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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 101891/2005

HERNANDEZ, CHRISTINA

VS.

PACE ELEVATOR

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED

OCT 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 10/2/08

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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CHRISTINA HERNANDEZ,

Plaintiff,

-against-

PACE ELEVATOR, INC., and SCHINDLER ELEVATOR CORPORATION,

Defendants.

----------x

Decision/Order
Index No.: 101891/05
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def Pace n/m (§3212) w/JRH affirm, SS affid, exhs	1
Pltf's opp w/DLK affirm, exhs	2
Def Pace reply w/JRH affirm, exh	3

Upon the foregoing papers, the decision and order of the court is as follows:

In this action plaintiff Christina Hernandez ("plaintiff") seeks damages for personal injuries allegedly suffered when the elevator she was riding on suddenly dropped. Plaintiff filed the note of issue on December 7, 2007. Defendant Pace Elevator Inc. ("Pace") now moves for summary judgment dismissing the complaint. The motion is opposed by plaintiff who argues that there are issues of fact for trial.

Since this motion was brought timely, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

A prior motion by defendant Schindler Elevator Company to dismiss the complaint and cross claims against it was granted, and therefore, Schindler has been

dismissed from this action. Order, Gische J., 7/7/06.

The court's decision is as follows:

Arguments

Plaintiff alleges that she was injured on April 11, 2003 when the elevator [number 1P24812] she was riding on ("elevator") within the building located at 520 First Avenue, New York, New York ("building") suddenly dropped several feet, bashing her against its back wall. She claims to have suffered a herniated disc with subsequent discectomy as a result of the accident.

Pace is a private elevator company. It contends that it had a service contract with the Department of Citywide Administrative Services ("DCAS") to perform elevator inspections of various City owned buildings on an ad hoc basis, including the subject building which houses the Office of the Chief Medical Examiner. These inspections were pursuant to, and to comply with, the Local Laws of The City of New York for the Year 1981 ("LL10/81"). LL10/81 mandates that elevators must be inspected five (5) times every two years; three (3) times by Buildings Department inspectors and twice by a private elevator and escalator inspection agency employed by the owner and licensed by the Department of Buildings. Building Code Title 27, Subchapter 18, section C26-1802.4.

Pace contends that although it had a contract with DCAS to inspect, identify and report any unsatisfactory conditions it observed in the elevators it was ordered to inspect, it was not responsible for repairing anything it reported, but that this was the responsibility of DCAS who maintained trained staff for that purpose. Thus, Pace contends it did not owe a duty of care to plaintiff, nor did it assume that duty.

Alternatively, Pace argues that even if it did owe plaintiff a duty, it was not negligent because it did not create, nor did it have notice of, a dangerous condition at the time of, or prior to, the date of plaintiff's accident.

Scott Schindler, Pace's president, was deposed on behalf of Pace. Schindler testified at his EBT that he is a licensed elevator inspector and that Pace entered into a contract with DCAS sometime in 2002 to test and inspect elevators for the City on an ad hoc basis. Schindler testified DCAS would send a request to have an elevator tested, and Pace would comply. Sometimes the testing was just annual inspection; other times it was the two (2) or five (5) year test. He "believed" that his first visit to (and inspection of) the subject elevator was October 8, 2003.

There is however, an earlier inspection report dated August 7, 2002 with Schindler's signature ("2002 inspection report"). That 2002 inspection report indicates that the subject elevator was graded "unsatisfactory" by Schindler and contains these comments: the "5 yr test [is] overdue, no city ID#'s, seal machine, repair intercom, clean pit." Schindler has provided his sworn affidavit that none of these conditions had anything to do with a mis-leveling problem.

Schindler also testified at his EBT that DCAS alone was responsible for making any repairs necessary to any elevator at the building and that Pace's only duty was to report its inspection results so the owner was compliant with LL10/81. Schindler acknowledged at his EBT that he had looked for, but could not find, a copy of Pace's contract with DCAS.

Keith Munroe, a former employee of DCAS was also deposed. Munroe testified at his EBT that he was responsible for general building operations at 520 First , but that

he had no training in, nor did he perform any, elevator repairs. He could not recall who performed "work" on the elevators or did repairs, but thought he had seen work being done by "non-DCAS people." When pressed for a time frame, Munroe could not pinpoint when he had observed this.

George H. Kowalski, Jr., was also employed by DCAS at the time of the accident. Kowalski is an elevator mechanic who was assigned to various City owned buildings at the time of plaintiff's accident. He testified at his EBT that he had worked at the subject building "from to time," but his regular assignment was at 111 Centre Street. Kowalski testified that on January 3, 2003 he installed and adjusted new parts, including cable and rollers, on the subject elevator. He put the elevator out of service to make the repair and once it was completed, he tested the elevator and put it back into service. Kowalski made another repair on March 26, 2003. He repaired a broken tachometer wire. Kowalski testified at his EBT that this wire goes from the tachometer up and over two piping to the SCR drive which powers and controls the elevator's motor. He also fixed a brake problem in August 8, 2003, after the date of the accident.

Plaintiff argues there are issues of fact that have to be tried. Among the factual disputes she identifies are whether Pace had, or assumed, a contractual duty to make repairs for DCAS. Plaintiff contends that Pace's obligations went beyond just inspecting the elevator, and therefore it assumed a duty to keep the elevator in reasonably safe condition - a duty which it then breached, resulting in her injuries.

Plaintiff argues that the deposition testimony of Munroe and Kowalski establishes that there was no regularly assigned mechanic for the building and although Kowalski did some repairs, there is no conclusive proof that Pace did not also have a

obligation to maintain, control, or repair the elevator. Plaintiff urges the court to sanction defendant by resolving these claims in her favor because defendant failed to comply with discovery. She also urges the court to apply the "best evidence rule" because Pace has not provided its contract with DCAS.

Plaintiff provides the sworn affidavit of Patrick A. Carrajat, an elevator consultant, whom she intends to call as an expert at trial and whom defendant objects to on the basis that he was not timely disclosed in response to Pace's Demand of Expert's Name dated March 24, 2005. Carrajat states that he has examined various documents provided in discovery and considered them in forming his opinion. These documents include the inspection reports that Schindler signed in 2002 and 2003. Plaintiff argues that although the 2002 inspection report indicates the five (5) year LL10/81 had not been performed as of August 7, 2002, and therefore Schindler gave the elevator an "unsatisfactory" grade, just one year later, in his October 9, 2003 inspection report, Schindler gave the elevator a "satisfactory" marking and passed the elevator, even though the 5 year inspection had not been done in the intervening time. Carrajat describes the 5 year test as involving loading the elevator with weights to see whether it needed to be calibrated or repaired to resolve any problem having to do with speed (sudden drop, for example). Carrajat further opines that Pace should have taken the elevator out of order after its 2002 test until the 5 year test was performed.

Pace argues the expert's report is flawed, unreliable, and therefore fails to raise any material issues of fact for trial. Pace argues further that the 2003 inspection report is "besides the point" because plaintiff's accident happened several month before Schindler issues his "satisfactory" grade. Furthermore, Pace argues that the

discectomy took place July 29, 2003 which would coincide with the date plaintiff testified at her EBT the accident took place (April 11, 2003).

Applicable Law

Since Pace seeks summary judgment in its favor, it bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden will it then shift to plaintiff to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

The confusion about when plaintiff's accident happened is easily resolved on this record, without having to resort to a trial. Plaintiff's complaint alleges the accident happened April 11, 2003, consistent with her testimony at her EBT. She testified the accident took place on a Friday. April 11, 2004 was a Monday. The Bill of Particulars is not verified by plaintiff, but by her attorney and plaintiff has not provided a sworn affidavit about why this discrepancy raises issues of fact for trial. Furthermore, plaintiff claims that as a result of her injuries she had a discectomy; the surgery took place in July 2003. It would be illogical for the surgery to have taken place before the accident

happened, if as plaintiff claims, the surgery was necessitated by this accident. Therefore, the court decides that there is no issue of fact when the accident took place, and it took place on Friday, April 11, 2003.

Plaintiff refers to court ordered discovery that she claims Pace has not complied wit. Copies of these orders, however, have not been provided to the court. Even assuming that plaintiff is correct, and defendant was ordered to produce Pace's contract with DCAS, Schindler has testified under oath, and states again in his sworn supporting affidavit, that he cannot locate a copy of the contract because it is missing. This is not the same as refusing to cooperate with discovery, and not a basis to impose sanctions upon defendant resolving issues in plaintiff's favor, or denying summary judgment.

Nor do the facts of this case lend themselves to the application of the "best evidence rule, " as plaintiff urges. This legal principal simply provides that a document, such as a contract, is the best evidence of what it says if its contents are in dispute and sought to be proved. Schozer v. William Penn Life Ins Co. of N.Y., 84 NY2d 639 (1994). Pace is not seeking to prove the contract it had with DCAS as its defense. Conversely, plaintiff's burden at trial is to prove Pace was negligent. Therefore, the terms of the contract are not in dispute.

Plaintiff's suggestion that Pace (Schindler) may have intentionally destroyed the document is based on speculation. Scansarole v. Madison Square Garden, L.P., 33 A.D.3d 517 (1st Dept 2006). Although spoliation of evidence may result in sanctions where crucial items of evidence involved in an accident are disposed of before the adversarial party has had an opportunity to examine them, plaintiff has not met her

burden of putting forth facts tending to show that such an extreme sanction is warranted in this case. Kirkland v. New York City Housing Authority et al., 236 AD2d 170 (1st Dept. 1997); Squitieri v. City of New York, 248 AD2d 201 (1st Dept. 1998); Marro v. St. Vincent's Hospital et al., 294 AD2d 341 (2nd Dept 2002). In reaching this decision, the court considered that the lost/missing contract between DCAS and Pace is not directly relevant to how plaintiff's accident happened. For example, it is not a videotape showing the inside of the elevator when it reportedly dropped. *Compare* Scansarole v. Madison Square Garden, L.P., supra.

Although the contract may clarify whether Pace had a contractual obligation to perform elevator repairs at the building, the terms of the contract can be proved in other ways. Bovis Lend Lease LMB, Inc., et al v. Garito Contracting, Inc., et al, 38 A.D.3d 260 (1st Dep't 2007); Eden Temporary Services, Inc. v. House of Excellence Inc., 270 A.D.2d 66 (1st Dep't 2000). Moreover, even if Pace did have a contractual obligation to make repairs, but failed to, this would be a claim available to the owner/DCAS, and not a basis to deny Pace's motion for summary judgment for the following reasons.

Where, as here, a contractor has a contractual duty to provide services under a service agreement, that contractual duty does not give rise to a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 (2002). There are three exceptions to this broad rule of law that will expose the contractor to liability because it has assumed a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d at 139 (*citing* Palka v. Service Master Mgt. Svcs. Corp., 83 NY2d 579, 585-6 [1990]). The exceptions are where 1) the contractor "launches a force or instrument of harm," by first undertaking

a task, but then negligently creating or exacerbating a dangerous condition resulting in an injury; 2) the performance of contractual obligations has induced detrimental reliance on continued performance of those obligations; and 3) the service contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. Espinal v. Melville Snow Contractors, Inc., *supra*. None of these exception apply.

Even assuming that the 5 year test was not performed, there is no evidence that DCAS ever instructed Pace to do that test. The purchase orders show that DCAS would request an inspection by Pace, notifying it of the kind of inspection needed. Furthermore, there is evidence that DCAS personnel made repairs to the elevator prior to the date of the accident, and even tested the elevator to make sure the repairs were done, and the elevator was operating, properly (Kowalski's EBT). Thus, Pace's control over the elevator was not exclusive nor so comprehensive that it absorbed the City's responsibilities to keep the elevator running in a safe condition.

This lack of exclusivity is also why plaintiff's argument, that the doctrine of *res ipsa loquitur* applies, fails. Even assuming that plaintiff can prove that the event that happened (elevator dropping several feet) does not occur in the absence of someone's negligence, and the sudden drop was not due to any voluntary action or contribution on her part, the third element of a *prima facie* case against the manufacturer is that the instrumentality was within the exclusive control of defendant. Dermatossian v. New York City Transit Authority, 67 NY2d 219 (1986). Kowalski's unrefuted deposition testimony is that he was instructed by DCAS to perform repairs on the elevator prior to the date of the accident. The elevator was also used by

authorized staff and others who were authorized to enter the building. Therefore Pace's access to the elevator was not exclusive.

Plaintiff struggles to prove that Pace either launched "a force or instrument of harm," by first undertaking the task of inspecting the elevator, giving it an "unsatisfactory" grade, but then finding it "satisfactory" a year later although the 5 year test had not been performed. There is, however, no issue of fact whether DCAS instructed Pace to perform that load bearing test before the date of the accident. The 2003 inspection report is for an inspection that took place in October 2003, several months after plaintiff's accident.

Leaving aside the issue of whether plaintiff's expert's opinion should be considered because (as Pace contends) plaintiff failed to comply with the disclosure requirements set forth in CPLR § 3101 (d) (1) (i) applicable to trial experts, Carrajat relies on incorrect facts to form his opinion. Amatulli by Amatulli v. Delhi Const. Corp. 77 N.Y.2d 525 (1991). Notably, Carrajat refers to the accident as happening in 2004, not in 2003 and a large part of his opinion deals with the results in the October 2003 inspection. Carrajat's claim, that Pace should have taken the elevator out of order in April 2002, when it learned the 5 year test had not been performed is offered without any support. There is no evidence that Pace had the authority to take this measure, that the owner or DCAS would have allowed it to do so, or that Pace was required to take this action under any applicable code, rule or statute.

In reviewing, and based upon, the foregoing, the court finds that Pace has proved that it did not owe plaintiff a duty of care, nor did it assume a duty to her, a necessary element of plaintiff's case. "In the absence of a duty, there is no breach

and without a breach, there is no liability." Pulka v. Edelman, 40 NY2d 781 *rearg den* 41 NY2d 901 (1977). Therefore, Pace's motion for summary judgment must be, and hereby is, granted. The complaint is hereby dismissed.

Conclusion

Defendant's motion for summary judgment dismissing the complaint is granted.

It is hereby

ORDERED that the Clerk shall enter judgment in favor of defendant PACE ELEVATOR, INC., against plaintiff CHRISTINA HERNANDEZ dismissing the complaint and this action; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
October 2, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.

FILED
OCT 08 2008
COUNTY CLERK'S OFFICE
NEW YORK