

<b>Fernandez v 56-11 94th St. Co, LLC</b>
2021 NY Slip Op 30635(U)
March 3, 2021
Supreme Court, New York County
Docket Number: 161178/2017
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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INDEX NO. 161178/2017

MOTION DATE 09/11/2020

MOTION SEQ. NO. 003

MARISOL FERNANDEZ, CHRISTOPHER MUNOZ,  
EMERITA HERNANDEZ, ELEANOR HERNANDEZ, MARY  
KIANG, MICHAEL KIANG, SHIRLENE GAYLE, ANA BELEN  
ROJAS, VIRNA SOL HERNANDEZ, JUAN OSCAR  
GARCIA, MARABINI DILIDILI, ROMEO DILIDILI, JOHN  
URUCHIMA, LYNDA CEVALLOS, JUANA LAVIGNE,  
MAURA SANCHEZ, MAFIZUL HOSSAIN, DARRYL  
REAMS, MONIQUE BANFIELD, ALICIA RAMIREZ,  
HARESH CHUGANI, POOJA SADARANGANI, DAVID  
JOHN, LUIS CARMONA, MARTHA CARMONA, NELSON  
VELEZ, ZENaida MARTINEZ, LEONOR GALVIZ, SUSANA  
RAMIREZ, DAMASO LOPEZ, ROSMERY BARRIOS, JUNG  
KIM, DONG ZHAO, WEN GAO, ALEJANDRO AGNONE,  
AUDREY CLAUSEN, LIZWA SHARIFFUDDIN, WEI XU,  
DEBRA BATTISTE, LEVDING CEVALLOS, DIEGO  
CEVALLOS, KAZI SHAMSUL, MOHSIN INAM, PATRICK  
PUGLIESE, SELAH GIRALDO, SHEKHAR BASNET, ANITA  
RANA, SONIA WADHWANI, BHAGWAN WADHWANI,  
BABAL B. SWAR, ANJU BISHT, HARISH BISHT, NEISHA  
LUM YOUNG, CHRISTIEN A. TOYEN, SHIMON KUMAR  
PRADHAN, PRASANA AMATYA, BRENDAN SENDZE, KIM  
LOWERS, ELIZABETH CASTILLO, CHRISTIAN  
VELASQUEZ, SHARAN VELASQUEZ, SARA PADOVANI,  
GABRIEL SOSA, KENYA TAYLOR, ADRIAN CRUZ,  
KRISTEN DESAPPIO, KHALID HASSAN, BRYAN  
TRINDADE, JESSICA TRINDADE, ISHWOR PATHAK,  
SUNAINA PRADHAN, PRATAP KUMAR RAI, DELINOIS  
VIXAMAR, ALLSTATE INDEMNITY COMPANY A/S/O  
CHRISTIAN TOYEN, ALLSTATE INDEMNITY COMPANY  
A/S/O MICHAEL TIMMONS,

**DECISION + ORDER ON  
MOTION**

Plaintiff,

- v -

56-11 94TH STREET CO., LLC, ALGIN MANAGEMENT  
CO., LLC, MAINTENANCE ASSET MANAGEMENT  
INC., DECLAN MCELHATTON, MCELHATTON  
MECHANICAL INC., MCELHATTON MECHANICAL INC.  
A/K/A MAINTENANCE ASSET MANAGEMENT INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89,

90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 118

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is denied..

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Such a motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (CPLR 3212[b]). To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form" (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 507; *see Zuckerman v City of New York*, 49 NY2d 557, 562). Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967; *see CPLR 3212[b]; Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d at 508). "Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 50, quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

"In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (Stukas v Streiter, 83 AD3d 18, 22; see Pearson v Dix McBride, LLC, 63 AD3d 895). "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" (Kolivas v Kirchoff, 14 AD3d 493, 493; see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404; Stukas v Streiter, 83 AD3d at 23).

Defendant argues that this case must be dismissed against him, because he did not use a propane torch on the subject roof on the incident date. To support this argument, plaintiff presents his affidavit attesting to this claim. This claim is also found in the affidavit of Daniel Mcelhatton. They both claim that on the date of the incident, neither touched a torch on the roof and that no one was authorized to use any torch on the roof.

These two affidavits are the only proof submitted by movant to support his request for summary judgment. Movant has not submitted any additional evidence, in admissible form or in any other form, to support the relief requested. This may be because discovery has not commenced. No party, including the movant, has been deposed and no documents have been exchanged.

In addition to the lack of supporting evidence, issues of fact remain to be decided in this matter. The first issue relates to resolving the conflict in defendant's denial of the use of any torch on the building roof and the Fire Department's Incident Report which states that the cause of the fire was due to the "illegal use of an incendiary torch". Another issue is the relationship, if any, between the fire and

movant's subsequent arrest on arson, reckless endangerment and fire code violations charges.

The trier of fact must also examine, clarify and determine movant's relationship to co-defendant Maintenance Asset Management Inc., in which movant denies having any corporate interest.

It is clear that this motion for summary judgment must be denied because it fails to meet any of the requirements necessary for this Court to grant such relief.

This is the decision and Order of the Court.

3/3/2021  
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: