

Caporale v 860 River LLC
2013 NY Slip Op 33279(U)
December 5, 2013
Supreme Court, New York County
Docket Number: 111150/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 111150/2011
CAPOREALE, EMILY
VS.
860 RIVER LLC
SEQUENCE NUMBER : 003
PRECLUDE

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

The following papers, numbered 1 to 4, were read on this motion to/for preclude evidence

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2, 4</u>
Replying Affidavits _____	No(s). <u>3</u>

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

The court grants plaintiff's motion to preclude evidence and compel disclosure to the extent of compelling the disclosure as set forth in the accompanying decision. C.P.L.R. §§ 3124, 3126(2).

FILED
DEC 18 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/5/13

Lucy Billings, J.S.C.
LUCY BILLINGS
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

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 46

-----x

EMILY CAPORALE,

Index No. 111150/2011

Plaintiff

- against -

DECISION AND ORDER

860 RIVER LLC and VERITAS PROPERTY
MANAGEMENT,

Defendants

-----x
-----x

860 RIVER LLC and VERITAS PROPERTY
MANAGEMENT,

Third Party Plaintiffs

FILED

- against -

DEC 18 2013

PRECISION ELEVATOR CORP.,

NEW YORK

Third Party Defendant

COUNTY CLERK'S OFFICE

-----x

LUCY BILLINGS, J.S.C.:

The court grants plaintiff's motion to preclude evidence and compel disclosure to the extent of compelling third party defendant to provide the following disclosure. C.P.L.R. §§ 3124, 3126(2). Plaintiff fails to raise any question that third party defendant undertook an obligation to inspect, maintain, or repair the manually operated elevator shaft door that fell on plaintiff, pursuant to third party defendant's contract with defendant 860 River LLC, the elevator owner, or by assuming that obligation, other than at the owner's request and with its approval. See Radnay v. 1036 Park Corp., 17 A.D.3d 106, 108 (1st Dep't 2005).

Therefore plaintiff is not entitled to records of subsequent repairs of the shaft door to show third party defendant's assumption of those duties and control of the shaft door's inspection, maintenance, and repair on any ongoing basis.

If third party defendant responded to the shaft door's malfunction that injured plaintiff, however, she is entitled to the records of that response and the attendant repairs, to determine the source of the malfunction and show the elevator's condition when its door fell on plaintiff. Albino v. New York City Hous. Auth., 52 A.D.3d 321 (1st Dep't 2008); Francklin v. New York El. Co., Inc., 38 A.D.3d 329 (1st Dep't 2007); Mercado v. St. Andrews Hous. Dev. Fund Co., 289 A.D.2d 148 (1st Dep't 2001); Kaplan v. Einy, 209 A.D.2d 248, 252 (1st Dep't 1994). Third party defendant's Maintenance Foreman Roman Shybuta, whom third party defendant produced as its witness for a deposition and who testified regarding the elevator's condition after plaintiff's injury, did not actually repair the door and could not assess the cause of the malfunction or why the door fell on plaintiff. Aff. of Leandros A. Vrionedes Ex. K, at 41. See Saia v. City of New York, 3 A.D.3d 397 (1st Dep't 2004); Longo v. Armor El. Co., 278 A.D.2d 127, 128 (1st Dep't 2000); Tolliver v. New York City Hous. Auth., 225 A.D.2d 412 (1st Dep't 1996); Kaplan v. Einy, 209 A.D.2d at 252. If the records of third party defendant's response to and repair of the malfunction reveal another employee of third party defendant who inspected or repaired the elevator following plaintiff's injury, that witness

likely possesses material information regarding the elevator's condition when the shaft door fell on plaintiff, the cause the malfunction, and why the door fell. Alexopoulos v. Metropolitan Transp. Auth., 37 A.D.3d 232, 233 (1st Dep't 2007); Saia v. City of New York, 3 A.D.3d 397; Longo v. Armor El. Co., 278 A.D.2d at 128-29; Tolliver v. New York City Hous. Auth., 225 A.D.2d 412. Upon the disclosure of such a witness, plaintiff may serve a notice of that witness' deposition pursuant to C.P.L.R. § 3107 and is entitled to depose the witness.

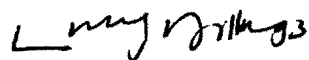
Finally, plaintiff is entitled to third party defendant's records of its inspection and repairs of other elevators in 860 River LLC's same building, for the three years before plaintiff's injury, as requested by plaintiff's Notice of Discovery and Inspection served November 28, 2011, and as required by the Preliminary Conference Order dated February 23, 2012. Plaintiff is entitled to these records not because they may show third party defendant's assumption and control of the shaft door's inspection, maintenance, and repair, but because the records may show third party defendant's or defendants' constructive notice of the shaft door's hazardous condition due to similar hazardous conditions of similar doors. Radnay v. 1036 Park Corp., 17 A.D.3d at 108; Armstrong v. Ogden Allied Facility Mgt. Corp., 281 A.D.2d 317, 318 (1st Dep't 2001); Longo v. Armor El. Co., 278 A.D.2d at 129.

Third party defendant shall produce the records in its possession, custody, or control as specified above within 20 days

after service of this order with notice of entry. C.P.L.R. §§ 3120(1)(i) and (2), 3124. Neither the compelled disclosure of these records nor the compelled testimony of a further witness from third party defendant suggests, of course, that any of this evidence will in fact be relevant and otherwise admissible in support of or in opposition to summary judgment or at trial. See, e.g., Francklin v. New York El. Co., Inc., 38 A.D.3d 329; Kaplan v. Einy, 209 A.D.2d at 252.

The court otherwise denies plaintiff's motion to preclude evidence and to compel disclosure. This decision constitutes the court's order. The court will provide copies to the parties' attorneys.

DATED: December 5, 2013



LUCY BILLINGS. J.S.C.

LUCY BILLINGS
J.S.C.

FILED

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