JUL 25 2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 150343/2010
ILEIWAT, ABDULLAH
vs.
PS MARCATO ELEVATOR CO. INC.
SEQUENCE NUMBER : 005
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 5

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: JUL 25 2012

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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Abdullah Ileiwat,

Plaintiff (s),

-against-

PS Marcato Elevator Co., Inc. and
Gotham Elevator Inspection,

Defendant (s).

----------x

PS Marcato Elevator Co., Inc,

3rd Party Plaintiff,

-against-

G.R. Housing Corporation,

3rd Party Defendant.

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Gotham Elevator Inspection, Inc. s/h/a
Gotham Elevator Inspection,

2nd-3rd Party Plaintiff,

-against-

G.R. Housing Corporation,

2nd-3rd Party Defendant,

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DECISION/ ORDER
Index No.: 150343-10**E**
Seq. No.: 004, 005, 006

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

T.P. Index No.:
591125/2010

2nd T.P. Index No[1].:
590537/2012

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

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[1]After these motions were argued, and while they were sub judice, Gotham commence this 2nd-third party action against GRH (T.P Index No. 590537/2012). The impact of this new action, if any, has not been briefed and is, therefore, not considered by the court.

Papers	Numbered
Motion Seq. No. 4	
GRH n/m (strike pleadings) w/ LAS affirm, exhs	1
Gotham opp w/JDS affirm, exhs	2
Ileiwat x/m (strike GRH answer) and opp to GRH w/PRB affirm, exhs	3
GRHousing opp w/LAS affirm, exhs	4
Motion Seq. No. 5	
Ileiwat n/m (CPLR 3025) w/PRB affirm, exhs	5
GRH opp w/LAS affirm, exhs	6
Ileiwat reply to GRH w/PRB affirm, exhs	7
Marcato opp w/CWR affirm, exhs	8
Motion Seq. No. 6	
Gotham n/m (CPLR 3025; spoliation) w/MHP affirm, RS affid, exhs	9
Ileiwat opp w/PRB affid, exhs	10
GRH reply w/LAS affirm	11
GRH opp and reply w/LAS affirm	12
Marcato opp w/CWR	13
GRH opp w/LAS affirm, exh	14
GRH reply w/LAS affirm	15
Gotham reply to GRH w/AHW affirm	16
Gotham reply to Ileiwat w/AHW affirm	17
Gotham reply to Marcato w/AHW affirm	18
GRH sur-reply w/LAS affirm	19
Other:	
So-ordered stip 5/17/12	20

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

GISCHE J.:

This is an action in which plaintiff Abdullah Ileiwat has asserted negligence and products liability claims against defendants PS Marcato Elevator Co., Inc. ("Marcato") and Gotham Elevator Inspection ("Gotham"). Marcato has commenced a third party action (T.P. Index No. 591125/2010) against G.R. Housing Corporation ("GRH"), for apportionment, contribution, indemnification, etc., alleging that Ileiwat was employed by GRH and that he sustained a grave injury, within the meaning of the Workers'

Compensation Laws (WCL § 12).

There are presently three motions and one cross motion before the court:

Motion sequence number 4 is by GRH, for discovery sanctions against Ileiwat, Marcato and Gotham. Ileiwat has cross moved to strike GRH's answer, or in the alternative, that the court compel GRH to comply with his discovery demands.

Ileiwat has also separately moved (motion sequence number 5) to amend his complaint to assert a direct cause of action against GRH for negligent/intentional impairment of his right to sue a third party tortfeasor, based upon claims of GRH's alleged spoliation of evidence.

Motion sequence number 6, by Gotham, is for leave to amend its answer to assert a spoliation claim against GRH. Gotham also seeks discovery sanctions against GRH, including striking its answer and reply, and an order requiring GRH to indemnify Gotham.

On May 17, 2012, in a so-ordered stipulation, the parties stipulated that GRH will respond to Ileiwat's demand for interrogatories within 45 days. The parties also stipulated that Gotham will respond to GRH's discovery demands within 45 days. GRH's discovery demands of Marcato have also apparently been resolved. Therefore, on GRH's discovery motion, the court must decide whether plaintiff adequately responded to GRH's demands for interrogatories and whether GRH has otherwise responded to Ileiwat's other discovery demands. Also for the court to decide are Ileiwat and Gotham's motions to amend their pleadings to assert spoliation based claims against GRH. GRH has withdrawn its motion against Mercato for discovery sanctions.

Background and Arguments Presented

Ileiwat contends that he was rendered a paraplegic when, on July 4, 2010, he was

crushed by a freight/sidewalk elevator at 711 Amsterdam Avenue, New York, New York ("building"). GRH is the owner of the building. Marcato was hired by the owner to inspect/test the elevators at the building. Gotham was hired by GRH as its "witnessing" test/inspection agency. At the time of his accident, Ileiwat was employed by GRH as a temporary summer vacation relief porter. Ileiwat contends that his injuries were proximately caused by defendants' negligent design, manufacture, supply, maintenance, installation and assembly of the elevator system or its parts.

Though GRH acknowledges that Ileiwat responded to its January 26, 2011 demands for interrogatories, GRH nonetheless contends that plaintiff's February 28, 2011 response is incomplete. GRH contends further that despite notifying plaintiff on December 27, 2011, that a more complete response was required, plaintiff has refused to comply with its further demand for responses to those interrogatories. GRH maintains that plaintiff has also failed to respond to its document demands dated January 26, 2011. Ileiwat opposes GRH's motion for discovery sanctions, arguing that he not only provided responsive answers and numerous authorizations for medical records, he also provided GRH with supplemental responses on April 10, 2012. He argues that the delay in his responses was due to GRH using the incorrect zip code and floor in its mailing. Thus, according to Ileiwat, he did not receive the December 27, 2011 letter until GRH's counsel sent a follow up letter on February 29, 2012.

Ileiwat's cross motion for discovery sanctions is based upon GRH's alleged failure to comply with plaintiff's demand for interrogatories, notice for discovery and inspection dated February 28, 2011 and its supplemental CPLR 3101 [d] demand dated March 7, 2011. Ileiwat contends GRH's responses of December 28, 2011 are either "selective" or

missing altogether.

One of the notices Ileiwat served was for a physical inspection of the subject sidewalk/freight elevator. Ileiwat contends GRH replaced the elevator one (1) year after the accident, knowing that plaintiff wanted an opportunity for a physical inspection of it and that such actions on the part of GRH are tantamount to negligent, if not intentional, spoliation of evidence. It is unrefuted that Ileiwat served GRH with a notice of inspection of the elevator, scheduling the inspection for March 22, 2011. That inspection did not proceed. It was later stipulated, however, at the November 17, 2011 preliminary conference, that the inspection of the elevator would be scheduled before February 3, 2012 and, in fact, it was scheduled for January 30, 2012. GRH, however, notified plaintiff's counsel by email on January 13, 2012 that the elevator in use on the day of the accident had been replaced with a new one and "the new elevator is about to become operational, but is not yet operating." According to GRH's counsel, she did not see the point of plaintiff inspecting the new elevator, though she did prevent counsel from doing so. Based on those circumstances, plaintiff seeks to amend his complaint to assert a new, direct claim against GRH, his employer, for negligent and/or intentional spoliation.

Although Gotham initially sought summary judgment dismissing Ileiwat's complaint on the basis that without the discarded mechanisms of the elevator and/or elevator system, plaintiff could not establish his prima facie case, in its May 8, 2012 reply to plaintiff's opposition, Gotham represent that it has withdrawn that branch of its motion, without prejudice. The arguments regarding the viability of a spoliation cause of action will still be considered, however, because a separate branch of Gotham's motion is for permission to assert a tort/spoliation claims against GRH.

In support of that relief, Gotham argues that GRH had actual and constructive notice that it had to preserve the elevator for a physical inspection, but either through its negligence or intentionally, the elevator was removed, altered, or otherwise destroyed, thereby spoliating key evidence to its defense.

Gotham maintains that GRH ignored its January 10, 2011 Demand for Preservation of Material Evidence and that it is clear from the November 17, 2011 preliminary conference order that all parties intended to inspect the subject elevator. Gotham contends it first learned the original, subject elevator had been replaced when it received GRH's January 18, 2012 letter, stating that the elevator was in the process of being replaced and discouraging Gotham from sending its expert to inspect and examine the new elevator. Gotham sent its expert (Ronald D. Schloss) anyway, but Schloss was not allowed to inspect the interior of the new elevator, the hoist way or the safety mechanisms below the car.

Schloss provides two sworn affidavits. In his first affidavit supporting Gotham's motion, he states that GRH "destroyed any demonstrative evidence to support the position of Gotham that the controlled access to the elevator shaft while the elevator car was in motion, was manually overridden..." and possibly "tampered with by plaintiff and/or plaintiff's employer prior to the accident." In his reply affidavit, Schloss describes with greater detail the testing he had hoped to perform, why that testing was necessary and the impact of not being able to test the elevator prior to its replacement. He also states that, with a reasonable degree of engineering certainty, that the DOB and OSHA documents standing alone are insufficient for Gotham to prove its position on liability. The court allowed GRH to address these additional statements in a sur-reply dated May

16, 2012.

While supporting all of Gotham's arguments for why spoliation sanctions should be imposed against GRH, in Ileiwat's opposition to Gotham's (now withdrawn) motion for summary judgment on his complaint, Ileiwat denies he cannot prove his prima facie case without the subject elevator. Despite seeking to assert his own tort claim for spoliation against GRH, Ileiwat argues that there are triable issues of fact whether he can prove his case without the elevator and its mechanisms. Ileiwat points out that depositions have not yet been held and discovery is ongoing. Notwithstanding such limited discovery, he has obtained documents from DOB and OSHA showing the elevator was kept in use, despite unsatisfactory reports, improper or absent repairs and improper followup inspections. On a procedural level, Ileiwat argues that Gotham's motion for summary judgment dismissing plaintiff's complaint should be denied because it is not supported by evidence in admissible form, such as affidavits, transcripts, etc., and Schloss's affidavit is devoid of merit. Marcato opposes Gotham's motion for summary judgment dismissing the plaintiff's complaint, adopting most of the arguments raised by Ileiwat for why the motion is premature.

GRH and Marcato separately oppose the motions by Ileiwat and Gotham to amend their pleadings. Both defendants[2] argue that the tort claim the movants seek to interpose are not recognized in New York State and, therefore, the proposed pleading is devoid of merit. GRH separately argues that Ileiwat cannot sue his employer for a tort. GRH points out that plaintiff's counsel visited the premises and did an informal inspection

[2]For ease of reference, unless otherwise provided, anyone other than Ileiwat is referred to as a "defendant."

of the elevator on July 23, 2010, less than three weeks after the accident. According to GRH, plaintiff has had his inspection and he is not entitled to multiple inspections. GRH further claims that it never made any representation that it would preserve the elevator and these issues came up and were dealt with at the preliminary conference. In relevant part, the preliminary conference provides as follows:

> Plaintiff and defendants to agree on a mutually convenient date and time to inspect and/or reinspect the freight elevator involved in plaintiff's accident on or before February 3, 2012. GR Housing does not represent that the condition of the elevator is the same as it was on the date of plaintiff's accident, July 4, 2010.

GRH denies it destroyed any evidence or engaged in any dilatory tactics. GRH contends the funds to replace this particular elevator were secured a year before plaintiff's accident and, in any event, the condition of the elevator immediately following the accident is well preserved in other sources, such as the records of the NYC Department of Buildings ("DOB"), Occupational Safety and Health Administration ("OSHA") and Marcato. GRH states it was never notified that it had to preserve the elevator.

With respect to Gotham's motion to amend, GRH separately argues that Gotham's Demand for Preservation of Material Evidence and its Answer were improperly served. While acknowledging that the law firm of Schecter & Brucker are listed with the NYS Department of State, Division of Corporations as GRH's registered agent for service, GRH argues "counsel for Gotham, experienced in insurance defense, should have known" the firm would not be representing GRH in this case. GRH also argues that Gotham had no right to demand that the elevator be preserved in the same condition after the accident until this matter is completed as this would be an inconvenience to the

building.

GRH argues that Ileiwat had John Weldin, an expert, inspect the subject elevator in July 2010 and Gotham should be demanding a copy of whatever report Weldin prepared. GRH denies it obtained any kind of tactical advantage by replacing its elevator, only the advantage of having a new elevator. GRH argues that Gotham does not need the lost evidence to prove its cross-claim against it for contribution. GRH also argues that Ileiwat's opposition to its motion demonstrates that Ileiwat does not have a valid spoliation claim after all (assuming Ileiwat could assert it), because he cites secondary sources to support his negligence and products liability claims.

Discovery

Adequacy of Ileiwat's responses to GRH's Interrogatories

GRH raises objections to the completeness of certain interrogatories, as enumerated in its April 17, 2012 affirmation in reply to plaintiff's opposition. The court's decision and order on the challenged responses is as follows:

Interrogatories 1 - 9: responses, as supplemented on April 9, 2012 are wholly adequate and do not support the imposition of discovery sanctions.

Interrogatory 11 - 14 seek more detailed information about what negligent act the defendants committed or what design defect existed that proximately caused the plaintiff's accident. Ileiwat's response is that plaintiff's expert report will be provided at the close of discovery. This cryptic response is meaningless and plaintiff shall, within Twenty (20) Days of being served with an entered copy of this order, provide a complete response to Interrogatories 11 - 14, inclusive.

Interrogatories 15, 16 and 17: Ileiwat's responses are satisfactory.

Interrogatory 21: Ileiwat's response is incomplete. Plaintiff shall, within Twenty (20) Days of being served with an entered copy of this order, provide a complete response to this Interrogatory.

Interrogatory 28: Ileiwat's response, that its expert report will be provided, is unresponsive and cryptic. Plaintiff shall, within Twenty (20) Days of being served with an entered copy of this order, provide a complete response to this interrogatory.

Interrogatory 29, 30, 31: Ileiwat's response is unsatisfactory. The documents demanded relate directly to the question propounded (CPLR 3131). Plaintiff shall, within Twenty (20) Days of being served with an entered copy of this order, provide a complete response to this interrogatory.

Interrogatory 32: This interrogatory demands that Ileiwat identify the various statutes, rules, regulations, codes allegedly violated by the defendants. The response Ileiwat has provided is wholly inadequate. Plaintiff shall, within Twenty (20) Days of being served with an entered copy of this order, provide a complete response to this interrogatory.

Interrogatory 39: Ileiwat has identified his witnesses in his first response and reserved the right to later identify other witnesses who may be revealed through the discovery process. This is a satisfactory response.

Interrogatories 40, 41 and 42: These interrogatories seeks documents that are duplicative of the demands made in GRH's Notice for Discovery and Inspection dated January 26, 2011 (CPLR 3120). Since plaintiff's responses to documentary discovery demands is not before the court to decide (see, So-Ordered Stipulation, 5/17/12), GRH's motion with respect to Interrogatories 40, 41 and 42 is denied without prejudice GRH

raising these issues (if necessary) in connection with its documentary discovery demands.

GRH's motion for discovery sanctions striking the plaintiff's complaint is otherwise denied.

Adequacy of GRH's responses to Ileiwat's Discovery Demands and Notice

Ileiwat contends that GRH's December 28, 2011 responses to his discovery demands are inadequate and GRH's opposition is that the plaintiff made no good faith effort to resolve this dispute, he did not notify GRH what discovery is lacking and it is unclear what plaintiff needs.

A court may strike the pleadings or parts thereof as a sanction against party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). The striking of a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious (Carlos v. 395 E. 151st Street, LLC, 41 A.D.3d 193, 194 [1st Dept 2007]).

22 NYCRR § 202.7[a][2] requires that a motion relating to disclosure be accompanied by an affirmation that counsel has conferred with counsel for the opposing part in a good faith effort to resolves the issues raised by the motion (Chichilnisky v. Trustees of Columbia University in City of New York, 45 A.D.3d 393 [1st Dept 2007]). Although plaintiff provides the affirmation of Attorney Butler, and she claims to have made a good faith efforts to resolve this matter prior to bringing this motion by calling her adversary and sending her letters, none of this is documented and Attorney Stark denies this took place. Therefore, Attorney Butler's affirmation does not satisfy the requirements

of this court rule in substance or form (Chichilnisky v. Trustees of Columbia University in City of New York, 45 A.D.3d at 394). At best, Attorney Butler has only established that GRH did not respond to interrogatories or otherwise provide complete responses to her discovery demands. The failure to comply with this court rule is a sufficient reason to deny Ileiwat's motion for disclosure sanctions (Chichilnisky v. Trustees of Columbia University in City of New York, supra).

The court will, however, instruct GRH that it must respond to Ileiwat's Demands for Interrogatories and for documents. Given the unproductive passage of time, GRH's responses and production shall be due no later than Twenty (20) Days after plaintiff serves GRH with a copy of this decision and order with notice of entry. Otherwise, Ileiwat's cross motion for discovery sanctions is denied without prejudice.

Motions to amend the pleadings

Presently, plaintiff has no direct claims at all against GRH, his employer, because he is limited to the compensation and benefits provided by the Workers' Compensation Law (Reich v. Manhattan Boiler & Equipment Corp., 91 N.Y.2d 772 [1998]). Initially, Ileiwat sought to amend his complaint to assert a claim for negligent/intentional spoliation of evidence on the basis that GRH destroyed, replaced, or otherwise has made the subject elevator unavailable to him for an inspection. Acknowledging, however, that the Court of Appeals has decided that New York does not recognize the tort of negligent spoliation (Ortega v. City of New York (9 N.Y.3d 69 [2007]) (*see* Reply Affirm, Efiled Doc # 46, ¶8), Ileiwat now argues that he can still assert a claim against GRH in "common law" for his employer having negligently or intentionally destroyed evidence he needed. For the reasons that follow, the court holds that no such tort exists, but even if it does, the

facts supporting this proposed claim demonstrate that the claim Ileiwat proposes is indistinguishable from the tort of negligent/intentional spoliation and, therefore, not a claim he can assert.

The plaintiff in Ortega was injured in a motor vehicle accident. The vehicle she had been driving at the time of her accident was towed and brought to an auto pound maintained and operated by the NYC Police Department. Although Ortega's attorney obtained an order from the Supreme Court for preservation of the vehicle, and the order was properly served on the pound, the vehicle was destroyed. Ortega then commenced an action against the City – a non-party to the collision– asserting a tort claim, based upon spoliation of evidence. The City moved for and was granted summary judgment (Ortega v. City of New York, 11 Misc.3d 848 [Sup Ct., Kings Co. 2006]). The decision was affirmed by the Appellate Division, Second Department (Ortega v. City of New York, 35 A.D.3d 422 [2nd Dept 2006]) and again by the Court of Appeals (Ortega v. City of New York, 9 N.Y.3d 69 [2007]).

Examining these decisions, it is clear that each court considered the devastating effect spoliation by an entity without ties to the underlying litigation can have on the plaintiff's case (Ortega v. City of New York, 11 Misc.3d at 859; Ortega v. City of New York, 9 N.Y.3d at 79). Notwithstanding these hardships, Court of Appeals found that "there is no way of ascertaining to what extent the proof would have benefitted either the plaintiff or defendant in the underlying lawsuit and it is therefore impossible to identify which party, if any, was actually harmed..." (Ortega v. City of New York, 9 N.Y.3d at 86). Consequently, the court rejected the tort claim of negligent spoliation because "it could not be proved without resort to multiple levels of speculation" (Ortega v. City of New York,

9 N.Y.3d at 81).

In the case at bar, GRH is a named third party defendant and, therefore, subject to the discovery rules – and sanctions– found in Article 31 of the CPLR. Discovery sanctions have also been employed against a litigant who had an opportunity to safeguard evidence but failed to do so (Ortega v. City of New York, 9 N.Y.3d at 76 [fn 2] *citing* Amaris v. Sharp Elecs. Corp., 304 A.D.2d 457 [1st Dept 2003] *lv. denied* 1 N.Y.3d 507 [2004]). The ultimate sanction is, of course, dismissal of the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party (Ortega v. City of New York, *supra* at 76).

Although the Appellate Division, First Department has decided that a fraudulent misrepresentation and fraudulent concealment cause of action "may be based on intentional spoliation of evidence, notwithstanding that New York does not recognize an independent tort of third party negligent spoliation" (IDT Corp. v. Morgan Stanley Dean Witter & Co., 63 A.D.3d 583 [1st Dept 2009]), it is clear from reading the court's entire decision that it did not stray from the tenets of Ortega: "We note that the New Jersey courts, which do not recognize a separate tort action for intentional spoliation, recognize a claim of fraudulent concealment based on the intentional spoliation of evidence" (IDT Corp. v. Morgan Stanley Dean Witter & Co., 63 A.D.3d at 587).

Applying these legal principles to Ileiwat's motion, the tort action he seeks to assert against GRH is not a claim available to him. The reason is not, as defendants argue, because Ileiwat is seeking to assert a direct claim against his employer, but because plaintiff has a number of remedial options available to him under the CPLR, if it is determined that GRH, in fact, spoliated evidence that ought to have been preserved.

Such sanctions may include the dismissal of the action or striking the pleading of the spoliator, if warranted (Ortega v. City of New York, 9 N.Y.3d at 76). The issue of whether Ileiwat is entitled to discovery sanctions, based upon GRH's alleged spoliation of evidence is, however, not directly before the court on plaintiff's motion. Nonetheless, as will be seen, the issue is indirectly resolved in connection with the motion by Gotham to amend its cross claims or, in the alternatively, for discovery sanctions against GRH. Plaintiff's motion to amend his complaint is denied.

Like Ileiwat, Gotham seeks to assert a tort cross-claim against GRH for its alleged spoliation of evidence (the elevator, its mechanisms, etc.). Although Gotham has other cross claims against GRH, its motion to amend must be denied for most of the same reasons the court has denied Ileiwat's motion to amend his complaint. Unlike Ileiwat, Gotham seeks the alternative relief of discovery sanctions under CPLR § 3126, based upon GRH's alleged spoliation of evidence.

It is unrefuted that the freight/sidewalk elevator presently in operation at the building at the present is new. Any argument by GRH that the preliminary order did not require it to make the elevator available involved in plaintiff's accident for inspection, or that it was anticipated that the elevator might be replaced, interject words into the court's preliminary conference order that simply cannot be found. The court's order provided that the parties were "to inspect and/or reinspect the freight elevator involved in plaintiff's accident on or before February 3, 2012." Although GRH made no promise that the condition of the elevator "is the same as it was on the date of plaintiff's accident," the elevator was not simply serviced following the order, it was completely replaced. Moreover, the replacement took place almost a year after the accident and a few weeks,

if not days, before the scheduled inspection. Various excuses on behalf of GRH are set forth by its attorney, but not contained in a sworn affidavit by a person with knowledge. Comments by counsel that it was "unreasonable" for this elevator to remain shut down are unavailing. Demands to inspect the elevator were outstanding for some time and could have been ably accommodated before the elevator replaced.

Based on these circumstances, the court can only conclude that the elevator, whether intentionally or through negligence, was replaced, removed, altered or otherwise physically disposed of before Gotham (or any other adversarial party) had an opportunity to examine it. It is also beyond cavil that the pre-replacement elevator and all its appurtenant mechanisms that were altered were vitally important to the claims involved in this case (see Hernandez v. Pace Elevator Inc., 69 A.D.3d 493 [1st Dept 2010]). Other arguments by GRH, that any party is not entitled to more than one inspection, are also unavailing given the preliminary conference order. This issue is addressed at greater length below.

"When a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." (Denoyelles v. Gallagher, 40 A.D.3d 1027, 1027 [2nd Dept 2007]). The burden is on the party requesting spoliation sanctions to demonstrate that the other party intentionally or negligently disposed of critical evidence, and that the moving party is compromised in its ability to defend the action (Squitieri v. City of New York, 248 A.D.2d 201 [1st Dept 1998]). The court has broad discretion in deciding the relief a party deprived of the lost evidence is entitled. Among the sanctions that may be imposed are "precluding proof favorable to

the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action" (Ortega v. City of New York, 9 N.Y.3d 69 [2007]).

Although some documentary discovery has taken place in this matter, it is not yet completed (see decision/order supra) and there have been no depositions. The record thus far, however, shows that plaintiff's attorney did an informal inspection of the elevator a few days after the accident and that she was accompanied by an expert with whom she consulted in anticipation of litigation. There are also a number of documents obtained through discovery which show the subject elevator was inspected numerous times. Some of the inspections resulted in negative reports.

At this point in the litigation, the court is unable to determine to what extent the spoliation of evidence has prejudiced Gotham's ability to defend itself against plaintiff's claims and co-defendant's cross claims. Spoliation alone will not warrant sanctions where it did not result in prejudice to the party requesting the disclosure, or where the evidence destroyed was not relevant to the allegations in the action (see Hernandez v. Pace Elevator Inc, supra).

Other arguments raised by GRH in opposition to Gotham's motion, including that it was improperly served with Gotham's January 10, 2011 Demand for Preservation of Material Evidence, or that the Demand is only directed to Ileiwat are unavailing. The demand is directed to all the parties and GRH acknowledges that the law firm that was served by Gotham is listed with the Secretary of State as GRH's registered agent for service. In any event, Gotham subsequently re-served the demand on the attorney

representing GRH in this case and the parties entered into the preliminary conference order, preserving Gotham's right to inspect the elevator.

Consequently, after careful examination of the issues framed by Gotham in its motion, Gotham's motion to amend its answer to assert a tort cross-claim based upon spoliation is denied. To the extent Gotham seeks, in the alternative, discovery sanctions, the court finds that the freight/sidewalk elevator and its mechanisms have been spoliated. The issues of what sanctions, if any, should be imposed for such spoliation, however, cannot be decided at this time, because it is unclear whether and to what extent the spoliation has affected Gotham's ability to defend itself against the claims asserted or prosecute its own claims. Therefore, that branch of Gotham's motion is denied without prejudice.

Other branches of Gotham's motion involve indemnification issues and are inextricably entwined with the issue of whether, as Gotham claims, GRH's pleadings should be stricken. Therefore, those branches of Gotham's motion are denied without prejudice as well.

Gag Order, Sanctions and Sundry Matters

Without any elaboration, and for the first time in reply papers, GRH asks for a "gag order" preventing plaintiff from speaking to the press. Not only is this request informally raised for the first time in reply, prior restraints of speech are unquestionably viewed with a strong presumption against their validity (Fischetti v. Scherer, 44 A.D.3d 89 [1st Dept 2007] *citing* Carroll v. President & Commrs. of Princess Anne, 393 U.S. 175 [1968]). The application for a "gag order" is denied.

Although GRH countenances plaintiff's motion to amend his complaint as frivolous

and asks for sanctions to be imposed, this relief, once again, is causally raised in responsive papers. The application is denied both because it is procedurally improper and substantively has no merit.

Recapitulation and Conclusion

The remaining discovery issues in the motion by GRH that were not resolved in the parties' so-ordered stipulation of May 17, 2012 are resolved in accordance with the foregoing decision/order. Ileiwat's cross motion for discovery sanctions against GRH is granted only to the extent provided, otherwise it is denied, without prejudice.

Ileiwat's motion to amend his complaint is denied.

Gotham's motion for summary judgment on plaintiff's complaint is marked withdrawn.

Gotham's motion for permission to serve an amended answer so as to asset a new cross claim against GRH for negligent/intentional spoliation is denied for the reasons stated. Gotham's motion for the imposition of discovery sanctions on GRH is granted in part and partly denied, without prejudice, for the reasons stated.

This case is hereby scheduled for a status conference on October 4, 2012 in Part 10 at 9:30.m. The Note of Issue is extended to October 5, 2012.

Any other relief requested in these motions but not directly addressed by the court herein denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 25, 2012

So Ordered:

Hon. Judith J. Gische, JSC