| **Francklin v New York El. Co., Inc.** |
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| 2007 NY Slip Op 32055(U) |
| July 2, 2007 |
| Supreme Court, New York County |
| Docket Number: 0102336/2005 |
| Judge: Joan Madden |
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SCANNED ON 7/9/2007

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

**PRESENT:** Hon Joan A. Madden
*Justice*

**PART** 11

Index Number : 102336/2005
FRANCKLIN, GERALD
VS
NEW YORK ELEVATOR
Sequence Number : 002
SUMMARY JUDGMENT

**INDEX NO.**
**MOTION DATE** 4-19-07
**MOTION SEQ. NO.**
**MOTION CAL. NO.**

**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 the annexed Memorandum, Decision & Order.

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

FILED
JUL 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 2, 2007

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: IAS PART 11

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GERALD FRANCKLIN AND SUZETTE FRANCKLIN, Index No: 102336/05

Plaintiffs,

-against-

NEW YORK ELEVATOR COMPANY, INC.,

Defendant.

----------------------------------------------------------------------X

FILED JUL 09 2007 NEW YORK COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this personal injury action, defendant moves for summary judgment dismissing the complaint against it, and plaintiff opposes the motion. For the reasons set forth below, the motion is denied.

**Background**

Plaintiff Gerald Francklin seeks damages for personal injuries he allegedly sustained on March 25, 2004, while he was beginning his work shift at the Le Parker Meridien Hotel ("Hotel") when the elevator ("elevator #10") he entered suddenly dropped, causing him to fall and land on his left leg. Defendant New York Elevator Company had an exclusive contract to maintain and repair the elevators at the Hotel, including elevator #10.[1]

At his deposition, Plaintiff testified that at approximately 8:00 am on March 25, 2004, he was entering elevator #10 at the cellar level of the Hotel when it suddenly dropped by about eight to ten inches. (Plaintiff dep. at 158). Plaintiff further testified that as he stepped into the elevator, the floor was not where it was supposed to be, causing him to land on his left leg. (Id. at 259, 217). According to plaintiff, once he was in the elevator, it continued rocking for some time and then moved up to the first floor, where he exited the elevator as fast as he could. (Id. at

[1] Neither party has submitted the elevator maintenance contract as evidence. However, it appears from the record that defendant was the exclusive company maintaining the elevator at the Hotel.

267, 275). Plaintiff testified that after leaving the elevator, he went to report the incident to his boss. (Id. at 276). Another Hotel employee, Hernane Llorca ("Llorca"), was in elevator #10 during the entire incident. (Id. at 215).

At his deposition, Llorca, who worked as a refrigeration and air-conditioning mechanic at the Hotel, testified that he was already inside of elevator #10 when plaintiff entered at the cellar level and that the floor of elevator #10 was approximately eight to ten inches below the level of the hallway floor when plaintiff entered it. (Llorca dep. at 11, 13). At his deposition, Llorca watched a video taken from the elevator #10 surveillance camera, confirmed that the video depicts the incident in question, and again testified that the floor of elevator #10 was eight to ten inches below the hallway floor at the time of the incident. (Id. 18-19, 21).

In discovery, defendant provided to plaintiff a work ticket from September 26, 2003, stating that elevator #10 was "coming in a foot high." (Plaintiff's Exhibit F).

In support of its motion for summary judgment, defendant offers the affidavit of its expert, Nickolas Ribaudo ("Ribaudo"), to counter plaintiff's version of the incident. Ribaudo has worked for approximately 40 years in the elevator maintenance trade, with extensive experience as an engineer, manager, and consultant. After reviewing the discovery materials and examining elevator #10, Ribaudo opined that while elevator #10 did not perform to "absolute perfection" at the time of the incident, elevator #10 also did not perform in "any defective or improper manner." According to Ribaudo, elevator #10 misleveled by one inch, which he opined is within the acceptable leveling parameters established by the elevator maintenance trade and adopted by

the New York City Administrative Code ("Code"). (Ribaudo aff. at 6). Ribaudo further opined that it is "physically, mechanically, and scientifically not possible" for elevator #10 to have dropped eight to ten inches during the incident and that this drop would have caused significant damage to the control valve or the hydraulic cylinder, which would have required an extensive repair before elevator #10 could run again and none of this damage occurred. (Id. at 7).

Defendant also relies on the deposition testimony of James Brennan ("Brennan"), a retired mechanic for defendant, who was assigned to maintain the elevators at the Hotel at the time of the incident. Brennan testified that he first learned of the incident involving plaintiff from a Hotel security officer, who told him that someone tripped because elevator #10 was not leveling properly. (Brennan dep. at 9, 20). Brennan testified that he proceeded to ride elevator #10 to visually check for leveling problems and that after a few trips up and down, he could not find anything wrong with elevator #10 and left it in service. (Id. at 24, 25). Brennan further testified that on the day of the incident, a security officer showed him the surveillance video taken from elevator #10 and that he recalled that elevator #10 appeared to be an inch below the cellar floor. (Id. at 27). After watching the surveillance video at his deposition, Brennan restated his opinion that elevator #10 appeared to be level with the cellar floor and then dropped an inch just before plaintiff entered. (Id. at 73, 78). Brennan could not remember whether he checked the leveling device for elevator #10 on the day of the incident. (Id. at 107). However, there is a work ticket from March 25, 2004 where Brennan indicated that elevator #10 was "off level" and that he adjusted the leveling to resolve the problem.

At his deposition, Brendan McDonough ("McDonough"), director of Hotel security, testified that the floor of elevator #10 was "no more than a couple of inches" below the hallway

floor, based on his recollection of the surveillance video. (McDonough dep. at 23). McDonough also testified that the Hotel maintains an elevator breakdown log to document complaints and that there is a log entry from March 25, 2004 at 3:08 am, stating that elevator #10 "consistently stops 1-12 inches below on [cellar] level[2]." (Id. at 54, 65).

Defendant moves for summary judgment dismissing the complaint on the grounds that it did not have notice of the alleged defect and that any alleged defect was an inch or less, which it claims is an acceptable tolerance under the Code, and not eight to ten inches as claimed by plaintiff. Defendant also argues that the alleged defect was not a proximate cause of plaintiff's injuries.[3] In support of its motion, defendant relies on Ribaudo's affidavit, Brennan's deposition, and plaintiff's medical records, indicating that plaintiff had knee and back injuries before the incident.

In opposition, plaintiff contends that defendant had notice of the alleged defect based on defendant's work ticket from September 26, 2003. Plaintiff also submits an affidavit from former Hotel engineering supervisor, David Berkowitz ("Berkowitz"), as additional proof of notice. Berkowitz states that on March 22, 2004 (i.e. three days before the incident), he "personally observed elevator #10 fail to level properly when stopped at the cellar." According to Berkowitz, there was a "drop of approximately one and a half inches from the cellar floor to the elevator floor." Berkowitz states that he "considered the improper leveling of elevator #10 to be unsafe" and had the elevator removed from service, and that it was his "custom and practice

[2] The record does not contain any documentary evidence of the log entry.

[3] Defendant also argues that the doctrine of *res ipsa loquitor* is not applicable. As plaintiff does not respond to this argument and as the negligence claim is sufficient to survive defendant's summary judgment motion without the doctrine, its applicability will not be addressed.

to notify [defendant] whenever an elevator was removed from service for safety reasons, so that appropriate action to resolve any problem that may exist could be taken." .

In addition to his own testimony, plaintiff relies on the deposition testimony of Llorca and McDonough to counter the defendant's arguments that elevator #10 did not mislevel eight to ten inches and that plaintiff's claim is based on speculation. Plaintiff also relies on defendant's work ticket from the day of the incident to indicate that there was a leveling problem with elevator #10. Plaintiff further argues that his medical records do not preclude a jury from finding that his injuries were proximately caused by the defective elevator.

**Discussion**

On a motion for summary judgment, the proponent must "make a prima facie showing of entitlement to judgment as a matter of law" by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once the proponent has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that triable issues of fact exist. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"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 Associates, 32 NY2d 553, 559 (1973); citing Smith v. Jay Apts., 33 AD2d 624 (1969), appeal denied, 26 NY2d 609 (1970); see 50 NY Jur. 2d Elevators and Escalators S. 31 (2007). "[C]ircumstantial evidence will suffice to support an inference of negligence where the

defendant company has 'exclusive control' of elevator maintenance." Karian v. G&L Realty, LLC, 32 AD3d 261, 263 (1st Dept. 2006) (quoting Rogers, 32 NY2d at 561).

Here, assuming *arguendo* that the expert affidavit and Brennan's testimony were sufficient to establish prima facie proof that elevator #10 was not defective as it misleveled only by an inch and/or that defendant had no actual or constructive notice of any alleged defect, (see Aquila v. Nathan's Famous, Inc., 284 AD2d 287 (2001); citing Maldonado v. Su Jong Lee, 278 AD2d 206 (2000)), summary judgment is not appropriately granted as plaintiff has met his burden of presenting proof controverting this showing.

With respect to notice, defendant's work ticket from September 26, 2003, stating that elevator #10 was "coming in a foot high," together with the statements by the Hotel's former engineering supervisor, Berkowitz, that three days prior to the incident elevator #10 was not leveling properly, and he had it removed from service, and the testimony regarding the Hotel log entry made at 3:08 a.m. are sufficient to raise a triable issue of fact as to whether defendant, as the party in exclusive control of elevator maintenance, knew or should have known of a leveling problem with elevator #10. See Rogers, 32 NY2d at 557 (1973) (in which the Court reinstated judgment against elevator maintenance company, noting that "[t]here was evidence that the door had malfunctioned during the six months preceding the accident from which the jury might infer that the elevator company negligently performed its undertaking to repair and maintain the elevator"); Giambrone v. New York Yankees by Steinrenner, 181 AD2d 547, 548 (1st Dept 1992) ("Only where the record is 'palpably insufficient' to establish ... notice 'that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it' can it be said that there is no factual issue to submit to the

trier of fact") (quoting Lewis v. Metropolitan Trans. Auth., 99 AD2d 246, 251 (1st Dept 1984) aff'd 64 NY2d 670 (1984)). In the present case, plaintiff meets his burden of showing that there is a triable issue of material fact with regard to notice.

Next, plaintiff has submitted sufficient evidence to controvert any showing by defendant that elevator #10 was not defective, including his deposition testimony and the testimony of the sole eyewitness to the incident, Llorca, that at the time of the incident, elevator #10 dropped eight to ten inches below the hallway floor. Notably, this testimony is consistent with testimony of McDonough, the director of Hotel security, that a Hotel log entry from the day of the incident, indicated that elevator #10 "consistently stops 1-12 inches below on [cellar] level." Moreover, contrary to defendant's argument, plaintiff is not required to present expert evidence to contradict the opinion of defendant's expert, and none of the cases cited by defendant establish that expert evidence is a requirement. Braithwaite v. Equitable Life Assurance Society of the U.S., 232 AD2d 352 (2nd Dept 1996) (granting summary judgment for defendant when plaintiff changed his story of the alleged incident and offered no other evidence to counter the testimony of defendant's three expert witnesses); Hardy v. Lojan Realty Corp., 303 AD2d 457 (2nd Dept 2003) (affirming summary judgment for defendant when plaintiff failed to submit evidence in an admissible form to counter defendant's prima facie showing that the elevator functioned properly).

Furthermore, unlike the cases relied on by defendant, plaintiffs' version of the event is supported by various evidence including eyewitness testimony and, thus, it cannot be said that plaintiff's claim is based on speculation. Compare Williams v. Port Authority of New York & New Jersey, 247 AD2d 296 (1st Dept 1998) (granting summary judgment for defendant when

plaintiff offered only her account of the incident to counter defendant's supervisor and expert); Digelormo v. Weil, 260 NY 192 (1932) (holding defendant not liable for the death of a boy, who was crushed by an elevator, since the cause of the of the accident was unknown).

Finally, contrary to defendant's argument, the record here is sufficient to raise a factual question as to whether the alleged defect was the proximate cause of plaintiff's injuries and/or aggravated any preexisting injuries. See generally Febesh v. Elcejay Inn Corp., 157 AD2d 102 (1st Dept 1990).

In view of the above, it is

ORDERED that defendant's motion for summary judgment is denied, and it is further

ORDERED that a pretrial conference will be held in Part 11, Room 351, 60 Centre Street, New York, NY on July 12, 2007 at 2:30 pm.

DATED: ~~June~~ July 2 2007

J.S.C.

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