

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32720  
O/ct

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 6, 2011

DANIEL D. ANGIOLILLO, J.P.  
JOHN M. LEVENTHAL  
LEONARD B. AUSTIN  
SHERI S. ROMAN, JJ.

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2010-08638  
2011-00790  
2011-01594

DECISION & ORDER

Tyrone Forde, appellant, v Vornado Realty Trust,  
et al., respondents, et al., defendants.

(Index No. 38247/07)

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Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac and Michael H. Zhu], of counsel), for appellant.

Geringer & Dolan, LLP, New York, N.Y. (John A. McCarthy and John T. McNamara of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Schack, J.), dated August 9, 2010, which granted the motion of the defendants Vornado Realty Trust, 731 Commercial LLC, and Otis Elevator Company for summary judgment dismissing the complaint insofar as asserted against them, (2) a resettled order of the same court dated September 27, 2010, and (3) a judgment of the same court dated December 20, 2010, which, upon the order and the resettled order, is in favor of the defendants Vornado Realty Trust, 731 Commercial LLC, and Otis Elevator Company and against him dismissing the complaint.

ORDERED that the appeals from the order and the resettled order are dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

November 1, 2011

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ORDERED that one bill of costs is awarded to the respondents.

The appeal from the intermediate order and the resettled order must be dismissed, because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeals from the order and the resettled order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

The respondents met their prima facie burden of demonstrating their entitlement to judgment as a matter of law by presenting evidence, in the form of an expert affidavit and deposition testimony of eyewitnesses, that the subject elevator stopped because of a blown fuse, that they lacked notice of a similar recurring problem with the subject elevator, and that the plaintiff's allegations as to how the incident occurred were physically and mechanically impossible (*see Hardy v Lojan Realty Corp.*, 303 AD2d 457; *Braithwaite v Equitable Life Assur. Socy. of U.S.*, 232 AD2d 352, 353; *Koch v Otis El. Co.*, 10 AD2d 464, 466; *see also Rogers v Dorchester Assoc.*, 32 NY2d 553, 559; *Stewart v World El. Co., Inc.*, 84 AD3d 491, 495; *Cilinger v Ardit Realty Corp.*, 77 AD3d 880, 882-883; *Levine v City of New York*, 67 AD3d 510; *Talapin v One Madison Ave. Condominium*, 63 AD3d 909, 910-911; *Fyall v Centennial El. Indus., Inc.*, 43 AD3d 1103, 1104; *Gjonaj v Otis El. Co.*, 38 AD3d 384, 385; *Vale v Poughkeepsie Galleria Co.*, 297 AD2d 800, 801). In opposition, the plaintiff failed to raise a triable issue of fact. The affidavit of the plaintiff's expert was speculative, lacking in foundation, and insufficient to raise a triable issue of fact (*see Cilinger v Ardit Realty Corp.*, 77 AD3d at 882-883; *Haynes v Estate of Goldman*, 62 AD3d 519, 521; *Santoni v Bertlesmann Prop., Inc.*, 21 AD3d 712, 715; *Vale v Poughkeepsie Galleria Co.*, 297 AD2d at 801; *Skidd v JW Marriot Hotels & Resorts*, 2010 WL 2834890, 2010 US Dist Lexis 68698 [SD NY 2010]; *cf. Stewart v World El. Co., Inc.*, 84 AD3d at 494).

The plaintiff could not rely on the doctrine of *res ipsa loquitur*, as he failed to demonstrate "that the [accident] was one that would not ordinarily occur in the absence of someone's negligence" (*Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 721; *see Cilinger v Ardit Realty Corp.*, 77 AD3d at 883; *Hardy v Lojan Realty Corp.*, 303 AD2d at 457).

The parties' remaining contentions either need not be addressed in light of our determination or are without merit.

ANGIOLILLO, J.P., LEVENTHAL, AUSTIN and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan  
Clerk of the Court