

Andriola v Schindler El. Corp.
2021 NY Slip Op 30448(U)
February 17, 2021
Supreme Court, New York County
Docket Number: 159647/2019
Judge: Richard G. Latin
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD G. LATIN **PART** **IAS MOTION 46**

Justice

-----X

NOREEN ANDRIOLA,

Plaintiff,

- v -

SCHINDLER ELEVATOR CORPORATION AND NOBLE
ELEVATOR COMPANY INC.

Defendants.

-----X

INDEX NO. 159647/2019

MOTION DATE 02/16/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that defendant Noble Elevator Company, Inc.'s unopposed motion to dismiss plaintiff's amended complaint is determined as follows:

Plaintiff commenced the instant action to recover for injuries she allegedly sustained on July 8, 2019 when she was injured due to a malfunctioning elevator at New York Presbyterian/Columbia University Medical Center located at 3959 Broadway, New York, New York. Defendant Noble Elevator Company Inc. ("Noble") now moves to, inter alia, dismiss plaintiff's amended complaint and any and all cross-claims against it, pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds that Noble never performed any service, maintenance, repair or inspection of the elevators at the aforementioned premises, prior to or after plaintiff's alleged accident.

A party seeking relief pursuant to CPLR 3211(a)(1) on the ground that its defense is founded upon documentary evidence "" may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a

matter of law” (see *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Evidence such as “[j]udicial records, such as judgments and orders, would qualify as ‘documentary,’ as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence” (see *Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431 [1st Dept 2014]). To qualify as “documentary,” the paper’s content must be “essentially undeniable . . . , assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based (*id.*).

Here, defendant Noble submits the affidavit of Stephen Dutton, President of Noble and co-defendant’s verified answer. Dutton testified that Noble Elevator never entered into any contract for the service, maintenance, repair or inspection of the elevators located at the aforementioned premises and never performed any service, maintenance, repair or inspection of the elevators there at any time either prior to or after the July 8, 2019 alleged accident. He further stated that any reference to Nobel Elevator contained in the New York City Department of Buildings’ records for the premises was entered by that agency in error since Noble Elevator never performed any work at the accident site. However, it is well settled that affidavits “which do no more than assert the inaccuracy of plaintiffs’ allegations” cannot be considered (see *Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]).

Additionally, defendant Noble asserts that co-defendant Schindler Elevator Corporation’s (“SEC”) verified answer qualifies as documentary evidence as SEC admits that on July 8, 2019, a service contract existed between SEC and New York Presbyterian Hospital which included providing services at the accident site.

Although co-defendant in its verified answer admits to having a service contract with New York Presbyterian Hospital, including servicing the accident site, it does not resolve all factual issues as a matter of law, and does not conclusively dispose of plaintiff's claim as to Noble.

Based on the above, the defendant Noble failed to meet its burden of providing "documentary evidence" showing that they had no connection or did not contribute to or cause plaintiff's alleged accident which occurred at New York Presbyterian Hospital.

Likewise, on a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, construing plaintiff's complaint liberally, accepting the facts alleged in the complaint as true, and affording the plaintiff the benefit of every possible inference, as required, the plaintiff states a cause of action for the injuries sustained herein (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). Whether the plaintiff can ultimately prevail on these allegations against the defendant is not relevant on this pre-answer motion to dismiss, because there is insufficient documentary evidence showing who created or caused the dangerous condition which caused plaintiff's alleged injuries, whether Noble performed any services at the aforementioned premises at any time, an explanation as to the alleged error in the New York City Department of Buildings' records, how long the elevator malfunction existed and Noble's connections with New York Presbyterian Hospital (*see J.P. Morgan Securities Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]).

Accordingly, defendant Noble Elevator Company Inc.'s motion is denied.

Plaintiff is directed to serve a copy of this order on all parties within thirty (30) days of the date of entry of this order, together with notice of entry.

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2/17/2021

DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE