

Werner v Treeline 400 GCP, LLC

2008 NY Slip Op 30190(U)

January 15, 2008

Supreme Court, New York County

Docket Number: 0104071/2007

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 104071/2007

WERNER, LAURIE

INDEX NO. 104071/07

vs

TREELINE 400 GCP, LLC

MOTION DATE

Sequence Number : 001

MOTION SEQ. NO. 001

CHANGE VENUE

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits A-E
Cross-Motion of Treeline 400 GCP, LLC, Affidavit
Answering Affidavits + Exhibits A-C
Answering Affidavit, ex. A + B
Replying Affidavits

1
2
3
4
5
6
7

Cross-Motion of Otis Elevator Co., Affs., Exh. A-N
Answering Aff., Replying Aff., Exh. A

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

Dated: January 15, 2008

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
LAURIE WERNER,

Plaintiff-,

-against-

TREELINE 400 GCP LLC, OTIS ELEVATOR
COMPANY and KONE, INC.,
Defendants.

Index No. 104071/07

DECISION AND ORDER

-----X
TREELINE 400 GCP LLC,

Third Party Plaintiff,

-against-

KONE, INC.,

Third Party Defendant.
-----X

SHULMAN, MARTIN, J:

In this personal injury action, defendant-third party defendant Kone, Inc. ("Kone") moves, pursuant to CPLR 511, to change the venue of this action from New York County to Nassau County. Defendant-third party plaintiff Treeline 400 GCP LLC ("Treeline") cross moves for the same relief. Defendant Otis Elevator Company ("Otis") cross moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint ("complaint") and all cross claims against it.

Plaintiff, Laurie Werner, a resident of Nassau County, alleges that she was injured on December 6, 2004, when she tripped getting into a misleveled elevator at 400 Garden City Plaza ("the building"), in Garden City, New York. Defendant Treeline purchased the building from the prior owner in March, 2004 and it is undisputed that, on the date of the alleged accident, Kone, not Otis, was the company under contract with

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Treeline to provide elevator maintenance service at the building. It is also undisputed that defendant Otis, which had been under contract with the prior building owner, had not provided elevator maintenance service at the building since April, 2004, eight (8) months prior to plaintiff's alleged accident. Moreover, Otis did not manufacture or install the elevators at the building.

Plaintiff bases venue in New York County on her allegation that Otis's principal place of business is located in New York County. Plaintiff has not identified any other nexus to New York County, and thus, if the court grants summary judgment dismissing the amended complaint and cross claims as against Otis, the court must also grant the motion and cross motion to change venue to Nassau County. Accordingly, the court will consider Otis's cross motion for summary judgment before addressing the venue motions.

SUMMARY JUDGMENT

"Where there is no genuine issue to be resolved at trial, the case should be summarily decided . . ." *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005). The movant's failure to make a prima facie showing, requires denial of the motion regardless of the sufficiency of the opposing papers. *Id.* However, if the movant makes such a showing, the burden shifts to the non-movant to demonstrate the existence of factual issues requiring trial. *Dallas-Stephenson v. Waisman*, 39 A.D.3d

303, 306 (1st Dept., 2007). Summary judgment is appropriate where the non-movant's opposition to the motion is entirely conjectural and there is no genuine issue of fact to be resolved. See, *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 207 (1975).

Here, Otis has made a prima facie showing that it is entitled to judgment as a matter of law. The evidence reveals that Otis did not manufacture or install the elevators in the building (Silvergleid Aff., Ex. G) and that it had not provided maintenance for the elevators since April 2004, a full eight (8) months before plaintiff's alleged accident. Otis has fully responded to plaintiff's discovery requests by producing maintenance and repair records for the elevators in the building for January through April, 2004 (Silvergleid Aff. Ex. N) and submitting an affidavit of an Otis employee with personal knowledge of the relevant facts and circumstances (Silvergleid Aff., Ex. G). Plaintiff has failed to come forward with any evidence to defeat Otis's motion and her mere speculation that misleveling "may have been a recurring problem" prior to the date Otis was terminated or that the misleveling on December 4, 2004 may have resulted from a repair that Otis made more than eight (8) months before the alleged incident is insufficient to overcome Otis's prima facie case that establishes that it had no duty to provide elevator services at the building on the date of the alleged accident and that Otis did not perform work or service of any kind on the elevators from April, 2004 up to and including the date of the alleged accident. *Pluhar v. Town of Southampton*, 29 A.D.3d 975 (2nd Dept., 2006) ("Mere speculation as to the cause of [the accident] is insufficient").

In *Karian v. G & L Realty, LLC*, 32 A.D.3d 261, 264 (1st Dept., 2006), plaintiff also claimed that she was injured because of a misleveled elevator. In that case, even

though the defendant elevator company's service contract had been terminated less than one month prior to the accident, the First Department granted summary judgment in the elevator company's favor, stating:

In order to defeat a well-supported summary judgment motion by an elevator maintenance company whose responsibility ceased prior to the accident, a plaintiff must be able to point to specific evidence from which it may be reasonably inferred that such company, while its contract was in effect, was negligent in the discharge of its duties, and that such negligence was causally related to the plaintiff's accident. Here, plaintiff, who fails to offer any explanation for the cause of her accident, points to no such evidence.

See also, Samanski v. Otis Elevator Co., 216 A.D.2d 376 (2nd Dept., 1995) (summary judgment granted where defendant submitted proof that it did not have control over or connection with the allegedly defective elevator for many years); *Quiles v. New York City Housing Authority*, 97 A.D.2d 505 (2nd Dept., 1983); *McMurray v. P. S. Elevator, Inc.*, 224 A.D.2d 668 (2nd Dept., 1996), *lv to app den* 88 N.Y.2d 811 (absent a service contract an elevator company is not deemed to be in control of an elevator).

Plaintiff's argument that the summary judgment motion is premature is without merit. Otis has responded to all of plaintiff's discovery requests and produced all the relevant evidence that is within its exclusive control. As the First Department stated in *Voluto Ventures, LLC v. Jenkins & Gilchrist Parker Chapin LLP*, 44 A.D.3d 557 (1st Dept., 2007):

To avail oneself of CPLR 3212(f) to defeat or delay summary judgment, a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or

conjecture, and that the party at least has made some attempt to discover facts at variance with the moving party's proof. [Plaintiff] has failed to demonstrate that necessary diligence.

Here, as in *Voluto Ventures, LLC*, plaintiff has failed to demonstrate that she made any attempt to discover facts that are at variance with the moving party's proof. Plaintiff has not obtained discovery from defendants Treeline or Kone and it is has not provided witness statements or an expert affidavit in opposition to Otis's motion. Accordingly, Otis's motion for summary judgment is granted in its entirety.

CHANGE OF VENUE

Because the court has dismissed the complaint as against Otis, the motion to change the venue of this action is also granted since Otis's alleged principal place of business was plaintiff's only nexus to New York County.¹ In *Avery v. Williams*, 244 A.D.2d 271 (1st Dept., 1997) the court held that a motion to change venue was properly granted where, as here, the accident did not occur in the county where the action was brought; none of the parties resided in the county where the action was brought; and there was no claim that any of the witnesses lived there or that plaintiff received any medical treatment there.

Accordingly, it is ORDERED that the branch of Otis's cross motion seeking dismissal of the complaint as against it is granted, and the Clerk is directed to enter judgment accordingly; and it is further

¹ It should be noted that plaintiff's own proof (Goldklang Aff., Ex. B), a printout from the New York State Department of State, Division of Corporations, reveals that Otis has named Westchester as its county of designation. See, *Job v. Subaru Leasing Corp.*, 30 A.D.3d 159 (1st Dept., 2006). Otis's only connection to New York County is that its agent for service of process is located here.

ORDERED that the action is severed and continued as to the remaining defendants; and it is further

ORDERED that the branch of Otis's cross motion seeking dismissal of all cross claims against it is granted without opposition; and it is further

ORDERED that the motion and cross motion seeking to change the venue of this action is granted; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Nassau, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Nassau upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
January 15, 2008



HON. MARTIN SHULMAN, J.S.C.

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