

Hisen v 754 Fifth Ave. Assoc., L.P.

2009 NY Slip Op 30864(U)

April 13, 2009

Supreme Court, New York County

Docket Number: 104406/2006

Judge: Emily Jane Goodman

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PRESENT: EMILY JANE GOODMAN

Justice

PART 17

Index Number : 104406/2006
HISEN, RONALD
 vs.
BERGDORF GOODMAN
 SEQUENCE NUMBER : 003
 STRIKE ANSWER

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided per above

FILED
 APR 20 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

WHY THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/13/09

EGJ
EMILY JANE GOODMAN

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: IAS PART 17

-----X
RONALD HISEN and MARGUERITE HISEN,

Plaintiffs,

- against -

754 FIFTH AVENUE ASSOCIATES, L.P.,
BERGDORF GOODMAN, INC., THE NEIMAN-
MARCUS GROUP, INC., CITY STORE GATES
MFG. CORP., and ALLBORO INSTALLERS, CO.,
INC.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Index No. 104406/2006

FILED
APR 20 2009
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NEW YORK

In this personal injury action alleging negligence, three motions (sequence numbers 003, 004 and 005) are consolidated for disposition in accordance with the following decision and order. In motion sequence number 003, plaintiffs move, pursuant to CPLR 3126, for an order striking the answer of defendants 754 Fifth Avenue Associates, L.P. (754), Bergdorf Goodman, Inc. (Bergdorf) and The Neiman-Marcus Group, Inc. (Neiman; collectively, with 754 and Bergdorf, the Bergdorf Defendants), on account of their alleged failure to provide certain disclosure, and directing a hearing on damages. In the alternative, plaintiffs move for an order compelling the Bergdorf Defendants to fully comply with all outstanding discovery requests, and a conditional order of preclusion which is self-executing in the event that those defendants delay in providing the requested disclosure.

In motion sequence number 004, plaintiffs move, pursuant to CPLR 3212, for summary judgment on the issue of liability as against the Bergdorf Defendants. The Bergdorf Defendants cross-move, also pursuant to CPLR 3212, for summary judgment: (1) dismissing the complaint and any and all cross claims as against them; (2) in their favor on their cross claim against defendants City Store Gates Mfg. Corp (City) and Allboro Installers, Co., Inc. (Allboro) for common-law indemnification; and (3) awarding them damages on their claim against City and Allboro for breach of warranty.

In motion sequence number 005, City moves, pursuant to CPLR 3212, for summary judgment: (1) dismissing any and all of plaintiffs' claims against it; and (2) dismissing any and all

cross claims against it or, in the alternative, for an order (a) striking the pleadings interposed by the Bergdorf Defendants, (b) precluding the Bergdorf Defendants from offering any evidence at trial relating to their cross claims against City, and (c) granting City summary judgment on its cross claims against the Bergdorf Defendants for indemnification.¹

FACTUAL ALLEGATIONS

Plaintiff Ronald Hisen, a truck driver and delivery person for United Parcel Service, was injured on December 13, 2005, while he was delivering several packages to a Bergdorf store located on West 58th Street, New York, New York. After parking his truck nearby, Hisen placed the packages on a hand truck, wheeled the hand truck to a closed, roll-up door which provided access to the store's loading dock area, and knocked on the outside of the door. The door was approximately 10 or 11 feet wide, and was made up of interconnected steel slats measuring approximately 2½ inches in horizontal width, together with a bottom rail made of steel or iron. In response to Hisen's knock, a store employee on the inside of the door pressed a button which activated a motorized mechanism that raised the door. After the door had been opened, Hisen took two of the packages he was delivering from his hand truck and brought them into the loading dock area. Hisen then returned to his hand truck to get a third package, and was in the process of carrying that package into the loading dock area, when the bottom portion of the rolled-up door separated from the upper portion and fell, striking Hisen's head.

Almost 11 months before the accident, the lower portion of the roll-up door had been damaged in a previous incident and repaired. In January 2005, workers were attempting to load a machine which had been used by a subcontractor to install flooring in the store on to a truck parked in the vicinity of the door. The machine had escaped from their control and rolled into, and damaged, the bottom portion of the door. Bergdorf entered into a contract with City, dated January

¹In connection with motion sequence 005, Allboro asks the Court to dismiss plaintiffs' complaint against it. However, Allboro never moved for any relief and therefore, is not entitled to any.

24, 2005 (the Contract), pursuant to which City agreed, inter alia, to “furnish [the] materials and labor” necessary to “replace” the bottom portion of the door comprised of “20 slats ... 127" long” and “one bottom bar ... 127" long.” The Contract contained a limited warranty which provided that “[e]quipment is warranted for 12 mos. from the date of this agreement against mechanical parts only.” City alleges that the repair work on the door was actually performed not by City but by Allboro, a company which is affiliated with City (*see* Villareal Reply Affirm., ¶¶ 6-9).

The repair work was completed by the end of January 2005. Bergdorf made several complaints to City concerning the quality of the paint job on the repaired portion of the door, between the end of January and mid-April 2005, and City sent workers to repaint that portion of the door on several occasions. However, Bergdorf alleges that, from the date when the door was repaired through the date of Hisen’s injury, it was never aware of, and never made any complaint to City concerning, any structural or mechanical problem with the door.

754 is the landlord and Neiman is the tenant on the lease of the premises in which the Bergdorf store is located. Bergdorf is a subsidiary of Neiman. The complaint asserts two causes of action which allege: that defendants were negligent in improperly maintaining and controlling the loading dock door; and that Hisen’s wife is entitled to damages for loss of services, society and consortium.

DISCUSSION

All of the motions and cross motions are denied.

Plaintiffs’ motion sequence number 003 seeks an order (a) striking the Bergdorf Defendants’ answer on account of their alleged failure to provide disclosure or (b) in the alternative, compelling compliance with plaintiffs’ outstanding disclosure requests. In their moving papers, plaintiffs asserted that the Bergdorf Defendants had failed to provide responses to certain discovery demands which were subsequently reiterated in, and certain demands which were newly set forth in, “Plaintiffs’ Further Combined Demands and Notices” dated October 24, 2007 and “Plaintiffs’ Further Combined Demands and Notices” dated October 29, 2007 (all, collectively, the Demands).

However, the papers which the Bergdorf Defendants submitted in opposition to plaintiffs' motion included: (1) a "Further Response to Combined Demands" dated January 2, 2008, which was accompanied by copies of most of the materials requested by the Demands; (2) an affidavit by Bergdorf's Director of Loss Prevention, which contained testimony as to his efforts to locate, his inability to locate, and/or the nonexistence of certain of the materials requested by the Demands; and (3) objections to certain of the Demands, together with case law citations which allegedly supported those objections.

In view of the "strong preference in our law that matters be decided on their merits," courts will not resort to the penalty of striking an answer for failure to comply with discovery demands "unless noncompliance is clearly established to be both deliberate and contumacious" (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]). The Bergdorf Defendants served plaintiffs with responses to their discovery demands on multiple occasions prior to the date of plaintiffs' motion and, although those responses were not complete, plaintiffs have failed to demonstrate that the Bergdorf Defendants engaged in a deliberate and contumacious failure to disclose warranting the "extreme and drastic penalty" of striking the Bergdorf Defendants' answer (*Cantos v Castle Abatement Corp.*, 251 AD2d 40, 41 [1st Dept 1998]).

Plaintiffs' motion is also denied, as moot, insofar as it seeks an order compelling the Bergdorf Defendants to fully comply with plaintiffs' allegedly outstanding disclosure requests. Plaintiffs apparently do not dispute that those discovery requests were substantially complied with by the materials which the Bergdorf Defendants submitted in conjunction with their papers in opposition to plaintiffs' motion inasmuch as: (1) the Bergdorf Defendants asserted in their opposition papers that they had therewith satisfied plaintiffs' outstanding discovery demands, and plaintiffs did not submit any reply papers on the motion; and (2) plaintiffs filed a note of issue and certificate of readiness dated January 4, 2008 -- i.e., two days after the date of the Bergdorf Defendants' "Further Response to Combined Demands" -- in which plaintiffs represented, inter alia, that "[d]iscovery proceedings now known to be necessary [are] completed" and that "[t]here are no

outstanding requests for discovery” (Azzaretto Affirm. in Supp., Ex. F; see *Escourse v City of New York*, 27 AD3d 319, 320 [1st Dept 2006]; cf. *Horizon Inc. v Wolkowicki*, 55 AD3d 337, 338 [1st Dept 2008]).

In motion sequence number 004, plaintiffs move for summary judgment against the Bergdorf Defendants on the issue of liability based upon the doctrine of *res ipsa loquitur*. The three requirements for the application of that doctrine are that:

(1) the event [which caused the injury] must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

(*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006] [citation and internal quotation marks omitted].) The Bergdorf Defendants do not dispute that the first and third requirements are satisfied, but argue that the second requirement is not satisfied, because the Bergdorf Defendants did not have exclusive control over the loading dock door which caused Hisen’s accident.² The Bergdorf Defendants assert that exclusivity of control is lacking, for *res ipsa loquitur* purposes, because: City had repaired the bottom portion of the door less than 11 months prior to the date when Hisen was injured; the door was used by many persons other than the Bergdorf Defendants’ employees, including delivery persons and contractors; and the door is located on a street where it is accessible to any passerby.

However, assuming that City repaired the loading dock door in January 2005, that fact would not preclude a determination that the Bergdorf Defendants exercised exclusive control over the door for *res ipsa loquitur* purposes. In view of the Bergdorf Defendants’ awareness that the loading dock door was being used by “many people other than [their] employees,” including contractors and

²In their papers opposing plaintiffs’ motion for summary judgment and in their papers in support of their cross motion for summary judgment, the Bergdorf Defendants for the most part refer to themselves collectively, without distinction, and do not assert grounds which any of the three of them individually may have for dismissal of the complaint or for summary judgment. Accordingly, the court does not address any such individual grounds which 754, Bergdorf and/or Neiman may have for the foregoing relief.

individuals involved in picking up and delivering shipments (Azzaretto Affirm. in Supp., ¶ 43; *see also* Langton EBT, at 80, 81; Maloubier EBT, at 28-29), the Bergdorf Defendants had a “nondelegable duty” to provide to those persons a “reasonably safe means of ingress and egress” (*LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287 [1st Dept 2008]; *see also Backiel v Citibank*, 299 AD2d 504, 505 [2d Dept 2002]; *Lumbermens Mut. Cas. Co. v Banco Espanol de Credito, S.A.*, 2006 WL 2987694, *11 [SD NY 2006]). Because the Bergdorf Defendants had such a nondelegable duty, their retention of City to perform repair work on the door did not deprive the Bergdorf Defendants of exclusive control over the door for purposes of *res ipsa loquitur* analysis (*see e.g. Dowling v 257 Assoc.*, 235 AD2d 293, 293 [1st Dept 1997]; *Potthast v Metro-North R.R. Co.*, 400 F3d 143, 154 [2d Cir 2005] [stating that, because “a defendant cannot disclaim responsibility by contracting out non-delegable duties, the introduction of independent contractors in lieu of employees does not change the calculus for evaluating *res ipsa loquitur* claims involving exclusive control”]).

Nor have the Bergdorf Defendants established that the use of the loading dock door by persons other than their employees, or the door’s location on a public street, precludes a determination that exclusive control was present for *res ipsa loquitur* purposes. “Exclusivity, as it applies to *res ipsa loquitur*, is a relative term. It does not require the elimination of all other possible causes of the incident,” or that a defendant had “sole physical access to the instrumentality causing the injury,” but “simply a rational basis for concluding that it is more likely than not that the injury was caused by [the] defendant’s negligence” (*Crawford v City of New York*, 53 AD3d 462, 464 [1st Dept 2008] [citations and internal quotation marks omitted]). A rational basis for such a conclusion is present here in view of, *inter alia*, the testimony given by the Bergdorf Defendants’ employees to the effect: that the loading dock door was a secure location within the store; that the store had video cameras mounted outside of the loading dock entrance which showed who was outside of or came through the door; that the door was customarily kept under video surveillance; that there was a box around the buttons which operated the opening and closing mechanism for the door; that the loading

dock supervisor had a key to that box; and that the box was kept locked when the Bergdorf Defendants' employees were not at the loading dock (*see* Maloubier EBT, at 33, 50-51; Langton EBT, at 97, 236, 242). Given those circumstances, the Bergdorf Defendants had sufficient exclusivity of control, for *res ipsa loquitur* purposes, over the portion of the door which, by coming or falling apart, caused Hisen's injury.

Nevertheless, plaintiffs have failed to establish that, based upon the *res ipsa loquitur* doctrine, they are entitled to summary judgment on the issue of liability as against the Bergdorf Defendants. *Res ipsa loquitur* "allows, but does not require" a jury to infer from circumstantial evidence that a defendant was negligent (*Morejon v Rais Constr. Co.*, 7 NY3d at 209). Accordingly, "*res ipsa loquitur* evidence does not ordinarily or automatically entitle [a] plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted" (*id.*). Rather, "only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict" (*id.*). "That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*id.*), and only when "no facts are left for determination" (*id.* at 212).

Plaintiffs have failed to satisfy their initial burden of proffering circumstantial evidence regarding the condition of the loading dock door which is "so convincing." Because plaintiffs proffer no such evidence, apart from the fact that the door fell, and the expert affidavit submitted by the Bergdorf Defendants (discussed *infra*) is inadmissible, summary judgment in favor of plaintiffs is denied.³

³It appears that the Bergdorf Defendants concede that the loading dock door was defective, but maintain that the defect was caused by City or Allboro. The Bergdorf Defendants do not proffer a non-negligent reason for the accident (*see e.g., Tora v GVP Ag*, 31 AD3d 341 [1st Dept 2006] [summary judgment based on *res ipsa* was denied because the piece of sidewalk shed which hit pedestrians could have fallen as a result of strong winds and not as a result of a defect in the shed]). Accordingly, summary judgment in favor of plaintiffs might be appropriate (*see O'Connor v 72 Street East Corp.*, 224 AD2d 246 [1st Dept 1996] ["[i]n view of the fact that there was no dispute that the valve manufactured by Sloan was defective, and that Sloan failed to submit any evidentiary proof in admissible form to rebut the permissible inference of negligence, summary judgment should

The Bergdorf Defendants cross-move for summary judgment, but have failed to establish their entitlement to summary judgment with respect to any of the three branches of their cross motion. The first branch seeks summary judgment dismissing the complaint, and any and all cross claims as against the Bergdorf Defendants, on the grounds that they did not create, and did not have actual or constructive notice of, any defective condition in the door which caused Hisen's injury.

The Bergdorf Defendants assert that they did not create the allegedly defective condition in the door because that condition was created, instead, by City's faulty repair of the door. As will be discussed further below, the Bergdorf Defendants have failed to submit competent evidence which establishes that City created the allegedly defective condition in the door which caused Hisen's injury. However, assuming, arguendo, that City did create such a defective condition, the Bergdorf Defendants' nondelegable duty to maintain a reasonably safe means of ingress and egress by means of the loading dock door would render those defendants vicariously liable, in any event, for City's negligence (*see e.g. Oliveri v GM Realty Co., LLC*, 37 AD3d 569, 570 [2d Dept 2007] [stating that, "[a]lthough, as a general rule, a property owner is not responsible for conditions created by an independent contractor, the defendant may be held vicariously liable for the negligence of its independent contractor if such negligence violated the defendant's nondelegable duty as the property owner to provide safe ingress and egress"]).

The Bergdorf Defendants have also failed to establish that they are entitled to dismissal of the complaint and all cross claims against them on the ground that they had neither actual nor constructive notice of the defective condition which allegedly caused Hisen's injury. The complaint states that plaintiffs are relying upon the doctrine of *res ipsa loquitur* as a means of establishing

have been granted based upon the doctrine of *res ipsa loquitur*"]. However, the Court is not prepared to grant plaintiffs summary judgment based on *res ipsa*, which is limited to the "rarest of *res ipsa* cases" when plaintiffs have not made the argument regarding the Bergdorf's Defendants' concession, if any, and its implications, to the Court, and therefore, the Bergdorf Defendants have not had the opportunity to respond.

defendants' liability (*see* Complaint, ¶ 47), and a defendant may be liable under the doctrine of *res ipsa loquitur* even where the defendant establishes that it had no actual or constructive notice of the defective condition which caused a plaintiff's injury (*see e.g. Fyall v Centennial El. Indus., Inc.*, 43 AD3d 1103, 1104 [2d Dept 2007]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 226 [1st Dept 2002]).

In the second branch of their cross motion, the Bergdorf Defendants seek summary judgment in their favor on their cross claim against City and Allboro for common-law indemnification. The Bergdorf Defendants assert that they are entitled to such indemnification because City was solely responsible for any defective condition in the door, and because, if the Bergdorf Defendants are determined to be liable to plaintiffs, such liability will be vicarious, and based solely upon their ownership of the premises where the accident occurred rather than upon any negligence on their part. No separate arguments are made as to Allboro. The Bergdorf Defendants have submitted, and this branch of their motion relies primarily upon, a report by Gerald Futej, a purported expert who was retained by the Bergdorf Defendants to perform an inspection of the door. In his report, Futej essentially opines that the separation of the bottom portion of the door from the upper portion -- and, thus, Hisen's injury -- was caused by the failure of the articulating joint between the door's original slats and the replacement slats that were used by City to repair the door; and that the joint failed because City's repair of the door was negligent, *inter alia*, in that City used replacement slats which were of a different size, cross-sectional shape and thickness than the original slats, and also installed the replacement slats upside down.

Denial of this branch of the Bergdorf Defendants cross motion is warranted.⁴ The burden rests upon the proponent of a motion for summary judgment to demonstrate a *prima facie* entitlement

⁴Insofar as the Bergdorf Defendants' cross-move for summary judgment as against Allboro, their cross motion is procedurally defective, and denial of the cross motion is required on that ground. Allboro has not moved for relief in any of the three motions which are consolidated for decision herein, and "[a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Barrett v Watkins*, 52 AD3d 1000, 1003 n 1 [3d Dept 2008] [citation and internal quotation marks omitted]; *see also Terio v Spodek*, 25 AD3d 781, 785 [2d Dept 2006]).

to summary judgment “by tender of evidentiary proof in admissible form” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Futej’s report is inadmissible, and does not satisfy the Bergdorf Defendants’ burden as the proponents of a summary judgment motion, inter alia, because it is unsigned, unsworn, does not set forth facts indicating that Futej possesses the requisite qualifications to furnish a reliable opinion concerning the matter in question, and is based upon facts and materials which are neither contained in the record nor personally known to Futej (*see e.g. Huntington Crescent Country Club v M&M Auto & Mar. Upholstery*, 256 AD2d 551, 551 [2d Dept 1998]; *Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]; *Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]; *Abrahamsen v Brockway Glass Co.*, 156 AD2d 615, 617 [2d Dept 1989]). The Bergdorf Defendants have therefore failed to demonstrate their entitlement to summary judgment on their cross claim against City and Allboro for common-law indemnification, because they have failed to demonstrate by competent evidence that City and/or Allboro were responsible for the defective condition which caused Hisen’s injury, without any negligence on the part of the Bergdorf Defendants.

In the third branch of their cross motion, the Bergdorf Defendants seek summary judgment awarding them damages on their claim against City and Allboro for breach of warranty. Their breach of warranty claim is predicated upon a “limited warranty” provision, contained in the Contract, which states that “[e]quipment is warranted for 12 mos. from the date of this agreement against mechanical parts only.” The Bergdorf Defendants argue that the warranty was breached because “the work performed by [City] was done in a manner so as to allegedly cause plaintiff’s injuries” (*Azzaretto Affirm. in Supp.*, ¶ 34).

This branch of the Bergdorf Defendants cross motion is procedurally defective, again and for the reasons previously stated, insofar as it is asserted against Allboro. Moreover, in view of the inadmissibility of Futej’s report, the Bergdorf Defendants’ have failed to establish that City repaired the loading dock door in a faulty manner which caused the separation of the bottom portion of the door from the upper portion, which, in turn, caused Hisen’s injury. Finally, even assuming that

Hisen's injury was the result of a faulty repair performed by City, the Bergdorf Defendants have not established, on this motion, that there was a breach of the warranty which was "against mechanical parts only" rather than against faulty performance of installation or repair, or that damages in tort would flow from such a breach.⁵ Accordingly, the Bergdorf Defendants' cross motion is denied in its entirety.

In motion sequence number 005, City moves for summary judgment dismissing the complaint and any and all cross claims as against it. City argues that it could not by its negligence have caused or contributed to Hisen's accident because City merely sold the portion of the loading dock door to the Bergdorf Defendants which caused Hisen's injury, and did not manufacture or install it. City asserts that, when it receives requests for the installation or repair of a door of the type involved here, it arranges for such work to be performed by Allboro, a company which is located across the street from, and has the same president as, City (*see* Greco EBT, at 8, 10, 11). City contends that Allboro, and not City, performed the repair of Bergdorf's loading dock door in January 2005.

However, City has not met its burden. Pursuant to the Contract which City entered into with Bergdorf, City expressly agreed that it would both: (1) "**manufacture and install** the following goods," i.e., the materials which were used to effect the repair of Bergdorf's loading dock door; and (2) "furnish [the] materials **and labor**" which were used to effect that repair (emphasis added). Accordingly, based on the representations of City in the Contract, an issue of fact exists as to what, if anything, City did with respect to the manufacture and installation of the door and the furnishing of materials and labor. Further, even if Allboro installed the door, as City alleges, the evidence indicates that City sent a representative to assess what repairs, if any, were needed to the door and City has not demonstrated that the determination to replace 20 slats, as opposed to replacing the entire door or replacing other slats, was not negligent (*id.* at 35, 37-38, 50, 52).

⁵The Contract expressly provides that "[n]o ... warranties have been made by either party unless set forth in writing, signed by both part[ie]s and attached hereto."

In the alternative to the branch of its motion which seeks summary judgment dismissing all cross claims as against it, City moves for an order (a) striking the pleadings interposed by the Bergdorf Defendants as against City, (b) precluding the Bergdorf Defendants from offering any evidence at trial relating to their cross claims against City, and (c) granting City summary judgment on its cross claims against the Bergdorf Defendants for indemnification. City asserts that it is entitled to the foregoing relief based upon the Bergdorf Defendants' purported spoliation of evidence because: the Bergdorf Defendants had exclusive control over the loading dock door and its whereabouts; there is no credible evidence that the door still exists; and, accordingly, "the subject door has most likely been discarded or destroyed and made unavailable by the [Bergdorf Defendants] for inspection by [City]," such that City has been deprived of the ability to either prove its claims or defend against other parties' claims (Villareal Affirm. in Supp., ¶ 19 [emphasis added]).

However, City has failed to establish any entitlement to relief based upon the Bergdorf Defendants' purported spoliation of evidence inasmuch as City does not assert that, at any time before it made the instant motion, it ever made any request to examine the loading dock door. Indeed, counsel for the Bergdorf Defendants affirms, in opposition to City's motion, that: the door has been preserved and is currently being stored in the Bergdorf Defendants' warehouse in Long Island City; plaintiffs' counsel and plaintiffs' expert inspected the door; City declined to attend that inspection; and City has never previously asked to examine the door (*see* Azzaretto Affirm. in Opp., ¶ 9).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby ORDERED that all of the motions and the cross motion which are asserted by motion sequence numbers 003, 004 and 005 are denied.

Dated: April 13, 2009

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EMILY JANE GOODMAN