[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 31

Index Number : 115799/2006
VILLALBA, DOROTHY
vs
NEW YORK ELEVATOR &
Sequence Number : 002
AMEND

INDEX NO. _____
MOTION DATE 2/2/10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on ...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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant New York Elevator & Electrical Corporation s/h/a New York Elevator & Electrical Corporation, Inc., pursuant to CPLR §3025 (b) for leave to amend its answer to add an eleventh affirmative defense against the plaintiffs Dorothy Villalba and Carlos Villalba and the third, fourth and fifth cross-claims against the co-defendants WSA Management Ltd. and WSA Management Equities, LLC is granted in its entirety; and it is further

ORDERED that the amended answer in the proposed form annexed to the moving papers (Exhibit A) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant New York Elevator & Electrical Corporation s/h/a New York Elevator & Electrical Corporation, Inc. shall 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: 3/25/10

J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

DOROTHY VILLALBA and CARLOS VILLALBA,

Index No. 115799/2006

Plaintiffs,

-against-

NEW YORK ELEVATOR & ELECTRICAL CORPORATION s/h/a NEW YORK ELEVATOR & ELECTRICAL CORPORATION, INC., WSA MANAGEMENT LTD., and WSA EQUITIES, LLC,

Defendants.

----------X

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

MEMORANDUM DECISION

Plaintiffs Dorothy Villalba ("plaintiff") and Carlos Villalba ("plaintiffs") commenced this action against defendants New York Elevator & Electrical Corporation s/h/a New York Elevator & Electrical Corporation, Inc. ("NYE"), WSA Management Ltd. and WSA Management Equities, LLC (collectively, "WSA") for personal injuries arising out of the elevator accident on December 17, 2005. NYE filed a verified answer on or about December 21, 2006, and now moves pursuant to CPLR §3025 (b) for leave to amend its answer to add (1) an eleventh affirmative defense that any injuries to plaintiffs were caused by the conduct of third parties and (2) third, fourth and fifth cross-claims against the co-defendants WSA for contractual indemnification and a breach of the agreement to procure a liability insurance. For the reasons set forth below, NYE's motion to amend is granted.

Background

Plaintiffs allege that while descending from the fifteenth floor as passengers in the express elevator ("elevator No.1") at 80 John Street, New York, New York (the "premises"), the elevator plummeted and stopped at the eighth floor before bouncing up and down and suddenly stopping between the tenth and eleventh floors. On or about October 23, 2006, plaintiffs filed a complaint against NYE, the elevator maintenance company, and WSA, the owner and managing agent of the premises. WSA entered into a contract with NYE for inspection, maintenance and repair of the elevators at the premises (the "contract"). In their complaint, plaintiffs allege that, as a result of NYE and WSA's negligence in failing to maintain the subject elevator in proper repair and in a safe condition, plaintiffs were severely injured.

NYE served an answer with cross-claims against WSA on or about December 21, 2006. WSA answered and then served an amended answer with cross-claims on or about July 18, 2007. In the course of discovery, NYE learned that at and before the time of the accident, the premises were being converted from the rentals to condominiums. The renovations of the former rental apartments, performed by Beni Construction Company and AM Building Maintenance (the "construction contractors"), involved installation of the new heating and air-conditioning system which required cutting holes in the walls and removing debris, causing significant dust conditions in the building, contributed by the construction work in the building lobby (Oliver deposition, exhibit I, pp. 561-562, 568-574). NYE asserts that such dust conditions may have affected the electrical and mechanical components of the elevator causing it to malfunction. Therefore, NYE now moves to amend its answer to add the eleventh affirmative defense that any

injuries sustained by plaintiffs were caused by the conduct of the third parties, *i.e.*, the construction contractors, not under control of NYE.

Further, NYE moves to add three cross-claims against WSA: (1) contractual indemnification, (2) failure to obtain liability insurance naming NYE as an additional insured, and (3) damages for legal fees, costs, disbursements and expenses incurred in the defense of this action. NYE, relying on CPLR §3025 (c), which permits the court to grant an amendment of pleadings to conform them to the evidence even after judgment, asserts that the court should grant leave to amend in light of the new evidence. It argues that, because at the time of the answer NYE's counsel knew only that WSA and NYE had a contract for elevator maintenance, but had not actually seen the contract, NYE asserted only two cross-claims against WSA, for contribution and apportionment of damages and for common law indemnification (Coleman Affirmation, at 4-5). In the course of discovery, WSA produced the contract and admitted that it was in effect between WSA and NYE on the date of the accident (see exhibit F, ¶¶ 2, 11, 13 and 18; Oliver deposition, exhibit I, at 525). The subject contract contains a contractual indemnity provision running from WSA to NYE's predecessor Gemini/Empire Elevator Company and a provision requiring that WSA name NYE as an additional insured under its liability and excess insurance policies (see last page of the contract, exhibit F).

NYE further contends that the remaining parties would not be prejudiced if this court grants leave to amend, because the note of issue has not been filed in this action[1] and there remains some discovery to be conducted concerning the construction contractors. Further, there

[1] The note of issue was due on December 11, 2009. Plaintiffs filed the opposition papers on December 15, 2009.

can be no unfair surprise to WSA or plaintiffs as the fact of the ongoing renovation at the premises was known to the parties to this action from the first session of the plaintiff Dorothy Villalba's deposition in February 2008 (see Dorothy Villalba deposition, at 25 -31, exhibit J), and WSA admitted the existence of a valid contract between WSA and NYE at the relevant time.

Plaintiffs oppose only that portion of the motion concerning NYE's request to add the eleventh affirmative defense by arguing that NYE submitted only their attorney's affirmation and presented no evidence from a person with knowledge that the alleged dust created by the contractors caused the elevator malfunctioning. Plaintiffs further argue that the deposition testimony taken thus far showed that the contractors did not perform work near elevator No. 1 or used elevator No. 3 for transporting the debris (Oliver deposition, at 648-649, exhibit A to plaintiffs' opposition). And, it was WSA's responsibility to clean any dust inside the elevator (Zabycinski deposition, exhibit A, *supra*). Additionally, plaintiffs maintain that NYE has known for more than four years about the renovations in the subject building (plaintiffs' opposition, ¶ 6), and did not offer a reasonable excuse for its delay in filing this motion "more than three years after the accrual of this action" (plaintiffs' opposition, ¶ 8). Plaintiffs also argue that NYE should not be permitted to advance new arguments in its reply papers. Consequently, plaintiffs argue, the subject portion of the motion is without merit, and, in any event, is prejudicial to "its legal position" (id.)

WSA opposes that portion of the motion seeking to include additional cross-claims against WSA, for contractual indemnification and for the alleged failure of WSA to obtain liability insurance naming NYE as an additional insured. WSA argues that the indemnification provision requiring WSA to indemnify NYE for its own negligence, is in violation of General

Obligation Law ("GOL") §5-323 and void and unenforceable as against public policy. That it is used in conjunction with the provision requiring the landlord to obtain liability insurance, does not render it enforceable as such "coupling" of the indemnification and insurance-procurement clauses is permitted only in real property lease agreements. Therefore, WSA argues, NYE's proposed cross-claim based on the indemnification provision is without merit.

As to the remaining cross-claims for failure to obtain liability insurance and damages consisting of attorney's fees, costs, disbursements and expenses, WSA argues that, if found in breach, NYE will be entitled only to the cost of the insurance premium of the liability policy it obtained and under which it is being defended.

In reply, NYE argues that no prejudice can be asserted since, at the time of filing the instant motion, the note of issue has not been filed, WSA has not asserted prejudice, and plaintiffs themselves have requested the adjournment of this motion several times before finally serving their opposition papers on December 15, 2009.

Further, NYE contends that the existence of the contract has not been a secret for WSA and that the Court of Appeals expressly approved of a contractual obligation to procure insurance. In support, NYE annexed the contract, the applicable insurance policies with relevant endorsements, excerpts of deposition transcripts and the correspondence with the insurance company. The contract contains the indemnification provision requiring WSA to indemnify NYE against any claims for injuries to persons or property (see exhibit F to motion, ¶¶ 44-47.) Citing the relevant portions of the contract, NYE argues that the parties negotiated the contract at arms length and one per cent of the contract price was a specific consideration for the indemnification clause. As to the insurance procurement provision, discovery shows that WSA

included only the condominium owner and mortgagee bank, Wachovia, as additional insureds in its relevant insurance policy and thus, WSA has ample coverage for the purposes of this action. NYE's own insurance, however, has a two million dollars deductible per occurrence for bodily injury. Thus, because of WSA's failure to name NYE as an additional insured on its policy, NYE is exposed to approximately two million dollars of out-of-pocket expenses, as opposed to up to the first one million had it been covered under WSA's policy.

NYE further contends that GOL §5-322.1, invoked by WSA in its opposition, only applies to clauses indemnifying of one's own negligence and not to insurance procurement clauses. And, while under certain circumstances, such indemnification clause may be found as violative of GOL, when it is coupled with a provision allocating risk of liability to a third party through the use of insurance, it is valid and enforceable. Thus, if WSA is found to have failed to procure insurance for NYE, that breach, in itself, obligates WSA to indemnify NYE. Consequently, if the court does not permit NYE to assert the cross-claims, WSA would effectively be rewarded for its failure to provide the insurance required by the contract. NYE also argues that, if NYE is ultimately found to have been free of negligence, the indemnification provision would not be prohibited by GOL §5-323.

As to the eleventh affirmative defense, NYE states that it is "merely a more specific pleading of the previously pleaded sixth, ninth and tenth affirmative defenses in the original answer" (exhibit E to motion papers). NYE asserts that the deposition testimony of non-party witnesses Hamlet Rosario, a project manager of Beni Construction (exhibit L to reply papers), and Robert Medina, the foreman of AM Building Maintenance (exhibit M), show that during the renovation construction work, neither the elevators nor the elevator shafts were sealed off from

the dust. In addition, NYE submits the excerpts of the deposition of Carlos Vanga, a president of the CEC Cab Corporation, performing the elevator cab renovation in mid-January 2006 (exhibit N) to show that there was ongoing construction in the building lobby creating the significant amount of dust. Therefore, according to NYE, it is at least possible that the dust could have affected the electrical and mechanical components of the subject elevator.

Discussion

It is well settled that leave to amend an answer pursuant to CLR § 3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Murray v City of New York*, 51 Ad3d 502 [1st Dept 2008]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]). "Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]). However, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contracting Co. v New York*, 60 NY2d 957, 959 [1983]).

"[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted" (*Megaris Furs, Inc. v Gimble Bros.*, Inc., 172 AD2d 209 [1st Dept 1991]). "[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgement" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A proposed pleading that

fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

The party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Thus, the court must determine: (1) whether the delay is "extended" and if so, whether NYE provided a "reasonable excuse" for the delay, (2) whether NYE's motion would significantly prejudice plaintiffs and/or WSA, and (3) whether NYE's proposed pleading has merit.

1. Extended Delay

Courts generally consider the delay "extended" when an amendment is filed significantly after the note of issue and certificate of readiness for trial (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24-25 [1st Dept 2003][leave to amend the pleading denied because of the extended delay where discovery has been completed and a note of issue filed more than four years before the motion to amend, without an explanation as to the delay, more than ten years after the

accident, more than six years after the commencement of the action, long after the completion of discovery and filing the note of issue, more than four years after the first trial of this action and over one and a half year after the decision of the prior appeal]; *cf. McFarland v Michel*, 2 AD3d 1297, 1300 [4th Dept 2003][there was no extended delay because "motion to amend was made within one week of filing note of issue and certificate of readiness and within 1 ½ years of the filing of the complaint]; *Jana Krigsfeld, et ano., v Feldman*, 2007 WL 2174753 [Sup Ct New York, New York County 2007][no delay where the note of issue filed on the same date as the motion to amend]).

Here, the motion was filed on August 28, 2009, more than 3 months *before* the note of issue due date, December 11, 2009. And, after several adjournments, plaintiffs finally filed the opposition papers on December 15, 2009. Thus, for the purposes of this motion, the delay is not "extended."

2. Reasonable Excuse

In any event, NYE provided a reasonable excuse for the delay explaining that it uncovered the evidence during the discovery which it did not have at the time of the filing of the answer, *i.e.*, testimony of the plaintiffs, WSA representative, the contractors of the companies involved in the building renovations and the obtained maintenance contract.

3. Prejudice

Further, plaintiffs and WSA failed to demonstrate that they would be prejudiced by NYE's delay in moving for leave to amend its answer (*Solomon Holding Corp. v Golia*, 868 NYS2d 612 [1st Dept 2008] [affirming the granting of the defendant's motion to amend to add statute of limitation defense absent showing of surprise or prejudice resulting directly from the

amendment]). And, prejudice cannot be shown when the non-movant has been aware of the factual basis of the proposed amendment (*Greenburgh Eleven Union Free School Dist. v National Fire Ins. Co. of Pittsburgh, PA*, 298 AD2d 180, 181 [1st Dept 2002].

Here, the transcript of the deposition of Dorothy Villalba demonstrates that plaintiffs were aware of the ongoing renovation at the premises which is the factual basis of the proposed affirmative defense. Further, in view of WSA's admission of the enforceability of the contract[2], which is the basis of the proposed cross-claims, WSA "cannot reasonably claim to be surprised by its own contractual obligations" (*Collins v Switzer Constr. Group, Inc.*,69 AD3d 407 [1st Dept Jan 5, 2010]). Finally, plaintiffs failed to explain how exactly they would be prejudiced, while WSA has not asserted any prejudice.

Although discovery and depositions have taken place, NYE's amendments do not seek claims against additional parties or invoke a new legal theory (*cf. Heller v Louis Provenzano, Inc.* 303 AD2d 20 [1st Dept 2003]; *72nd Street Associates v Greystone Servicing Corporation, Inc.*, 2005 WL 621 4620 [Sup Ct New York, New York County 2005]), and as such, are not prejudicial to plaintiffs. Indeed, the proposed 11th affirmative defense relates to the causation element by specifying the previously pleaded sixth, ninth and tenth affirmative defenses in NYE's original answer (see exhibit E to motion papers; reply affirmation, ¶ 17). And, while the cross-claims against WSA assert new causes of action for indemnification and breach of contract, WSA has not claimed any prejudice. Therefore, both plaintiffs and WSA failed to show that they would be unfairly prejudiced by the proposed amendment.

---

[2] See exhibit G to motion, reply to notice to admit, ¶¶ 11-18.

3. Merits

Proposed Affirmative Defense

Upon review of the proposed amendment, NYE has established that the proposed defense has merit by submitting the verified amended answer and the evidentiary proof necessary to support the defense. The deposition transcripts of the plaintiffs, WSA representative, and contractors of the companies involved in the building renovations, and the obtained maintenance contract demonstrate NYE's ability to support the merits of its proposed amendment.

"[An] affidavit or affirmation of an attorney even if he has no personal knowledge of the facts, [. . .] may serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form," e.g., documents, transcripts. Such an [. . .] affirmation could also be accepted with respect to the admissions of a party made in the attorney's presence" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, in addition to its counsel's affirmation, NYE submitted excerpts of deposition transcripts of WSA's representative, of the contractors involved in the renovations of the building apartments at the relevant time and of the building doorman.

This case is distinguishable from *Guzman v Mikes Pipe Yard* (35 AD3d 266 [1st Dept 2006]), cited by plaintiffs. In *Guzman*, the defendant's unsupported motion was insufficient as a matter of law as the complete moving papers consisted "solely of a four-page attorney affirmation, without an affidavit of a person having personal knowledge or *any other* evidence" [emphasis added]). Unlike in *Guzman*, NYE's counsel's affirmation is accompanied by ample evidence. First, the contractors' testimony shows that their work involved cutting openings through the apartments' walls for air conditioning units resulting in the significant dust and

debris condition in the building and near the elevators, and that the elevators were not in any way sealed off from the dust (exhibits L - N, supra). Further, the testimony of Mr. Oliver indeed indicates that the contractors used two of the adjoining building elevators for transporting the debris to the basement (Oliver deposition, at 648-649). Plaintiffs' contention that the dust elimination was WSA's responsibility and the building doorman cleaned the dust inside the elevator (Zabycinski deposition, exhibit A, *supra*), in and of itself, does not negate the possibility that the dust may have affected the mechanical or electrical components on the *outside* of the elevator, which could be determined at trial. Thus, the motion is supported by sufficient evidence to conclude that the proposed 11th affirmative defense has merit.

Proposed Cross-Claims

Contrary to WSA's contention, NYE has made a sufficient showing that the proposed third, fourth and fifth cross-claims have merit (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363 [1st Dept 2007]; *Ebasco Constructors, Inc. v Aetna Insur. Co.*, 260 AD2d 287 [1st Dept 1999]; *Nab -Turn Constructors v City of New York*, 123 AD2d 571 [1st Dept 1997]).

A. Indemnification

The subject contract contains a contractual indemnification provision running from WSA to NYE's predecessor Gemini/Empire Elevator Company. WSA argues that the indemnification provision of the maintenance contract is void and unenforceable because it violates General Obligation Law ("GOL") §5.323, prohibiting a maintenance contractor from exempting itself

from liability for its own negligence,[3] similar to the prohibition in GOL §5-322.1 against indemnifying a construction contractor for its own negligence[4].

At this pre-trial stage, the court cannot conclude that the indemnification provision is void under GOL §5-323 on the ground that it would indemnify NYE for its own negligence. The elevator maintenance agreement obviously qualifies as a contract for "maintenance or repair of real property or its appurtenances." NYE is a contractor within the meaning of the statute. However, NYE's negligence cannot be determined at this stage. And without a finding of negligence on the part of NYE, a GOL prohibition against indemnifying a contractor for its own negligence is inapplicable (*Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990] [because the trial evidence failed to demonstrate negligence on the part of the contractor, GOL §5-322.1's prohibition against indemnifying a contractor for its own negligence was held inapplicable; "neither the wording nor the intent of the statute is violated by allowing it to allocate responsibility for this unexplained accident through an indemnification provision"]; *Haynes v Estate of Sol Goodman*, 62 AD3d 519, 880 NYS2d 609 [1st Dept 2009]; *Mahoney v Turner Const. Co.*, 37 AD3d 377 [1st Dept 2007]; *Crouse v Hellman Constr. Co., Inc.*, 38 AD3d 477, 478 [2007]; *see Marano v Commander Elec., Inc.*, 12 A3d 571[2d Dept 2004]).

---

[3] GOL § 5-323 provides: " Every covenant, agreement or understanding . . . in connection with . . . any contract or agreement affecting real property[. . . whereby a contractor exempts himself from liability for injuries to person or property caused by or resulting form the negligence of such contractor, his agent, servants ro employees, as a result of work performed or services rendered in connection with the construction, maintenance or repair of real property or its appurtenances, shall be deemed void as against public policy and wholly unenforceable."

[4] GOL § 5-322.1 renders void and unenforceable "any provision or agreement in connection with building construction purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injuries to persons . . . contributed to, caused by or resulting from the negligence of the promisee . . . ."

The cases on which WSA relies, while dealing with similar prohibition against indemnification of construction contractors in GOL §5-322.1, involve post-verdict motions for contractual indemnification (*Rogers v Dorchester Assocs.*, 32 NY2d 553, 347 NYS2d 22 [1976], *Cavanaugh v 4518 Assocs.*, 9 AD3d 14, 776 NYS2d 260 [1st Dept 2004]), and thus, are not controlling. Thus, NYE may assert a cross-claim for contractual indemnification.

B. Failure to Procure Insurance

Further, NYE demonstrated that its fourth cross-claim that WSA failed to procure liability insurance covering NYE has merit (*Kinney v Lisk Co.* 76 NY2d 215, 557 NYS2d 283 [1990]; *Cucinotta v City of New York*, 68 AD3d 682, [1st Dept 2009]; *Eagle v Chelsea Piers, L.P.*, 46 AD3d 367 [1st Dept 2007]; *Wong v New York Times Co.*, 297 AD2d 544 [1st Dept 2002]; *Trokie v York Preparatory School, Inc.*, 284 AD2d 129 [1st Dept 2001]). NYE annexed the subject contract which clearly states:

> Purchaser expressly agrees to name Gemini/Empire Elevator Company[5] as an additional insured under their general liability and excess (umbrella) insurance policies . . . Purchaser hereby waives the right to subrogation.

However, WSA's policy, submitted by NYE, fails to name NYE as an additional insured, in direct violation of the contract. Thus, NYE's fourth cross-claim against WSA for failure to obtain liability insurance naming NYE as an additional insured, has merit.

C. Damages

NYE also seeks damages for legal fees, costs, disbursements and expenses incurred by NYE in the defense of this action. WSA counters that NYE's damages are limited to the cost of the insurance premium of liability policy it obtained.

---

[5] Gemini/Empire Elevator Company is the predecessor of NYE.

In *Inchaustegui v 666 Fifth Avenue LP* (96 NY2d 111 [2001]), where a tenant breached an agreement to maintain a liability insurance and name the landlord as an additional insured, the Court of Appeals held that the landlord, having procured its own insurance, *sustained no loss beyond its out-of-pocket costs* and thus, could not look to the tenant for the full amount of the settlement and defense costs in the underlying tort claim. Thus the landlord's damages were limited to the costs of purchasing the substitute insurance and other out-of-pocket expenses arising from the liability claim not covered by the substitute insurance, such as any deductibles or any increase in premiums resulting from the liability claim (*Inchaustegui*, at 127).

Here, unlike in *Inchaustegui*, NYE has shown that its own policy has a two million dollar deductible per personal injury claim. Thus, as a result of WSA's breach, NYE would be exposed to as much as two million dollars in expenses, "arising from the liability claim." Although the appropriate measure of damages must be determined upon the proper proof at trial, NYE has demonstrated that its fifth cross-claim has merit.

Based on the foregoing, motion by NYE pursuant to CPLR §3025 (b) for leave to amend its answer is granted in its entirety.

Conclusion

Accordingly, it is hereby

ORDERED that the motion by defendant New York Elevator & Electrical Corporation s/h/a New York Elevator & Electrical Corporation, Inc., pursuant to CPLR §3025 (b) for leave to amend its answer to add an eleventh affirmative defense against the plaintiffs Dorothy Villalba and Carlos Villalba and the third, fourth and fifth cross-claims against the co-defendants WSA Management Ltd. and WSA Management Equities, LLC is granted in its entirety; and it is further

ORDERED that the amended answer in the proposed form annexed to the moving papers (Exhibit A) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant New York Elevator & Electrical Corporation s/h/a New York Elevator & Electrical Corporation, Inc. shall 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: March 25, 2010

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

HON. CAROL EDMEAD