANY, MACCERICT QUEENS LIMITED PARTNERSHIP, SCHINDLER ELEVATOR CORPORATION, THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

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INDEX NO. 158681/2016

MOTION DATE

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317

were read on this motion to/for REARGUMENT/RECONSIDERATION.

By notice of motion, defendant Thyssenkrupp Elevator Corporation (TEC) moves for orders: (1) pursuant to CPLR 3126, striking the answer of defendants Macerich Company, Macerich Management Company, and Macerich Queens Limited Partnership (collectively, Macerich); (2) pursuant to CPLR 2221, granting leave to reargue the November 30, 2022 order granting Macerich's motion for summary judgment; (3) pursuant to CPLR 3212, granting TEC's motion for summary judgment; and (4) pursuant to CPLR 5015 or 2001, vacating the November 30, 2022 order. Macerich and plaintiff oppose the motion.

I. PERTINENT PROCEDURAL BACKGROUND

This action involving violations of the Labor Law was commenced in October 2016, and in December 2016, additional defendants were added (NYSCEF 1, 4). Plaintiff contends that he was injured while working at the Queens Center Mall, a building owned by certain Macerich defendants, and while employed by a contractor hired by one of the Mall's tenants, Apple.

Plaintiff alleges that he was injured while using one of the Mall's freight elevators, also owned by Macerich, when the gate of the elevator fell on him. Beginning in 2017, the parties exchanged discovery and appeared for discovery conferences.

In 2018, Macerich moved for an order granting summary judgment on its cross-claims for contractual indemnity and/or conditional indemnity against TEC, which was denied for reasons stated on the record, including that the motion was made "prior to the completion of discovery" (NYSCEF 102).

In September 2021, plaintiff filed his note of issue (NOI) (NYSCEF 174). TEC then moved to vacate it, which was resolved by stipulation in September 2022 (NYSCEF 279). In the stipulation, Macerich agreed to undertake a search for certain categories of documents requested by TEC - most, if not all of them, related to the relationship between Macerich and Apple - and to either provide the documents or an affidavit detailing its search efforts, within 30 days (NYSCEF 279). The stipulation also extended TEC's time to move for summary judgment to 60 days after Macerich provided the documents and/or search affidavit (*Id.*).

In March 2022, Macerich again moved for summary judgment on its cross-claims for contractual indemnity against TEC, and the motion was partially granted by decision and order dated November 30, 2022, by granting Macerich conditional contractual indemnification against TEC "to the extent [Macerich] is found to be free of any negligence causing or contributing to plaintiff's alleged accident" (NYSCEF 280).

II. NOVEMBER 2022 ORDER

As pertinent here, the November 2022 order provides as follows:

> Initially, this Court notes that the instant motion is not barred by the law of the case doctrine since the denial of movants' initial motion for summary judgment was based on the fact that it was premature and was clearly not a determination on the merits (*See*

Shatzkin v Village of Croton-on Hudson, 51 AD3d 903, 903 [2d Dept 2008]; *Meekins v Town of Riverhead*, 20 AD3d 399, 400 [2d Dept 2005]).

Here, the agreement requires TEC to indemnify Queens Center and MPM, as well as its agents and affiliates, "from and against any claim, demand, [or] cause of action", including "all attorney's fees, court costs, expenses and disbursements . . . to the extent arising out of or derived from the breach of [the] [a]greement or the actual and/or alleged negligent performance" of the agreement (emphasis added). Doc. 233 at par. 6. The agreement further provided that "[s]uch indemnity shall include any and all liability resulting from bodily injuries. . . arising out of or in any way connected with [TEC's] negligent performance of this [a]greement." Doc. 233 at par. 6. Thus, TEC's indemnification obligation, including costs and attorneys' fees, was triggered by plaintiff's allegation that said defendant's negligent performance of the agreement contributed to the accident (*See Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 445 [1st Dept 2022]). Additionally, the indemnification provision contains a savings clause and, thus, does not violate GOL § 5-322.1 (*See Payne v NSH Community Servs., Inc.*, 203 AD3d 546, 548 [1st Dept 2022] [citations omitted]). MPM and Queens Center are therefore entitled to conditional summary judgment on their contractual indemnification claim against TEC to the extent that plaintiff's accident was not caused by their negligence (*see Vitucci v Durst Pyramid LLC*, 205 AD3d at 445, citing *Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]).

Even where issues of fact exist regarding an indemnitee's active negligence, an award of conditional indemnification is proper where the indemnification provision in question does not violate the GOL (*See Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013] [defendant entitled to conditional summary judgment on its claim for contractual indemnification where the extent of its indemnification depended on the extent to which it was found negligent for plaintiff's injuries]). Since the agreement herein does not require TEC to indemnify MPM and Queens Center for their own negligence (contrary to the contention of MPM and Queens Center), MPM and Queens Center are thus entitled to conditional summary judgment on their contractual indemnification claim against TEC (*See Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]).

III. MOTION TO STRIKE

TEC argues that Macerich failed to comply with the September 2022 stipulation and did not provide either responsive documents or a search affidavit. It contends that it made a good-faith effort to resolve the issue, but received no response from Macerich's counsel, and despite knowing that it owed discovery, Macerich improperly moved for summary judgment. TEC

maintains that Macerich's conduct has been willful and contumacious, thereby warranting the striking of its answer or preclusion at trial (NYSCEF 284).

Macerich asserts that its answer should not be stricken and observes that the documents sought by TEC have no bearing on Macerich's cross-claims for indemnity. In any event, Macerich submits a copy of its responses (NYSCEF 311), and denies that its failure to provide the responses earlier constituted willful and contumacious conduct (NYSCEF 310).

TEC fails to address Macerich's arguments in its reply papers, and it does not deny that it received the required responses from Macerich (NYSCEF 317).

Thus, as it is undisputed that Macerich provided the discovery at issue, TEC's motion to strike and/or preclude is denied.

IV. MOTION FOR LEAVE TO REARGUE

A. Contentions

TEC argues that leave to reargue should be granted as the court overlooked both applicable law and facts. As to the applicable law, TEC contends that Macerich did not establish an absence of triable facts as part of its prima facie case, as it still owed discovery to TEC when the prior motion was decided, and thus could not have negated all factual issues. TEC also maintains that the indemnity provision at issue between it and Macerich is barred by General Obligations Law (GOL) 5-322.1 as it permits indemnity even if Macerich was negligent, and that Macerich's negligence may be inferred by its undisputed failure to provide documents to Apple that would have governed the performance of construction and to supervise, instruct, or control contractors during the construction of the Apple store. TEC further maintains that the court misapprehended the law in failing to apply the "law of the case" arising from the 2019 decision to the November 2022 order, as the 2019 decision denied Macerich's motion "prior to the

completion of discovery," thereby establishing that a subsequent motion should not be considered until the discovery process had ended (NYSCEF 284).

TEC also argues that the court overlooked the fact that the indemnity provision in the contract between it and Macerich is bilateral and that it could have enforced that provision via a summary judgment motion but it was still waiting for discovery from Macerich when Macerich filed its motion. It denies that there is any evidence of its negligence and asserts that, therefore, the only possible negligence was Macerich's, which therefore negated TEC's obligation to indemnify Macerich as doing so would violate the GOL. Finally, TEC argues that the court overlooked the fact there is no evidence of its negligence, that the contract requires arbitration to resolve disputes, and that Macerich could have sought indemnity and a defense from Apple but did not do so, thereby failing to mitigate its damages (*Id.*).

In opposition, Macerich argues that TEC made the same arguments here as it did in opposition to the motion, all of which were considered and rejected. Macerich observes that the "missing" discovery solely consists of documents related to Apple's lease at the premises, and therefore, has no relation to the issue of indemnity between Macerich and TEC. Macerich also denies that the indemnity provision violates GOL 5-322.1 and/or that the law of the case applies and precluded it from seeking summary judgment until all discovery had been exchanged. Macerich further maintains that it is irrelevant whether there is a bilateral indemnity provision or whether TEC was actually negligent, observing that the provision requires indemnity based on plaintiff's allegations that TEC was negligent. Given the provision's language, Macerich maintains, TEC's claim that there is no evidence of its negligence is immaterial. Finally, Macerich urges that TEC's arguments related to arbitration and Macerich's failure to mitigate its

damages should be rejected as TEC failed to raise them in its original opposition and cannot raise them for the first time here (NYSCEF 310).

In reply, Macerich reiterates its arguments (NYSCEF 317).

B. Analysis

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrive at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *lv dismissed and denied* 80 NY2d 1005 [1992]; *see Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

1. Macerich's failure to provide discovery

TEC's argument that Macerich's second motion was premature as Macerich still owed discovery when the motion was made was considered and rejected in the November 2022 order. In any event, TEC did not identify, either on the prior motion or this one, what specific information it needed from Macerich in order to defend against the motion. Moreover, a review of the responses that Macerich provided in March 2023 establishes that nothing therein would have had any bearing on TEC's indemnity obligations. Rather, the responses are related to Apple's tenancy at the premises.

2. GOL 5-322.1

In the November 2022 order, it was determined that the contract between TEC and Macerich did not require TEC to indemnify Macerich for Macerich's own negligence. Indeed, the contract instead explicitly requires Macerich to indemnify TEC for Macerich's "active

negligence or willful misconduct." TEC thus fails to establish that the court overlooked or misapprehended the law as to GOL 5-322.1.

3. Law of the case

The fact that Macerich's first motion was denied as discovery was ongoing and depositions had not yet taken place does not constitute a determination that Macerich was precluded from renewing its motion until all discovery was complete. In any event, it was incumbent upon TEC to establish that there was discovery remaining which prevented it from defending itself against the motion (CPLR 3212[f]), and, to the extent it so alleged, the court found that the argument was meritless.

Moreover, the law of the case is not applicable to discretionary rulings or rulings that are not on the merits, such as when a motion is denied as premature (*see Shatzkin v Vil. of Croton-on-Hudson*, 51 AD3d 903 [2d Dept 2008] [prior order was not law of case as it did not reach merits of motion but rather decided that motions were premature]; *see also Allstate Ins. Co. v Buziashvili*, 71 AD3d 571 [1st Dept 2010] [law of case inapplicable to case management decisions]; *Brothers v Bunkoff Gen. Contrs*, 296 AD2d 764 [3d Dept 2002] [law of case applies solely to questions of law]).

4. Bilateral indemnity clause and evidence of negligence

As plaintiff's allegations that TEC was negligent triggered TEC's duty to indemnify Macerich under the indemnity provision, whether the provision requires bilateral indemnity and whether there is evidence of TEC's negligence are immaterial, and TEC fails to cite any authority related to these issues.

5. Arbitration and failure to mitigate

As TEC failed to set forth arguments related to arbitration or failure to mitigate in its original opposition papers, it may not do so here (*see 388 Realty Owner LLC v Amtrust Intl. Underwriters Ltd.*, 192 AD3d 449 [1st Dept 2021] [defendant improperly advanced new argument in motion for reargument]; *Matter of Setters v AI Props. And Devs. [USA] Corp.*, 139 AD3d 492 [1st Dept 2016] [reargument does not permit party to present new arguments not previously raised]).

V. MOTION FOR SUMMARY JUDGMENT

A. Contentions

TEC argues that it is entitled to summary dismissal of the claims against it as there is no evidence that it had notice of any defect or issue with the elevator, relying on plaintiff's testimony that he never complained about the elevator to anyone while he worked there, and on Macerich's witness, the operations manager of the Queens Center Mall, who testified that any notice of an issue with the elevators would have been given to Macerich but that it had received no such notice, nor had the witness observed any safety issue during his daily walk-throughs of the premises (NYSCEF 284).

Macerich contends that TEC has not demonstrated that it lacked notice of the defective elevator as it did not produce for deposition or submit an affidavit from its full-time mechanic who was assigned to the elevator and who would have personal knowledge of any safety issues involving it. It alleges that TEC also failed to show that it did not create the defect based on its failure to properly maintain the elevator, observing that TEC did not submit an affidavit from the elevator expert who had inspected the elevator on its behalf (NYSCEF 310).

Plaintiff also opposes the motion, arguing that TEC did not meet its prima facie burden of showing an absence of constructive notice as it did not submit proof that it had a regular inspection schedule for the elevator and that it followed the schedule before the accident. The only witness produced by TEC had no knowledge of its duties and responsibilities related to the subject elevator, and the repair records produced by TEC pertained to a different elevator. Plaintiff also asserts that TEC may be held liable under the theory of res ipsa loquitur, which it failed to address or controvert (NYSCEF 315).

In reply, TEC argues that plaintiff misapprehends the caselaw dealing with inspections, and that it submitted sufficient proof of lack of notice through its account history records which do not reflect an issue with the elevator, and through the testimony of plaintiff and Macerich. Moreover, TEC's records showed that it regularly inspected the elevator when performing preventative maintenance on it, and it was unable to produce its mechanic for deposition as he is no longer employed by TEC. It also denies that res ipsa loquitur is applicable as it did not have exclusive control over the elevator and plaintiff's act of walking into the elevator, despite hearing beeps indicating that the gate was about to close, affected the elevator's function (NYSCEF 316).

In reply to Macerich's opposition, TEC argues that Macerich fails to raise a triable issue (NYSCEF 317).

B. Analysis

A defendant moving for summary dismissal in a case involving an alleged dangerous condition on premises establishes prima facie entitlement to dismissal by evidence that it did not have actual or constructive notice of the condition and, therefore, it did not fail to remedy the condition as it had no notice of it. Moreover, "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 Assocs.*, 32 NY2d 553, 559 [1973]).

Here, TEC establishes that Macerich did not have notice of a defect and that plaintiff did not complain about any defect before his accident, but it does not demonstrate that it itself lacked actual or constructive notice. The account history records show only that it made repairs to various elevators at the Mall in 2014 and 2015, but contain no information indicating whether it received a complaint about the elevator at issue before the accident. Nor do the records show that the elevator was regularly inspected and/or maintained. Its witness had no knowledge about TEC's maintenance of elevators at the Mall, and did not know if any work or repairs were done to the elevator before the accident, whether complaints were made about the elevator, or whether there were prior accidents involving the elevator (*see Stewart v World Elev. Co., Inc.*, 84 AD3d 491, 495 [1st Dept 2011] [defendants failed to meet burden as they submitted almost no evidence regarding elevator's maintenance and inspection history, either before or after accident, and witness was not competent to testify about defendants' maintenance and inspection practices; "(a) defendant is not entitled to summary judgment on notice grounds where there is a failure to present sufficient evidence regarding its maintenance procedures in respect of an allegedly malfunctioning elevator"]).

Thus, TEC essentially relies on gaps in plaintiff's and Macerich's proof, which is insufficient to meet its burden (*see eg Pimental v DE Freight LLC*, 205 AD3d 591 [1st Dept 2022] [contractor could be liable for dangerous or defective conditions that it failed to remedy despite having actual or constructive notice of the conditions, and defendant did not establish

prima facie that it lacked constructive notice of defect in truck's lift gate, but rather relied on gaps in proof, which was insufficient]).

Moreover, TEC submitted no evidence showing that the elevator was not defective (*see Kucevic v Three Park Ave. Bldg. Co., L.P.*, 55 AD3d 792 [2d Dept 2008] [elevator company failed to establish entitlement to dismissal as it did not show that elevator was not defective or that it had no actual or constructive notice of defect]).

Also, to the extent that plaintiff has advanced a res ipsa loquitur claim against TEC, TEC does not establish that the claim is inapplicable here (*see Barkley v Plaza Realty Invs. Inc.*, 149 AD3d 74, 77 [1st Dept 2017] [observing that "res ipsa loquitur has frequently been applied in cases involving elevator malfunctions, including those involving doors which unexpectedly closed upon and injured plaintiffs while attempting to enter and exit an elevator"; and finding that res ipsa applied to accident where electric eye or sensor did not detect presence of plaintiff entering and door closed on her]; *see also Lilly v City of New York*, 161 AD3d 461 [1st Dept 2018] [res ipsa loquitur applicable to accident where plaintiff testified that elevator door, which closed by electronic sensors, suddenly and unexpectedly closed on her]). TEC's argument that plaintiff's actions may have affected the functioning of the elevator door raises a factual issue reserved for trial (*see Carter v New York City Hous. Auth.*, 176 AD3d 605 [1st Dept 2019] [malfunctioning elevator doors may give rise to res ipa loquitur claim, and issues related to defendant's control and whether plaintiff's own actions affected instrumentality at issue are for jury to decide]).

For all of these reasons, TEC fails to demonstrate, prima facie, that it may not be held liable for plaintiff's accident. In light of this result, there is no need to consider whether plaintiff and Macerich raised a triable issue.

VII. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant TEC Elevator Corporation's motion is decided as follows:

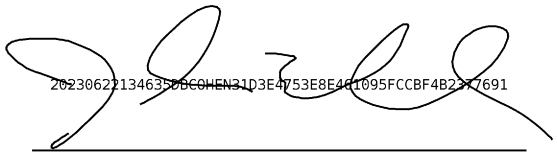
(1) Motion to compel is denied as academic;

(2) Motion for leave to reargue is denied;

(3) Motion for summary judgment is denied;

And it is further

ORDERED, that the parties appear for a settlement/trial scheduling conference on September 27, 2023, at 9:30 am, in person, at 71 Thomas Street, Room 305, New York, New York.



6/22/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE