

**Matter of Magnani v 1472 Broadway, Inc.**

2007 NY Slip Op 30994(U)

April 24, 2007

Supreme Court, New York County

Docket Number: 0114664/2003

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART \_\_\_\_\_

Index Number : 114664/2003

INDEX NO. \_\_\_\_\_

MAGNANI, GREGORY

MOTION DATE \_\_\_\_\_

vs

1472 BRADWAY

MOTION SEQ. NO. \_\_\_\_\_

Sequence Number : 003

MOTION CAL. NO. \_\_\_\_\_

SUMMARY JUDGMENT

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED**

**IN ACCORDANCE WITH A COMPANING MEMORANDUM DECISION**

**FILED**

APR 27 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/24/07

WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
GREGORY MAGNANI and TINA MARIE MAGNANI

Plaintiffs,

-against-

Index No. 114664/2003  
Mtn. Seq. 003

1472 BROADWAY INC., 500 FIFTH AVENUE, INC., and  
JGS ADVISORS, LLC

Defendants.

-----X  
500 FIFTH AVENUE, INC., formerly incorporated as  
1472 BROADWAY INC., and JGS ADVISORS, LLC

Third-Party Plaintiffs,

-against-

NEW YORK ELEVATOR & ELECTRICAL CORPORATION  
d/b/a and a/k/a NEW YORK ELEVATOR COMPANY, INC.,

Third-Party Defendants

-----X

**TOLUB, J.:**

By this motion Third Party Defendant New York Elevator & Electrical Corp, d/b/a New York Elevator Company, Inc., (NYEC) seeks and order dismissing the Plaintiff's complaint and Defendant/Third Party Plaintiff's third-party complaint in their entirety. Defendants 500 Fifth Avenue, Inc., formerly incorporated as 1472 Broadway, Inc., and JGS Advisors, LLC, cross-move for summary judgment pursuant to CPLR §3212 against Plaintiff and Third Party Defendant NYEC for contractual and common law indemnification.

**FILED**  
APR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

## FACTS

This is an action to recover damages for personal injuries sustained by the Plaintiff on August 28, 2002. Plaintiff claims he was injured when he entered freight elevator #19 at 500 Fifth Avenue New York and was hit by a descending elevator gate. Plaintiff's shoulder and neck were injured as a result of the gate hitting him. At the time of Plaintiff's incident, 500 Fifth Avenue was owned by 500 Fifth Avenue, Inc., (formerly incorporated as 1472 Broadway Inc.,) and JGS Advisors LLC served as the owner's agent. NYEC maintained the elevator in question pursuant to a full service maintenance contract dated May 11, 1995.

## DISCUSSION

NYEC's motion for summary judgment is denied. Summary judgment is drastic remedy since it deprives the litigant of his day in court and should not be employed if there is any doubt that a triable issue of fact exists. (Andre v. Pomerov, 35 NY2d 361 [1974]). The requirements of the rule must be strictly complied with and, where the issue is arguable, summary judgment should be denied. (Bakerian v. Horn, 21 AD2d 714 [3<sup>rd</sup> Dept 1964]).

A landowner is under a duty to maintain its property in a reasonably safe condition. In order to recover damages for an alleged breach of this duty, Plaintiff must demonstrate that the landlord created, or had actual or constructive notice, of the hazardous condition which precipitated the injury. (Piacquadio v. Recline Realty Corp., 84 NY2d 967 [1994]; Laventure v. McKay, 266 AD 516 [2d Dept 1999]). Defendants argue that there was no defective condition in the elevator and, in the event that there was a defect, that Defendants had no notice of any defective condition. Plaintiff argues that Defendants had constructive and actual notice because there were ongoing problems with that elevator. A review of the affidavits submitted by the

parties makes it evident that there are issues of fact precluding summary judgment.

Defendants 500 Fifth Avenue and JGS's cross-motion for summary judgment against NYEC for common law and contractual indemnification is granted. NYEC argues, inter alia, that the cross-motion for indemnification should be denied as premature. NYEC acknowledges that it was responsible for maintaining and repairing the subject elevator pursuant to a contract that was in effect on the date of the incident. (Rosen Aff. para. 6; NYEC Ex. E).

The contract sets forth in section 3.1 that:

Contractor shall indemnify, defend and hold harmless Owner and Newmark and all partners, officers, directors, shareholders, trustees, employees and agents of the foregoing (individually referred to as '**Indemnified Party**' or collectively referred to as '**Indemnified Parties**'), from and against all liabilities, claims, suits, losses, damages, fines, judgments and settlements, including legal and professional costs and fees, arising out of, or in connection with, any act or omission, breach of performance of the Contractor, its agents, servants, employees, sub-contractors, or independent contractors, and any defects of workmanship or materials, The [sic] aforesaid indemnity, defend and hold harmless includes acts of Contractor for which Indemnified Parties are vicariously responsible because of a non-delegable statutory duty and shall not be affected by any partial negligence by an Indemnified Party. This Article shall survive the termination and expiration of this Agreement.

Pursuant to this agreement, NYEC would perform monthly maintenance, service and repair work on the elevators located at 500 Fifth Avenue. NYEC was responsible for periodic maintenance of the elevator and performing repair services on the elevator. Under New York law, in cases involving elevator accidents, the owner and managing agent of a building are entitled to common law and contractual indemnification from an elevator company with a full service agreement. (Rogers v. Dorchester Associates, et.al., 32 NY2d 553 [1973]; Mas v. Two

Bridges Associates, 75 NY2d 680 [1990]). Furthermore, where an elevator company assumes the contractual duty to maintain the elevators and there has been no showing of active negligence on behalf of the owner, the owner may be granted summary judgment on its cross-claim for indemnification in advance of any factual determination that the elevator company was negligent. (Ortiz v. Fifth Avenue Building Associates, et.al., 251 AD2d 200 [2d Dept 1998]; Reiff v. PS Marcato Elevator Company., Inc., 799 NYS2d 163 [3d Dept 2004]). It follows that 500 Fifth Avenue and JGS are entitled to contractual and common law indemnification.

Accordingly it is

ORDERED that Third-Party Defendant motion for summary judgment is denied; and it is further

ORDERED that Defendants'/Third-Party Plaintiffs' cross-motion for indemnification is granted.

Counsel for the parties are directed to appear for mediation on 5/21/07 as scheduled.

This constitutes the decision and judgment of this court.

Dated: 4/24/07

**FILED**  
 APR 27 2007  
 ENTER: COUNTY CLERK NEW YORK  
 WALTER B. TOLSON, J.S.C.  
 COUNTY CLERK'S OFFICE