

David v Museum of Modern Art

2025 NY Slip Op 34104(U)

October 24, 2025

Supreme Court, New York County

Docket Number: Index No. 160020/2019

Judge: Mary V. Rosado

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

MARTIN DAVID, Plaintiff,

Plaintiff,

- v -

THE MUSEUM OF MODERN ART, and SCHINDLER ELEVATOR CORPORATION

Defendants.

INDEX NO. 160020/2019

MOTION DATE 04/28/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 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

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of August 6, 2025, Defendant Schindler Elevator Corporation's ("Schindler") motion for summary judgment and Defendant the Museum of Modern Art's ("MOMA") cross motion for summary judgment dismissing Plaintiff's Complaint are granted.

I. Background

Plaintiff sues MOMA and Schindler for injuries he sustained allegedly when he lifted a bookshelf while working for non-party Collins Building Services ("Collins). On August 10, 2019, Plaintiff worked as a porter for Collins which provided maintenance and cleaning services to MOMA at 11 West 53rd Street, New York, New York (the "Premises") (NYSCEF Doc. 54 at 21; 26; 35-36). Plaintiff was on the second floor in front of the freight elevator moving wheeled bookshelves from the second to the sixth floor with his coworker, Alex Encarnacion (NYSCEF Doc. 54 at 37; 42; 44; 51). According to Plaintiff, Mr. Encarnacion tried to push a bookshelf onto the freight elevator, which was not level with the floor, and one of the wheels on the bookshelf

broke off (NYSCEF Doc. 54 at 55).¹ Plaintiff lifted the bookshelf so he and Mr. Encarnacion could look where the wheel came off, and Plaintiff claims he strained his back (NYSCEF Doc. 54 at 67). Eleven days prior to Plaintiff's accident, on July 31, 2018, the elevator passed its annual test and inspection, which was witnessed by an independent 3rd party inspector (NYSCEF Doc. 63).

Schindler serviced the freight elevators for MOMA (NYSCEF Doc. 55 at 32-33). According to Terry Murphy, the Schindler mechanic who services MOMA's elevators, he rode each elevator every Monday to inspect the elevators for any issues (NYSCEF Doc. 56 at 25). He also inspected the freight elevator at issue once per month. Mr. Murphy never received any reports of the elevator being unlevel (NYSCEF Doc. 56 at 48). Mr. Murphy performed maintenance work on the elevator days prior to Plaintiff's accident, including on August 7, 2018 and August 9, 2018, but on these days there were no reported issues with the elevator being unlevel (NYSCEF Doc. 56 at 87-94). Jon B. Halpern, P.E., retained by Schindler, opined with a reasonable degree of engineering certainty that the elevator was not unlevel, nor did it or Schindler's maintenance violate any code or industry standard, but that if the wheel broke, it broke because it became caught in code compliant gaps between the freight elevator sill and the landing sill (NYSCEF Doc. 63). Schindler moves for summary judgment dismissing Plaintiff's Complaint, and MOMA cross moves for the same relief. Plaintiff opposes.

II. Discussion

Schindler's motion is granted. As a preliminary matter, Plaintiff concedes he is not a covered individual under the New York Labor Law, so his claims for violations of the Labor Law are dismissed. Therefore, Plaintiff's only remaining claim asserted against Defendants is for negligence. Schindler's argument that it did not owe a duty to Plaintiff is unavailing as the service

¹ The freight elevator was allegedly an inch higher than the floor it opened onto (NYSCEF Doc. 54 at 57).

contract between Schindler and MOMA at a minimum raises an issue of fact as to whether Schindler displaced MOMA's duty to maintain elevator safety at the Premises.

However, Schindler has met its *prima facie* burden of establishing it did not have actual or constructive notice of the elevator being unlevel, and established it did not breach any duty owed to Plaintiff (*see, e.g. Cruz v New York City Housing Auth.*, 92 AD3d 615 [1st Dept 2012]; *see also Parris v Port of New York Auth.*, 47 AD3d 460 [1st Dept 2008]). There is no evidence of prior complaints regarding the elevator being unlevel. But there is documentary evidence that the elevator passed its annual inspection ten days prior to Plaintiff's accident. There is documentary and testimonial evidence that Schindler's mechanic performed maintenance on the subject elevator twice in the days leading up to the accident and no levelling issues were noted, and there is evidence Schindler's mechanic rode each elevator weekly and performed inspections on each elevator monthly, and leveling issues were never noticed. While there is a gap between the freight elevator and the second-floor landing sill, Schindler's expert examined the gap and stated with a reasonable degree of engineering certainty the gap was code compliant (NYSCEF Doc. 63). Therefore, the burden shifts to Plaintiff to raise a triable issue of fact (*see Walsh v West Gramercy Associates LLC*, 235 AD3d 462, 462-63 [1st Dept 2025] citing *Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458-59 [1st Dept 2011]; *see also Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011]).

In opposition, Plaintiff fails to raise an issue of fact and instead makes arguments based on speculation and conclusory assertions (*see, e.g. Santoni v Bertelsmann Property, Inc.*, 21 AD3d 712, 714 [1st Dept 2005]). Plaintiff fails to offer any rebuttal or contradictory expert testimony in response to Schindler's expert's opinion. Plaintiff's reliance on his own testimony and the testimony of Mr. Encarnacion is insufficient (*see Pui Kum Ng Lee v Chatham Green, Inc.*, 179

AD3d 431 [1st Dept 2020]; *Gjonaj v Otis Elevator co.*, 38 AD3d 384, 385 [1st Dept 2007]). These witnesses vaguely state the elevator had been unlevel for months, yet they failed to make any complaints about the elevator's condition, and in the absence of any expert opinion contradicting Defendant's expert and the evidence of a passed inspection less than two weeks prior to Plaintiff's accident, this vague and conclusory testimony is not enough (*see Fasano v Euclid Hall Associates, L.P.*, 136 AD3d 478, 479 [1st Dept 2016]; *see also San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 591 [1st Dept 2012]; *Narvaez ex rel. Osorio v New York City Housing Authority*, 62 AD3d 419, 420 [1st Dept 2009]).

Plaintiff's reliance on *Merrick v. Macerich Company*, 223 A.D.3d. 530 (1st Dept. 2024) is likewise misplaced, as in that case, unlike here, the defendants' records lacked detail and the mechanic who provided testimony did not have personal knowledge. Here, there is record evidence of a passed inspection days prior to Plaintiff's accident, and further maintenance in the days leading up to the accident, with no mention of any leveling issues. Likewise, the elevator malfunction in *Merrick*, namely unexpected closing doors that failed to detect the presence of a person, is drastically different from the alleged malfunction here – namely the elevator being unlevel by one to two inches.

Plaintiff's reliance on *res ipsa loquitur* is misplaced (*see, e.g. Torres-Martinez v Macy's Inc.*, 146 AD3d 638, 639 [1st Dept 2016]). The elevator was not in the exclusive control of Defendants, since according to Plaintiff and Mr. Encarnacion, the elevator was frequently used by Collins employees to move heavy objects between floors (*Parris v Port of New York Auth.*, 47 AD3d 460, 461 [1st Dept 2008]). Moreover, Plaintiff's injuries could have occurred in the absence of negligence. Plaintiff is claiming he was injured from lifting heavy bookshelves – these injuries could have been sustained by Plaintiff due to his own negligence by improperly lifting the

bookshelf, or simply by virtue of his job, which involved manual labor, and could have occurred regardless of how the elevator was functioning (*Walsh v West Gramercy Associates LLC*, 235 AD3d 462, 463 [1st Dept 2025] citing *Fasano v Euclid Hall Associates, L.P.*, 136 AD3d 478, 479 [1st Dept 2016]). Because Schindler met its *prima facie* burden, and Plaintiff failed to raise a triable issue of fact, Schindler’s motion for summary judgment is granted.

MOMA’s cross motion for summary judgment dismissing Plaintiff’s Complaint is also granted. For the same reason Schindler established it did not have notice of any issues regarding leveling of the elevator, so too MOMA established it did not have notice of any levelling issues (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011]). In opposition, Plaintiff fails to raise a triable issue of fact (*Walsh, supra* at 462). Therefore, MOMA’s cross motion is granted, and Plaintiff’s Complaint is dismissed.

Accordingly, it is hereby,

ORDERED that Schindler’s motion and MOMA’s cross motion for summary judgment dismissing Plaintiff’s Complaint is granted, and Plaintiff’s Complaint is hereby dismissed; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

10/24/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input type="checkbox"/> NON-FINAL DISPOSITION | |
| | <input checked="" type="checkbox"/> GRANTED | | <input 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"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |