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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Jankovic

-v-

Concorde

INDEX NO. 113174/09

MOTION DATE

MOTION SEQ. NO. 007

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is denied.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/23/12

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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MILIVOJ JANKOVIC,

Plaintiff,

Index No.: 113174/09

-against-

DECISION

CONCORDE CONDOMINIUM CORP. and
CENTENNIAL ELEVATOR INDUSTRIES, INC.,

Defendants.

----------x

LOUIS B. YORK, J.:

Plaintiff moves: (1) pursuant to CPLR 3212, for summary judgment on the issue of liability based on defendants' negligence; (2) striking defendants' answer due to their spoliation of key evidence, pursuant to New York City Building Code (Building Code) § 3010.1; and (3) resolving the issue of defendants' liability as a matter of law, pursuant to CPLR 3126, based on defendants' destruction of evidence.

BACKGROUND

At the time of the occurrence, plaintiff was employed as a handyman by nonparty Janoff & Olshan, Inc., working at the premises owned by defendant Concorde Condominium s/h/a Concorde Condominium Corp. (Concorde). On February 14, 2009, while riding in the service elevator, which was installed, serviced and repaired by defendant Centennial Elevator Industries, Inc.

(Centennial), plaintiff was injured when the elevator suddenly bounced several times and came to an abrupt halt. The complaint asserts one cause of action against defendants for negligence.

At his examination before trial, plaintiff testified that he boarded the elevator at the sub-cellar level after obtaining some tools from his shop, and entered the elevator in order to go to the 10th floor to do some repair work in an apartment. According to plaintiff, the elevator initially ascended normally, but then suddenly dropped and bounced or "jumped" twice. At the time of the accident, plaintiff was alone in the elevator, and he heard a loud noise as if something had fallen on top of the elevator car. The car stopped abruptly, leaving him trapped in the car.

According to a memorandum sent from David Azulai (Azulai), the resident mechanic at the building, to Zachary Pomerantz, Azulai's supervisor, on February 18, 2009:

> "This memorandum is being sent to inform you about an accident that occurred on Saturday, February 14, 2009 at approximately 3 p.m. Ernesto the concierge at the front desk informed me that Mike the handyman is stuck in service elevator. I open the elevator door and get hem [*sic*] out. I ask hem [*sic*] if he is injured and what is happened [*sic*] hi [*sic*] answer that he is fine and that the elevator jump twice an stuck. He also heard strong noise. After that he return to work.
> On Tuesday, February 17, 2009 he complains of back and leg pain."

An accident report, to the same effect as the above-quoted memorandum, was prepared on March 8, 2009.

At his deposition, plaintiff averred that, when the elevator

stopped, he was thrown towards his right side, forcing his back to come in contact with the opposite wall. Plaintiff further stated that he never experienced any difficulties with the service elevator from the time that it was modernized in 2007 until his accident on February 14, 2009, nor did he have any problems with the service elevator on the day of the incident until it malfunctioned.

When the elevator came to a halt, plaintiff received a call on the elevator intercom from the building security guard, Germaine Green, who had heard a loud noise emanating from the elevator and, immediately thereafter, another building employee, working at the front desk, called plaintiff to find out if he was okay. A video camera in the elevator enabled the building employees to see that plaintiff was trapped in the elevator car. After approximately 25 minutes, Azulai was able to pry the elevator doors open and plaintiff crawled out, assisted by Azulai. The elevator had stopped between the first floor and the cellar.

Plaintiff was able to go home on his own that day, and did not feel any pain before he left the building but, allegedly, a few days later, his leg began to hurt and he could not continue working. Plaintiff went on disability on February 21, 2009. Plaintiff further testified that he never requested to see the video of the incident or have a copy made for him.

Pursuant to the terms of its contract with Concorde, Centennial agreed to "provide full comprehensive maintenance and repair services for the vertical transportation systems ... ." Specifically, the contract provides that Centennial would be responsible for the elevator components that are in issue in the instant matter, the service elevator's over-speed governor and pit cable tensioning devices (governor tension sheave).

The building's elevators were constructed in or about 1978 and, in June of 2007, Centennial entered into an agreement with Concorde to modernize the building's four elevators, including the service elevator that is the subject of this litigation. Richard L'Esperance, Centennial's executive vice-president, was deposed in this matter and testified that the subject governor tension sheave was refurbished pursuant to the modernization agreement. L'Esperance stated that, if a governor tension sheave was found to be defective, it would be removed, sent to a machine shop, and a new bearing would be put in. In addition, L'Esperance said that, if a governor tension sheave is making noise, the typical procedure would be to remove it to the machine shop if the noise were significant, otherwise grease could be applied to the sheave. L'Esperance said that, from his recollection, prior to the accident, such removal and repair was not performed on the governor tension sheave that is the subject of this litigation. After the accident, L'Esperance conducted an

investigation to determine the cause of the accident, and testified that the governor tension sheave had "ripped out."

After plaintiff's accident, employees from Centennial came to the premises and removed the governor tension sheave for repairs. Mark A. Drakeford, a Centennial service supervisor, was also deposed in this matter and testified that he was one of the workers who came to the premises to remove the governor tension sheave after plaintiff's accident. According to what Drakeford recalled, the 50-60 pounds of weights that were part of the governor tension sheave apparatus had come out of the basket where they were usually held, due to what he believed was a crack in that portion of the sheave. Drakeford said that it was unusual for a governor tension sheave to fail as it did in the instant matter.

According to both L'Esperance and Drakeford, once the governor tension sheave ripped out, the elevator's safety would be tripped, causing an abrupt stop.

Israel Regal, one of the mechanics who was working on the team that removed and repaired the governor tension sheave after the incident, was deposed in this matter and testified that he recalled a similar situation in which a governor tension sheave came out of position because a rag had fallen inside, between the sheave and a rope, or the sheave may have malfunctioned because of metal or component fatigue.

Plaintiff has attached Concorde's service record of Centennial's work, which indicates that, on November 3, 2008, the service elevator was making noise, and the description of the work performed states that the governor tension sheave was oiled and greased.

Plaintiff has included the affidavit of Patrick J. McPartland, a professional engineer, who reviewed the invoice from Expert Machine Services, Inc. to Centennial reflecting the repair of the governor tension sheave, among other documents, and who opined, with a reasonable degree of engineering certainty, that the accident was caused by the failure of the governor tension sheave as a result of negligent and deficient maintenance by Centennial, and that it is highly unlikely that a foreign object caused the governor tension sheave to jam.

It is plaintiff's position that there is no non-negligent explanation for the failure of the governor tension sheave that caused his accident.

The thrust of plaintiff's argument in the present motion is that defendants' removal and repair of the governor tension sheave after the accident constitutes spoliation of evidence, requiring a judgment in his favor on the issue of liability. Plaintiff argues that defendants were on notice of the accident on the day that it occurred, February 14, 2009, and that additional notice was provided on February 18, 2009, when a

memorandum regarding the accident was prepared by Azulai. Plaintiff further contends that, not only did defendants remove and repair the governor tension sheave after having notice of the accident, defendants also overrode the video footage in the camera that was located in the service elevator, thereby spoliating that evidence as well.

Plaintiff maintains that Concorde, as the building owner, had a nondelegable duty to maintain the elevator in a safe condition and may be held liable for Centennial's negligence in failing to maintain the elevator properly. Further, plaintiff asserts that, since the cause of his injuries was the elevator's malfunction, he has established his prima facie entitlement to judgment on the issue of negligence.

Plaintiff also contends that defendants' answer should be stricken and the issue of negligence be resolved in his favor because of defendants' spoliation of the video tape and governor tension sheave.

In opposition to the instant motion, defendants argue that plaintiff's spoliation arguments must fail because there is no evidence that any alleged spoliation was wilful, contumacious or in bad faith, or that they were on any notice to preserve evidence.

Defendants maintain that, with respect to the elevator video, the video was under the control of plaintiff's employer

and plaintiff never made a request that a copy of the video be made for him. Moreover, plaintiff did not seek any medical attention after the incident, and returned to work for several days thereafter. Defendants aver that plaintiff's counsel never served any pre-suit notification requesting the preservation of the video. Also, according to defendants, plaintiff has failed to establish that the video is a crucial piece of evidence, since there is no dispute that the elevator made a noise, bounced twice, suddenly stopped, and plaintiff stumbled against the side of the elevator car.

With respect to the repair of the governor tension sheave, defendants state that the cost of the repair was only $365.00, meaning that they did not need to notify the Department of Buildings nor preserve the item, pursuant to section 3010.1 of the Building Code. The sheave was removed the day after the incident and replaced on February 18, 2009, and plaintiff first complained of pain on February 17, 2009, after the governor tension sheave had already been removed for repair. According to defendants, no evidence has been presented that they were notified of the legal action until the lawsuit was filed. As a consequence, defendants claim that they were under no duty to preserve the governor tension sheave and cannot be found to have spoliated evidence.

Defendants say that the elevator was inspected and approved

by VDA, an independent elevator consultant, and the City of New York, and was maintained in compliance with all industry standards, precluding plaintiff's assertion that he is entitled to summary judgment on the issue of negligence.

Lastly, defendants assert that plaintiff is not entitled to relief pursuant to CPLR 3126, because they have fully complied with all disclosure orders.

In support of their opposition, defendants have provided the affidavit of Jon Halpern, a professional licensed engineer, who opines, with a reasonable degree of engineering certainty, that: (1) Centennial properly cleaned and lubricated the governor tension sheave; (2) since plaintiff did not require medical attention at the time of the incident and the cost to repair the governor tension sheave was less than $1,000.00, defendants were under no duty to report the accident to the Department of Buildings; (3) it cannot be ruled out that foreign debris could have caused the accident; (4) the sudden stop of the elevator, under the conditions described by the parties, is not likely to cause injury to a passenger; and (4) it is reasonable to conclude that plaintiff's injuries were not caused by the sudden stop of the service elevator.

In reply, plaintiff argues that, even though the bill for the repair of the governor tension sheave was only $365.00, the cost of labor should also be included so as to raise the cost of

the repair to over $1,000.00, which, pursuant to section 3010.1 of the Building Code, would require preserving the defective equipment.

In regard to the video tape, plaintiff states that, pursuant to Concorde's contract with plaintiff's employer, the employer is required to maintain and turn over to Concorde any records concerning claims for injuries, so that Azulai's notice of the incident can be attributed to Concorde so that Concorde cannot establish that it did not have notice of plaintiff's potential claim.

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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of plaintiff's motion seeking summary judgment on the issue of liability based on defendants' negligence is denied.

The court agrees with plaintiff that both Concorde, as the owner of the premises, and Centennial, as the company engaged to provide maintenance and repair for the elevator, may be liable to a passenger who is injured resulting from a condition that was not corrected after notice of such condition, or where the owner and contractor failed to use reasonable care to discover and correct such condition. *Levine v City of New York*, 67 AD3d 510 (1st Dept 2009)(building owner has a nondelegable duty to maintain an elevator on its premises in a reasonably safe condition); *Casey v New York Elevator & Electrical Corp.*, 82 AD3d 639 (1st Dept 2011)(elevator company which agrees to maintain an elevator in a safe condition may be liable to a passenger for failing to correct conditions of which it knew or should have known).

However, in the instant matter, not only is there a question as to whether defendants had any notice of a defective condition, but the parties have provided conflicting expert opinions on the possible cause of the accident, which precludes granting summary judgment on the issue of negligence. *Bradley v Soundview Healthcenter*, 4 AD3d 194 (1st Dept 2004); *Patel v MBG Development, Inc.*, 77 AD3d 498 (2d Dept 2004).

The portions of plaintiff's motion seeking to strike defendants' answer due to their spoliation of evidence, pursuant to section 3010.1 of the Building Code is also denied.

Section 3010.1 of the Building Code states, in pertinent part, that, when an accident involves the failure of an operating mechanism, requiring the services of a physician and repairs exceeding $1,000.00, "[n]o part shall be removed from the premises of the damaged construction or operating mechanism until permission to do so has been granted by the commissioner."

The court finds that section 3010.1 of the Building Code was not violated, since the documentary evidence establishes that the cost of the repair was less than $1,000.00 and, at the time the governor tension sheave was removed, as discussed below, defendants were on no notice of a potential claim and medical assistance was refused by plaintiff.

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Squitieri v City of New York*, 248 AD2d 201 (1st Dept 1998). Penalties for a refusal to comply with disclosure requests are provided for in section 3126 of the CPLR. That section allows for such sanctions as: (a) having the matter resolved against the party who destroyed or failed to preserve the significant evidence [section 3126 (1)]; (b) prohibiting the disobedient

party from supporting or opposing claims based on such spoliated evidence [section 3126 (2)]; or (c) striking the pleadings of the disobedient party [section 3126 (3)].

The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the court and is assessed on a case-by-case basis. *Ortega v City of New York*, 9 NY3d 69 (2007). In order to sustain a claim of spoliation, the movant must demonstrate that the party alleged to have spoliated the evidence was on notice of a potential lawsuit. This notice creates a duty on the part of the party in possession and control of the evidence to see that it is preserved. *Amaris v Sharp Electronics Corp.*, 304 AD2d 457 (1st Dept 2003).

After the alleged incident giving rise to this litigation, plaintiff insisted that he was all right, refused medical attention, and continued to work for several days before claiming that he was suffering any pain. Prior to such claim of injury, the governor tension sheave had been removed and repaired. Plaintiff's admissions at his deposition that he did not require medical assistance, declined to have an ambulance called for him, and continued to work belie his assertion that defendants should have been on notice of a potential claim.

In addition, although he was provided with an opportunity to view the elevator video, plaintiff never did so, nor did he ever request a copy of the video prior to instituting the current

lawsuit. Further, there is no dispute that there was a loud noise, the elevator bounced two times, and then came to an abrupt halt. Defendants do not challenge that, as a result of the abrupt stop, plaintiff was knocked against the side of the elevator car.

Since the video was seen at the time of the occurrence by the building's staff, which is how they knew that plaintiff was trapped in the elevator, and those employees have and can be deposed, plaintiff has not had his ability to prosecute the suit compromised. *See generally Thomas v City of New York*, 9 AD3d 277 (1st Dept 2004)(plaintiff having alternate means of establishing a given point rebuts claims of spoliation).

> "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to [prosecute the] action [internal quotation marks and citation omitted]."

Scordo v Costco Wholesale Corp., 77 AD3d 725, 727 (2d Dept 2010).

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. *Kirkland v New York City Housing Authority*, 236 AD2d 170 (1st Dept 1997). However, under all circumstances, it is the court that determines the nature and extent of any penalties. CPLR 3126.

Under the circumstances presented by the facts of this case,

the court concludes that defendants did not spoliate the governor tension sheave or the elevator video because, at the time that those items were repaired or destroyed, defendants were not on notice of any claim, and plaintiff had been afforded the opportunity to view and copy the video tape. Further, no evidence has been presented that defendants' actions were wilful or contumacious. Therefore, the issue of liability cannot be resolved in favor of plaintiff as a matter of law based on spoliation of evidence.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied.

FILED

MAY 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/23/12

ENTER:

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.