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

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KHANIJA L. BATSON,

DECISION & ORDER

Plaintiff,

Index No.:66846/2019
Sequence No. 2

-against-

AVALONBAY REDEVELOPMENT LLC, AVALONBAY COMMUNITY INC., ASSET PRESERVATION, INC., 255 HUGUENOT STREET CORP, 255 HUGUENOT OWNER LLC, 275 HUGUENOT REIT LLC, OTIS ELEVATOR COMPANY, UNITEC ELEVATOR SERVICES COMPANY,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 41-53, 57-61, were read in connection with moving defendant, Asset Preservation, Inc. ("API") motion for summary judgment.

Plaintiff brought this action to recover damages for personal injuries allegedly sustained by plaintiff on July 1, 2018, when plaintiff was allegedly injured by an elevator within the building at 255 Huguenot Street in New Rochelle.

NOW based upon the foregoing, the motion is decided as follows:

It is well settled that "a 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 demonstrate

the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

The president of API, Javier Vande Steeg, attests that at all relevant times, the sole business of API was to serve as a Qualified Intermediary, pursuant to Section 1031 of the Internal Revenue Code, that permits a property owner to defer its payment of capital gains tax by being deemed to

have "exchanged" property being sold by the owner for replacement property that the owner wishes to acquire. As a Qualified Intermediary, API acts on behalf of its clients by accepting and holding the proceeds of the sale of a client's property until the client directs API to purchase replacement property with some or all of the sale proceeds that API's client has entrusted to it. API does not acquire any title to, or any leasehold interest in, the property in question. Nor does API ever take possession of, use, improve, maintain, manage or control the property or manage the property. Further, API is not now, nor has it ever been, in the business of designing, building, installing, repairing, servicing or maintaining elevators.

Based upon his review of API's business records, Steeg represents that API facilitated a Section 1031 like kind exchange on behalf of its client Hartz Mountain Industries, Inc. ("Hartz"). As part of that exchange, Hartz sold its interest in unrelated real property in Newark, New Jersey, and API accepted and held certain proceeds of that sale. Subsequently, Hartz entered into a contract with AvalonBay Redevelopment, LLC to purchase a leasehold interest in Premises at 255 and 275 Huguenot Street, New Rochelle, New York (NYSCEF Doc No. 45).

Thus, API argues that for the foregoing reasons, API owed no duty to plaintiff with respect to the condition of the premises or any elevator located at the premises, and therefore cannot be held liable for any personal injuries suffered by plaintiff in a fall in an elevator at the premises in 2018.

Taking into consideration the documentary evidence produced by API, and the Steeg affidavit, API established, prima facie, that its limited role in connection with the purchase of the premises by defendant 255 Huguenot Street Corp., ended in 2010, eight years before the instant incident, and thus, cannot be held liable for plaintiff's incident.

In opposition to API's prima facie showing, plaintiff failed to raise a triable issue of fact, and argued that the motion should be denied as premature. "A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (Rutherford v Brooklyn Navy Yard Dev. Corp., 174 AD3d 932, 933 [2d Dept 2019]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion (Haidhaqi v Metro. Transp. Auth., 153 AD3d 1328, 1329, [2d Dept 2017]). Plaintiff failed to demonstrate that deposing API might somehow yield evidence of a connection between API and the premises and/or the elevator at any time after the closing in 2010, or that API owed a duty to plaintiff.

Accordingly, it is hereby

ORDERED, that defendant API's motion for summary judgment is granted, and plaintiff's complaint is dismissed as against API; and it is further

ORDERED, that the remaining parties shall appear in Room 800, the Compliance Conference Part, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York 10601, at a date and time to be scheduled by the Compliance Part upon the resumption of normal court operations.

Matters not specifically addressed are herewith denied.

This constitutes the Decision and Order of the Court.

The Clerk shall mark his records accordingly.

Dated: **April 23, 2020**
White Plains, New York

s/CDW virtual signature affixed during the COVID-19 court closure
HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties Counsel by NYSCEF