

**Arrington v City of New York**

2007 NY Slip Op 31827(U)

June 20, 2007

Supreme Court, New York County

Docket Number: 0106541/2004

Judge: Eileen A. Rakower

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: RAKOWER  
Justice

PART 5

Index Number : 106541/2004

ARRINGTON, JAMES

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

PAPERS NUMBERED

1  
2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED  
JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 6/20/07

EILEEN A. RAKOWER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
JAMES ARRINGTON,

Plaintiff,

Index No.  
106541/04

- against -

Decision and  
Order

THE CITY OF NEW YORK and AL'AN ELEVATOR  
CORPORATION,

**FILED**  
JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he fell into an elevator shaft at the Coler/Goldwater Specialty Hospital on Roosevelt Island in the City and Sate of New York on August 5, 2003. Al'an Elevator Corporation ("Al' an") moves for summary judgment pursuant to CPLR 3212 seeking to dismiss all claims and cross claims as against it. The City of New York ("City") cross moves to dismiss based on plaintiff's failure to file a timely notice of claim. City moved for similar relief, and the motion was denied without prejudice by Order dated March 31, 2006, inasmuch as plaintiff's attorney represented to Justice Michael Stallman that the action was stayed by plaintiff's bankruptcy proceeding. This Court has been unable to discover a stay. Rather, U.S. Bankruptcy Judge Dennis E. Milton issued an Order dated March 2, 2006, directing the retention of special personal injury counsel for the trustee to pursue this claim. City and Al' an served Katz & Kern, LLP, who was named to represent the Chapter 7 Trustee for the Bankruptcy Estate. Plaintiff files no papers in opposition to either the motion or the cross motion.

Al'an, in support of its motion, provides the pleadings, plaintiff's verified bill of particulars, relevant portions of the contract between the New York City Health and Hospitals Corporation and Al'an, the affidavit of Al'an's president and sole shareholder, Anthony DiNapoli, the customer leger and corresponding invoices

relevant to the issues here, and the affidavit of its President of Field Operations, Richard Gaudio. Al'an asserts it only provided emergency and major elevator repair service at the Coler/Goldwater Memorial Hospital, and had no contract to provide routine or regular elevator inspection and maintenance. Indeed, it did not perform such services at the hospital prior to this incident. The first time it performed work under the contract on the elevator at issue was on August 7, 2003, according to Mr. DiNapoli. Mr. Gaudio confirms that the work under the contract was to be done "only when requested to do so by the hospital and when provided a work order therefore." He outlines with the work orders and a customer ledger what, if any, service calls Al'an made under the contract. He concludes that Al'an was contacted on August 6, 2003 regarding the subject freight elevator, one day after plaintiff's fall.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970). *Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890.) *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 (1st Dept. 1989). The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)

Al'an has made a prima facie showing that it was not responsible for the routine maintenance and repair of the subject elevator, and that it had not worked on the subject elevator prior to plaintiff's fall. Plaintiff fails to provide opposition, demonstrating by proof in admissible form that an issue of fact remains. City also files no opposition to the relief sought.

City asserts that the 90 day period within which to file a notice of claim expired on November 3, 2003, and the notice of claim here was filed on November 5, 2003. Additionally, since the statute of limitations has expired, plaintiff cannot move to

extend the time and/or accept the filing nunc pro tunc.

General Municipal Law §50(e) requires the filing of a notice of claim within 90 days after the claim arises as a condition precedent to maintaining an action against a municipality. The court has discretion to grant leave to file a late notice of claim. However, "a Court is precluded from granting such an application when permission is sought after the Statute of Limitations has run." (*Davis v. City of New York*, 250 A.D.2d 368 [1<sup>st</sup> Dept. 1998]). The Statute of Limitations expired one year and ninety days after the action accrued.

Wherefore, it is hereby

ORDERED that Al'an's motion for summary judgment dismissing all claims and cross claims as against it is granted, and the Clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED that City's cross motion to dismiss for failure to file a timely notice of claim is granted, and the Clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: June 20, 2007



EILEEN A. RAKOWER, J.S.C.

**FILED**  
JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE