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| <b>Sanchez v 440 Ninth Ave., L.P.</b>  |
| 2016 NY Slip Op 30877(U)   |
| May 9, 2016  |
| Supreme Court, New York County   |
| Docket Number: 158339/2013   |
| Judge: Cynthia S. Kern   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
JOSE SANCHEZ,

Plaintiff,

-against-

Index No. 158339/2013

**DECISION/ORDER**

440 NINTH AVENUE, L.P.,

Defendant.

-----X  
**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

| Papers                                       | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | 1        |
| Answering Affidavits .....                   | 2        |
| Replying Affidavits.....                     | 3        |
| Exhibits.....                                | 4        |

Plaintiff commenced the instant action seeking damages for injuries he allegedly sustained when the door of a freight elevator closed on his hand. Defendant now moves for an order pursuant to CPLR § 3212 granting summary judgment and dismissing plaintiff's complaint. For the reasons set forth below, defendant's motion is denied.

The relevant facts are as follows. Defendant owns and operates the building located at 440 Ninth Avenue, New York, New York (the "building"). Plaintiff, an employee of defendant's cleaning contractor, regularly operated and cleaned a freight elevator (the "elevator") in the building when the freight elevator operator, Abdul Alkushtary ("Alkushtary"), went on his breaks. He had received on-the-job training on how to operate the elevator from Alkushtary. To use the elevator, the operator must manually open the elevator's doors. Although the inner, "accordion" door stays open on its own, the outer door must be held open with a chain and hook that wraps around the door from the inside to the outside of the elevator. According to

plaintiff's deposition testimony, on the date of the accident the chain was covered in peeling painters' tape. Specifically, plaintiff testified as follows:

- Q: Did you notice whether the hook was broken at all?  
 A: It was kind of loose, they have replace [sic] the tape and probably somebody didn't adjust the length.  
 Q: This is the day of your accident you saw that?  
 A: Yes.  
 ...  
 Q: Now, other than the replaced tape, did you look at the hook part?  
 A: The hook part it was okay [sic]. The tape, that gets loose.

Further, plaintiff testified that if the outer door is released, it closes in about a second. At approximately 1 p.m. on or around May 31, 2013, plaintiff was operating the elevator when he stopped it on the ground floor to clean it. He opened the door, put the hook in place and turned to grab his broom and dustpan that he had with him in the elevator. When he tried to leave the elevator, the hook came loose and the door closed on plaintiff's hand, injuring it (the "accident").

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

A property owner must "maintain its property in a reasonably safe condition under the existing circumstances." *Zuk v. Great Atl. & Pac. Tea Co., Inc.*, 21 A.D.3d 275, 275 (1<sup>st</sup> Dept 2005). "In order to recover damages for a breach of this duty, a party must establish that the

landlord created, or had actual or constructive notice of the hazardous condition which precipitated the injury.” *Id.* A property owner’s duty to “maintain its building’s elevator in a reasonably safe manner” is nondelegable. *Isaac v. 151 Macombs, LLC*, 84 A.D.3d 457, 458 (1<sup>st</sup> Dept 2011).

In the present case, defendant’s motion for summary judgment must be denied as there are issues of fact as to whether the elevator’s outer door and the mechanism used to hold it open is a dangerous condition. Plaintiff has testified that the elevator’s outer door had to be held open by a chain and hook, and that on the date of the accident the chain was covered in peeling painters’ tape, which may have been involved in the mechanism’s functioning. In addition, plaintiff has testified that the elevator’s outer door automatically closes very quickly if the hook is removed, in approximately a second. Based on this evidence, whether the elevator’s outer door and the mechanism used to hold it open is a dangerous condition is an issue of fact appropriate for determination by the jury.

Further, if the elevator’s outer door and the mechanism used to hold it open is a dangerous condition, there is an issue of fact as to whether defendant created this condition. Neither of the parties has submitted any evidence regarding who created the outer door and the mechanism used to hold it open. Moreover, if the elevator’s outer door and the mechanism used to hold it open, or some part thereof, is a dangerous condition, there is an issue of fact as to whether defendant had actual or constructive notice of this condition. According to the affidavit testimony of Aristeia Thanos Rader (“Rader”), the property administrator for defendant at the time of the accident, the hook and chain have “been there since [Rader] got to the building” and she knew that the outer door closes quickly if the hook is removed.

Defendant’s argument that there is no evidence that the hook is defective is without merit

