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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 113736/2005
TEHAN, LAURA
VS.
AFFINIA CAPITAL LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

FILED
DEC 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Affinia Capital, LLC and Affinia Management Company, LLC for summary judgment on their cross-claim against Nouveau Elevator Industries, Inc. for common-law indemnification, along with attorneys' fees, costs and expenses, is denied as moot; and it is further

ORDERED that the motion by Affinia Capital, LLC and Affinia Management Company, LLC for summary judgment on their cross-claim against Nouveau Elevator Industries, Inc. for contractual indemnification, along with attorneys' fees, costs and expenses is granted; and it is further

ORDERED that the cross-motion by plaintiffs for an order directing that the issue of negligence be deemed resolved in plaintiffs' favor as against the defendants for their failure to produce crucial material evidence necessary to the prosecution of this action and that if the issue of negligence is not resolved in plaintiffs' favor, that defendants' Answers be struck and/or that they be precluded from offering any evidence at trial that will work to the plaintiffs prejudice and/or disadvantage as a result of the missing evidence and/or their failure to disclose same, is denied; and it is further

Dated: _____ _____ J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

ORDERED that an adverse inference shall be issued at trial to prevent Affinia Capital, LLC and Affinia Management Company, LLC from using the absence of the videotape to their own advantage; and it is further

ORDERED that Nouveau Elevator's cross-motion that the cross-claims of Affinia Capital, LLC and Affinia Management Company, LLC against Nouveau Elevator be stricken due to their spoliation of the video tape depicting the plaintiff's accident, is denied; and it is further

ORDERED that Affinia Capital, LLC and Affinia Management Company, LLC serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 15, 2009 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

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 35

----------X

LAURA TEHAN AND LOUIS TEHAN,

Plaintiffs,

Index No. 113736/05

-vs-

AFFINIA CAPITAL LLC, AFFINIA MANAGEMENT COMPANY, LLC, NOUVEAU ELEVATOR INDUSTRIES, INC.

Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Laura Tehan ("plaintiff") and Louis Tehan (collectively "plaintiffs") sue for personal injuries plaintiff sustained in an elevator accident at the Southgate Tower Hotel (the "Hotel") located in New York, New York ("Southgate"), which is owned and operated by defendant Affinia Capital, LLC and managed by Affinia Management Company, LLC (collectively "Affinia").

Affinia now moves for summary judgment on its cross-claims against Nouveau Elevator Industries, Inc. ("Nouveau Elevator") for common-law and contractual indemnification, along with attorneys' fees, costs and expenses pursuant to the "Standard Form Of Elevator Full Maintenance Agreement" (the "Agreement"), dated May 5, 1995, between Affinia and Nouveau Elevator. In response, plaintiffs and Nouveau Elevator cross move for sanctions related to Affinia's failure to produce discovery as demanded and ordered.

Background

Pursuant to the Agreement, Nouveau Elevator was to provide maintenance on 10 elevators located in the Southgate Hotel.

According to plaintiff, on June 7, 2003, at about 9:30 p.m., plaintiff and her three companions got into elevator No. 2 in the lobby to go to their room on the 12th floor. After the elevator had just passed the 9th floor, it stopped, jerked twice and then dropped to the 6th floor, causing plaintiff's head to knock into the side of the elevator. Plaintiff's companions hit the emergency button and the elevator came to an abrupt stop on the 6th floor. Plaintiff did not get back on the elevator and walked up to the 12th floor. The morning after the incident, plaintiff went down to talk to the Manager. She spoke with "Eric" who told her a man had got stuck in the elevator earlier on that same day and in that same elevator, No. 2. Eric further said they had been having ongoing trouble with that elevator and the repairman had just been there but he did not know where he went or if he was coming back. He also said a sign should have been put out for people not to use the elevator.

Affinia's Motion

Affinia argues that it is entitled to contractual indemnification from Nouveau Elevator under the Indemnification section of the Agreement. Under the exclusive Agreement, Nouveau Elevator assumed complete responsibility for the maintenance, repair, inspection and servicing of the Southgate's elevators, including Elevator No. 2. More importantly, Nouveau Elevator expressly agreed to indemnify Affinia, as the owners and managers of the Southgate, for any injuries arising out of and resulting from the performance of its work under the Agreement, which includes attorneys' fees and related expenses.

Affinia further argues that although the indemnification provision excludes those claims arising out of the sole negligence of Affinia, there is no evidence establishing any negligent act on the part of any Southgate employee, or any other individual employed by Affinia. There is no

evidence establishing that this accident was caused solely by some negligent act by Affinia.

Further, Affinia is also entitled to common-law indemnification against Nouveau Elevator. Nouveau Elevator was fully responsible for the maintenance of the subject elevator. Affinia played no role in maintaining the elevators, except for paying Nouveau Elevator's fees for services rendered. Affinia's employees never undertook any maintenance activities regarding the elevators, provided no labor and/or assistance to Nouveau Elevator and provided no equipment and/or materials to Nouveau Elevator. Nouveau Elevator was on site conducting repairs for nine hours on the date in question before putting the elevator back in service. Some 10 hours later the elevator malfunctioned again, allegedly causing plaintiff's injuries. Any negligence could only be that of Nouveau Elevator. As Affinia had no responsibility for the malfunction, they are entitled to conditional summary judgment on its common law indemnification claim.

Plaintiff's Opposition

Plaintiff argues that the hotel is considered in the exclusive control of its elevators, which supports the inference of negligence by the doctrine of *res ipsa loquitur* because the public does not generally handle the controlling components of the automatic doors as they are otherwise out of the public's normal reach. In order to maintain and/or repair the elevators, access was needed to the motor room (a.k.a. machine room). The motor room was under lock and key and Affinia would have to give access thereto to Nouveau.[1] Other parts, such as the "MO rollers" are equally inaccessible to the public because they are located inside the elevator shaft on the shaft door. Where one, some or all interdependent defendants are in control of an injury-causing device and

[1]A key designated for Nouveau to use was kept in the security room (Exh. G, plaintiff's opposition, C. Raia EBT, p. 73).

burdened with its supervision, a *res ipsa loquitur* inference can be drawn against either or both.

Further, Affinia, as a hotel owner, has a nondelegable duty to maintain the elevator in a reasonably safe condition even though the maintenance and repair responsibility was transferred to an elevator company because Affinia had notice that the elevator was malfunctioning earlier that day. The defective parts were exclusively in the control of one or both of the defendants and were otherwise outside of the plaintiff's reach.

Also, Affinia has not established *prima facie* entitlement to summary judgment and there are questions of fact as to the exclusiveness of control and/or whether Affinia breached its independent duty even if Nouveau Elevator allegedly had exclusive control. Nouveau Elevator would have to get access to the elevator motor room because Affinia had the key. Donald Cristiano, Nouveau's Service Manager, testified that when Nouveau Elevator showed up and asked to put certain elevators out of service, Affinia could say no and it would be Affinia's obligation to reschedule. Edwin Mejia of security ("Officer Mejia") testified that only Nouveau Elevator and Affinia's security or maintenance departments have a key to shut down the elevators.

There is also a question of fact as to whether Affinia was negligent based on the fact that it had notice that there were problems with elevator No. 2 just hours prior to plaintiff's injuries from the malfunctioning elevator. When Officer Mejia arrived for work on the date of the accident, he was told that the elevators were dropping and/or skipping floors that day. Officer Mejia was aware of the problems prior to the date of the accident and while he was not sure if elevator No. 2 was specifically having those problems, he knew Nouveau had been at the Hotel because it was also indicated in the logbook. A work ticket completed by Nouveau employee,

Wilfredo Acevedo, shows that he worked on elevator car No. 2 on June 7, 2003 from 2:00 a.m. until 11:00 a.m. He removed a passenger, reset the controller, tightened connections to the loop circuit and repaired the "M" floor MO roller and interlock assembly. The parts that Acevedo repaired can cause an elevator to behave erratically if they are out of repair.

To date, defendants have not produced the time ticket covering the work done by Nouveau Elevator as a result of the incident or the log book wherein Officer Mejia testified that each visit by Nouveau is logged.

Plaintiffs' Cross-Motion

Plaintiffs also request that the issue of negligence be deemed resolved in plaintiffs' favor as against the defendants for their failure to produce crucial material evidence necessary to the prosecution of this action and that if the issue of negligence is not resolved in plaintiffs' favor, that defendants' Answers be struck and/or that they be precluded from offering any evidence at trial that will work to the plaintiffs' prejudice and/or disadvantage as a result of the missing evidence and/or their failure to disclose same.

In the Second Notice to Produce dated December 30, 2006, plaintiffs specifically requested call back slips, work slips, dispatchers logs, modification and upgrades to the Elevators from June 2001 through June 2004. Nouveau Elevator did not respond to plaintiffs' Second Notice to Produce. On October 29, 2008, plaintiffs served a Notice for Discovery and Inspection specifically seeking all work tickets for June 7, 2003 and June 8, 2003. Plaintiffs did not receive a response. On January 21, 2009, a Stipulation was entered into requiring defendants to respond to plaintiffs' October 29, 2008 Notice for Discovery and Inspection and provide the video tape seen by Officer Mejia within 60 days to the extent it existed. When defendants failed

to comply with the Scheduling Order, on April 9, 2009, a letter was sent requesting compliance. Defendants have still failed to provide the material required under the Scheduling Order. Nouveau Elevator failed to provide any records which account for the hour-long work Acevedo performed at 11:00 on January 7, 2003 when Officer Mejia told Nouveau Elevator to shut the No. 2 elevator. Additionally, Affinia has not produced the video tape.

Since one, some or all interdependent defendants are in control of the injury-causing device and burdened with its supervision, a *res ipsa loquitur* inference can be drawn against either or both as it is not necessary that there be but a single person in control of that which caused the damage.

Finally, if defendants claim that the above referenced crucial evidence has not been produced and cannot be because it is lost, destroyed and/or missing, whether accidentally or intentionally, plaintiffs are entitled to a spoliation sanction against both defendants. Sanctions may be warranted as a matter of elementary fairness even though Courts are reluctant to dismiss a pleading. As stated by Nouveau Elevator, defendant should not be allowed to profit from disposal of or lack of availability of crucial evidence.

Plaintiffs alternatively request that either under CPLR 3126 and/or because of spoliation, the defendants' Answers be struck and/or that they be precluded from offering any evidence at trial that will work to the plaintiffs' prejudice and/or disadvantage as a result of the missing evidence, such as, but not limited to, evidence that the elevator could have malfunctioned because of acts or omissions on the part of the plaintiff or other passengers; that the elevator did not malfunction; that the elevator was not shut down as a result of malfunction while the plaintiff was a passenger and/or that Nouveau Elevator did not repair and did not have to repair the

elevator after the plaintiff's injury.

Nouveau Elevator's Opposition

Plaintiff has not produced any good faith correspondence concerning the Notice to Produce, which is overly broad. Further, plaintiff made no reference to this document in its Note of Issue. In any event, Nouveau Elevator's response to plaintiffs' March 31, 2007 demands, copies of its contract with South Gate Tower, and the shut down report and time tickets for Elevator No. 2 for six months prior and including June 7, 2003 were provided. Nouveau Elevator previously searched for time tickets for June 7, 2003, and none other than the one previously exchanged were located. Moreover, as shown by a computer log, the response to the October 29, 2008 Notice for Discovery (initially served on prior counsel) was inadvertently not served, Nouveau Elevator's counsel was waiting for confirmation of the results of an additional search. Additionally, following receipt of the within motion, Nouveau Elevator conducted another search of their records for these documents, and a response indicating that no additional records were found was served. The employee who conducted the search prepared the affidavit in that regard. Plaintiffs' statement that Nouveau Elevator lost, destroyed or wilfully withheld crucial evidence and prejudiced plaintiff does not apply. Nouveau Elevator's records do not contain a work order for January 7, 2003, indicating work done on this date following the plaintiff's accident and do not contain a work order for January 8, 2003. The work order for January 7, 2003 preceding plaintiff's accident had already been produced. The plaintiffs' claim that this record was somehow destroyed or withheld, is completely without basis, as it is unfounded speculation that such a record was ever produced.

Further, plaintiffs failed to demonstrate how they were prejudiced by Nouveau Elevator's

inadvertent delay. And, plaintiffs' request that the Court resolve issues of negligence in plaintiffs' favor pursuant to, *inter alia, res ipsa loquitur* is untimely. Plaintiffs' motion is improperly entitled a cross-motion, is in fact a separate motion pursuant to CPLR 2215, as there is no motion pending which is requesting relief as against the plaintiffs. Plaintiffs are trying to circumvent the 120-day rule for summary judgment motions and the requirement of good cause for filing a late summary judgment motion. Moreover, the motion as against Nouveau Elevator is insufficient to make out a case as to plaintiffs' entitlement to summary judgment. Plaintiffs have not produced an expert affidavit in support their motion and are simply asking that the Court find in their favor, based merely upon the claim of the happening of an accident.

Nouveau Elevator's Cross-Motion and Opposition

Nouveau Elevator also argues that Affinia's cross-claims against Nouveau Elevator should be stricken due to Affinia's spoliation of the video tape depicting the plaintiff's accident, which was demanded by plaintiff and Nouveau Elevator and ordered by the Court to be produced, if in existence. The video tape would have allowed Nouveau Elevator's expert, not to mention the jury, a view of the inside of the elevator car in order to view the actions of the individuals inside the car at the time the incident allegedly took place, including their interactions with the car operating panel (*i.e.*, their pushing of control buttons), the information displayed on position indicator, and the "jerk reactions" of the passengers. Nouveau Elevator cannot definitely document the manufacturer of the subject video tape; nor, obviously, can plaintiffs have the video tape examined in support of its defense of this action. Affinia should not be allowed to profit from the disposal or lack of availability of this crucial evidence; which is certainly prejudicial to Nouveau Elevator's of this action.

Affinia's motion for indemnification should be denied due to its spoliation of the video tape alone. Nor is there any evidence that Nouveau Elevator created the alleged defective "condition." Moreover, a general awareness that a condition may be present is insufficient to provide notice of the particular condition. The Agreement is also void under General Obligations Law ("GOL") § 5-322, as it seeks indemnification for its own negligence and does not contain the saving language that it is valid "to the fullest extent allowed by the law."

Further, Affinia failed to prove a breach or default by Nouveau Elevator pursuant to the Agreement. There was no evidence that the condition arose out of any acts of the part of Nouveau Elevator. Affinia fails to submit evidence or an expert affidavit indicating that the alleged malfunction arose out of the work of Nouveau Elevator, only speculation and hearsay.

Plaintiffs' Opposition

As demonstrated in their opposition to Affinia's motion, plaintiffs raised issues of fact applicable to both defendants.

However, in the event the Court dismisses plaintiffs' complaint against Affinia,[2] plaintiffs argue that Nouveau Elevator is not entitled to such relief because it has not moved for such relief. Further, the issues of fact raised in plaintiffs' opposing papers apply to Nouveau Elevator as well.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New*

[2] The Court notes that Affinia did not move for dismissal of plaintiffs' complaint.

York, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The opponent must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774,777 521 NYS 2d 216 [1987]; *Masciotta v Morse Diesel Intl., Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]).

Here, it is uncontested that Section 1.28 of the Agreement, entitled "Indemnification," provides, in pertinent part, as follows:

> The contractor hereby indemnifies and saves harmless the Owner, Managing Agent . . . from and against *all liability claims* . . . arising out of the performance of this contract by the Contractor . . . , except from and against such claims and demands which may arise out of the *sole negligence of* the Owner, Managing Agent, ... The Contractor . . . shall pay all attorney fees and all other expenses and promptly discharge any judgments arising therefrom. . . .
> (Emphasis added).

Based on a plain reading of Section 1.28, the "Contractor," Nouveau Elevator, is obligated to indemnify the "Owner," Affinia, for all claims, such as the action herein, arising out of Nouveau Elevator's performance of the Contract; however, Section 1.28 contains an exclusion, whereby Nouveau Elevator is not obligated to indemnify Affinia where such claims arise out of the "sole negligence" of Affinia. In other words, if such claims arose out of Affinia's sole negligence, then Nouveau Elevator is not obligated to indemnify Affinia. However, Section 1.28 does not likewise exclude from Nouveau Elevator's indemnification obligation a situation wherein Affinia is found partially negligent. In this regard, GOL §5-322.1 provides:

> A covenant, promise, agreement . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, . . . , *whether such negligence be in whole or in part*, is against public policy and is void and unenforceable; . . . .

GOL §5-322.1 "prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, or had the authority to supervise, direct or control the work that caused the injury" (*Naranjo v Star Corrugated Box Co.*, 11 AD3d 436, 438 [2004]). The statute as originally enacted prohibited indemnification agreements where the negligence of the general contractor was the sole cause of the injury, nothing prohibited indemnification agreements in cases of joint fault (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]). By amending the statute to prohibit indemnification agreements

where the negligence of the general contractor/owner caused the injury "in whole or in part," the Legislature "clearly signalled its intention to cover" agreements that requires indemnification of an owner or general contractor for all claims arising from the subcontractor's work, regardless of whether the general contractor or owner was partially negligent, such as the indemnification clause herein.

Section 1.28 cannot be read to require indemnification for that portion of any awards attributable to the negligence Affinia. Section 1.28 contemplates indemnification, even in cases where the Affinia is found to be partially negligent, and contains "no language limiting the subcontractor's obligation to that permitted by law" or to Nouveau Elevator's negligence (*see Itri Brick & Concrete Corp.*, at 795). Further, GOL §5-322.1 "makes no attempt to salvage that part of an indemnification contract that would require a subcontractor to indemnify a general for the subcontractor's negligence only" (*id.*). However, GOL §5-322.1 applies to the indemnification clause in its entirety where the promisee, *i.e.*, Affinia, "is actually found to have been negligent" (*id.* at 795, fn. 5) [stating that "without a finding of negligence on the part of the general [contractor/promisee], the [indemnification] agreements *as applied would not run afoul of the proscriptions of General Obligations Law § 5-322.1*]). Thus, an indemnification clause that purports to indemnify a party for its own negligence may nonetheless be enforced where the party to be indemnified is found to be free of any negligence and its liability is merely imputed or vicarious" (*Quick v City of New York*, 24 Misc 3d 1210 [Sup Ct Kings County 2009] citing *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]; *Kelly v Newmark & Co. Real Estate, Inc.*, 51 AD3d 1247, 858 NYS.2d 439 [3d Dept 2008] citing *Sirigiano v Otis El. Co.*, 118 AD2d 920, 921, 499 NYS2d 486 [1986], *lv. denied* 68 NY2d 604 [1986] and *Mas* v *Two Bridges*

Assocs. by Nat. Kinney Corp., 75 NY2d 680, 687-688, 555 NYS2d 669 [1990] [stating that with respect to contractual indemnification, although defendants may have "had a nondelegable duty to plaintiff to maintain and repair the elevator, unless [they] had actual notice of the malfunction, [their] liability was vicarious only"]).

It cannot be contested that the owner, *i.e.*, Affinia, of a multiple dwelling (the Southgate Hotel), owes a duty to persons on its premises to maintain them in a reasonably safe condition (Multiple Dwelling Law § 78) (*Mas v Two Bridges Assocs. by Nat. Kinney Corp.*, at 687; *Camaj v East 52nd Partners*, 215 AD2d 150, 626 NYS2d 110 [1st Dept 1995]). This duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another (*Mas*, citing Multiple Dwelling Law § 78). It is further uncontested that under its exclusive, full service Agreement with Affinia, Nouveau Elevator was contractually obligated to maintain, regularly and systematically inspect and, if necessary, repair the elevator in question.

As between the owner and one voluntarily undertaking responsibility for maintenance, however, the party assuming the contractual duty is liable to the owner for the damages the owner must pay (*Mas* at 687-688). In *Rogers v Dorchester Assocs.* (32 NY2d 553 [1973]), a case in which the property owner had entered into an exclusive maintenance agreement with Otis Elevator Company ("Otis"), it was held there that the owner was liable to the injured party pursuant to statute but that indemnification was not barred because of the owner's nondelegable duty; as between the owner and Otis the former "had the right, under the maintenance contract, to look to Otis to perform [the owner's] entire duty to plaintiff" (*id.* at 563).

Here, there is no evidence establishing any negligent act on the part of any Southgate

employee, or any other individual employed by Affinia. There is no evidence establishing that plaintiff's accident was caused solely by some negligent act by Affinia. There is no evidence indicating that Affinia had notice of any problem with Elevator No. 2 after Nouveau Elevator repaired it on June 7, 2003 at 11:00 a.m., and failed to so notify Nouveau Elevator prior to plaintiff's accident. Having demonstrated that it is free of any negligence and that any liability against it would be merely imputed or vicarious, indemnification clause herein may nonetheless be enforced in favor of Affinia and against Nouveau Elevator.

That Nouveau Elevator would have to get access to the elevator motor room through Affinia because Affinia had the key, and that Affinia could say no if Nouveau Elevator asked to put an elevator out of service is insufficient. An owner or contractor's retention of general supervisory authority, presence at a work site, authority to enforce safety standards, or coordination of the work are insufficient to establish the type of control and supervision which precludes enforcement of an indemnification agreement (*Quick v City of New York*, 24 Misc 3d 1210 citing *Biance v Columbia Washington Ventures*, 12 AD3d 926 [3d Dept 2004]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 221 [1st Dept 2003]). Rather, the owner or general contractor must have actual authority to direct and control the methods used in carrying out the work that caused the accident (*Quick v City of New York*).

Further, the contention that an issue of fact exists as to whether Affinia was negligent because Affinia had notice that there were problems with elevator No. 2 just hours prior to plaintiff's injuries from the malfunctioning elevator is not supported by the record. Although Affinia contracted with Nouveau Elevator to handle all maintenance and repair work, liability can be found against Affinia if it received notice of a defect and failed to notify the elevator

company about it (*Rogers v Dorchester Assoc.*). Here, when Officer Mejia arrived for work on the date of the accident, he was told that the elevators were dropping and/or skipping floors that day. However, the work ticket completed by Nouveau employee, Wilfredo Acevedo, indicates that Acevedo serviced elevator car No. 2 on prior to plaintiff's incident June 7, 2003, from 2:00 a.m. until 11:00 a.m. that morning. There is no indication that Affinia was on notice of any problems with Elevator No. 2 *after* Nouveau serviced said elevator and prior to plaintiff's incident (*Camaj v East 52nd Partners*, 215 AD2d 150, 151 [1st Dept 2005] [based upon Schindler's extensive contract to handle all maintenance and inspection and the prompt notification to Schindler of the trouble, East 52nd's liability arises, if at all, solely by reason of its non-delegable duty; actual negligence, if found, must be attributable to the acts or omissions of Schindler. Accordingly, there are no triable issues precluding summary judgment in favor of East 52nd on its cross claim against Schindler for indemnification, and we grant that upon a search of the record]).

Nor does the application of *res ipsa loquitor* bar Affinia from obtaining indemnification from Nouveau Elevator since Nouveau Elevator was responsible for inspecting and repairing the subject elevator (*see Yun-Long Lin v Royalton, LLC*, 13 Misc 3d 1214, 824 NYS2d 759 [Sup Ct Kings County 2006] [stating that "Given Central's responsibility for the inspection and repair of the subject elevator, Royalton [the owner of the building] did not exercise exclusive control of the instrumentality which caused plaintiff's injuries. Consequently, as to Royalton, the doctrine *of res ipsa loquitor* is inapplicable"]; *see also, Reiff v P.S. Marcato Elevator Co.*, 5 Misc 3d 1018, 799 NYS2d 163 [Sup Ct Queens County 2004] [granting conditional partial summary judgment on liability of the elevator company for common-law indemnification even where there was an

issue of fact as to the applicability of the doctrine of res ipsa loquitur]).

Additionally, contrary to Nouveau Elevator's contention, Affinia need not prove that Nouveau Elevator breached the Agreement, or that any malfunction arose out of any acts of the part of Nouveau Elevator (*Linares v Fairfield Views, Inc.*, 231 AD2d 418, 647 NYS2d 194 1st Dept 1996] [holding that since Mainco was fully responsible for the inspection, maintenance, upkeep and repair of the elevator, and Fairfield passed on any complaints of misleveling to Mainco for repair, Fairfield's liability for the misleveling is vicarious only, based on its nondelegable duty to keep the premises in repair. In such circumstances, Fairfield is entitled to indemnification from the party primarily responsible for the defect, Mainco]).

Therefore, Affinia's motion for summary judgment on its contractual indemnification claim against Nouveau Elevator under the Indemnification section of the Agreement is granted. Affinia's motion for summary judgment on its common law indemnification claim is moot.

Plaintiffs' Cross-Motion

The Court notes that plaintiffs' cross-motion does not seek summary judgment, but seeks relief based on defendants' alleged failure to produce material evidence. Therefore, the 120-day rule found in CPLR 3212(a),[3] which applies to motions for summary judgment, does not render plaintiffs' cross-motion untimely or bar plaintiffs' cross-motion from this Court's consideration.

In any event, plaintiffs' cross-motion, which is directed chiefly at Nouveau Elevator, for an order directing that the issue of negligence be deemed resolved in plaintiffs' favor as against the defendants for their failure to produce crucial material evidence necessary to the prosecution

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[3] CPLR 3212(a) provides that "Any party may move for summary judgment in any action, after issue has been joined; . . . such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

of this action and that if the issue of negligence is not resolved in plaintiffs' favor, that defendants' Answers be struck and/or that they be precluded from offering any evidence at trial that will work to the plaintiffs' prejudice and/or disadvantage as a result of the missing evidence and/or their failure to disclose same, is denied. The record indicates that Nouveau Elevator substantially complied with all discovery demands and orders.

Further, the submissions fail to demonstrate that Affinia's failure to produce the video tape warrants a finding of spoliation. Courts have defined spoliation as the intentional or negligent destruction of "key" or "crucial" evidence, and have held that sanctions are warranted when "crucial items of evidence" are destroyed (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]; *see also Atlantic Mutual Ins. Co. v Sea Transfer Trucking Corp.*, 264 AD2d 659, 660 [1999]; *see DeKenipp v Rockefeller Ctr., Inc.*, 856 NYS2d 23, 23 [Sup Ct New York County 2007] [holding that "[s]poliation is the loss, destruction, or alteration of key evidence to a lawsuit"]; *see also Squitieri, supra*]; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Condition Corp.*, 221 AD2d 243 [1st Dept 1995]). It is uncontested that the parties entered into a Stipulation, dated January 21, 2009, requiring defendants to respond to plaintiffs' October 29, 2008 Notice for Discovery and Inspection and provide the video tape seen by Officer Mejia within 60 days *to the extent it existed*, and that Affinia failed to produce such video tape. However, this action was commenced in 2005, and the demand for the video tape was not made until three years later. The parties acknowledged that fact that the video tape might not be in existence by virtue of the language employed in the Stipulation. There is no indication that Affinia intentionally destroyed the video tape (*see Scansarole v Madison Square Garden, L.P.*, 33 AD3d 517, 827 NYS2d 1 [1st Dept 2006]). The record does not demonstrate that plaintiff,

who can testify at trial about how the accident occurred, has been left without the means to prove her claim, or that Nouveau Elevator cannot successfully defend this action without the video tape. Thus, it cannot be said that plaintiff and Nouveau Elevator's respective pursuit or defense has been substantially impaired due to the absence of the video tape depicting what occurred in the elevator at the time of plaintiff's incident so as to warrant the severe sanction of striking Affinia's Answer, resolving the issue of negligence in plaintiffs' favor, or precluding Affinia from offering any evidence at trial that will work to the plaintiffs' prejudice and/or disadvantage. Rather, an adverse inference is sufficient to prevent Affinia from using the absence of the videotape to their own advantage (*see Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287, 845 NYS2d 643 [1st Dept 2007]).

Nouveau Elevator's Cross-Motion

Based on the above, Nouveau Elevator's cross-motion to strike Affinia's cross-claims against Nouveau Elevator due to Affinia's spoliation of the video tape depicting the plaintiff's accident, is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Affinia Capital, LLC and Affinia Management Company, LLC for summary judgment on their cross-claim against Nouveau Elevator Industries, Inc. for common-law indemnification, along with attorneys' fees, costs and expenses, is denied as moot; and it is further

ORDERED that the motion by Affinia Capital, LLC and Affinia Management Company, LLC for summary judgment on their cross-claim against Nouveau Elevator Industries, Inc. for

contractual indemnification, along with attorneys' fees, costs and expenses is granted; and it is further

ORDERED that the cross-motion by plaintiffs for an order directing that the issue of negligence be deemed resolved in plaintiffs' favor as against the defendants for their failure to produce crucial material evidence necessary to the prosecution of this action and that if the issue of negligence is not resolved in plaintiffs' favor, that defendants' Answers be struck and/or that they be precluded from offering any evidence at trial that will work to the plaintiffs prejudice and/or disadvantage as a result of the missing evidence and/or their failure to disclose same, is denied; and it is further

ORDERED that an adverse inference shall be issued at trial to prevent Affinia Capital, LLC and Affinia Management Company, LLC from using the absence of the videotape to their own advantage; and it is further

ORDERED that Nouveau Elevator's cross-motion that the cross-claims of Affinia Capital, LLC and Affinia Management Company, LLC against Nouveau Elevator be stricken due to their spoliation of the video tape depicting the plaintiff's accident, is denied; and it is further

ORDERED that Affinia Capital, LLC and Affinia Management Company, LLC serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 15, 2009

Hon. Carol Robinson Edmead, J.S.C.