**FILED: BRONX COUNTY CLERK 07/26/2018 11:17 AM** INDEX NO. 25611/2015E
NYSCEF DOC. NO. 112 RECEIVED NYSCEF: 07/26/2018

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

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ANDREW MABLE

Index No. 25611/2015E

Plaintiff,

-against-

**DECISION AND ORDER**

384 EAST ASSOCIATES, LLC and PROTO PROPERTY SERVICES, LLC and ALL BOROUGH ELEVATOR LLC,

Defendants.

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384 EAST ASSOCIATES, LLC and PROTO PROPERTY SERVICES, LLC,

Third-Party Plaintiffs,

-against-

ALL BOROUGH ELEVATOR LLC,

Third-Party Defendant.

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HON. DORIS M. GONZALEZ:

Upon: i) the Order to Show Cause, by Stacey Haskel, Esq., attorney for the Plaintiff, for an Order: 1) permitting the plaintiff to file and serve his 3101 (d) expert exchange; 2) permitting the plaintiff's expert, Patrick Carrajat, to inspect the subject elevator; 3) in the alternative, if such inspection is not allowed, to preclude defendant and third-party defendant from using the expert affidavit of Patrick J. McPartland in their motion and cross-motion for summary judgment; and 4) to stay the proceeding in this matter, pursuant to CPLR 2201, to allow for an extension of time for the plaintiff to submit opposition to the motion and cross-motion for summary judgment currently returnable on June 4, 2018; ii) the Affirmation in Partial Opposition, dated May 30, 2018, by

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Matthew Mann, Esq., attorney for defendant 384 East Associate, LLC and Proto Property Service, LLC; iii) the Affirmation in Partial Opposition, dated May 29, 2018 by Lauren M. Solari, Esq., attorney for defendant/ third party defendant All Borough Elevator LLC.

PROCEDURAL HISTORY

The action was commenced by the filing of a Summons and Verified Complaint on or about October 9, 2015. Issue was joined by service of an Answer, on or about December 8, 2015. To bring an action as against All Borough Elevator LLC ("All Borough"), the defendants 384 East Associates, LLC ("384 East Associates") and Proto Property Service, LLC ("Proto") impleaded the third-party defendant. The defendants commenced a third-party action with the filing of a third-party Summons and Verified Complaint on or about January 29, 2016. Issue was joined by service of a third-party Answer, on or about April 4, 2016. The plaintiff filed an amended Summons and Verified Complaint adding defendant All Borough Elevator LLC ("All Borough"), on or about April 14, 2016, and issue was joined by service of the Amended Answer on or about April 15, 2016.

The plaintiff filed a note of issue and certificate of readiness, on or about November 8, 2017. On March 5, 2018, the defendants 384 East Associates and Proto timely moved for summary judgment before Justice Tapia. Defendant All Borough cross-moved for summary judgment on March 27, 2018. The movant seeks for this Court to extend the time to submit opposition. The motion for summary judgment is returnable July 30, 2018 before Justice Tapia.

This matter is currently scheduled for a conference on October 4, 2018 in the Pre-Trial Part.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Andrew Mable on August 3, 2015, in the elevator at the premises located at 384 West

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194th Street, Bronx, New York. It is alleged that the plaintiff sustained injury as a result of the elevator door closing on his hand. The premises is owned by 384 East Associates. It is alleged there is a service contract between All Borough and the building owner, 384 East Associates.

The defendants 384 East Associates and Proto retained Mr. McParland to inspect the elevator on and about January 12, 2017. On March 5, 2018, the defendants moved for summary judgment using Mr. McParland's affidavit dated February 21, 2018, in support of the motion. The plaintiff post-note of issue seeks an inspection of the elevator, but defendant will not allow the plaintiff to enter the premises. The elevator is question has undergone post remedial repairs and/or modernization, therefore it is not in the same condition as the date of the accident.

Despite there being no inspection, the plaintiff retained his own expert and has a report to exchange. The defendants 384 East Associates, Proto and All Borough oppose the motion arguing there should be no post-note of issue discovery, and the elevator is not in the same condition as it was at the time of the plaintiff's accident.

DISCUSSION OF LAW

The law is well settled that pursuant to 22 NYCRR 202.21 (d), the Court may authorize additional discovery "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness" that would otherwise cause "substantial prejudice." (*Audiovox Corp. v Benyamini*, 265 AD2d 135, 140 [2000]; *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376 [1st Dept 1990])

The plaintiff has failed to establish that there were any "unusual and unanticipated circumstances" to allow the requested inspection of the elevator post-note of issue. The plaintiff argues that an expert to inspect the elevator was not necessary until the defendant's motion for

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summary judgment. Under the circumstances of this case, the plaintiff should have foreseen the need for an expert to prove a prima facie case.

Further, it is well settled that evidence of post-accident repairs is not discoverable or admissible in a negligence matter (Corcoran v Village of Peekskill, 108 N.Y. 151, Getty v Town of Hamlin, 127 N.Y. 636,; Clapper v Town of Waterford, 131 N.Y. 382,; Cahill v Kleinberg, 233 N.Y. 255,; Scudero v Campbell, 288 N.Y. 328,; Croff v Kearns, 29 A.D.2d 703,; Barone v 111 East 39th St. Corp., 38 A.D.2d 797; Carollo v Rose, 43 A.D.2d 831). Based on the record, the elevator in question has undergone modernization since the date of the accident and it is not in the same state it was at the time of the plaintiff's accident.

As per CPLR Rule 3101(d)(i), a party who retains an expert must disclose said expert within a sufficient period of time before the commencement of trial and give appropriated notice thereof. The party, however, shall not be precluded from introducing the expert's testimony solely on grounds of exchanging same while on the trial calendar. This matter is currently scheduled for a pre-trial conference on October 4, 2018 and motions for summary judgment are pending.

The Court may grant "a stay of proceedings in a proper case, upon such terms as may be just" (CPLR 2201). Here, the plaintiff has failed to satisfy his burden in establishing that a stay is appropriate under the circumstances. Since the motions for summary judgment are pending before Justice Tapia, any extension of time to submit opposition to said motions should be made to him.

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby

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**ORDERED**, that the plaintiff's motion to serve CPLR 3101(d) expert exchange is GRANTED; and it is further

**ORDERED** that the plaintiff shall serve its expert exchange within 15 days of this order; and it is further

**ORDERED** that the plaintiff's request for an inspection of the elevator is DENIED; and it is further

**ORDERED** that the plaintiff's motion to stay the trial is DENIED; and it is further

**ORDERED** that the plaintiff's motion to extend the time to submit opposition papers to the motion for summary judgment should be made to Justice Tapia.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 24, 2018
Bronx, New York

ENTER:

HON. DORIS M. GONZALEZ, J.S.C.