

<b>Barkley v SL Green Mgt., LLC</b>
2022 NY Slip Op 32342(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 155022/2017
Judge: Shlomo Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SHLOMO HAGLER** **PART 17**

*Justice*

-----X

ISABEL BARKLEY,

Plaintiff,

- v -

SL GREEN MANAGEMENT, LLC,

Defendant.

-----X

SL GREEN MANAGEMENT, LLC

Plaintiff,

-against-

NOUVEAU ELEVATOR INDUSTRIES, INC.

Defendant.

-----X

INDEX NO. 155022/2017

MOTION DATE 12/14/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595745/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for

JUDGMENT - SUMMARY

In motion sequence number 003, defendant SL Green Management, LLC (SL Green) moves for summary judgment, pursuant to CPLR 3212, to dismiss the sole negligence cause of action asserted against it by plaintiff Isabel Barkley (Barkley), and to grant it summary judgment with respect to the third-party causes of action for contractual indemnification, common law indemnification, and breach of contract it asserts against third-party defendant Nouveau Elevator Industries, Inc. (Nouveau). Nouveau supports SL Green's motion for summary judgment against

Barkley but cross-moves for summary judgment, to dismiss SL Green's third-party causes of action in their entirety. Barkley opposes SL Green's motion and Nouveau's cross motion.

### **Background**

Barkley, a resident of the State of New York, alleges that, on July 18, 2016, at about 7 o'clock in the evening, she was injured at the building located at 100 Park Avenue, in the County, City and State of New York (Premises), when she "was caught in the [closing] doors of an elevator while exiting on the 4th floor when the elevator sensor did not re-track (*sic*)" (*see* summons and complaint, dated May 31, 2017, ¶¶ 1,16 - 17 [NYSCEF Doc No. 1] and affirmation of Brian A. Kalman, Esq., executed December 11, 2020 [Kalman affirmation] [NYSCEF doc No. 101], exhibit A [Plaintiff's Bill of Particulars, dated August 3, 2017 [BP] [NYSCEF Doc No. 102], ¶¶ 1-2]).

At the time of her alleged injury, Barkley was employed at the Premises as Director of Tax at WPP Group, USA (Kalman affirmation, ¶ 2 [(b)]. Barkley asserts that the malfunctioning elevator caused her to suffer a "crush injury," requiring surgical reconstruction of a ligament in her right wrist and resulting in a dislocation of her ulna and the partial tear of a ligament in her left wrist. Barkley asserts these injuries have caused her substantial harm, including pain and discomfort, and have limited her range of motion (BP ¶ 13).

SL Green asserts that it cannot be held liable because it did not create the dangerous condition which allegedly caused Barkley's injuries and that it had not received actual or constructive notice of the existence of such dangerous condition before Barkley's injury (Kalman affirmation, ¶¶ 40-44). SL Green also asserts that it is not the owner of the Premises, but rather its leasing and management agent, and that the Premises' owner, at times relevant herein, was

and is non-party SLG 100 Park LLC (Kalman affirmation, exhibit E [affidavit of John Flaherty, sworn to December 9, 2020 [Flaherty aff], ¶¶ 3-6).

SLG 100 Park LLC entered and continued a full-service elevator maintenance contract with Nouveau, beginning on or about May 1, 2014 (Service Contract) (Kalman affirmation, ¶¶ 6-7, 15 and exhibit F), which SL Green contends makes Nouveau fully responsible for the maintenance and service of subject elevator through the date on which Barkley was allegedly injured (Kalman affirmation ¶ 44). SL Green also notes that the doctrine of *res ipsa loquitur* may not be applied against it here, as it ceded all responsibilities with respect to the elevators to Nouveau (*id.* ¶¶ 46-47).

As to its third-party claims, SL Green first asserts that if the Court should determine that it is liable to Barkley, Nouveau must honor the indemnity provision to its Service Contract, which provides, in pertinent part, that:

*“To the fullest extent permitted by law and at its own cost and expense, Contractor [Nouveau] shall defend and hold harmless (i) Owner [SLG 100 Park LLC] and the Owner Parties, (ii) the owner and tenant of each building where Work is to be performed hereunder, and the respective directors, officer, shareholders, partners, members, managers, employees and agents of each such owner and tenant and (iii) such other parties in interest as Owner may designate in writing from time to time (collectively, the ‘Owner Indemnified Parties’) from and against all losses, liabilities, damages, judgments, costs, fines, penalties, actions or proceedings and attorneys’ fees, and shall defend including appeals, for personal injury to or death of any person, for loss or for damage to property or damage to the environment as a result of the (i) acts, omissions, or other conduct of Contractor . . . , in connection with Contractor’s performance or failure to perform under this Agreement, (ii) or any breach of any warranty or representation of Contractor made under the Agreement”*

(Kalman affirmation, exhibit F, schedule F, Indemnity, subparagraph [a] [emphasis added]). SL Green asserts that it should be contractually indemnified under the Service Contract as a member of the “Owner Indemnified Parties.” The Service Contract does not define “Owner Indemnified

Parties” to include SL Green. Nouveau, however, does not take issue with SL Green’s assertion and so has conceded this point.

SL Green also claims that Nouveau should be held liable for breach of contract, for damages arising from Nouveau’s failure to obtain insurance coverage for it, as mandated in the Service Contract. The Service Contract provides, in pertinent part:

**“INSURANCE REQUIREMENTS:**

During the entire term that the Agreement is in effect, Contractor shall secure, maintain and pay the premiums of the following policies of insurance. All such insurance shall be primary insurance, notwithstanding any insurance maintained by Owner or any of the Owner Indemnified Parties.

\* \* \*

(c) Commercial General Liability Insurance, including Contractual Liability to specifically include coverage for the indemnification clause of this Agreement, Products & Completed Operations Liability (including XCU coverage), Broad Form Property Damage, Personal Injury Liability and Advertising Injury Liability, written on an occurrence form, with combined bodily injury and property damage limits of liability of no less than \$15,000,000 per occurrence, \$15,000,000 general aggregate per project, \$15,000,000 Personal [Injury] and Advertising Injury and \$15,000,000 Products and Completed Operations liability, per project ....

Contractor’s aggregate insurance required under subsection[] (c) may be furnished in combination with policies of umbrella insurance”

(Kalman affirmation, exhibit F, schedule F, Insurance Requirements, subsection [c]).

**Discussion**

“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 of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]).

To prevail, the movant must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in their favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movant has made its showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and other proof must be examined carefully “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment” (*id.*).

### **SL Green’s Motion for Summary Judgment**

SL Green asserts it cannot be held liable because it is not the owner of the Premises and because it neither created a defective condition, nor received actual or constructive notice of such condition, with respect to the elevator in which Barkley was allegedly injured. SL Green also maintains that the doctrine of *res ipsa loquitur* cannot be applied to hold it liable as property manager of the Premises, because there is no evidence of negligence on its part, and because it had ceded all control over elevator maintenance and repair at the Premises to Nouveau before Barkley’s alleged injuries occurred.

Specifically, John Flaherty, SL Green’s Property Manager for the Premises since 2007, avers that he was not aware of any complaints about the elevator or any repair and maintenance records showing that the elevator had malfunctioned in the year prior to Barkley’s accident

(Kalman affirmation, exhibit E, ¶ 12). Flaherty also asserts that Nouveau was the sole full-service elevator maintenance and repair contractor for the Premises from May 1, 2014 through at least July 18, 2016, and that SL Green did not direct, supervise or control Nouveau during that time (*id.* ¶¶ 10-11). SL Green has therefore made out its prima facie showing that it is entitled to summary judgment dismissing Berkley's cause of action as a matter of law (*Pui Kum Ng Lee v Chatham Green, Inc.*, 179 AD3d 431, 431 [1st Dept 2020]; *Gjonaj v Otis El. Co.*, 38 AD3d 384, 384-85 [1st Dept 2007]).

In opposition, Barkley argues that SL Green must be held liable because it failed to address problems that its property manager knew of or should have known about, such as how the floor of the elevator in question "were always mis leveled" and how the property manager failed to set the door closing timer properly, to allow adequate time for passengers to enter and exit the elevator car.

Barkley, however, made no allegations about the elevator misleveling or the doors closing too quickly until counsel submitted their opposition affirmation, wherein they alleged that the misleveling of the elevator delayed Barkley's entry into the car, causing her to be caught in the doors. Her complaint (NYSCEF Doc No. 92) does not state the manner or means by which she was allegedly injured. In paragraph 2 of her initial bill of particulars (Kalman affirmation, exhibit A [NYSCEF Doc No. 102]), her amended verified bill of particulars (NYSCEF Doc No. 122), and her third amended verified bill of particulars (NYSCEF Doc No. 123), Barkley alleges that she suffered bodily injury when she was "caught in the doors of the elevator while entering on the 4th floor when the elevator sensor did not re-track (*sic*)."

Barkley is not permitted to raise, for the first time in opposition to summary judgment motion, a new theory of liability based on alleged misleveling of the elevator or an improperly

calibrated door timer, which she did not set forth in her complaint or bill of particulars (*Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]).

Even if these issues were properly raised, plaintiff never testified that the alleged misleveling of the elevator was the proximate cause of her accident. Plaintiff merely testified that on the date of the accident the subject elevator was closing “faster than normal” (NYSCEF #85, p. 140, lines 3-4) and was “aggressive” (NYSCEF #85, p. 139, lines 13). In addition, the testimony of Anthony Cook, the housekeeper who was seen on the subject video lifting his cart through the elevator, testified that the elevator misleveled on the date of the accident on the 4<sup>th</sup> floor of the subject building. However, Cook admitted that he never reported this alleged misleveling condition to representatives of management SL Green nor to the elevator company Nouveau.

Based on the testimony of Donald Cristano of Nouveau, plaintiff argues that the door timer or speed would normally be controlled by the building manger. However, Cristano never testified that he or anyone else from Nouveau received such specific instruction from SL Green.

Notwithstanding the above, Flaherty and Cristano testified that SL Green and Nouveau never received any complaints concerning malfunction of the subject elevator including allegations of misleveling, improperly calibrated door timer, malfunction of sensor and the failure to properly retract. In any event, John Halpern, P.E., opined that the subject elevator was in proper working order. Plaintiff failed to proffer any expert opinion to controvert Halpern’s expert opinion.

Barkley’s assertion that SL Green should be held liable for negligence under the doctrine of *res ipsa loquitur* is also mistaken. As noted by *Devito v Centennial El. Indus., Inc.* (90 AD3d 595, 596 [2d Dept 2011]), a case Barkley cites, a plaintiff must show, among other things, that

“the maintenance and service of the elevator was in the exclusive control” of defendant (*see also Chambers v Tilden Towers Hous. Co. Section II, Inc.*, 177 AD3d 413. 413 [1st Dept 2019] [“Exclusive control of the instrumentality bringing about the injury, which is necessary for (*res ipsa loquitur*) doctrine to apply, is absent where, as here, an owner ceded all responsibility for maintenance and repair to elevator service contractor”]).

Here, Barkley’s support for its *res ipsa loquitur* argument is premised on their new theories of liability involving the elevator floor misaligning, and the need to adjust the time setting on the elevator doors being defects SL Green’s manager knew or should have known about. Even if these belated allegations could be heard for the first time in opposition (*Abalola, supra*), Barkley still does not allege that SL Green held *exclusive* control over the elevator’s maintenance and repair and so fails to satisfy this element of a *res ipsa loquitur* claim.

Accordingly, SL Green’s motion for summary judgment, dismissing Barkley’s cause of action for negligence, must be granted.

### **Nouveau’s Cross-Motion**

SL Green also contends that it is entitled to contractual and common law indemnification for any claims arising from Nouveau’s performance of the Service Contract, and that Nouveau is also liable for its breach of contract, inasmuch as it failed to secure \$15 million in “additional insured” liability coverage for SL Green under its business insurance policies, as promised.

Nouveau cross-moves to dismiss each of SL Green’s third-party causes of action.

Nouveau contends that SL Green’s cause of action for common law indemnification must be dismissed because SL Green did not cede all control of elevator maintenance and repair to Nouveau, noting that SL Green hired a consultant to oversee Nouveau’s work and to advise SL Green regarding the functioning of its elevators. SL Green disputes these contentions and argues

that Nouveau was fully responsible for elevator maintenance and repair under the Service Contract. As the question of SL Green's liability to Barkley for negligence has been resolved in SL Green's favor, SL Green's cause of action for common law indemnification is moot.

SL Green's causes of action for breach of contract and contractual indemnification, however, are not mooted, because SL Green may be entitled to recover its attorneys' fees and other costs of defense, should it prevail on either cause of action.

With respect to breach of contract, Nouveau asserts SL Green is mistaken to claim that it failed to procure commercial general liability insurance, providing the coverages prescribed for in the Service Contract. In support, Nouveau presents certificates of insurance from three different insurers, reflecting primary, umbrella, and excess liability coverage, specifically naming SL Green and SLG 100 Park LLC, among others, as additional insureds (*see* Verdirame opposition affirmation, exhibit L [NYSCEF Doc No 138]). Certificates of insurance, however, are not dispositive evidence and so questions of fact remain, precluding summary judgment for both SL Green and Nouveau on the breach of contract cause of action (*see Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996] ["A certificate of insurance is merely evidence of a contract of insurance, not conclusive proof that the contract exists, and not, in itself, a contract to insure" [citations omitted]).

Nouveau also argues that SL Green's claim for contractual indemnification is premature because it had not yet been determined whether SL Green was liable to Barkley. It is true that where an indemnitor is not an insurer, "its duty to defend its contractual indemnitee is no broader than its duty to indemnify" (*Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 [1st Dept 2010] [citation omitted]) and so, generally, no duty to defend would arise

until there is a showing that Nouveau had been negligent (*see id.*, citing *Francescon v Gucci Am., Inc.*, 71 AD3d 528 [1st Dept 2010]).

“However, the [Service Contract] contains a promise by defendant not only to indemnify, but also to procure insurance that fully covers the scope of the indemnity” (*id.*). The First Department went on to note that defendant Thyssenkrupp Elevator Corporation had obtained a policy in the agreed-to face amount with a \$1.25 million deductible and so it was obligated to defend and indemnify plaintiff for any covered liability within the deductible (*id.*).<sup>1</sup> As Nouveau’s putative obligation to indemnify SL Green for defense costs cannot be determined without first examining the insurance policies Nouveau allegedly procured under the Service Contract, the parties’ motions for summary judgment with respect to SL Green’s causes of action for breach of contract and contractual indemnification must both be denied.

### **Conclusion**

ORDERED that SL Green’s motion for summary judgment, to dismiss plaintiff Barkley’s cause of action against it for negligence, is granted and Barkley’s complaint is dismissed; and it is further

ORDERED that SL Green’s motion for summary judgment, with respect to its third-party causes of action against Nouveau for contractual indemnification and breach of contract, is denied; and it is further


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<sup>1</sup> Commercial general liability insurance generally includes a promise to defend insureds. “Liability insurance coverage entails the defense and settlement of claims made against the insured by third parties and is in essence ‘litigation insurance’” (*Gentile v Wakeel*, 135 Misc 2d 301, 302 [Sup Ct, Oneida County 1987], quoting *Kandel v Tocher*, 22 AD2d 513, 515 [1st Dept [1965]]). “Where an insurance policy includes the insurer’s promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer’s duty to furnish a defense is broader than its obligation to indemnify” (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984], citing *International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326 [1974]). “Though policy coverage is often denominated as ‘liability insurance’, where the insurer has made promises to defend ‘it is clear that [the coverage] is, in fact, ‘litigation insurance’ as well” (*id.*, quoting *International Paper Co.*, 35 NY2d at 326).

ORDERED that SL Green’s motion for summary judgment, with respect to its third-party cause of action against Nouveau for common law indemnification, is hereby denied as moot; and it is further

ORDERED that Nouveau’s cross motion for summary judgment, to dismiss SL Green’s third-party causes of action is granted with respect to common law indemnification but denied with respect to breach of contract and contractual indemnification; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of SL Green, dismissing the negligence claim made against it by Barkley in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

<u>7/15/2022</u> DATE					 SHLOMO HAGLER, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE