

Bennici v 41 E. 11th St., LLC
2021 NY Slip Op 30231(U)
January 26, 2021
Supreme Court, New York County
Docket Number: 150474/2012
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. LAURENCE L. LOVE</u>	PART	IAS MOTION 63M
	<i>Justice</i>		
-----X		INDEX NO.	<u>150474/2012</u>
NUNZIO BENNICI,		MOTION DATE	<u>01/19/2020, 01/19/2021</u>
Plaintiff,		MOTION SEQ. NO.	<u>013 014</u>
- v -			
41 EAST 11TH STREET, LLC,			
Defendant.			

**DECISION + ORDER ON
MOTION**

-----X	
41 EAST 11TH STREET, LLC	Third-Party
Plaintiff,	Index No. 590757/2013
-against-	
P.S. MARCATO ELEVATOR CO., INC.,	
Defendant.	
-----X	

The following e-filed documents, listed by NYSCEF document number (Motion 013) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 185, 187, 193, 194, 195, 198, 199 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 014) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 188, 190, 191, 192, 196 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

Defendant P.S. Marcato Elevator Co., Inc. (motion sequence no. 13) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint; and defendant 41 East 11th Street, LLC, (motion sequence no. 14) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and any cross claims. Oral argument was heard on both motions January 19, 2021 via Microsoft Teams.

This personal injury action involves a passenger elevator located within the building at 95 University Place, New York, New York which allegedly closed on plaintiff's arm as a result of an alleged elevator malfunction on July 13, 2011, at approximately 12:40 PM.

Plaintiff commenced this action by filing a summons and verified complaint on March 2, 2012. 41 East 11th Street, LLC joined issue with the filing of its verified answer on June 8, 2012. 41 East 11th Street, LLC commenced a third-party action against P.S. Marcato Elevator Co., Inc. by filing a third-party summons and verified complaint on September 25, 2013. P.S. Marcato Elevator Co. joined issue by filing a verified answer on October 24, 2013.

Plaintiff's complaint alleges negligence, carelessness, and recklessness amongst the defendants. Plaintiff specifically alleges "elevator door closed uncontrollably on plaintiff causing serious and sever injuries to plaintiff's hand; said elevator lacked proper door sensors to prevent door from closing on plaintiff."

CPLR § 3212 (b) states that, "the [summary] motion 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." To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

Defendant P.S. Marcato Elevator Co. Inc. claims that there was no evidence presented showing an issue with the condition of said elevator. They further claim a lack of constructive or actual notice of maintenance issues with the subject elevator. In addition to presenting limited

maintenance records they rely on the deposition of Brendan Kelleher, “the super of the building,” who had no information on the maintenance of the elevator.

The deposition transcript of Andrew Trapani states, “[i]t’s [the sensor] an electronic device and, you know, unless it gets physically damaged, which actually does happen as people bring freight in and out of an elevator, or they can hit into it and knock it off, other than that it doesn’t have a lifetime other than, you know, being damaged.”

Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (see *Vega v Restani Constr Corp*, 18 NY3d 499, 503 [2012]).

In opposition, plaintiff argues that “defendants have failed to produce any evidence that the subject elevator was properly maintained. They have failed to produce any evidence as to what maintenance if any was done to the subject elevator or when. Specifically, defendant have (sic) not produced any records reflecting any specific maintenance or testing to the detector door. PS Marcato failed to document any preventative maintenance to the subject detector edge in the 12 months prior to the accident based on the records that were submitted. Defendant P.S. Marcato does not provide any testimony or written affidavits from any employee who performed any specific alleged maintenance or testing to the detector door” (see NYSCEF Doc. No. 193 p. 4).

Additionally, the Court notes that the same elevator was shut down eight days prior to the date of the incident for an unknown reason. It is telling that defendants own elevator mechanic Ivette Pastore, could not articulate the reason the elevator was shut down at that time and no records were produced to clarify what had occurred at that time.

Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

Questions of fact exist to whether the sensor in the elevator was functioning properly and whether there was proper maintenance of the subject elevator which preclude summary judgment being granted for P.S. Marcato Elevator Co.

Defendants 41 East 11th Street, LLC's motion for summary judgment as the owner of the building in which the elevator was located was unopposed by plaintiff. Defendant P.S. Marcato Elevator sole opposition was limited to the issue of contractual indemnification. There has been no evidence presented to indicate any liability on the part of defendant 41 East 11th Street, LLC.

ORDERED that P.S. Marcato Elevator Co., Inc.'s motion for summary judgment (motion sequence no. 13) is DENIED.

ORDERED that the motion of defendant 41 East 11th Street, LLC for summary judgment (motion sequence no. 14) dismissing the complaint herein and any cross-claims asserted is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

<u>1/26/2021</u>					
DATE			LAURENCE L. LOVE, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input 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
		<input type="checkbox"/> DENIED			