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SHORT FORM ORDER

INDEX No. 02-18616
CAL. No. 06-00411-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-16-07
ADJ. DATE 3-16-07
Mot. Seq. #007 - MD
008 - MD
009 - MD
010 - MD

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ALAN LASSER,

Plaintiff,

- against -

NORTHROP GRUMMAN CORP. f/k/a GRUMMAN CORP. & NORTHROP GRUMMAN SYSTEMS CORP. f/k/a NORTHROP GRUMMAN CORP. and/or GRUMMAN CORP., THYSSEN KRUPP ELEVATOR CO. f/k/a THYSSEN DOVER ELEVATOR CO. & DOVER ELEVATOR CO. f/k/a THYSSEN DOVER ELEVATOR CO.,

Defendants.

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Upon the following papers numbered 1 to 65 read on these motions for renewal; motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 34 ; 38 - 56 ; Notice of Cross Motion and supporting papers 35-37 ; Answering Affidavits and supporting papers 57 - 59 ; Replying Affidavits and supporting papers 60 - 61; 62 - 63 ; Other 64 - 65 (plaintiff's affidavit) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (007) by defendant Northrop Grumman Corporation and Northrop Grumman Systems Corporation for renewal of defendant's previous motion (003) wherein the moving defendant sought an order pursuant to CPLR 3126 rendering a judgment by default against plaintiff, or an order prohibiting plaintiff from supporting his allegations based upon the testimony of plaintiff's expert, Patrick Carrjat, opposed by plaintiff, is denied; and it is further

ORDERED that this motion (008) by defendant Northrop Grumman Corporation and Northrop Grumman Systems Corporation for renewal of defendant's previous motion (004) wherein the moving defendant sought an order pursuant to CPLR 3212 and CPLR 3211 granting defendant/ third party plaintiff summary judgment dismissing plaintiff's complaint on the issue of liability, opposed by plaintiff, is denied; and it is further

ORDERED that this motion (009) by defendant Thyssen Krupp Elevator Company and Dover Elevator Company f/k/a Thyssen Dover Elevator Company for an order pursuant to CPLR 3126 granting default against plaintiff or precluding plaintiff from supporting his allegations based upon the testimony of Mr. Carrajat, or an order deeming all issues raised by Mr. Carrajat as being resolved in the moving defendant's favor, opposed by plaintiff, is denied; and it is further

ORDERED that this motion (010) by defendant Thyssen Krupp Elevator Company and Dover Elevator Company f/k/a Thysen Dover Elevator Company for an order pursuant to CPLR 3212 granting summary judgment against plaintiff and dismissing the complaint on the issue of liability, and dismissing all cross claims asserted against the moving defendant, opposed by plaintiff, is denied.

This is an action sounding in negligence wherein plaintiff alleges he sustained personal injury due to the malfunction of a freight elevator at the Grumman Bethpage facility at building #5, South Oyster Bay Road, Town of Oyster Bay, New York on July 28, 2000, when the elevator doors allegedly closed down on his head (Northrop exhibit F, p.75). The second verified Bill of Particulars sets forth that as a result of the malfunction, plaintiff was caused to sustain, inter alia, anterior cervical diskectomies with allograft and autograft fusions at C 3-4, C 4-5, C 5-6 and C 6-7; multiple disc herniations at T 5-6, T 6-7, T 7-8, T 8-9, T 9-10; disc bulge at T 7-8; multi level degenerative disc disease T 5-6, T 11-12; spinal cord compression at C 6-7.

Procedurally, motions (002) and (005) by defendant Thyssen Krupp Elevator Company and Dover Elevator Company f/k/a Thysen Dover Elevator Company (hereinafter Thyssen), and cross motions (003) and (004) by defendant Northrop Grumman Corporation f/k/a Northrop Grumman Systems Corporation f/k/a Northrop Grumman Corporation (hereinafter Northrop), for orders granting summary judgment and to preclude plaintiff's expert witness from testifying, were denied without prejudice upon renewal, upon the expiration of the sixty day stay imposed by order of this Court dated October 2, 2006 (Doyle, J.). These prior motions are now before this Court again on renewal, are considered together, and decided as follows:

CPLR 3126 provides in pertinent part that "[I]f any party, or a person who at the time a deposition is taken or an examination or inspection is made...refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed...the court may make such orders with regard to the failure or refusal as are just, among them"

1. an order that issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims

or defenses, from producing in evidence designated things or items, testimony, or f rom introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

CPLR 3101(d)1(I) provides in pertinent part that "...each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of such expert witness and a summary of the grounds for each expert's opinion...."

Turning to motion (007), defendant Northrop sets forth in the Notice of Motion that defendant seeks an order pursuant to Article 31 and CPLR 3126 rendering a judgment by default against plaintiff or an order prohibiting plaintiff from supporting his allegations based on plaintiff's expert, Patr ck Carrajat CPLR 3101(d) response and failure to respond to their subpoena.

Plaintiff's expert response is annexed as defendant Northrop's Exhibit E, and sets forth that Patrick A. Carrajat is expected to be called as a witness at trial, and indicates a copy of his curriculum vitae setting forth his background and qualifications is annexed hereto. However, the moving defendant has not produced a copy of the same with the report. In reviewing the report, this Court determines that plaintiff has disclosed that Mr. Carrajat is expected to testify that the "cause of the accident that resulted in the injuries to the plaintiff was the malfunctioning of the elevator caused by defendants' failure to properly inspect, maintain, repair and adjust the elevator door protective devices and other components in the door reopening system. Mr. Carrajat will base his opinions on the established design parameters of door protection devices and their functionality. The design standard for a door protective device is that it is a non-contact or limited contact device designed to reverse a closing elevator door without injuring the passenger entering or exiting the elevator. He will also opine that the defendants failed to perform or document any periodic checks of the door closing force and that the failure to do so is a departure from established Code requirements and industry standards. Mr. Carrajat will further testify that no records presented show any maintenance, inspection or repairs being performed to the door protective devices during the 12 months prior to the date of the accident by defendant Thyssen Krupp Elevator. Mr. Carrajat will also testify that the industry standard for maintenance record keeping was not met. The minimum standard is a logbook for each individual elevator recording in detail all maintenance and repairs or in the alternative, a maintenance check chart kept for the same purpose. Mr. Carrajat thereafter sets forth reliance upon the current Code requirements and the failure to have warning signs warning of the danger of the automatic doors, that such failure is a departure from industry standards, and further testimony concerning the Code and custom as to remote closing of freight elevator doors and the requirement of an audible alarm to warn that the doors are ready to close. Mr. Carrajat further sets forth that his opinions will be based on his review of all party and witness deposition transcripts, eyewitness statements, maintenance and repair records provided by the defendants, his examination of the sub ect elevator, his forty-five years of experience in the elevator industry and any additional

information that may come into evidence up to and including the time of the trial of this matter.

Based upon the foregoing, and in reviewing defendant Northrop's submissions, it is determined that plaintiff substantially complied with, and responded appropriately to, defendant's demand made pursuant to CPLR 3101(d)1(i) for plaintiff's expert disclosure (***Jasopersaud v Tao Gyoun Rho, et al.***, 169 A2d 184, 572 NYS2d 700 [1991]).

Accordingly, defendant Northrop has failed to demonstrate a basis to dismiss plaintiff's complaint pursuant to CPLR 3126, or to preclude plaintiff's expert's testimony at the time of trial.

Counsel for defendant Northrop states they served a subpoena duces tecum on defendant's expert, Mr. Carrajat, on April 4, 2006 to compel him to produce all documents, papers, photos, notes, electronic transmissions or other communications, bill, invoices, documents, reports, notes, etc. contained in the expert's file and used in the production of his report which was served pursuant to CPLR 3101(d) and that Mr. Carrajat has refused to comply with this subpoena.

CPLR 3101(d) 2 provides, "Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

CPLR 3101(d)1(iii) also provides in pertinent part that "further disclosure concerning the expected testimony of an expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate...."

Defendant Northrop has not demonstrated it submitted a prior motion to this Court for disclosure pursuant to CPLR 3101(d); instead, Northrop served a subpoena. Defendant Northrop has not demonstrated special circumstances, special need, or undue hardship in obtaining disclosure of materials requested, or undue hardship in obtaining the materials by other means. Further, plaintiff's expert sets forth that his opinions will be based on his review of all party and witness deposition transcripts, eyewitness statements, maintenance and repair records provided by defendants, his examination of the subject elevator, his forty five years of experience in the elevator industry, as well as current Code requirements and defendants' lack of maintenance, inspection or repair records. Plaintiff's expert has not set forth reliance upon any documents which Northrop claims it cannot obtain. Defendant Northrop has not demonstrated special circumstances or prejudice for plaintiff's failure to respond to the subpoena, or that it even had a basis to serve a subpoena. Based upon the foregoing, it is determined by this Court that defendant Northrop has failed to demonstrate a basis to

dismiss plaintiff's complaint pursuant to CPLR 3126, or to preclude plaintiff's expert's testimony at the time of trial

Accordingly, that part of defendant's motion (007) is denied.

Defendant Northrop also seeks a Frye hearing to contest the validity of Mr. Carrajat's proposed expert theories, asserting they are conclusory conjecture and unsupported by objective evidence. A Frey hearing will be held to determine the admissibility of scientific evidence "only where a party seeks to submit innovative "novel" scientific, medical or technical evidence. Expert testimony regarding "novel" scientific techniques, experiments or theories must satisfy the court that it has gained general acceptance in the field in which it belongs. General acceptance by the relevant community does not mean that it must be unanimously endorsed (***Lambadarious v Kobren, M.D.***, 191 Misc2d 86, 739 NYS2d 549 [2002]; *see also,* ***Frye v United States***, 293 F 1013 [DC Cir 1923]).

Based upon this Court's review of the expert disclosure provided by plaintiff, and based upon the moving defendant's failure to set forth the novel scientific evidence to be produced by plaintiff's expert, or the failure to submit an affidavit from their expert to set forth what the novel scientific evidence at issue is, this Court determines defendant Northrop has not demonstrated entitlement to a Frye hearing. Additionally, it is determined that the trial court would be the appropriate forum to make such an application (***Lambadarious v Kobren, M.D.***, *supra*).

Accordingly, motion (007) by defendant Northrop for a dismissal of the complaint or to preclude plaintiff is denied in its entirety.

In motion (009), defendant Thyssen seeks an order pursuant to CPLR 3126 granting default against plaintiff or precluding plaintiff from supporting his allegations based upon the testimony of Mr. Carrajat, or an order deeming all issues raised by Mr. Carrajat as being resolved in the moving defendant's favor. Although not set forth in the Notice of Motion, defendant Thyssen also seeks a Frye hearing. Defendant Thyssen has merely submitted the affirmation of counsel for defendant Thyssen, adopts the arguments set forth by counsel for defendant Northrop in motion (007), and has not submitted an affidavit from defendant Thyssen or an or an expert affidavit in support of that part of the motion which seeks a Frye hearing. In that counsel for defendant Thyssen relies on the arguments and supporting papers submitted with motion (007), and in that motion (007) was denied for the reasons set forth above, it is determined that defendant Thyssen's application must fail as well.

Accordingly, motion (009) by defendant Thyssen is denied in its entirety.

Turning to motion (008), defendant Northrop seeks renewal of defendant's previous motion (004) wherein the moving defendant sought an order pursuant to CPLR 3212 and CPLR 3211 granting defendant/third party plaintiff summary judgment dismissing plaintiff's complaint on the issue of liability. In motion (010), defendant Thyssen seeks an order granting summary judgment on the issue of liability as well.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented ***(Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498). The movant has the initial burden of proving entitlement to summary judgment ***(Winegrad v NYU Medical Center***, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers ***(Winegrad v NYU Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact." (CPLR 3212[b]; ***Zuckerman City of New York***, 49 NY2d 557, 427 NYS2d 595). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form ***(Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843), and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790).

It is axiomatic that in a personal injury action, to prove a prima facie case of negligence, the plaintiff must establish the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff (***Gordon v Muchnick,*** 180 AD2d 715, 579 NYS2d 745 [1992]).

In support of the motion (008) for an order granting summary judgment, defendant Northrop has submitted, inter alia, a copy of the expert disclosure report submitted by plaintiff's expert, Patrick Carrajat (defendant Northrop exhibit E), as well as copies of the pleadings, bill of particulars, the order of October 2, 2006 (Doyle, J.); various discovery documents; affirmation of counsel for defendant; unsigned, unsworn copy of the deposition transcript of Alan Lasser; an uncertified copy of a transcript of a hearing of the Workers' Compensation Board, State of New York; an unsigned, unsworn copy of the deposition transcript of Raymond Sontag; unsigned, unsworn copy of the deposition transcript of Dominick Guardino; unsigned, unsworn deposition transcript of Charles Saliba; a certified copy of an inspection certificate for elevator F-1 for 12/15/99; an unsigned, unsworn copy of the deposition transcript of Douglas Bedell; an unsworn copy of the IME of Brian Hainline, M.D., and an uncertified copy of a purported agreement between Northrop and Dover Elevator Company dated March 18, 1999, and maintenance records from Dover Elevator Company for the period of 2/17/99 through 2/9/00, and Thyssen Dover Elevator maintenance records for 3/9/00 through 7/27/00.

Based upon review of defendant Northrop's admissions, it is determined Northrop has not met its burden of demonstrating entitlement to an order granting summary judgment as a matter of law on the issue of liability. None of the deposition transcripts are in admissible form, however, no party has objected to them so the Court may consider the same. Defendant Northrop has not submitted an affidavit in support of the motion, and there has been no evidence submitted concerning

the functioning of the elevator at issue at the time of the accident, merely the affirmation of counsel for defendant. Nor has defendant submitted an expert affirmation in support of the motion on the issue of liability. A copy of the purported contract between defendants has not been submitted.

Although there is a certificate issued by the Town of Oyster Bay demonstrating that elevator F-1 was inspected (Northrop exhibit M), there is no admissible evidence supporting the condition of the elevator involved in the incident in which plaintiff claims to have sustained injury on the date of the incident. This document is therefore not dispositive on the issue of liability standing alone. The maintenance and repair records (Northrop exhibit L) do not indicate they are for the elevator at issue, however, this issue seems to be undisputed. The cover letter accompanying the records indicates the repair records will be provided upon the parties specific identification of the elevator involved. The remainder of the submissions do not go to the issue of demonstrating there are no issues of fact as to liability. There are factual issues concerning compliance of the elevator with applicable Codes on the date of the accident, as well as the maintenance, repair and condition of the elevator, especially on the date of the incident. Defendant Northrop's motion must fail as a matter of law as Northrop has not demonstrated prima facie entitlement to an order granting summary judgment.

Accordingly, defendant Northrop's motion (008) for an order granting summary judgment on the issue of liability is denied.

Turning to motion (010), defendant Thyssen seeks an order pursuant to CPLR 3212 granting summary judgment against plaintiff and dismissing the complaint on the issue of liability, and dismissing all cross claims asserted against the moving defendant. In support of the motion, defendant Thyssen has submitted, inter alia, an attorney's affirmation; a copy of the Order dated October 2, 2006 (Doyle,J.); an unsigned, unsworn copy of the deposition transcript of Douglas Bedell; an unsigned, unsworn copy of the deposition transcript of Raymond Sonntag; a copy of the expert disclosure report submitted by plaintiff's expert, Patrick Carrajat (defendant Northrop exhibit E), as well as copies of the pleadings, bill of particulars, and various discovery documents; unsigned, unsworn copy of the deposition transcript of Dominick Guardino; unsigned, unsworn copy of the deposition transcript of Alan Lasser; and the notarized affidavit of Patrick McPartland, P.E., which does not set forth the truth of the contents.

The affidavit of defendant's expert, Patrick McPartland, P.E., sets forth that his affidavit is based upon plaintiff's failure to establish notice of a defective condition with the subject elevator which he describes as elevator F-1 under identification number 7478. He states the elevator was installed in the 1980's, was manufactured by Rotary Lift, and has been in continuous use at the Grumman facility since the facility was opened. Defendant's expert opines that Dover performed a sufficient number of maintenance hours on the freight elevator as required by industry standards, but does not state for what time period, or how often those inspections were done. He states the freight elevator was equipped with a bell that would emit sound to warn of the gate closing, and the code does not require the alarm or warning bell to sound when the push button in the car is operated. No maintenance can be performed on the bell as it is a self-contained part. He then states that Rule 112 d of the applicable code requires the warning bell to start to sound at least five seconds prior to the time the car door or gate starts to close and shall continue until the hoistway door is substantially

closed. Defendant's expert further states the Town of Oyster Bay inspection reports from December 1999 and June 2000 established that the freight elevator's alarm bell was fully compliant with the regulation from 1999 to one month prior to the incident. Defendant's expert continues to set forth at paragraph 8 of his report that there are no complaints, records, testimony or evidence that he has reviewed evidencing complaints with the alarm system following the June 16, 2000 inspection and the subsequent certification July 20, 2000. The accident occurred July 28, 2000. McPartland further states that for a two and one half year period prior to the incident, there were no complaints made concerning the alarm bell or any repairs to the car gate, or safety edge required for the "A" line doors.

Based upon the fact that defendant has not submitted any admissible evidence concerning the condition of the elevator on the date of the accident, it is determined defendant has not demonstrated prima facie entitlement to an order granting summary judgment.

Additionally, plaintiff, who is proceeding pro se as his previous counsel was relieved, has opposed the motions for summary judgment and submitted his own affidavits. He has pointed out in his opposition affidavits that there was inconsistent testimony about the warning bell by Saliba (Saliba EBT p. 35) who stated the alarm would sound off one half minute to a minute before the elevator door closed. Ray Sonntag testified (Sonntag EBT p. 42,43,54) that all the freight elevators in Grumman would sound a bell to let the operator know you did not close the door, and the bell would sound until the door closed; he also testified the bell would ring for ten minutes prior to the door closing (p.53). This Court noted that Mr. Sonntag also testified he never heard the bell on the elevator ringing and then witness the door close (defendant Northrop exhibit H, p.30), and he did not think there were lights on the elevator on July 28, 2000 (p.32). Plaintiff also argues that the testimony of Louis Lasser (Northrop Exhibit I, p. 24), Alan Lasser and Don Guardino (Northrop Exhibit J, p.65) set forth that none of them heard any bells at the time of the accident.

The Dover repair sheet dated 6/22/99, submitted with plaintiff's opposition, indicates the repair person found the elevator stuck with the door open, repairs were made to the car (front) gate to correct the trouble as the doors were not closing. The report further indicates the repair person "found the door open rear button not working. Replaced the Peele button with an Edwards pushbutton. Monitored operation. Found operation proper and elevator in service." Consequently, this repair sheet would rebut defendant's expert's unsworn, but notarized report concerning his statement that for a two and one half year period prior to the incident, there were no complaints made concerning the alarm bell or any repairs to the car gate, or safety edge required for the "A" line doors, and would go to the issue of notice. Although defendant's expert sets forth the inspection reports from the Town of Oyster Bay demonstrate the freight elevator was in proper working order at the time of the incident, there is no opinion set forth concerning how this was ascertained as there is no mention by defendants or their expert concerning the condition and operation of the elevator at the time of the accident.

Based upon the foregoing, although the burden did not shift to plaintiff, it is determined plaintiff has also raised triable issues of fact which preclude an order granting summary judgment.

Accordingly, motion (010) is denied due to the existence of factual issues which preclude defendant's motion for summary judgment.

Dated MAY 14 2007

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION