[* 1]

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: **DEBRA A. JAMES** **PART 59**
Justice

PUENG FUNG,

Plaintiff,

- v -

20 WEST 37TH STREET OWNERS, L.L.C., WINOKER REALTY COMPANY, INC., MINOS RENOVATIONS, INC., and CENTENNIAL ELEVATOR INDUSTRIES, INC.,

Defendants.

Index No.: 100468/04

Motion Date: 05/08/07

Motion Seq. No.: 6

Motion Cal. No.: _____

20 WEST 37TH STREET OWNERS, L.L.C.,
Third -Party Plaintiff,

- v -

MINOS RENOVATIONS, INC., WINOKER REALTY COMPANY, INC., and CHARWIN MANAGEMENT CORP.,

Third -Party Defendants.

Third-Party Index No.: 591045/04

CENTENNIAL ELEVATOR, INC.,
Second Third -Party Plaintiff,

- v -

D.T.M., INC.,
Second Third -Party Defendant.

Second Third-Party Index No.: 591045/06

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

The following papers, numbered 1 to 5 were read on this motion to strike the answer.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	5

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers,

The court shall deny plaintiff's motion to strike Centennial's answer for spoliation. The court shall also deny

Check One: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

Centennial's cross-motion for summary judgment while directing that the remaining discovery take place in an expedited manner (see Motion Seqs. 5 & 11).

The Court has stated that

> Spoliation is the destruction of evidence. Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. A correlating trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial "witness" to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission. The trend is particularly pronounced in litigation involving products liability, but also is found in negligence cases.
> 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. We have found dismissal to be a viable remedy for loss of a "key piece of evidence" that thereby precludes inspection.

Kirkland v New York City Housing Authority, 236 AD2d 170, 173 (1st Dept 1997).

In this case, the court's Preliminary Conference Order dated December 17, 2004, directed "all defendants to provide any records with regard to inspection, construction and/or maintenance and/or repair of the subject freight elevators of the subject building including copies of any contracts from two years prior to and including 12/24/03." A Compliance Conference Order dated September 30, 2005, states that "Centennial shall produce

work tickets within 30 days; Centennial shall produce witness with knowledge on 11/15/05 at 10:00 A.M." A further Status Conference Order dated July 25, 2006, stated that "defendant to produce on or before ebt of Bacolas work tickets, inspection records, violation documents and repair records and invoice[s] for elevator work from building file."

It is undisputed on this motion that the only records provided by Centennial in response to this court's orders to produce the work tickets and maintenance records of the subject elevator is a three page spreadsheet entitled "Completed Ticket Summary Listing." Centennial argues that the work tickets are transcribed into this electronic form and that it therefore has satisfied its discovery obligations under this court's orders. Centennial's witnesses state that the original work tickets were destroyed after three or four months in the regular course of business and that the electronic record is all that is maintained.

Plaintiff argues that it strains credulity to believe that there are no other records responsive to plaintiff's requests and that defendant took over two years to discover that it did not have the original work tickets. Plaintiff claims that the destruction of the work tickets constitutes spoliation justifying the sanction of striking the answer.

The court finds that the plaintiff has not met his burden of demonstrating that there has been spoliation. However, the court expressly does not rule on whether Centennial has adequately complied with this court's discovery orders so as not to be sanctioned under CPLR 3126. "To impose a sanction for spoliation of evidence, it must be established that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when he was on notice that such evidence might be needed for future litigation." Haviv v Bellovin, 39 AD3d 708, 709 (2d Dept 2007). It is agreed by the parties that the work tickets for the subject freight elevator were destroyed and the work ticket summary listing shows that defendants were aware that an incident had taken place on the elevator the day after plaintiff's accident.

However, plaintiff has failed to show that the work tickets were "crucial" to proving their claim as to the issue of notice. Absent a showing that "the evidence destroyed was central to [plaintiff's] case or that [plaintiff was] prejudiced by its destruction" no sanctions will be imposed for spoliation. Friel v Papa, 36 AD3d 754, 755 (2d Dept 2007). Here, the plaintiff has failed to show that actual or constructive notice cannot be proven in the absence of the destroyed records. The record on this motion fails to state whether defendants have complied with

this court's Preliminary Conference Order which requires that the "names and addresses of all eye witnesses and notice witnesses" be exchanged by the parties. Such information would of course include the identities of defendants' employees who worked on or received inquiries about the subject elevator prior to the accident. See Tomasello v 64 Franklin, Inc., 45 AD3d 1287, 1288 (4th Dept 2007) ("plaintiff does not contend, nor does the record reflect, that the loss of the [destroyed evidence] will prevent him from establishing a prima facie case of negligence. Further, plaintiff will have the opportunity, if so advised, to depose the individuals who viewed the [evidence] in question").

Because the record fails to indicate what, if any, other discovery devices have been employed, and to what effect, to establish Centennial's notice (or lack thereof) of the accident, the spoliation motion must be denied. It is incumbent upon the movant on a spoliation motion to demonstrate that there is no other means of proving the claim without the destroyed evidence. The court shall therefore schedule further discovery on an expedited basis so that plaintiff may seek such evidence if it has not already been provided. If Centennial does not comply with this court's discovery orders including the production of the names and addresses of notice witnesses as it is obliged to do, the court may impose other sanctions for the failure to provide such discovery including preclusion and issue inferences

at trial. See Longo v Armor Elevator Co., Inc., 307 AD2d 848, 849 (1st Dept 2003) (although no clear showing of spoliation, court resolved issue of negligence in favor of plaintiff in a case involving an elevator accident as an "appropriate disclosure sanction for the Building defendants' repeated and continuing failure to produce documents that they were ordered to produce in a decision of this Court . . . or to adequately explain their inability to do so"); see also Dorsa v National Amusements, Inc., 6 AD3d 652, 653-654 (2d Dept 2004) (destruction of maintenance records led to sanction precluding defendant from offering any evidence at trial as to the dangerous condition and directing that an adverse inference charge be issued).

The court notes that Centennial improperly and belatedly files a second motion for summary judgment (see Motion Seq. No. 9) as a cross-motion to plaintiff's motion for discovery sanctions. On procedural grounds alone the cross-motion would of course be denied. On its merits, the motion is also insufficient.

The governing law has been succinctly set forth by the Second Department in case similar to that here stating

> It is well settled that an elevator maintenance company owes a duty of care to members of the public, and may be liable for failing to correct conditions of which it is aware, or failing to use reasonable care to "discover and correct a condition which it ought to have found" (Rogers v Dorchester Assocs., 32 NY2d 553, 559). Moreover, a jury may infer negligent inspection and repair in the maintenance of an elevator from evidence that the

> elevator doors opened in the absence of the elevator cab, and the interlock system, which was designed to prevent such an occurrence, required replacement (see, Guzman v Saks Fifth Ave. Corp., 141 AD2d 801). In this case, notwithstanding Gemini's claims that its 1986 contract with the building's managing agent gave rise only to obligations regarding the passenger elevators, the record demonstrates that an inspection was conducted on April 27, 1994, approximately three weeks prior to the injured plaintiff's fall, by Gemini's sub-contractor, and that this inspection covered all 11 elevators in the building. Furthermore, Gemini submitted a bill for this inspection which recited the relevant charges "as per estimate" for 11 elevators. It is clear, notwithstanding the terms of the 1986 maintenance contract, which was to be effective for only 36 months and would have expired in 1989, that Gemini did in fact undertake to inspect all 11 elevators in the building, including the one implicated in the injured plaintiff's accident, and charged a fee for its services. Therefore, Gemini's contention that it was a volunteer and that its inspection of the freight elevator was done "gratuitously" is without merit. Rather, there are issues of fact, inter alia, as to whether Gemini provided contractually-agreed-upon services and whether it was negligent in its inspection and/or maintenance of the elevator. Consequently, Gemini is not entitled to summary judgment.

Alsaydi v GSL Enterprises, Inc., 238 AD2d 533, 534 (2d Dept 1997).

Centennial's affidavit in support of its cross-motion wholly fails to carry its prima facie burden of demonstrating that it is free from any negligence that may have caused plaintiff's accident. Centennial's contract with the building specifically provides that one of its duties is "[i]dentification of problems that should be corrected by your elevator maintenance company." Centennial also created bid documents and specifications for "a comprehensive [preventative] maintenance program for Two (2)

passenger elevators." Centennial argues that it had no responsibility with respect to the service elevator where the accident occurred. However, the October 23, 2002, letter from the Centennial to Winoker Realty indicates that it did undertake to perform work with respect to the service elevators in terms of specifying the maintenance requirements going forward. Centennial also submits a letter the owner sent to it dated October 12, 2002, pursuant to which the owner directed that work be performed on the service elevators. That is, despite the alleged contractual limitation asserted by the Centennnial, there is an issue of fact as to the work Centennial performed and/or specified with respect to the service elevator. Therefore summary judgment shall be denied.

Accordingly, it is

ORDERED that the motion and cross-motion are DENIED; and it is further

ORDERED that the mediation conference before Part Mediation-1 on February 4, 2008, at 10:30 A.M. is hereby cancelled, and the parties are directed to attend a status conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on January 29, 2008, at 2:30 P.M. to set a schedule for the completion of outstanding discovery.

This is the decision and order of the court.

Dated: January 14, 2008 ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.