

<b>Grullon v Elevator Refurbishing Corp.</b>
2020 NY Slip Op 34784(U)
May 6, 2020
Supreme Court, Westchester County
Docket Number: Index No. 60916/2018
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
CHRISTIAN GRULLON,

Plaintiff,

-against-

**DECISION AND ORDER**  
**Index No. 60916/2018**  
**Sequence No. 1**

ELEVATOR REFURBISHING CORP. and 671 BRONX  
RIVER ROAD OWNERS, INC.,

Defendants.

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WOOD, J.

The following papers were read on this motion by defendant Elevator Refurbishing Corp. for summary judgment dismissing plaintiff’s complaint and any and all cross-claims, and for such other and further relief as this Court may deem just and proper.

Notice of Motion; Affirmation in Support; Exs. A-J; Affidavit of Service  
Affirmation in Opposition; Exs. A-C; Affidavit of Service  
Reply Affirmation; Affidavit of Service

Plaintiff commenced this action by filing a summons and verified complaint on July 18, 2018. Plaintiff alleges that while lawfully at 671 Bronx River Road (the premises) in Yonkers, New York, he was caused to trip and fall on May 1, 2017 due to a misleveled elevator. He further alleges that defendant Elevator Refurbishing Corp. (ERC) maintains the elevators at the premises, and that defendant 671 Bronx River Road Owners, Inc. (671 Bronx) owns and manages the premises. Plaintiff alleges negligence on the part of both defendants, as well as actual and constructive notice

of a dangerous condition. ERC filed a verified answer with cross-claims on September 28, 2018. 671 Bronx filed an answer with cross-claims on November 1, 2018, and ERC filed an answer to the cross-claims that same day. Thereafter, the parties conducted numerous depositions, summarized below.

#### Deposition of Plaintiff

Plaintiff described the premises as a six-story residential building with two elevators (Ex. D. at 15). At the time of the accident, plaintiff had resided on the first floor, which was located one floor above the lobby, for several years (Ex. D at 13, 15-16, 26). On the relevant date, plaintiff and his wife (plaintiff's fiancée at the time of the accident) entered the left side elevator at the lobby level without incident (Ex. D at 21, 32, 35-37). The floor of the elevator was level with the floor of the lobby when they entered the elevator (Ex. D at 37). Nothing unusual happened with respect to the operation of the elevator during its ascent to the first floor (Ex. D at 39-40).

The elevator come to a complete stop on the first floor and the door opened in its normal fashion (Ex. D at 42-43). The lighting in the elevator was “[g]ood” and the first floor was well-lit (Ex. D at 27-28). When the elevator door opened and plaintiff was about to step out, he “was looking straight” and did not look down at the floor (Ex. D at 52). Plaintiff faced the elevator door and stepped out with his left foot (Ex. D at 44-47). He was holding two grocery bags in his right hand and three in his left, and wore glasses and Timberland boots (Ex. D at 43, 48). Plaintiff stated, “I turned, I got out of the elevator first with the bags in my hand and when I stepped out with my left foot I didn’t feel the floor there. And my foot went behind my body and I came to a complete stop on top of my right knee in the first floor hallway” (Ex. D at 40-41). Plaintiff’s wife was still inside the elevator when he fell (Ex. D at 49). Plaintiff dropped all of the grocery bags when he fell (Ex.

D at 50). His glasses fell but did not break (Ex. D at 50). Plaintiff's clothing and shoes were not damaged, and plaintiff was not bleeding (Ex. D at 50-51). However, when plaintiff's wife helped him up he felt a "strange pain on [his] knee," and he went to the emergency room that evening (Ex. D at 51, 61-62). Due to the knee injury, plaintiff missed at least a month of work immediately following the accident (Ex. D at 73).

Plaintiff and defense counsel had the following exchange:

Q. Do you know what caused you to fall?

A. The elevator being misaligned, I lost my footing.

Q. How do you know it was misaligned?

A. When I fell and I looked back I seen, like, the elevator cart [sic] and the hallway corridor floor was not leveled (Ex. D at 53).

Plaintiff specified that the elevator door was four to six inches above the first floor hallway (Ex. D at 55). He and his wife did not photograph the elevator on the day of the accident (Ex. D at 69-70).

Prior to the date of his accident, plaintiff had not observed misleveling with respect to the left side elevator, nor had he experienced any problems with that elevator or complained about it (Ex. D at 24-25, 55). Over the next couple of days immediately following the accident, plaintiff "had interactions with [the building superintendent, Rudolfo Tirri]" and told him about it (Ex. D at 68). Tirri told plaintiff "that elevator from time to time has problems" (Ex. D at 68).

#### Deposition of Angelique Solo-Grullon

Plaintiff's wife testified that plaintiff's accident occurred during the evening, and that he reported it to the building superintendent either the same day or the following day (Ex. J at 9, 11, 22). She stated that after plaintiff took a step, she saw that "[t]he elevator was unlevel," meaning that "[i]t was not leveled with the hallway floor" (Ex. J at 19). Plaintiff's wife further stated, "Well, the elevator was higher than the hallway ground and I think it was approximately four to five inches,

around there” (Ex. J at 20). She had not reported any problems with the left side elevator prior to plaintiff’s accident (Ex. J at 21).

Deposition of Kenneth Frank

Kenneth Frank testified that he was employed as an “elevator tech” by ERC at the time of the accident, and that ERC engages in elevator repair, conversion, and maintenance (Ex. E at 8). He did troubleshooting at the premises prior to the accident (Ex. E at 14). Frank explained that the premises had “two single speed AC [alternating current] elevators,” meaning that they traveled at one speed (Ex. E at 14). Prior to the accident, ERC had advised the building owners or managers that one or both of the elevators had to be upgraded (Ex. E at 17-18). In addition, Frank personally spoke to the building superintendent, Rudolfo Tirri, prior to the accident about modernizing the elevators, and told him, “You need new elevators” (Ex. E at 45-46). This advice was given because “the elevator on the premises is around 40 years old, there were certain issues with a 40-year elevator that can only be remedied with an upgrade” (Ex. E at 19).

Frank testified that he went to the premises more than once to address misleveling issues prior to the accident, but did not know for which elevator (Ex. E at 43). However, when he was later asked, “Did you specifically discuss with the super the left-sided elevator misleveling problems prior to May 1<sup>st</sup>, 2017?”, Frank replied, “Yes” (Ex. E at 75). Frank recalled making a brake adjustment in the motor room prior to the accident, and explained, “I know I had a problem with the leveling, so I know [sic] adjusted the brake” to adjust the leveling (Ex. E at 68-69). He did not recall receiving a complaint about misleveling of the left side elevator between May 1 and May 10, 2017, nor did he remember going to the premises during that time frame (Ex. E at 35).

Frank explained that “[i]n general, any time you adjust a single speed elevator brake, it does

require follow-up” to the extent of “check[ing] if the brake is continuing to work as it was adjusted” (Ex. E at 79). Frank was then asked, “When would you do that formally after initially doing work on it for the leveling that you talked about?”, and he replied, “About a month” (Ex. E at 79). He also noted that leveling is checked at every monthly maintenance inspection, but that at times ERC maintained elevators “less than monthly” because it was “extremely busy” (Ex. E at 49, 53).

Frank identified the “route” elevator mechanic for the premises as Pedro Encarnacion<sup>1</sup> (Ex. E at 23). He testified that a work ticket reflected that on March 22, 2017, Encarnacion adjusted leveling on both elevators (Ex. E at 29-30, 77). When asked about the particular circumstances that would require leveling adjustments, Frank said, “It would depend on, more than likely, there would be a complaint generated. I don’t know if—I don’t know if there was a complaint generated” (Ex. E at 31). He added, “This particular building, they are very sensitive about the leveling of the elevator. Maybe there was a specific floor that was off level, that is just speculation on my part, so” (Ex. E at 31). Frank later remarked that the building superintendent was “vigilant” about leveling issues, such that “[i]f he thought the elevator was off level, he would call, and if he thought it was off level too much, he would shut it down” (Ex. E at 76).

Frank also provided details with respect to the type of elevator at issue. He explained, “This car is not designed with a leveling system, it’s designed with a stopping system. The target is level, but it’s very seldom achieved because of the variables involved” (Ex. E at 49). Frank stated that “[s]pecifically as [to] elevators like [the ones at the premises], there are several adjustments you can make to improve leveling” such as “brake adjustment and target adjustment” (Ex. E at 66). He

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<sup>1</sup> This name is misspelled throughout the transcript.

remarked that “many variables” such as temperature, weight, and environment affect leveling in single-speed elevators as opposed to other elevators (Ex. E at 70-71).

Deposition of Pedro Encarnacion

Pedro Encarnacion (who testified through an interpreter) was a route mechanic for ERC during the relevant time frame (Ex. I at 12, 15-16). He testified that he “would do maintenance” and “answer the calls,” meaning that “[i]f there was a damaged elevator [he] would go and fix it” (Ex. I at 12). He conducted maintenance at the premises on a monthly basis, including checking the brakes and going to each floor to assess leveling (Ex. I at 12, 23, 66).

While on the premises, Encarnacion would deal with the superintendent, Tirri (Ex. I at 17). Encarnacion testified that he did not have a key to the elevator motor room and that Tirri would open the room for him (Ex. I at 56). He would give one copy of his maintenance records, also known as work orders, to Tirri and the other copy to his boss at ERC (Ex. I at 21-22). Encarnacion prepared the work orders in the regular course of business (Ex. I at 22). When additional work was needed on the elevators (other than maintenance), either Encarnacion or Frank performed it (Ex. I at 23-24).

Encarnacion stated that “[a]ll the elevators that have one speed, in the morning they could be perfectly level and depending on the temperature, ... if it’s too hot or too cold or a lot of humidity or too many people in the elevator the level changes” (Ex. I at 29). According to Encarnacion, these variables could result in misleveling of “one or two inches” (Ex. I at 67). He testified that Tirri “would always call [the ERC office]” when there was “dis-leveling” (Ex. I at 37), and that if a misleveling problem was reported, ERC would fix it by adjusting the brakes (Ex. I at 29-30). When asked if there were other ways to fix a leveling problem “other than adjusting the brakes,” Encarnacion replied, “Not on an elevator that has a single speed” (Ex. I at 58).

During his deposition, Encarnacion was asked about numerous work orders for the premises, some of which were not prepared by him (Ex. I at 24). Encarnacion was “not sure” about the work described in a December 21, 2016 work order prepared by Frank that referred to an oil leak, floor stops, and a brake adjustment (Ex. I at 33-34). Encarnacion prepared the October 26, 2016 work order which “had to do with leveling” (Ex. I at 36). The work order stated that “elevator was running with leveling problem, fixed and check operation” (Ex. I at 36). Encarnacion did not recall if the work order was for one or both elevators (Ex. I at 37). The February 15, 2017 work order prepared by Frank reflected that the “oil that was on the ground, on the floor was cleaned and that they did some kind of tension to the brakes” (Ex. I at 30). The March 10, 2017 work order prepared by an ERC employee named Dan stated: “left car, adjust brake to level stops” (Ex. I at 27-28). With respect to a March 22, 2017 work order prepared by Encarnacion, Encarnacion stated, “If I remember, but I’m not real sure, they sent me for the leveling problem and I did the maintenance for that. That’s what I think happened regarding this” (Ex. I at 70). The most recent work order for the premises was dated March 30, 2017 and prepared by Frank (Ex. I at 26-27). Encarnacion was asked to read the description of work in the work order (Ex. I at 27). When asked if he knew what the description meant based on Frank’s abbreviations, Encarnacion said no (Ex. I at 27). When it was pointed out that neither 671 Bronx nor ERC produced a work order for April 2017, Encarnacion said, “Probably someone else did [the monthly maintenance] not me” (Ex. I at 71-72).

#### Deposition of Rudolfo Tirri

Prior to and at the time of the accident, Rudolfo Tirri (who testified through an interpreter) was employed by 671 Bronx as the superintendent for the premises (Ex. H at 9-10). He did not perform any elevator work from 1984 to 2017 (Ex. H at 14). ERC came to the premises on a regular

basis to maintain the elevators (Ex. H at 18). Tirri did not complain to anyone at ERC or 671 Bronx about elevator misleveling prior to the accident, did not receive a complaint about misleveling of the left side elevator prior to the accident, and did not observe misleveling of the left side elevator prior to the accident (Ex. H at 21, 37, 45-47). When asked if he knew “if the left elevator misleveled on at least one occasion” prior to May 1, 2017, he said that he did not remember (Ex. H at 22). He did not know why the elevators on the premises were adjusted with respect to leveling in March 2017, and did not know if he asked ERC to adjust the elevators for leveling purposes prior to May 1, 2017 (Ex. H at 24-25).

Plaintiff called and told Tirri about the accident one or two days after it happened, explaining that the left side elevator “was not even and he fell” (Ex. H at 25-26). However, Tirri testified that “[b]efore knowing about the accident, [Tirri] had already reported [sic] and the elevator was repaired” (Ex. H at 27). He elaborated that at 9:30 a.m. on May 1, 2017, “[t]hat day that the accident happened,” the building porter informed him that the left side elevator was misleveled (Ex. H at 28). Tirri then went to the lobby, saw that the elevator was misleveled, and shut the elevator down by using a switch in the “elevator room” on the roof (Ex. H at 28-29). He also “immediately” called “the elevator company” and someone arrived that same day (Ex. H at 31-32). When plaintiff reported his accident, Tirri went back to the left side elevator to check the leveling problem again (Ex. H at 30). At that time, the elevator was working “okay” and “was not off level,” although Tirri had not personally turned the elevator back on between the moment that he shut it down and the moment that plaintiff reported the accident to him (Ex. H at 31, 42). Tirri explained that both he and ERC had keys to the elevator room (Ex. H at 29, 33). Towards the end of his deposition, Tirri stated

that the first time the porter ever notified him of a misleveled elevator was in fact May 2, 2017 (Ex. H at 46-47).

### ERC's Motion

Following the completion of discovery, plaintiff filed a note of issue on October 8, 2019. ERC timely moved by Notice of Motion for summary judgment dismissing the complaint and all cross-claims. It appended the deposition transcripts summarized above, as well as the pleadings, plaintiff's bill of particulars, the note of issue, the elevator modernization proposal submitted by ERC to 671 Bronx in 2013, and the maintenance contracts between ERC and 671 Bronx.

ERC opines that based on the deposition testimony submitted, there is no evidence that an elevator defect existed at the time of plaintiff's accident. More precisely, ERC appears to be arguing that there is no evidence that the left side elevator actually misleveled on the relevant date. It also implies that it lacked notice of a misleveling issue. ERC further contends that even if the left side elevator misleveled, there is no evidence that this occurrence was the result of an act or omission on the part of ERC, and misleveling can occur even in a properly maintained single-speed AC elevator due to the elevator's design. ERC faults 671 Bronx for failing to upgrade the elevators on the premises as recommended, and opines that the proposed elevator modernization would have addressed any misleveling issues. It asserts that explicit language in the maintenance contract between ERC and 671 Bronx establishes that "the responsibility to upgrade the elevator equipment to improve the quality of leveling rested with the building" (ERC Aff. ¶¶67-68).<sup>2</sup> ERC further asserts that plaintiff cannot prevail under the doctrine of *res ipsa loquitur*.

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<sup>2</sup> The Court notes that the specific phrase upon which ERC's argument hinges, namely "VVVF Frequency Drives," is not defined in the contract or mentioned in the deposition transcripts.

In opposition,<sup>3</sup> 671 Bronx proffers Encarnacion's deposition transcript, 37 work orders pertaining to the elevators at the premises, and the affidavit of its expert, Patrick J. McPartland, an engineer and certified elevator inspector. McPartland made the following averments:

Checking the elevator equipment for oil leaks, locating the sources of leaks and repairing those leaks was a part of the duties to the maintenance contract in effect on and before the plaintiff's accident of May 1, 2017. An oil leak in the machine room was discovered in December, 2016, as evidenced by a work ticket dated December 21, 2016.... A problem of oil leaking would have been a substantial factor in causing the subject elevator to mis-level to the degree of four to six inches, the mis-leveling observed by plaintiff immediately after the accident, as plaintiff testified at his deposition. The type of elevator involved in plaintiff's accident was what is known as a single-speed AC elevator, which stops at a given floor by means of a brake. The brake for the elevator brings the elevator to a stop by the action of brake shoes being applied to the brake drum, the resulting friction causing the elevator to stop at the desired floor. If oil were to come into contact with the surface of the brake drum, or the brake shoes, or both, this oil would significantly reduce the amount of friction that could be applied to the brake drum by the brake shoes, which would, in turn, cause the elevator to slide past the floor landing at which it was to have stopped, resulting in a mis-leveling of the elevator (671 Bronx Ex. C at ¶5).

671 Bronx opines that ERC's argument boils down to an assertion that the subject elevator misleveled simply because single-speed AC elevators are prone to misleveling, and not because ERC failed to maintain it. Based on McPartland's affidavit, 671 Bronx reasons that an issue of fact exists as to whether ERC was negligent in its maintenance of the elevator.

In reply, ERC contends that McPartland's affidavit is "speculative, unsupported by facts and based on incorrect assertions," and should therefore be disregarded (Reply Aff. ¶4).

### Analysis

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless

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<sup>3</sup> Plaintiff did not submit opposition papers.

of the sufficiency of the opposing papers” (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*Valentin v Parisio*, 119 AD3d 854, 855 [2d Dept 2014]). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Flaccavento v John’s Farms*, 173 AD3d 1141, 1142 [2d Dept 2019] [internal quotation marks omitted]). A review of the evidence submitted by ERC in support of its motion reveals that it failed to make a prima facie showing of entitlement to judgment as a matter of law.

As an initial matter, ERC’s contention that summary judgment must be granted because there is no evidence that the elevator misleveled at the time of plaintiff’s accident is without merit. ERC’s submissions include the deposition transcripts of plaintiff and his wife. Plaintiff testified unequivocally that he fell due to misleveling of the left side elevator upon its arrival on the first floor, and his wife corroborated his testimony (*see Flanagan v Town of Huntington*, 155 AD3d 1000 [2d Dept 2017]; *Vasquez v Mount Sinai Med. Ctr.*, 136 AD3d 631 [2d Dept 2016]; *Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406 [4th Dept 2008]). Cases cited by ERC in support of its position are inapposite (*see, e.g., Mallen v Farmingdale Lanes, LLC*, 89 AD3d 996 [2d Dept 2011] [defendant was granted summary judgment where plaintiff’s deposition testimony demonstrated that plaintiff could not identify the cause of her fall]; *Bloch v RT Long Is. Franchise, LLC*, 70 AD3d 993 [2d Dept 2010]; *Vaynshteyn v Cohen*, 266 AD2d 280 [2d Dept 1999] [defendants were granted summary judgment where plaintiffs could not state “with surety what caused the accident”]).

In addition, the evidence presented by ERC fails to establish that it lacked notice of a misleveling issue (*see Roserie v Alexander's Kings Plaza, LLC*, 171 AD3d 822 [2d Dept 2019] [elevator maintenance company was properly denied summary judgment dismissing the complaint where its own submissions included “evidence of multiple service calls to repair the subject elevator”]; *Papapietro v Kone, Inc.*, 123 AD3d 894 [2d Dept 2014] [elevator maintenance company was not entitled to summary judgment where its records reflected that “approximately six months before the accident, the defendant was called to repair the alarm bell”]). While ERC correctly observes that neither plaintiff nor plaintiff’s wife made prior complaints regarding misleveling, ERC submitted the deposition transcripts of Frank, Encarnacion, and Tirri, which demonstrate that misleveling was a problem prior to plaintiff’s accident. Notably, Frank stated that he specifically discussed “the left-sided elevator misleveling problems” with the building superintendent prior to May 1, 2017 (Ex. E at 75). In addition, Frank and Encarnacion’s testimony reveals that Encarnacion made leveling adjustments to both elevators on March 22, 2017 due to a leveling problem, and that one or both elevators had previously been adjusted with respect to leveling on multiple occasions within the year preceding the accident. Furthermore, Tirri’s inconsistent deposition testimony reflects that ERC may have had notice of misleveling of the left side elevator on the very morning of plaintiff’s accident, which occurred in the evening.

The Court next addresses ERC’s contention that there is no evidence that the misleveling of the left side elevator was the result of an act or omission of ERC. ERC takes the position that it properly maintained the left side elevator, and could not have corrected the misleveling problem due to 671 Bronx’s failure to authorize an elevator upgrade.

Contrary to ERC's claim, its submissions fail to establish the absence of negligence on ERC's part. ERC's employees provided differing perspectives with respect to how a misleveling problem could be resolved in a single-speed elevator. Encarnacion testified that the only way to address misleveling in a single-speed elevator was to adjust the brakes, which he did on March 22, 2017 (Ex. I at 58), whereas Frank stated that "[s]pecifically as [to] elevators like [the ones at the premises], there are several adjustments you can make to improve leveling," such as "brake adjustment and target adjustment" (Ex. E at 66). More importantly, Frank testified that once a single-speed elevator brake is adjusted, follow-up is required in "[a]bout a month" in order "[t]o check if the brake is continuing to work as it was adjusted" (Ex. E at 79). Here, although work orders were generated on March 10, 2017 and March 22, 2017 by ERC employees<sup>4</sup> with respect to brake adjustments either limited to or including the left side elevator, no work order was produced for any date in April 2017 by either defendant. Furthermore, Frank testified that some elevators were not maintained every month due to ERC's workload, and Encarnacion did not testify that he personally conducted maintenance at the premises during the month of April. Accordingly, ERC has presented no evidence that the left side elevator brake was actually checked in April 2017. In addition, ERC fails to address the fact that plaintiff alleged misleveling to the extent of four to six inches, not the one to two inches that Encarnacion intimated is typical for single-speed elevators.

Lastly, the Court notes that while ERC correctly contends that plaintiff would face certain hurdles if relying on the doctrine of *res ipsa loquitur*, the Court of Appeals has stated that in the absence of direct evidence of negligence, "*res ipsa loquitur* aside, circumstantial evidence of

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<sup>4</sup>The Court notes that with respect to the March 30, 2017 work order, there is no deposition testimony specifying the nature of the work performed or which elevator was serviced.

sufficient probative force may permit a jury to infer negligence” (*Rogers v Dorchester Associates*, 32 NY2d 553, 559 [1973]).

Accordingly, ERC’s motion must be denied, regardless of the sufficiency of the opposing papers (*see Orahovac v CF Lex Assoc.*, 147 AD3d 968 [2d Dept 2017]; *Cox v Pepe-Fareri One, LLC*, 47 AD3d 749 [2d Dept 2008]).

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that defendant Elevator Refurbishing Corp.’s motion is **denied**; and it is further

ORDERED that the parties are directed to appear for a conference in the Settlement Conference Part at a time and date to be provided by the Settlement Part at a later date, upon the resumption of normal court operations following the COVID-19 court shutdown.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
May 6, 2020

*Signed virtually during the COVID-19  
Court shutdown*

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HON. CHARLES D. WOOD  
Justice of the Supreme Court

To: All Parties by NYSCEF