

**Marquez v New York City Hous. Auth.**

2016 NY Slip Op 32445(U)

November 2, 2016

Supreme Court, Bronx County

Docket Number: 300732/12

Judge: Barry Salman

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PART 17

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

11/10

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

-----X  
**EILEEN MARQUEZ,**

Plaintiff,

- against -

**NEW YORK CITY HOUSING AUTHORITY,**

Defendant.  
-----X

Index No.: **300732/12**

Hon. **BARRY SALMAN**  
Justice

The following papers numbered 1 to \_\_\_ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**, noticed on **July 20, 2015**, and duly submitted as no. \_\_\_ on the Motion Calendar of **11/19/15**.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memorandum of Law	4	

In this action for premises liability arising from an alleged fall due to an allegedly defective elevator, defendant's motion for summary judgement is granted inasmuch as the uncontroverted evidence establishes that defendant had neither actual nor constructive notice of the defective condition alleged to have caused the instant accident.

Defendant's evidence - plaintiff's 50-h hearing and deposition transcripts - establishes that on May 12, 2011, plaintiff fell as a result of being struck by an elevator door which closed, striking her as she entered the elevator within defendant's premises. Plaintiff, who

lived within defendant's premises had observed that the instant elevator door closed too quickly on several occasions and last complained about it a month prior to her accident. Defendant's evidence - affidavits and deposition transcripts from its two elevator mechanics at the subject premises - establishes that defendant installed a new TL Jones Sensor on the door of the subject elevator on April 7, 2011 - a month prior to plaintiff's accident. The foregoing sensor causes an elevator door to retract if it encounters an object in the door's path as it closes and when defective, will prevent the door from closing at all. After installation, defendant received no complaints about the subject elevator door prior to plaintiff's accident and upon performing preventative maintenance to the subject elevator on May 11, 2011 - a day prior to plaintiff's accident - no defects were noted. Janitorial records for the instant premises indicate that daily inspections of the elevator doors as early as February 14, 2011 and including the date of the accident alleged yielded no defects.

Based on the foregoing, defendant establishes that it had no actual notice of the defective condition alleged, which given plaintiff's testimony - that the elevator door struck her despite the fact that she was in its path of travel - could only be a defective TL Jones Sensor. To be sure, plaintiff testified that she complained about the condition a month prior to the accident, that the sensor was replaced soon thereafter and defendant received no complaints thereafter and prior to plaintiff's accident. Moreover, because defendant's daily inspection records for the subject door yielded no defect, the condition alleged could have developed at the time of the instant accident such that the condition did not exist long enough to charge defendant with constructive

notice (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Thus, defendant establishes prima facie entitlement to summary judgment (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803, 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790, 790 [3d Dept 1998]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Green v Albemarle, LLC*, 966, 966 [2d Dept 2013]).

Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment. Significantly, plaintiff submits an affidavit from Michael Sena (Sena), a Qualified Elevator Inspector, who solely based on documentary evidence, as opposed to an examination of the subject elevator, opines that the elevator door in question was defective in that it closed too quickly. Sena's opinion, however, fails to raise a question of fact sufficient to preclude summary judgment. First, Sena's opinion is not probative on the issue of notice or in this case, the absence of it. Second, Sena's opinion is nevertheless insufficient to raise an issue of fact in that his opinion is speculative. To be sure, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v. Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1982]). Moreover, "where the expert states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever" (*Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 533-534, n 2 [1991] [internal quotation marks omitted]). Accordingly, "an expert's affidavit proffered

as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (*Romano v Stanley*, 90 NY2d 444, 451-52 [1997]).

Here, clearly Sena's opinion is based solely on plaintiff's testimony, which to the extent bereft of any facts as to the speed of the door, precise distance it traveled, and precisely what period of time it traveled the foregoing distance, cannot form the basis of a competent opinion as to a defect with the subject elevator. Hence, when Sena opines that the door was "traveling at a rate of speed well in excess of a foot per second" and that it "closed with 30 pounds of force," it is clear that his opinion is baseless finds no factual support in the records he reviewed. To be sure, here, Sena never inspected the elevator and all records upon which he relies negate the existence of any defective condition on the date of plaintiff's accident. It is hereby

**ORDERED** that the complaint be dismissed, with prejudice. It is further

**ORDERED** that defendant serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated:

11/2/16

Hon. \_\_\_\_\_

**BARRY SALMAN, J.S.C.**