

**Lampach v Richmond El. Co., Inc.**

2010 NY Slip Op 33571(U)

December 3, 2010

Sup Ct, Richmond County

Docket Number: 101357/2009

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No. 101357/2009  
Motion No.: 1**

**VIVIANE LAMPACH**

*Plaintiff*

*against*

**RICHMOND ELEVATOR COMPANY, INC.**

*Defendant*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of the following motion

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Exhibits</b>	<b>Attached to Papers</b>
<b>Memorandum of Law</b>	<b>3</b>

Upon the foregoing cited papers, the Decision and Order on this Motion to Compel is as follows:

That part of the motion by the plaintiff, Viviane Lampach, to compel the defendant, the Richmond Elevator Company, Inc., to produce selected repair records for years preceding the incident that is the cause of action, is granted. That part of the plaintiff's motion to compel production of two repair records created after the alleged incident is granted in order to determine defendant's control and maintenance of the subject elevator. That part of the motion to compel the defendant to produce the logbook that is not in the possession, custody or control of the defendant is denied.

**Facts**

This is an action alleging that the defendant, the Richmond Elevator Company, Inc, was negligent in the maintenance of an elevator. The plaintiff was employed as a school librarian at the New York City Department of Education, Bronx High School of Science (the school). As a consequence of her employment , she frequently used the school's single elevator. The plaintiff alleges that, on June 16, 2006, the elevator improperly aligned itself with the floor of the building. As a result of incorrect leveling of the elevator, the plaintiff alleges she fell and

sustained injuries. The elevator was maintained by the defendant under contract to the Department of Education.

The defendant states that it no longer has a contract with the New York City Department of Education to maintain the school's elevators. The plaintiff has consulted an individual, Patrick Carrajat, who is said to have knowledge of elevators. Mr. Carrajat asserts that the school's maintenance logbook includes information concerning the school elevator. According to Mr. Carrajat, the logbook was maintained by the defendant, and is the property of the defendant. The defendant states that the logbook is in the possession of the school and that the defendant no longer has access to the logbook or its location.

The plaintiff has served demand upon the defendant for records. The defendant has declined to produce specific records relating to its work on the school elevator on July 27, 2004, August 2, 2004, August 11, 2004, March 7, 2005, April 19, 2005, April 22, 2005, April 23, 2005, and June 15, 2005. The defendant also declines to produce records of work performed on June 19 and 20, 2006, after the plaintiff's alleged accident. Furthermore, part of the demands for discovery not delivered by the defendant to the plaintiff includes a logbook maintained in the machine room of the school for the period between March 6, 2005 and June 20, 2005. The plaintiff moves the court to compel production of each of these records.

### **Procedural History**

The plaintiff made demands for discovery of the above material on August 10, 2009, April 21, 2010, and on May 17, 2010. The defendant responded with denials to each demand. Motion to compel was made on October 15, 2010.

### **Discussion**

The New York Civil Practice Law and Rules (CPLR) § 3101(a)(1)(4) states: "Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party...and (4) any other person upon notice

stating the circumstances or reasons such disclosure is sought or required.”<sup>1</sup> This has been interpreted as providing for a “liberal policy of disclosure.”<sup>2</sup> Nonetheless, liberality does not extend to unfettered disclosure.<sup>3</sup> Disclosure is at the discretion of the court, and is based upon materiality and necessity to bear upon “preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reasonableness.”<sup>4</sup> In their respective arguments, the parties provide a variety of citations, but binding precedence is the basis for this decision.

Here, the plaintiff demands disclosure by the defendant of work records pertaining to the subject elevator on the dates of July 27, 2004, August 2, 2004, August 11, 2004, March 7, 2005, April 19, 2005, April 22, 2005, April 23, 2005, and June 15, 2005. This request is not unfettered and is for specific types and for a limited number of records . Production of these eight records has not been represented by the defendant as creating delay nor of being responsible for creating prolixity. The relevance of the specific records and dates is established in the plaintiff’s exhibits 5 and 6, which contain excerpts from the school custodian’s logbook. Each excerpt cites a date and notes that work was done on the school’s elevator. These excerpts are the foundations for relevant requests for records, seeking useful and reasonable information. Accordingly, the defendant must provide to the plaintiff those records of work done on the subject elevators on the aforementioned dates.

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<sup>1</sup>CPLR § 3101 (a) (1) and (4).

<sup>2</sup>*DeOlden v State of New York*, 107 AD 2d 790, 791 [Second Dept 1985]; *citing Allen v Crowell-Collier Publishing Co.*, 21 NY 2d 403, 406 [1968].

<sup>3</sup>*Foster v Herbert Slepoy Corp.*, 74 AD 3d 1139, 1140 [Second Dept 2010].

<sup>4</sup>*Andon v 302-304 Mott St. Assocs.*, 94 NY 2d 740, 746 [2000]; *quoting Allen v Crowell-Collier Publishing Co.* 21 NY 2d at 406.

The plaintiff also makes demands for records of work performed on the subject elevator on the dates of June 19 and 20, 2006, which are after the alleged incident. In the Appellate Division, Second Department, evidence of subsequent repairs is not usually admissible or discoverable in an action based upon negligence.<sup>5</sup> However, “[e]vidence of subsequent repair may be admissible if an issue of control and maintenance exists.”<sup>6</sup> Here, the plaintiff asserts that the defendant repaired, regulated and maintained the subject elevator, and the defendant denies the allegation. Therefore, the records of subsequent repairs to the elevator may be discoverable and admissible for the limited purpose of responding to issues of control and maintenance of the subject elevator. Records of subsequent repair may not be used not as evidence of negligence.

The plaintiff is entitled to “serve on any other party a notice ... (I) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served.”<sup>7</sup> The plaintiff states that the logbook sought by this motion to compel was maintained by defendant’s employees, but kept in an elevator machine room of the school. Employee’s personnel had been given access to that machine room while under contract to the Department of Education. The plaintiff asserts that the defendant consequently has constructive control and possession of the logbook. The defendant asserts that it no longer has a contract for the school with the Department of Education, and therefore the defendant lacks access to the machine room and to the logbook. Even if Mr. Carrajat is correct and the defendant was previously responsible for maintaining the logbook and the logbook’s entries, that does not unquestionably mean that the defendant currently has control, custody or possession of the logbook. After its service contract with the Department of Education terminated, the defendant states it no longer has possession of the logbook itself or of copies. It

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<sup>5</sup>*Klatz v Armor Elevator Co.*, 93 AD 2d 633, 637 [Second Dept 1983]; and *Corcoran v the Village of Peeksville*, 108 NY 151, 156 [1888].

<sup>6</sup>*Klatz v Armor Elevator Co.*, 93 AD 2d at 637; and *Scudero v Campbell*, 288 NY 328, 329 [1942].

<sup>7</sup>CPLR § 3120 1. (i).

is axiomatic that a party may not be compelled to produce that which the party does not possess.<sup>8</sup> Therefore, the defendant may not be compelled to provide the logbook.

Accordingly, it is hereby:

ORDERED, that to the extent the defendant, Richmond Elevator Company, Inc., has records in its possession, custody or control, the defendant shall produce documentation of work done by the defendant on the subject elevator for the dates of July 27, 2004, August 2, 2004, August 11, 2004, March 7, 2005, April 19, 2005, April 22, 2005, April 23, 2005, June 15, 2005, July 19, 2006, and July 20, 2006 and it is further

ORDERED, that all parties return to **DCM Part 3, 130 Stuyvesant Place, 3d Floor** on **Wednesday, January 5, 2011 at 9:30 am.**

ENTER,

DATED: December 3, 2010

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>8</sup>*Sagiv v Gamache*, 26 AD 3d 368, 369 [Second Dept 2006]; *and Corriel v Volkswagen of America, Inc.*, 127 AD 2d 729, 731 [Second Dept 1987].