Xholi v 150 E. 42 Holdings LLC
2020 NY Slip Op 31627(U)
May 29, 2020
Supreme Court, Kings County
Docket Number: 505866/17
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of May, 2020.

PRESENT:

HON. KATHY J. KING,
Justice.

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Kujtime Xholi,

Plaintiff,

- against -

150 East 42 Holdings LLC, 150 East 42 Realty LLC, AM 150 East 42 Realty LLC, Jones Land Lasalle Americas, Inc. and Nouveau Elevators Industries Inc.

Defendants.

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DECISION/ORDER

Index No. 505866/17

The following papers number 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5, 6
Reply Affidavits (Affirmations)	7, 8

Upon the foregoing papers, Defendant Nouveau Elevators Industries, Inc. ("Nouveau") moves for summary judgment, dismissing plaintiff's complaint, pursuant to CPLR 3212. Defendants 150 East 42 Holdings LLC, 150 East 42 Realty LLC, AM 150 East 42 Realty LLC and Jones Land Lasalle Americas, Inc. (collectively "The Building Defendants"), cross move and seek summary judgment and dismissal of plaintiff's complaint, pursuant to CPLR 3212, or,

in the alternative, move for indemnification against co-defendant Nouveau.[1] Plaintiff, Kujtime Xholi, opposes both the motion and cross motion.

Plaintiff seeks to recover monetary damages for personal injuries allegedly sustained on May 18, 2016 when she was struck by the doors of a service elevator in the process of closing at 150 East 42nd Street New York, New York ("the subject premises"). Plaintiff is an office cleaner at the subject premises. The Building Defendants are the owners of the subject premises. At the time of the accident, defendant Nouveau was the provider of elevator maintenance services for the Building Defendants pursuant to a contract between the parties. The elevator service contract required the door open time to be 3 seconds, the door close time to be 4 seconds and the car stop dwell time to be 3 seconds. In support of its motion, defendant Nouveau contends that prior to, and on the day of the accident, the subject elevator functioned in accordance with the requirements of the elevator service contract. The Building Defendants argue that they had no notice of a defect regarding the elevator.

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562; *Graffeo*, 46 AD3d at 615). "[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim

[1] The Building Defendants adopted defendant Nouveau's arguments and evidence in support of their motion.

... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, in order to make a prima facie showing of summary judgment as a matter of law, the Building Defendants must show that the elevator was not defective and that they had no notice of a defect. The case law has established that "[a]n elevator company which agrees to maintain an elevator in safe operating condition can also be held liable to an injured passenger 'for failure to use reasonable care to discover and correct a condition which it ought to have found'" (*Hussy v Hilton Worldwide, Inc*, 164 AD3d 482, 483-484 [2d Dept 2018] [internal citations omitted]). Additionally, it is well settled that, "a property owner can be liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect, or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect" (*Goodwin v Guardian Life ins Co of Am*, 156 AD3d 765, 766 [2d Dept 2017]).

In the case at bar, the Building Defendants submit proof in admissible form including, *inter alia*, plaintiff's deposition testimony, affidavit of Property Manager Walter Maher, copies of the elevator service record, records of the City of New York Department of Buildings ("DOB") inspections and a report from Jon Halpern, the engineering expert of the moving defendants, to show that the subject elevator was functioning properly in accordance with the elevator service contract at the time of the accident.

Based on the admissible evidence, the Court finds that Nouveau and the Building Defendants have made a prima facie showing as a matter of law that the elevator was not defective and that there was no actual or constructive notice of any defective condition which could have caused plaintiff's injuries (*see Goodwin v Guardian Life Ins Co of Am*, 156 AD3d 765, 766 [2d Dept 2017].

While plaintiff's expert, Patrick A. Carrajat, in opposition, opined that the safety edge, an elevator part which holds the elevator doors open, may not have been functioning properly, the Court finds that Mr. Carrajat's affidavit was conclusory and speculative, and, thus, insufficient to raise a triable issue of fact. Contrary to the opinion of plaintiff's expert, the DOB inspection records indicate that an inspection was performed the day following the accident which found that the elevator was functioning properly. Notably, the DOB's finding is consistent with the opinion of Jon Halpern, defendant's expert, whose report is annexed to the moving papers. Finally, the affidavit of Property Manager, Walter Maher, establishes that prior to the accident, defendants had never received nor logged any complaints that the doors of the elevator were not functioning properly. Accordingly, the Court finds that plaintiff failed to raise a triable issue of fact, as to whether the elevator door was defective (*see Goodwin* 156 AD3d at 766).

Plaintiff also failed to raise a triable issue of fact as to whether the accident was one that would not ordinarily occur in the absence of negligence and, therefore, plaintiff cannot rely on res ipsa loquitur (*see Goodwin* 156 AD3d at 767) to defeat the prima facie showing of Nouveau and the Building Defendants.

Based on the foregoing, defendant Nouveau's motion for summary judgment dismissing plaintiff's complaint is granted (Mot. Seq.# 2), and the cross motion of the Building Defendants' for summary judgment dismissing plaintiff's complaint is granted (Mot. Seq.#3).

This constitutes the decision/order of the Court.

ENTER,

HON. KATHY J. KING
J.S.C.