



Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiff alleges that while moving bins filled with bolts of cloth into a warehouse during the course of his employment with third-party defendant Capital Moving & Storage Co., Inc., he sustained personal injuries when the elevator he was using malfunctioned. The warehouse building was owned by defendant Skillman and leased to two commercial tenants. The portion of the building where the accident occurred, including the subject elevator, was leased to defendant Donghia. An elevator maintenance agreement between Donghia and Thyssen was in effect on the date of the accident.

An out-of-possession owner that has relinquished control over the leased premises and is not obligated under the lease to maintain or repair the premises will not be held liable for injuries that occur on the premises. (See, *Khan v Bangla Motor and Body Shop*, AD3d , 2006 WL 633781, 2006 NY App Div LEXIS 2877; *Knipfing v V & J, Inc.*, 8 AD3d 628 [2004]; *Ingargiola v Waheguru Mgt.*, 5 AD3d 732 [2004].) It is undisputed that Skillman was not contractually obligated to maintain or repair the premises leased to Donghia. Although Skillman retained the right to enter the premises and make repairs at Donghia's expense if Donghia failed to do so, such a reservation of right demonstrates sufficient control to impose liability on an out-of-possession owner for injuries resulting from an unsafe condition on the premises only where the injuries are proximately caused by a significant structural or design defect that violates a specific statutory duty. (See, *Khan v Bangla Motor and Body Shop*, supra; *Sangiorgio v Ace Towing and Recovery*, 13 AD3d 433 [2004]; *Nunez v Alfred Bleyer & Co.*, 304 AD2d 734 [2003].)

Plaintiff has not alleged a specific statutory violation. Moreover, there is no evidence that the alleged dangerous condition in the elevator was a significant structural defect. (See, *Knipfing v V & J, Inc.*, supra; *Sangiorgio v Ace Towing and Recovery*, supra; *Nunez v Alfred Bleyer & Co.*, supra; *Angwin v SRF Partnership, L.P.*, 285 AD2d 570 [2001] *Kilimnik v Mirage Rest.*, 223 AD2d 530 [1996].) Under these circumstances, the part of defendant Skillman's motion that is for summary judgment dismissing the complaint and cross claims asserted against it is granted. The part of Skillman's motion that is for relief in the alternative is denied as academic.

The cross motion by defendant Donghia is denied. Pursuant to the terms of the lease it entered into with Skillman, and as lessee in possession and control of the subject portion of the

premises, Donghia had a contractual and common-law obligation to maintain and repair the leased premises including, specifically, the elevator. (See, *Putnam v Stout*, 38 NY2d 607 [1976]; *Zuckerman v State of New York*, 209 AD2d 510 [1994]; cf., *Rosen v Long Is. Greenbelt Trail Conference*, 19 AD3d 400 [2005].) Contrary to Donghia's contention, its liability is not solely dependent upon proof of its notice of the defective condition and its failure to notify Thyssen to correct it. Rather, Donghia could also be held vicariously liable for the negligence of Thyssen. (See, *Rosenberg v Equitable Life Assur. Socy.*, 79 NY2d 663, 668 [1992]; *Rogers v Dorchester Assocs.*, 32 NY2d 553 [1973]; *Sirigiano v Otis Elev. Co.*, 118 AD2d 920 [1986].) Furthermore, defendant Donghia has failed to satisfy its initial burden of demonstrating, prima facie, that it did not have actual or constructive knowledge of the alleged defect. (See, *Gilbert v Kingsbrook Jewish Ctr.*, 4 AD3d 392 [2004]; cf., *Carrasco v Millar El. Indus.*, 305 AD2d 353 [2003].) In any event, the proof submitted by plaintiff is sufficient to raise an issue of fact as to the issue of notice and as to the applicability of the doctrine of res ipsa loquitur. (See, *Hall v Barist El. Co.*, 25 AD3d 584 [2006]; *Gurevich v Queens Park Realty Corp.*, 12 AD3d 566 [2004]; *Carrasco v Millar El. Indus.*, supra.)

The cross motion by Thyssen is denied as untimely. (CPLR 3212[a].) The note of issue herein was filed on March 25, 2005, and the cross motion was not made until August 31, 2005. The cross motion, thus, was not made within 120 days after the filing of the note of issue as required by CPLR 3212(a), and Thyssen did not seek leave of court to make a late application upon a showing of good cause for the delay. (See, *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 (2004); *Thompson v Leben Home for Adults*, 17 AD3d 347 [2005].)

Dated: April 25, 2006

J.S.C.