SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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PATRICIA BOOTH, JOHN BOOTH,

Plaintiff,

- v -

OTIS ELEVATOR COMPANY, TRIBORO ELEVATOR CONSULTANTS LLC,MEMORIAL SLOAN-KETTERING CANCER CENTER

Defendant.

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INDEX NO. 158604/2017

MOTION DATE 08/30/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

Upon the foregoing documents, defendant Otis Elevator Company (Otis) moves for an order vacating plaintiff's note of issue; granting leave to reargue its application to depose employees of defendant Memorial Sloan-Kettering Cancer Center (MSKCC) pursuant to CPLR 2221 (d); and other related relief.

A motion for leave to reargue "is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks omitted]). "'Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted'" (Matter of Setters v AI Props. & Devs. (USA) Corp., 139 AD3d 492, 492 [1st Dept 2016], quoting William P. Pahl Equipment Corp., 182 AD2d at 27). Here, the Court finds that Otis fails to

identify any fact or law that this Court misapprehended; rather, it continues to assert arguments already considered and rejected by the Court.

This Court discussed the issue of deposing MSKCC employees, Robert Romano and Deniz Ramazan, at length during two conferences held on June 5 and July 22, 2019. At the June 5, 2019 conference, MSKCC objected to Otis' demand to depose these employees on the grounds that MSKCC had already produced a notice witness with knowledge of the elevator's maintenance and, to the extent that the two subject employees were witnesses to the accident, as they were in the vicinity when it occurred, the surveillance video of the accident shows what happened and there was no need to ask the employees what they saw. Otis claimed that there was no audio accompanying the video and therefore, it was unknown what the employees may have said to the plaintiff and her daughter before, during, or after the accident (see NYSCEF Doc. No. 38 at ¶ 11; NYSCEF Doc. No. 62 at ¶ 9).

The parties orally argued the issue before the Court at the conference on June 5, 2019, and the Court then directed MSKCC to produce affidavits from those employees "as to their observations, if any, at the time of the incident" (NYSCEF Doc. No. 21, item 3). The order went on to state that Otis was to outline any deficiencies with the affidavits and, if the affidavits were insufficient, depositions were to be held (id.). Thereafter, MSKCC produced the affidavits pursuant to the order; Otis sent a deficiency letter; and MSKCC voluntarily produced supplemental and amended affidavits. Otis, still not satisfied with the affidavits, requested a conference with the Court (see NYSCEF Doc. No. 22), which was held on July 22, 2019. As a result of the conference, wherein the Court reviewed the affidavits and heard the parties' contentions, the Court issued an order specifically finding that the supplemental and amended affidavits sufficiently addressed the objectives stated during the June 5, 2019 conference, as well

as the issues outlined in Otis' deficiency letter to MSKCC. Accordingly, although the prior order stated that depositions may be ordered if the affidavits were insufficient, the Court found that the affidavits were sufficient; therefore, no depositions were warranted, and plaintiff was permitted to file the note of issue. At the July 22, 2019 conference, however, Otis also raised the issue of the two employees possibly being called as notice witnesses (i.e., witnesses having knowledge of the elevator maintenance and operation). Although the Court finds that such assertion was (and still is) entirely speculative and not based on any evidence in the record, as the employees were patient escorts and there was no evidence remotely suggesting that they had personal knowledge of the elevator's operation, the Court fashioned an appropriate remedy by precluding those witnesses from being called at trial as notice witnesses, and otherwise limited their testimony, if they were called at all (see NYSCEF Doc. No. 26). As the movant's case law notes in its papers, discovery is meant to sharpen the issues at trial and reduce unfair ambush and surprise — which is exactly what the Court has done here. Thus, the Court did not "overlook[] and/or misapprehend[] the law regarding discovery" (NYSCEF Doc. No. 67 at ¶ 9).[1]

In the instant motion, Otis argues that "by being deprived of deposing these individuals, OTIS has been deprived the opportunity not only to develop the record as a whole and obtain relevant information necessary for the defense of this action, but has also been deprived of admissible evidence should this matter proceed to trial" (NYSCEF Doc. No. 38 at ¶ 25). The Court finds this argument vague, unsubstantiated and conclusory. Otis fails to cite any specific reason for why these witnesses are material and necessary to its defense, or otherwise important to any of the issues in the action (see, e.g., id. at ¶ 34 [claiming the "relevance of the information

[1] Even though Otis specified what the Court allegedly misapprehended or overlooked for the first time in reply papers, which should be disregarded (see generally **Error! Main Document Only.**Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992]), the Court addresses some of the contentions for purposes of finality.

likely to be contained within the testimony of these witnesses" is obvious or a "[g]iven" but never explains what the relevance is]). Otis also claims that the witnesses are relevant "as evidenced by Plaintiff's refusal to consent not to call these individuals as witnesses should this matter proceed to trial" (NYSCEF Doc. No 38 at ¶ 3). However, plaintiff's inability to enter into such stipulation is evidence of *nothing*, and is entirely irrelevant as the Court already issued a protective order precluding these witnesses under specific circumstances, which applies to all parties.

The Court also did not "misapprehended the facts and law in its decision regarding the admissibility of the affidavits at the time of trial" (NYSCEF Doc. No. 67 at ¶ 11)[2] because the Court did not make any ruling or finding, and specifically left the decision for the judge assigned to the trial (see NYSCEF Doc. No. 26).

Accordingly, because no discovery remains outstanding, the matter is trial-ready and the note of issue shall not be vacated. Further, the Court finds no basis to stay the trial pending the outcome of Otis' appeal.

It is hereby ORDERED that the motion is denied in its entirety. This constitutes the decision and order of the Court.

9/5/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[2] See supra, n 1.