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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 103034/2010

DELACRUZ, FATIMA

INDEX NO. 103034/10

VS

N.Y. PALACE HOTEL

MOTION DATE

Sequence Number : 004

MOTION SEQ. NO. 004

SUMMARY JUDGMENT

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 7/11/11

HON. EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

FATIMA DE LA CRUZ,

Plaintiff,

Index No.
601197/10

- against -

Decision and
Order

NEW YORK PALACE HOTEL, DORCHESTER SERVICES, INC., ALLSTATE OVERHEAD GARAGE DOORS, INC., ACME ROLLING STEEL DOOR, CORP. ARCHDIOCESE OF NEW YORK, MICHAEL SKURNIK WINES, INC., and FOND DU LAC COLD STORAGE LLC.,

Mot. Seq. 004

Defendants.

----------X

AMADEO HOTELS, LTD d/b/a NEW YORK PALACE HOTEL,

Third-Party Plaintiff,

-against-

MICHAEL SKURNIK WINE, INC.

Third-Party Defendant.

----------X

ACME ROLLING STEEL DOOR CORP.,

Defendant/Second
Third-Party Plaintiff,

-against-

MICHAEL SKURNIK WINES, INC.

Third-Party Defendant/
Second Third-Party
Defendant.

----------X

AMADEO HOTELS, LTD., d/b/a NEW YORK PALACE HOTEL,

Third Third-Party Plaintiff,

-against-

FOND LAC COLD STORAGE, LLC,

Third Third-Party Defendant.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she was struck in the head by the door of a freight elevator at the New York Palace Hotel, located at 455 Madison Avenue in the County and State of New York on November 6, 2007. Specifically, plaintiff alleges that "an agent and/or employee of Fond Du Lac Storage, LLC ["Fond Du"] . . . pressed the "close door" button on the elevator when it was not safe to do so, closing the elevator door on Plaintiff's head."

Defendants Amadeo Hotels, LTD d/b/a New York Palace Hotel ("Amadeo")and Acme Rolling Steel Door Corp. ("Acme") brought a third-party action against Michael Skurnik Wines, Inc. ("Skurnik"). Amadeo also brought a third-party action against Fond Du.

Defendant Archdiocese of New York ("the Archdiocese") is the owner of the land upon which the Hotel is located. The Hotel itself is currently owned by Amadeo. On July 1, 1974, the Archdiocese and an entity called New York Palace, Inc. entered into a "Ground Lease" for certain parcels of land located at 451-457 Madison Avenue, 29-37 East 50th Street and 24-32 East 51st Street, On July 31, 1980 the

Archdiocese and "The Palace Company[1]" executed a "Second Restatement of Lease," which was to commence July 1, 1974 and end on June 30, 2022. Thereafter, the Hotel was constructed on the property.

The Archdiocese now moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes. No other party submits papers. The Archdiocese, in support of its motion, submits: the pleadings; the bill of particulars; an incident report by "Irims;" a "guest accident report;" a"customer invoice" from Skurnik; the affidavit of David Brown, Esq., Director of Real Estate for the Archdiocese; a copy of the lease; a copy of an indenture agreement; and a copy of a document titled: "Kone Inc. Premium (Complete Maintenance) Agreement for Vertical Transportation.

The Archdiocese contends that it cannot be liable for plaintiff's injuries because it did not own the Hotel. Rather, pursuant to the ground lease, it only maintained ownership of the land upon which the Hotel was located. The Archdiocese further argues that Amadeo was responsible to maintain the premises and make all repairs.

Plaintiff, in opposition, claims that, under Multiple Dwelling Law §78, the Archdiocese, which retained a right of re-entry, owes a non-delegable duty to keep the premises in good repair. Further, plaintiff argues that the Archdiocese's motion should be denied as premature because it has cancelled an inspection of the subject elevator.

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 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d

[1] It is not specified when or how The Palace Company became Amadeo Hotels, LTD d/b/a New York Palace Hotel.

249, 251-252 [1st Dept. 1989]).

§78 of the Multiple Dwelling Law states that "every multiple dwelling . . . shall be kept in good repair . . . [t]he owner shall be responsible for compliance with the provisions of this section . . . " The responsibility to ensure that a building is kept in good repair is non-delegable. (*Bonifacio v. 910-930 Southern Boulevard, LLC*, 295 AD2d 86[1st Dept. 2002]).

Pursuant to the lease, title to the a new building on the land would "automatically vest" in the Tenant. However, that transfer does not divest the Archdiocese of its interest in the Hotel. Section 7.02 of the ground lease states, in relevant part:

> Upon construction of the new building, or any replacement thereof . . . legal title thereto shall automatically vest in Tenant until expiration or earlier termination of this lease, at which time Tenant covenants and agrees that *sole ownership of the New Improvement and the right of possession and use of the New Improvement shall automatically vest in Landlord* without payment or consideration of any kind.(emphasis added).

Further evidence of Archdiocese's intention to maintain its interest in the Hotel is that the lease includes a clause requiring that the Tenant submit "preliminary plans in sufficient detail to show the design, character and appearance of the building to be erected," and the lease reserves the Archdiocese's right to inspect the new building during construction. Indeed, the lease directs that the Tenant shall "construct a modern, first class, fully air conditioned fire resistant building for apartment, hotel or office purposes . . ." Finally, the Tenant is required to maintain insurance "for the mutual benefit of Landlord and Tenant against . . .(b) claims for personal injury or death or property damage in or on the demised premises (including elevators) . . ."

Even if it can be considered an owner for purposes of Multiple Dwelling Law §78, the Archdiocese contends that it has transferred all responsibility for maintenance and repair to the Tenant. However, an out of possession landlord may only escape its duty if it "completely parted with possession and control" of the premises. (*Worth Distributers, Inc. V. Latham*, 59 NY2d 231[1983]). Where the landlord reserves a right to re-enter the premises for inspection and repairs, it

constitutes "a sufficient retention of control to subject the owners to liability." Here, Article 13 of the lease states, in relevant part:

> Tenant will permit Landlord . . .to enter the demised premises at all reasonable times for the purpose of (a) inspecting the same, (b) making any necessary repairs thereto and performing any work therein that may be necessary by reason of Tenant's failure to make any such repairs or perform such work or to commence the same for 10 days after written notice form Landlord . . .

In light of its reservation of the right to re-enter for purposes of inspection and repair, the Archdiocese has failed to establish, as a matter of law, that it did not owe plaintiff a duty to maintain the building, including the elevator, in a safe condition. (see *Mas v. Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680).

Wherefore it is hereby

ORDERED that the motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: July 11, 2011

Eileen A. Rakower, J.S.C.