

Khazanov v 40 X Owner LLC

2023 NY Slip Op 33653(U)

October 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 515513/2017

Judge: Richard Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of OCTOBER, 2023

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

-----X
ROMAN KHAZANOV,

Plaintiff,

-against-

Index No.: 515513/2017
Decision and Order
Mot. Seq. No. 10 & 11

40 X OWNER LLC, 40 EXCHANGE PLACE CORP.,
NEWMARK KNIGHT FRANK, POWER ELEVATOR
CORP. and CENTENNIAL ELEVATOR INDUSTRIES,
INC.,

Defendants,

-----X
40 X OWNER LLC and NEWMARK KNIGHT FRANK,

Third-Party Plaintiff(s),

-against-

POWER ELEVATOR CORP. and CENTENNIAL
ELEVATOR INDUSTRIES, INC.,

Third-Party Defendants,

-----X
The following papers NYSCEF Doc #'s to read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	262-283; 289-318
Opposing Affidavits (Affirmations) _____	286-287; 321
Reply Affidavits _____	319-320

After having come before the Court and the Court having heard oral argument on July 19, 2023 and upon a review of the forgoing, the court finds as follows:

Defendant's Power Electric Corp move pursuant to CPLR 3212 for an Order granting the defendants summary judgment thereby dismissing the plaintiff's complaint and all cross-claims against Power Elevator Corp.. (MS#10).

Defendants/third-party plaintiffs, 40X Owner LLC ("40X") and Newmark Knight Frank ("Newmark") move for an Order dismissing Power Elevator's motion for summary judgment as against 40X and Newmark; and granting 40X and Newmark's cross-motion for conditional summary judgment against Power on the grounds of contractual indemnification. (MS#11)

It is alleged plaintiff was injured when his arm was struck, and became trapped, by a closing elevator door, as plaintiff was attempting to enter this elevator #4 in a building owned and managed by the defendant 40X Owner LLC, and by the defendant Newmark Knight Frank. The alleged incident herein occurred on January 26, 2017 at 40 Exchange Place, New York, NY. The incident took place on the elevator bearing NYC ID no. 2P1927. The elevator bearing NYC ID no. 1P927 is designated as elevator no. 4. Pursuant to contract signed on May 31, 2016, Power Elevator Corp. maintained and repaired the subject elevator pursuant to contract. The contract between Power and co-defendant went into effect on June 1, 2016. Power admits the contract for repair and maintenance was in effect on the date of the accident.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. A motion for summary judgment will 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 the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

"An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (*Rogers v. Dorchester Assoc.*, 32 NY2d 553, 559, 347 NYS2d 22, 300 NE2d 403; see *Fyall v. Centennial El. Indus. Inc.*, 43 AD3d 1103, 1104, 843 NYS2d 137; *Oxenfeldt v. 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392, 816 NYS2d 563); quoting *Hudson v. Tower Elevator*, 60 AD3d 906, 907, 876 NYS2d 117, 117 (2009).

In the present case, the defendants have failed to meet their burden. There are numerous issues of fact including but not limited to, how the accident occurred, whether there was notice of the condition, whether defendants serviced the elevator, whether defendants were responsible for correcting the condition under their maintenance contract, as well as competing experts and credibility. "Where both sides present expert testimony in support of their respective positions, it is for the jury to decide which expert's testimony is more credible (see *Velez v. Policastro*, 1 AD3d 429, 431, 766

NYS2d 684; *Cavlin v. New York Med. Group*, 286 AD2d 469, 471, 730 NYS2d 337; *Ibrahim v. Lombardo*, 229 AD2d 423, 424, 644 NYS2d 519); quoting *Texter v. Middletown Dialysis Ctr., Inc.*, 22 AD3d 831, 832, 803 NYS2d 687, 689 (2005). As such defendant Powers motion for summary judgment must be denied.

As to Defendants 40X and Newmark's cross-motion for conditional summary judgment against Power on the grounds of contractual indemnification the indemnification clause contained in the contract states;

"INDEMNIFICATION/HOLD HARMLESS To the fullest extent permitted by law, Provider [Power], shall defend, indemnify and hold harmless Owner [40X], any Fee Owner of the realty and/or improvements upon the realty of the building, Managing Agent [Newmark] and their respective directors, shareholders, partners...including but not limited to those listed on the Exhibit A (collectively, "Newmark Family Properties, LLC"), from and against any and all claims, demands, suits, actions, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including reasonable attorneys' fees and expenses, on account of bodily or personal injury, sickness, disease, or death sustained by any person or persons...directly arising out of the negligent acts or omissions of Provider, its Subsidiaries and Subcontractors..."

It is clear from the contractual indemnification clause that it is only triggered upon a finding that the injury directly arises out of the negligent acts or omission of the provider. As the question of liability has not yet been determined the defendants request for conditional indemnification is premature. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660, 871 NYS2d 654). "Where a question of fact exists regarding the owner's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature (see *State of New York v. Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758, 720 NYS2d 589); quoting

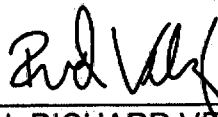
Bellefleur v. Newark Beth Israel Med. Ctr., 66 AD3d 807, 808–09, 888 NYS2d 81, 83–84 (2009).

Accordingly, Defendant Power Electric Corp motion for summary judgment is hereby denied, for the reasons stated above. (MS#10). Defendants 40X and Newmark's cross-motion for conditional summary judgment against Power on the grounds of contractual indemnification vis hereby denied, with leave to renew a negligence finding has been made, for the reasons stated above. (MS#11)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
October 13, 2023

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

OCT 13 2023