

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

IAS PART 12

- - - - - x
NADER ALTINMA, individually and as
Administratrix of the Estate of
LAFORTUNE ALTINMA, Deceased,

Plaintiff,

Index No. 21262-00

Motion Date: 8/23/06

- against -

Motion Cal. No. 3

EAST 72ND GARAGE CORP., ACE OVERHEAD
GARAGE DOOR, INC., and CHARLES
CALDERONE ASSOCIATES, INC.,

Defendants.

- - - - - x
CHARLES CALDERONE ASSOCIATES, INC.,

Third-Party Plaintiff,

- against -

GLENWOOD MANAGEMENT CORP.,

Third-Party Defendant.

- - - - - x
GLENWOOD MANAGEMENT CORP.,

Second-Third Party Plaintiff,

- against -

HUMPHREY MAN-LIFT, CORP.,

Second Third-Party Defendant.

- - - - - x

ACE OVERHEAD GARAGE DOOR, INC.,

Third Third-Party Plaintiff,

- against -

GLENWOOD MANAGEMENT and EAST 72nd
REALTY, L.L.C.,

Third Third-Party Defendant.

- - - - - x

The following papers numbered 1 to on this motion:

	<u>Papers Numbered</u>
E. 72 nd Garage Corp.'s Notice of Motion-Affirmation-Affidavit-Service-Exhibits	1-4
Plaintiff's Affirmation in Opposition to Motion and Cross-Motions-Affirmation-Service-Exhibits	5-8
E. 72 nd Garage Corp.'s Certification in Support of Reply Affirmations-Service-Exhibits	9-10
Plaintiff's Second Supplemental Opposition to Motion and Cross-Motions-Affirmation-Svc-Exhibits	11
Charles Calderone Associates, Inc.'s Notice of Motion-Affirmation-Affidavit-Service-Exhibits	12-15
Charles Calderone Associates, Inc.'s Reply Affirmation-Exhibits	16-18
Ace Overhead Garage Door, Inc.'s Notice of Motion-Affirmation-Affidavit-Service-Exhibits	19-22
Ace Overhead Garage Door, Inc.'s Reply Affirmation-Exhibits-Memorandum of Law	23-26
E. 72 nd Garage Corp.'s Notice of Cross-Motion-Affirmation-Service-Exhibits	27-30
Humphrey Man-Lift, Corp.'s Notice of Motion-Affirmation-Service-Exhibits	31-34
Glenwood Management Corp.'s Affirmation in Opposition-Exhibits-Service	35-37
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Humphrey Man-Lift, Corp.'s Reply Affirmation-Exhibits-Memorandum of Law	41-44

For the purpose of judicial economy and consistency, the Court considers herein, a total of five (5) motions and cross-motions submitted on behalf of the parties to this matter. They

are:

1) By notice of motion, defendant, East 72nd Garage Corp., seeks an order of the Court, pursuant to CPLR §3211(a)(7) and §3212, dismissing plaintiff's complaint and all cross-claims as to them.

Plaintiff files an affirmation in opposition. Garage Corp. submits a reply.

2) By notice of motion, defendant, third-party plaintiff, Charles Calderone Associates, Inc., seeks an order of the Court, pursuant to CPLR §3212, granting them summary judgment and dismissing the action and all cross-claims as to them.

Plaintiff files an affirmation in opposition and defendant, Calderone replies.

3. Defendant, East 72nd Garage Corp., files a notice of cross-motion, seeking an order pursuant to CPLR §3126 and §3042, striking plaintiff's complaint or alternatively, precluding plaintiff from offering testimony at trial regarding defendant's notice of the alleged dangerous or defective condition of the man lift and/or precluding plaintiff from offering evidence or testimony with respect to Franz Nicholas. Plaintiff files an affirmation in opposition.

4. By notice of motion, defendant, third-party plaintiff, Ace Overhead Garage Door, Inc., seeks an order of the Court, granting them summary judgment and dismissing all claims against them.

Plaintiff files an affirmation in opposition and defendant replies.

5) By notice of cross-motion, second, third-party defendant, Humphrey Man-Lift Corp., seeks an order of the Court, pursuant to CPLR §3212, granting them summary judgment and dismissing the complaint and any and all cross-claims as to them on the grounds that there is no issue of fact as to any liability or negligence on their part.

Third-party defendant, Glenwood Management Corp., files an affirmation in opposition. Plaintiff files an affirmation in opposition. Third, third-party plaintiff, Ace, files an affirmation in partial opposition and in further reply to the opposition to their motion.

Defendant Humphrey Man-Lift Corp., files a reply to the opposition to their motion for summary judgment.

On or about May 16, 2006, the Hon. Martin Schulman, so-ordered a stipulation of the parties allowing them to resubmit for this Court's consideration, the above noted motions and cross-motions. The motions were previously submitted sometime in 2003 and were, according to counsel, inadvertently marked "disposed, referred to arbitration," in the TSP and no decision was ever rendered, nor were the motions marked withdrawn. Accordingly, as it appears that all parties have submitted motions in conformance with the stipulated order of the Hon. Martin Schulman, the motions and cross-motions shall be determined herein.

The underlying cause of action for personal injuries and wrongful death is based upon an accident which occurred on January 9, 2000, at 1365 York Avenue, New York, N.Y., at a place known as Somerset Garage. On that date and place, decedent, Lafortune Altinma, a 34 year old parking garage attendant, was found by a co-worker, unconscious, and "wedged between the lift and subfloor" of a "man-lift" (see, plaintiff's Exh. A., Police Aided Report). A "man-lift" is a single person vertical transportation device used by the parking attendants to travel between the parking garage floors. Decedent was taken by ambulance to N.Y. Hospital, where they failed to resuscitate him.

An autopsy was performed on January 11, 2000, wherein the cause of death was listed as "Asphyxia Due to Compression of the Chest," with "Blunt Impact Injuries of Torso," and Manner of Death listed as "Accident, (Wedged in Elevator Lift)" (see, plaintiff's Exh. A.).

In a Notice of Decision, dated August 16, 2000, the State of New York awarded Worker's Compensation death benefits to decedent's wife and children. Glenwood Management Corp. (Glenwood), was listed as employer and the State Insurance Fund as carrier. Plaintiff's dependents were paid for 30 weeks of wages in the total sum of \$7,400.10.

The various parties are as follows:

Nader Altinma is the widow of the deceased. Ace Overhead Garage Door, Inc. (Ace), provided maintenance and repair of the man-lift on an as needed basis when called upon by Glenwood Management Corp. (Glenwood) to do so. Charles Calderone Associates, Inc. (Calderone), performed annual inspections of the man-lift, pursuant to N.Y. Local Law No. 10. Glenwood was the managing agent for Somerset Garage, among others. Somerset Garage

is where the accident occurred. Humphrey Man-Lift Corp. (Humphrey), is the manufacturer of the man-lift, who sold the machine to the owner in 1972. East 72nd Realty, L.L.C. (L.L.C.) owned the premises and equipment at Somerset Garage, and finally East 72nd Garage Corp. (Garage Corp)., is the parking garage license holder and employer of the Somerset Garage manager, bookman, and several of the parking attendants.

All the employees working at the Somerset Garage were hired by Glenwood and trained by Glenwood. Plaintiff/decedent, came on the payroll of the L.L.C. starting on December 27, 1999. Pay checks to the employees at Somerset Garage were issued by Glenwood from either the Garage Corp. or L.L.C. accounts. Glenwood, L.L.C., and Garage Corp. were all covered by the same insurer.

Plaintiff/decedent's immediate supervisors at the Somerset Garage were Reynold Duverglas, the on site garage manager, and Leon Michael, a bookman, who was plaintiff/decedent's supervisor when Reynold Duverglas was absent.

Defendant, Garage Corp., maintains that plaintiff's complaint should be dismissed as to them on the grounds that the complaint fails to state a cause of action pursuant to CPLR §3211(a)(7) and/or alternatively, that plaintiff's claims are barred by the N.Y. Worker's Compensation Law §11 and §29(6). Plaintiff was hired by Glenwood, and received training from Glenwood before going to work at Somerset Garage. Although payroll checks were issued by Glenwood, the checks for employees working at Somerset garage were issued from accounts for L.L.C. or Garage Corp.

Defendant, third-party plaintiff, Calderone, maintains that because they did not own, operate, manage, maintain or control the man-lift where plaintiff's accident occurred, they can not be held liable on any claims by plaintiff or cross-claims by defendants. On or about April 14, 1999, defendant Glenwood, hired Calderone, a private elevator inspection agency qualified by the City of New York to inspect the man-lift in question, pursuant to N.Y.C. Local Law No. 10. On or about June 15, 1999, Calderone performed such inspection and found the subject man-lift to be in satisfactory operating order (see, defendant Calderone's Exh. F).

Defendant Calderone, was asked to observe the operation of the subject man-lift again on January 10, 2000, the day after the accident. Calderone found the man-lift in satisfactory operating order on that date as well. The court notes, however, conflicting observations in the report, namely:

"We suspect that the lower limit safety stop

switch and the treadle safety switch in the pit had been activated as a result of the accident. The lower limit safety switch and the treadle safety switch was re-set, but the man lift would not function. Upon further inspection of the control equipment, it was observed that the thermal overloads on the controller had blown, indicating that the drive motor had overheated (the thermal overload is designed to shut down the system when the drive motor overheats). The man lift was operational after the thermal overloads were manually re-set."

Moreover, contrary to the representation of defense counsel, representatives of OSHA were not present when Calderone began the test inspection on January 10, 2000, in violation of the warning tag posted on the elevator by Richard Harris, inspector for the City of New York, Department of Buildings, Elevator Division (see, plaintiff's Exh. A, letter from Glenwood Management Corp. to Mr. Richard Harris (tag states in bold letters, UNSAFE, under penalty of the law, this must not be removed except by an authorized employee of the Department of Buildings). In fact, in a letter from Vice President, Ernest Zimpritsch of Calderone to Glenwood Management, Mr. Zimpritsch states: "While testing the man-lift, representatives from the U.S. Department of Labor (OSHA) arrived at the site. At their request we again demonstrated the operation of the lower limit safety stop switches and the treadle safety stop in the pit since these switches are in the vicinity where the body was found" (see, defendant Calderone's Exh. F). Zimpritsch, in the same letter, maintains that they had the permission of the police department to test the operation and safety devices of the man-lift on that date.

Richard Harris, Badge No. 1719, N.Y.C. Department of Buildings Elevator Inspector, inspected the man-lift on January 18, 2000. Mr. Harris issued a report on January 20, 2000 (attached as part of plaintiff's Exh. A) in which he noted that removal of the unsafe tag without prior approval of the Department of Buildings was a violation of the N.Y.C. code. He also concluded: "Because I was not present at the time of the first test of man-lift 55 I'm unable to determine [the] cause of [the] accident, but after inspection and tested [sic] safety's I'm restoring man-lift 55 back in service."

Defendant Ace maintains that the action by plaintiff against them, and any and all cross-claims must be dismissed as they owed no duty to plaintiff in the first instance, under New York law which could constitute the proximate cause for plaintiff's injury

and death. Ace maintains that they had no written contract for services with Glenwood. Instead, Ace maintains, Glenwood or the garage would call them on an as needed basis to perform maintenance and repairs. The last repair made by Ace on this particular man-lift was in October of 1998. Thereafter, the man-lift was inspected by Calderone and returned to service. Since plaintiff's Bill of Particulars alleges violations of various Occupational Safety and Health Administration (OSHA) and American Society of Mechanical Engineers (ASME) codes, (i.e. generally a failure to perform tests, inspections, and record keeping) as the basis of defendant's negligent acts; and since defendant Ace maintains they had no obligation as a service provider to perform such acts, there can be no duty owed to plaintiff.

Defendant Humphrey maintains that plaintiff's complaint (apparently filed separately under Index No. 506/02), as well as the second, third-party complaint with Glenwood as second, third party plaintiff should be dismissed as against them as no specific act of negligence or products liability is alleged against them by plaintiff Altinma or second-third party plaintiff, Glenwood.

Humphrey sold the subject man-lift to the garage owner in 1972, complete with detailed written instructions for installation and maintenance. Humphrey, however, did not install this particular man-lift. Although Humphrey maintains that they had no other involvement with this man-lift thereafter, Ace maintains that when parts needed to be replaced as part of their repair service, the parts were ordered from Humphrey. No complaints are made regarding any of those parts.

John Favaro, the Humphrey sales manager, who testified at the EBT on behalf of Humphrey maintained that in his 20 years with the company, he was unaware of any complaints about problems with safety devices on their man-lifts.

In plaintiff's opposition, counsel points to the elevator accident report of Richard Harris, the Department of Buildings inspector who reports that Detective Vargas, first on the scene, found the decedent at the bottom of the landing, pinned by one of the steps.

Plaintiff also offers the affidavit of an expert, George Murray, a licensed elevator inspector with the City of New York, who is also qualified as an elevator inspector with the American Society of Mechanical Engineers (ASME).

Based on his examination of the subject man-lift, the documents and records produced in discovery, his knowledge of the rules and regulations governing operation and maintenance of the man-lift elevators (particularly §8.2 of the ASME man-lift code and §29 CFR 1910.68(e) of the regulations of the Office of Occupational Safety and Health Administration (OSHA), and his 40 plus years of experience in this field, Mr. Murray rendered an opinion regarding the decedent's accident.

Mr. Murray concluded that Ace was negligent in accepting work maintaining, repairing, replacing or overhauling, even on an "as needed" basis the subject man-lift as they were not qualified to do so. Having accepted such work, Murray concludes, Ace should have been knowledgeable about the applicable codes and informed Glenwood of the necessity of abiding by them.

Likewise, Murray concludes that Calderone should have informed Glenwood and/or the owners or managers of the Somerset Garage of the necessity of observing the ASME and OSHA codes, as well as the manufacturer's recommendations, but failed to do so.

Finally, Murray concludes the failure of the man-lift safety stop devices to function as designed contributed to the cause of the accident. Murray opines:

I can conceive of no feasible scenario under which all three (3) of the automatic safety stop devices would have malfunctioned simultaneously as they did in the absence of their having been a long-standing safety device problem at the Somerset Garage. (Emphasis added).

Counsel for the defense, in countering plaintiff's argument based on Mr. Murray's affidavit, cites the first part of Mr. Murray's opinion while leaving out the underlined portion.

Finally, by cross-motion previously submitted on May 18, 2004 and resubmitted here with the Court's permission, defendant, Garage Corp., seeks an order dismissing the complaint as to them or granting them summary judgment and dismissing the complaint or striking plaintiff's complaint or precluding plaintiff from introducing evidence of defendant's notice of a defective condition of the man-lift or precluding plaintiff from introducing the testimony of Franz Nicholas, as a sanction for what defendant describes as plaintiff's failure to provide discovery as ordered.

Franz Nicholas was an employee at Somerset Garage on the

date when plaintiff died. Plaintiff maintains that notice was provided on November 21, 2001 of Mr. Nicholas' "adverse party statement" to all defendants. Garage Corp. maintains that none of the defendants received such notice. In the handwritten statement by Mr. Nicholas, which is dated January 27, 2000, Mr. Nicholas claims that although he did not witness plaintiff/decedent's accident, the man-lift in question had not been operating properly for approximately 12 months prior to the accident, and was not working properly on that day. He stated that the platform of the lift did not stop even with the floor.

Motion No. 1

The first part of defendant, Garage Corp.'s motion is a claim that plaintiff fails to state a cause of action pursuant to CPLR §3211(a)(7). Defendant, Garage Corp. maintains that the cause of plaintiff's accident is unknown and that any claim to the contrary is pure speculation. It is undisputed that there are no known witnesses to the accident. Plaintiff was discovered when a co-worker sought to use the man-lift, and observed plaintiff's hand protruding from the pit.

"On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (see, CPLR §3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory... [D]ismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Arnav Industries, Inc. v. Brown, Raysman Millstien Felder & Steiner, 96 NY2d 300, 303 (2001); Collins v. Telcoa International Corp., 283 AD2d 128, 131 (2nd Dep't. 2001)).

In paragraphs 24, 25 and 26 of the complaint, plaintiff generally alleges that Garage Corp. had a duty to maintain the man-lift in a reasonably safe condition, to provide a reasonably safe man-lift for decedent's use, and to insure that the man-lift was adequately inspected, maintained and repaired, and in paragraphs 73-83, plaintiff alleges that defendant, Garage Corp., among others, failed to do so. Viewing the facts in a manner most favorable to plaintiff, as the Court is obliged to do, that portion of defendant's motion to dismiss pursuant to CPLR §3211(a)(7) is denied.

Defendant, Garage Corp. also argues that plaintiff was a general employee of Glenwood and a "special employee" of Garage Corp. As such, defendant argues, plaintiff is barred by Worker's

Compensation Law from bringing a negligence action against Garage Corp.

"It is well settled that a person may be deemed to have more than one employer - a general employer and a special employer - for purposes of the Worker's Compensation Law" (citations omitted) (Vanderweff v. Victoria Home, 299 AD2d 345 (2nd Dep't. 2002). "Whether a general employee of one employer may be a special employee of another is generally a question of fact. Consideration of a number of factors, such as, 'the payment of wages; the right to hire or discharge; the right to direct the servant where to go, and what to do; the custody or ownership of the tools and appliances he may use in his work; the business in which the master is engaged or that of him said to be a special employer..." (Matthews v. Town of Morristown, 286 AD2d 535, 536 (3rd Dep't. 2001).

While... "[o]rdinarily no one fact is decisive"; "...where the record clearly shows that the general employer has surrendered direction and control over the employee to the special employer to perform the special employer's work, and the special employer assumed and exercised that exclusive control, the question of whether a special employment relationship exists may be determined as a matter of law." *Id.* at 536.

In this instance, where plaintiff/decendent was hired by Glenwood, trained by Glenwood, and then sent to Somerset Garage to work under the direction and control of Ronald Duverglas and Leon Michael, employees of Garage Corp., it is apparent to this Court, that plaintiff, decendent was a special employee of Garage Corp. as a matter of law. *Id.*, Vanderwerff, supra. at 345. Thus, "[w]here, as here, plaintiff received Worker's Compensation benefits from [Glenwood], [the] general employer, he may not maintain an action at law against [his] special employer (see, Worker's Compensation Law §11, 29(6)). *Id.*

Moreover, "...[w]orker's compensation is an exclusive remedy as a matter of substantive law, and where it appears that the plaintiff [decendent] was an employee of the defendant, the obligation of alleging and proving non-coverage falls upon the plaintiff" (Villatoro v. Grand Boulevard Realty, 18 AD3d 647 (2nd Dep't. 2005). Here, defendant has made a prima facie showing that plaintiff was the special employee of Garage Corp., covered by Worker's Compensation Law and plaintiff has failed to raise a triable issue of fact. *Id.* at 648.

Nevertheless, third-party defendant's cross-claims for indemnification and contribution from plaintiff/decendent's

employers remain viable as plaintiff/decendent certainly suffered a "grave injury" within the meaning of Worker's Compensation Law §11 (Pineda v. 79 Barrows Street Owner's Corp., 297 AD2d 634 (2nd Dep't. 2002); Konior v. Zucker et al., 299 AD2d 320, 321 [2nd Dep't. 2002]) (see, Worker's Compensation Law, para. 3, which states in part, "...grave injury, which shall mean only one or more of the following: death..."). Consequently, that portion of defendant Garage Corp.'s motion which seeks dismissal of any and all cross-claims is denied.

Motion No. 2

Defendant, third-party plaintiff, Calderone, maintains that the action and all cross-claims should be dismissed as against them pursuant to CPLR §3212, on the grounds that they did not own, manage, maintain, repair or control the subject man-lift.

Defendant admits that in April of 1999, they agreed with Glenwood Management to provide an annual inspection of the subject man-lift, pursuant to Local Law No. 10 (see, defendant's Exh. C), but that such agreement also detailed "Work Not Included," to wit: any detailed analysis, recommendations, or report of the man-lifts and related equipment as it pertains to general service and reliability." Id. This, Calderone maintains relieves them of the obligation that plaintiff's expert, George Murray, maintains should have been done by them, that is informing Glenwood/Somerset Garage of the need to inspect the man-lift periodically in conformance with ASME and OSHA regulations.

Moreover, defendant maintains there were no defects in the safety devices reported. Defendant's contention, however, that the man-lift was inspected the day after the accident in the presence of OSHA representatives is belied by Ernest Zimpritsch's letter ("While testing the man-lift, representatives from the U.S. Department of Labor OSHA arrived at the site. At their request we again (emphasis added) demonstrated the operation of the lower limit safety stop switches..." (defendant's Exh. H). Nor was the N.Y.C. Department of Buildings inspector, Richard Harris, able to render an opinion as to the cause of the accident or whether the safety devices were properly operating as the "UNSAFE" tag was removed by Calderone Vice President, Zimpstrich in violation of the code, and the man-lift was "tested" by defendant, Calderone, apparently before any independent testing authority had arrived.

Defendant cites plaintiff's expert's opinion that "I can conceive of no feasible scenario under which all (3) of the

automatic safety stop devices would have malfunctioned simultaneously..." (Plaintiff's Exh. I, Aff. of Geo. Murray, para. 9) in further support of the claim that the elevator/ man-lift was operating properly.

Defendant, however, leaves out the last part of that sentence which states "...in the absence of there having been a long-standing safety device problem at the Somerset Garage."

Paragraph 2.2 of defendant's agreement to provide inspections to Glenwood provides:

"2.2 We will notify you immediately of any deficiencies that would render the man-lifts 'unsatisfactory' in terms of Local Law No. 10, or if there exists any safety related conditions."

Plaintiff maintains, therefore, through their expert's opinion evidence that defendant not only failed to inform Glenwood/Somerset garage of the need for periodic inspections and record keeping pursuant to OSHA regulations and industry standards set by ASME, but that Calderone negligently inspected the man-lift contributing to plaintiff's injury and death (Beyada v. Helmsley 245 AD2d 479 (2nd Dep't. 1997)).

"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 issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form" (Santanastasio v. Doe, 301 AD2d 511 [2nd Dep't. 2003]).

Moreover, it is insufficient for a movant to merely "point to gaps in the plaintiff's proof" to establish a defense as a matter of law (Pearson v. Parkside Limited Liability Co, 27 AD3d 539 (2nd Dep't. 2006); and "[f]ailure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers" (Windgrad v. NYU Medical Center, 64 NY2d 851, 853 (1985)).

Accordingly, upon all of the foregoing, defendant Calderone's motion for summary judgment against plaintiff and dismissal of any and all cross-claims is denied.

Motion No. 3

The Court notes the obvious, that since at least May of 2004, defendants herein have had more than ample time to demand

an opportunity to depose Franz Nicholas. No claim is made by defendants that such a demand was made and refused or otherwise not complied with. Accordingly, that branch of defendant Garage Corp.'s request for relief is denied.

Motion No. 4

Defendant, Ace maintains that they owed no duty to plaintiff and/or the co-defendants in the first instance which could constitute the proximate cause of plaintiff's injury. Plaintiff's expert, however, maintains that Ace, primarily a garage door repair company, should not have accepted work involving maintenance and/or repair of a man-lift and/or having accepted such work they should have been aware of the appropriate industry standards and conveyed such to plaintiff's employers. Defendant Ace, admits performing an "overhaul" of the subject man-lift in October 1998.

While such an argument may not ultimately succeed, plaintiff's only obligation is to raise triable issues of fact. Here, plaintiff maintains that defendant Ace's repairs were negligently performed, compounded by defendant Calderone's negligent inspection.

Accordingly, defendant Ace's motion for summary judgment and dismissal is likewise denied.

Motion No. 5

Finally, defendant Humphrey maintains that the action by plaintiff under Index No. 506/02 and the second third-party action by second third-party plaintiff, Glenwood should be dismissed on the grounds that there is no evidence of negligence, or products liability defects or design against Humphrey.

It is undisputed that Humphrey sold the subject man-lift to defendant owners in 1972. Humphrey did not install the man-lift, nor provide service, maintenance or repair. While Ace maintains that they did purchase some parts from Humphrey, no specific claims are made that any of the safety devices concerned were purchased from Humphrey for replacement. Moreover, plaintiff has not even alleged, much less proved, that any other complaints regarding unsafe defects or design have been lodged regarding this specific man-lift or any other similar man-lift manufactured by Humphrey in the more than thirty years since its purchase.

"Having found that defendants established that the [man-lift] was reasonably safe as designed... the burden shifted to

plaintiffs to demonstrate that defendants marketed a product which was not reasonably safe and that its defective design was a substantial factor in causing plaintiff's injury (Vannucci v. Raymond Corp., 258 Ad2d 198, 200 (3rd Dep't. 1999)).

Where, as here, many years have passed without incident, such passage of time is further substantiation that the product as manufactured and sold was not defective. The Court will not hold a manufacturer to a standard that requires them to build and design products that are "...invincible, fail-safe, and accident proof... incapable of wearing out. The remedy remains in having the machinery inspected periodically so that worn parts may be replaced" (Mayorqa v. Reed-Prentice Packaging Machinery Co., 238 AD2d 483, 484 (2nd Dep't. 1997)).

Accordingly, upon all of the foregoing, defendant Humphrey's motion is granted; and it is further

ORDERED, that portion of defendant East 72nd Garage Corp.'s motion for summary judgment against plaintiff, Altinma is granted and plaintiff Altinma's complaint is hereby severed and dismissed as against defendant East 72nd Garage Corp., and the Clerk is directed to enter judgment in favor of defendant; and, it is further

ORDERED, that defendant Humphrey Man-Lift, Corp.'s motion for summary judgment is granted and the complaint, and second-third party complaint and any and all cross-claims are hereby severed and dismissed as against defendant Humphrey and the Clerk is directed to enter judgment in favor of defendant; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
November 9, 2006

JOSEPH P. DORSA
J.S.C.