

<b>Kleinplatz v 253 W. 16 Owners, Inc.</b>
2022 NY Slip Op 30009(U)
January 4, 2022
Supreme Court, New York County
Docket Number: Index No. 152446/2017
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 152446/2017

SAMUEL KLEINPLATZ,

Plaintiff,

MOTION SEQ. NO. 002

- v -

253 WEST 16 OWNERS, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for

JUDGMENT - SUMMARY

In this personal injury action commenced by plaintiff Samuel Joseph Kleinplatz, defendant 253 West 16 Owners, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint or, in the alternative, for the dismissal of plaintiff's claims of left wrist and right knee injuries. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an incident on May 31, 2016, in which plaintiff was allegedly injured while exiting an elevator on the third floor of the building where he lived at 253 West 16<sup>th</sup> Street in Manhattan ("the building" or "the premises"). Doc. 1. In his complaint, filed March 15, 2017, plaintiff alleged that defendant was negligent and violated the breach of warranty of habitability. Doc.1. Defendant joined issue by its answer filed May 10, 2017. Doc. 7.

In his bill of particulars, plaintiff alleged that he was injured while exiting a mis-leveled elevator on the third floor of the premises; that his injuries were caused by defendant's negligence; and that, as a result of the incident, he injured his left wrist and shoulder and right knee and foot. Doc. 30. Plaintiff also claimed that defendant had constructive notice of the allegedly dangerous condition and failed to warn of the same. Doc. 30. In his amended bill of particulars, plaintiff sets forth substantially identical allegations. Docs. 30, 55.

At his deposition, plaintiff testified that he fell due to the mis-leveling of the elevator, which was the only such device in the building. Doc. 54 at 29-30. He did not notice that the elevator was mis-leveled until after he fell. Doc. 54 at 30, 47. Plaintiff estimated that the cab of the elevator was about 3-4 inches below the level of the third floor, possibly more. Doc. 54 at 45-47. Plaintiff said he had seen the elevator mis-level "[m]ultiple times" in the past and that he had reported the problem to the Department of Buildings ("DOB") and to Steve Birbach, the building's property manager. Doc. 54 at 30, 80-83.

Plaintiff further testified that he injured his left hand and right knee in the alleged incident. Doc. 54 at 51. He believed he underwent left hand surgery in January 2017 and right knee surgery in February 2017. Doc. 54 at 55-57.

Beth Rake, superintendent of the premises from 1984 – 2017, testified on behalf of defendant. Doc. 56 at 6. She recalled that the building had a maintenance contract with Greyhound Elevator from 2014 through 2017. Doc. 56 at 17-18. She admitted that there were occasions on which she would post a sign on the elevator warning that it was mis-leveling. Doc. 56 at 12-13. She did not know how often Greyhound came to the building to address the mis-leveling of the elevator and did not keep a record of how often it did so. Doc. 56 at 19. She recalled that she posted such a warning sometime during her last two years on the job and that, when she did so,

she notified Greyhound that service was needed. Doc. 56 at 19. Additionally, Rake admitted that at least one complaint was made regarding the mis-leveling elevator prior to plaintiff's accident. Doc. 56 at 23-26.

A March 3, 2016 proposal from Greyhound to defendant reflected that the leveling of the elevator needed to be repaired and adjusted. Doc. 59. Additionally, on or about April 15, 2016, Rake put up a sign warning residents of the third floor that the elevator was mis-leveling. Docs. 65, 68.

Plaintiff filed a note of issue and certificate of readiness on or about December 28, 2020. Doc. 57.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 60. In support of the motion, defendant argues that plaintiff's negligence claim must be dismissed since it did not have notice of the mis-leveling on May 31, 2016 and since a full inspection of the elevator, as well as "necessary repairs" were made to the elevator on May 16, 2016. Doc. 60.<sup>1</sup> Defendant further argues that it cannot be liable herein since plaintiff did not know what caused him to fall and did not testify about any complaints he made to defendant about mis-leveling after May 16, 2016. Doc. 60. Further, claims defendant, the superintendent at the premises always notified the elevator repair company in the event of a malfunction. Doc. 60. Defendant further asserts that a single instance of mis-leveling does not give rise to liability for a breach of warranty of habitability. Doc. 44.

In support of the motion, Steven Birbach, President & CEO of Vanderbilt Property Management, LLC, property manager for the premises, submits records his company kept in the regular course of business regarding the maintenance of the elevator. Doc. 46.

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<sup>1</sup> Although Greyhound issued an invoice to defendant dated May 16, 2016, it was for "elevator maint." and did not specify whether it was for mis-leveling. Doc. 59.

Alternatively, defendant seeks partial summary judgment dismissing any claims regarding plaintiff's left wrist and right knee injuries. Doc. 60. In support of its request for this alternative relief, defendant submits the sworn report and affidavit of Dr. Gregory Montalbano, an orthopedic surgeon, who examined plaintiff and determined that neither his left wrist surgery nor his right knee injury resulted from the alleged accident. Docs. 45-49. However, Dr. Montalbano notes in his examination report that "[a]s a result of the accident, [plaintiff sustained injuries] to the left hip, right knee, [and] left wrist." Doc. 49.

In opposition, plaintiff argues that defendant was on notice of problems with the elevator since violations were issued to the building regarding the elevator in April 2016, about 6 weeks before the alleged accident. Docs. 64, 67.<sup>2</sup> Plaintiff further asserts that Rake put up a sign on the third floor on or about April 15, 2016 warning that the elevator was not working properly. Docs. 64, 68.

Yulia Topchiy, a resident of the building, submits a sworn statement representing that she was aware of prior mis-leveling but she does not give a time frame for the alleged incidents. Doc. 69. Additionally, Rafael Rosa submits a sworn witness statement in which he attests to seeing plaintiff fall while leaving the elevator. Doc. 70. However, Rosa does not represent that he saw plaintiff fall due to the mis-leveling of the elevator. Doc. 70.

Plaintiff further maintains that his left wrist and right knee injuries arose from the accident. Doc. 64. In opposition to defendant's motion, plaintiff submits the affidavit of Dr. Bradley Horak, a hand surgeon, who opines, "with a reasonable degree of medical certainty", that plaintiff's left wrist injury and surgery were causally related to the accident. Doc. 66. Dr. Horak also submits his

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<sup>2</sup> Although a DOB notation reflects that a violation was filed against the elevator on April 15, 2016, the DOB report does not specify that the violation arose from mis-leveling. Doc. 67.

surgical report, which indicates that plaintiff injured his left wrist in the accident. Doc. 73. Plaintiff also submits the operative report of Dr. Johnny Arnouk, who performed surgery on plaintiff's right knee due to pain he had "since suffering a fall in his building several months earlier." Doc. 74.

In reply, defendant argues that plaintiff failed to oppose the branch of the motion seeking dismissal of the breach of warranty of habitability claim and thus it must be dismissed. Doc. 79. Defendant further asserts that neither the notice witnesses named by plaintiff nor the sign posted by Rake on the third floor creates an issue of fact. Doc. 79.

### LEGAL CONCLUSIONS

On a motion for summary judgment, the movant "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]). Once this showing is 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" (*Alvarez*, 68 NY2d at 324). A movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Defendant has failed to establish its prima facie entitlement to summary judgment dismissing the complaint. Initially, defendant argues that the cause of action for breach of warranty of habitability must be dismissed because plaintiff was injured in "a one-time elevator mis-leveling event" and not as the result of a consistent and pervasive condition. Doc. 79. However, this argument overlooks plaintiff's testimony that he had seen the elevator mis-level multiple times, as well as Rake's testimony that she had posted signs warning of the mis-leveling on several

occasions. Thus, defendant fails to establish its entitlement to summary judgment dismissing this claim despite the fact that plaintiff does not oppose this branch of the motion.

Further, defendant fails to establish its prima facie entitlement to summary judgment dismissing plaintiff's negligence claim. Although defendant submits elevator repair records which purportedly reflect that the mis-leveling was corrected prior to plaintiff's accident, none of the records actually confirms this and defendant has not submitted an affidavit of an individual with knowledge interpreting the records. Importantly, on March 3, 2016, Greyhound sent defendant a proposal for work including leveling repair and adjustment to the elevator. Doc. 59. The proposal was not approved until April 22, 2016, and it is unclear whether the leveling work was performed, if at all, prior to plaintiff's May 31, 2016 incident. Therefore, defendant has failed to establish as a matter of law that it did not have actual and/or constructive notice of a mis-leveling problem. At the very least, issues of fact exist as to whether defendant had notice of a mis-leveling condition (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]; *Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86, 91 [1st Dept 2002]). The evidence submitted could allow a jury to find that defendant had actual notice of a recurring mis-leveling problem with the elevator based on plaintiff's testimony regarding prior similar incidents, the sign which plaintiff claims Rake posted on the third floor, and Greyhound's service records (*see Martin v Kone, Inc.*, 94 AD3d 446, 447 [1st Dept 2012]; *Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [1st Dept 2007]). Greyhound's servicing, or scheduled servicing, of the elevator in response to at least one prior complaint about mis-leveling raises an issue of fact as to notice (*see Ardolaj v Two Broadway Land Co.*, 276 AD2d 264, 265 [1st Dept 2000]).

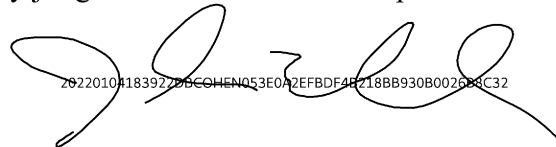
Finally, as noted above, Dr. Montalbano opines that plaintiff's left wrist and right knee injuries are not related to the alleged incident. However, in the medical history section of his

examination report, Dr. Montalbano notes that “[a]s a result of the accident, [plaintiff sustained injuries] to the left hip, right knee [and] left wrist” and that plaintiff complained of sharp pain in his right knee as well as “constant pain” in his left wrist depending on the day. Doc. 49. Thus, defendant has failed to establish as a matter of law that plaintiff did not sustain injuries to his left wrist and right knee in the accident. Even assuming, arguendo, that defendant established that plaintiff did not sustain injury to his left wrist as a result of the accident, Dr. Horak’s sworn report would raise an issue of fact in this regard.

The parties’ remaining arguments are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that defendants’ motion for summary judgment is denied in all respects.



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1/4/2022  
DATE

DAVID B. COHEN, 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