

Berra v CHSP 36th St. LLC

2019 NY Slip Op 34056(U)

January 4, 2019

Supreme Court, Bronx County

Docket Number: 22534/2013E

Judge: Lizbeth Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

-----X

YDALGO BERRA,

Plaintiff,

DECISION and ORDER
Index No 22534/2013E

-against-

CHSP 36TH STREET LLC, HYATT HOTEL
CORPORATION and ROTAVELE ELEVATOR, INC.,

Defendants.

-----X

HONORABLE LIZBETH GONZÁLEZ

Plaintiff Berra commenced the underlying action against the defendants claiming that their negligence caused him to sustain serious injuries.

By Notice of Motion, defendants CHSP 36th Street LLC and Hyatt Hotels Corporation s/h/a Hyatt Hotel Corporation (“defendants CHSP,” collectively) seek an Order awarding them summary judgment (CPLR 3212) on their cross-claims against defendant Rotavele Elevator, Inc. (“Rotavele Elevator”) and directing Rotavele Elevator to indemnify and defend CHSP and pay their attorneys fees and litigation costs. Defendant Rotavele Elevator opposes the defendants’ motion.

By Notice of Cross-Motion, plaintiff Berra seeks partial summary judgment on the issue of liability and to strike the defendants’ answer (CPLR 3126) on spoliation grounds. In the alternative, plaintiff requests that the issue of notice be resolved in his favor or a negative inference be given to the jury because of the defendants’ destruction of and/or failure to preserve critical evidence. Defendants CHSP and Rotavele Elevator separately oppose plaintiff’s cross-motion.

Defendants CHSP’s Motion

In accordance with a Basic Service Agreement (“Agreement”) between defendants CHSP and Rotavele Elevator, defendants CHSP seek summary judgment on their cross-claims against defendant Rotavele Elevator.

The pertinent paragraphs of the Agreement are as follows:

5. Service under this agreement shall commence on March 1, 2012 and shall continue for a period of twelve (12) months.

6. No representations are made by us that our service hereunder will or can render the equipment absolutely free from occurrence or reoccurrence at any time of such items as failure of elevator to level off at landings, eccentricities in the operation of hatchway doors or car doors or any other defects not ordinarily revealed by the customary inspection and testing methods used by us.

7. REI [Rotavele Elevator Inc.] does not assume any management or control over any part of the equipment except during periods of work when our employees actually take direct charge of the equipment, and such management and control over the elevator equipment remains exclusively with the purchaser.

11. You agree to maintain the hatchway, pit and machine room in clean condition and to keep the elevator equipment from being exposed to the elements or to physical damage. You agree to shut down the equipment immediately upon the manifestations or appearance of any irregularity in operation of the elevator equipment; to notify the company at once, and keep the equipment shut down until completion of the repairs. You will keep the equipment under observation by personnel competent to detect any such manifestation or appearance of any irregularities in operation between periods of the company's inspections. You will give the company written notice within twenty-four hours after occurrence of any accident in or about the elevators.

Because summary judgment is a drastic remedy, the proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*JMD Holding Corp v Congress Financial Corporation*, 4 NY3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

In support of their motion, defendants CHSP proffer the deposition testimony transcripts of plaintiff Berra and non-party witnesses, Raymond Negron, John Mallia, James Taylor and John Parker, the Agreement and a History Report.

Plaintiff Berra, a security guard employed by Strike Force Protective Services, testified that he reported to work at the Hyatt Place Midtown South Hotel located at 52 West 36th Street in New York County ("subject premises") on 4/29/13. At around 5AM, Mr. Berra entered elevator #1 ("subject elevator") on the ninth floor, intending to go to the eighth floor, when it

went into a free-fall and came to a sudden stop between the second and third floors, causing his body to slam into the elevator floor and injury to his back and left knee.

Raymond Negron testified that at the time of plaintiff Berra's incident, he was employed by the Hyatt Hotel as a night auditor and worked at the front desk. On the day of Mr. Berra's incident, Mr. Negron heard "a boom, a — like something had just dropped." He knew the sound came from the elevator and learned that Mr. Berra was stuck within in between floors. Mr. Negron phoned Michael Guerrero, the chief engineer, informed him of the incident and proceeded to extricate the plaintiff. Mr. Negron shut off the elevator, manually opened its doors and removed Mr. Berra from the elevator. The elevator and floor were not leveled when the elevator doors were opened.

John Mallia testified that he is a mechanic employed by Rotavele Elevator as a maintenance supervisor and served in that capacity on the date of plaintiff's incident. Mr. Mallia's responsibilities included providing technical support to employees and troubleshooting. Rotavele Elevator installed the elevators at the Hyatt Hotel and performed the monthly maintenance. To his knowledge, Rotavele Elevator was the only entity responsible for elevator maintenance.

James Taylor testified that he was employed by Rotavele Elevator as a field mechanic on the day of plaintiff's incident. His responsibilities included "[t]roubleshooting, fixing elevators that are shut down, and monthly maintenance service." Rotavele maintained the hotel's elevators from January through April in 2013.

John Parker self-described as the chief operating officer for Real Hospitality Group, a third-party managing company hired by CHSP to manage the subject hotel. He testified that Real Hospitality Group contracted with Rotavele Elevator¹ to service and monitor the hotel elevators. He described the elevator issues that were brought to his attention. Although the Basic Service Agreement requires written notice within 24 hours after the occurrence of any elevator accident, Mr. Parker did not recall receiving notification relative to plaintiff's incident.

¹ During his deposition, Mr. Parker was shown the referenced agreement that incorrectly describes the hotel's location as 52 West 26th Street. He testified that 26th Street is a typo and should read as 52 West 36th Street, the subject property.

The History Report proffered by the defendants provides the name of the technician, the date and time of contact, the service provided, the number of hours spent on the problem, comments and the work performed during the period of 1/9/13 to 4/29/13. Prior to plaintiff's 4/29/13 incident, technician Carlos Victoria last worked on the elevator on 4/15/13 for "Lights in Cab" and "Entrapment."² On the date of plaintiff's incident, the History Report indicates that James Taylor was the assigned technician, was dispatched at 8AM and completed the work at 10AM; the type of work performed is redacted.

In support of its argument, defendant Rotavele Elevator, like the movants, relies upon the deposition testimony of James Taylor, John Mallia, Raymond Negron and proffers the testimony of Michael Guerrero. By affirmation, Rotavele's counsel posits that the proffered testimony establishes that the elevator problems were unrelated to Rotavele Elevator's work and services.

Mr. Taylor (Rotavele supervisor) testified that the "technology of the equipment" makes it impossible for the subject elevator to go into a free-fall and come to an abrupt stop. In addition, a sudden drop in the elevator would be indicated in the computer error log as "fault." The court notes that although Mr. Taylor was provided and queried about a computer log, it is not proffered as evidence. Additionally, the History Report contains no reference to a sudden drop in the elevator.

Mr. Mallia (Rotavele mechanic) first heard of plaintiff's incident on 4/25/16, almost three years post-accident. Mr. Mallia testified that if the elevator went into a "free fall," the "overspeed governor will first trip a switch in case the car overspeeds" - a rate of "855 feet per minute" - and cause the car to stop. When asked if he would describe it as an "abrupt stop," Mr. Mallia responded, "I wouldn't say so."

Mr. Negron (Hyatt night auditor) testified that he was aware of the contract between Rotavele Elevator and Hyatt Hotel. Michael Guerrero, described by Mr. Negron as the chief engineer, has direct contact with Rotavele Elevator.

Defendant Rotavele Elevator proffers the deposition testimony of Michael Guerrero. At the time of plaintiff's incident, he served as the hotel's chief engineer. His responsibilities

² The nature of the elevator "entrapment" is unexplained.

were “[t]o ensure all mechanicals [were] operating properly...HVAC units in the rooms, rooms looking up to par, keep them brand new. Just overall maintenance and engineering in the entire building, in the nutshell.” As for the elevators, Mr. Guerrero testified that Rotavele Elevators installed and maintained the elevators. On 4/29/13 at approximately 5AM while on his way to the gym, Mr. Guerrero received a call from Mr. Negrón who informed him that someone was stuck in the elevator. Mr. Guerrero went to the hotel and upon arrival, called Rotavele Elevators to report the incident. He then left the hotel, went to the gym and made the 6AM class. When Mr. Guerrero returned to the hotel at around 7:30M or 8AM, plaintiff Berra had been extricated from the elevator.

Mr. Guerrero (hotel engineer) testified that the building underwent construction and opened approximately one month prior to plaintiff’s incident. Because the elevators were used for construction, they experienced problems due to dust and debris in the elevator shafts and pits. Mr. Guerrero stated that he would not categorize the problems as “maintenance issues” but “more post-construction...big wear and tear during construction, a lot of debris go in the shaft, a lot of stuff get out of alignment and things have to get adjusted.” He also stated that building staff had reset the main power switches, turning the elevators and the rope gripper on and off, approximately ten times in the six weeks prior to plaintiff Berra’s incident. Notably, Mr. Mallia (Rotavele supervisor) testified that the elevators should be reset by Rotavele because Rotavele is otherwise unable to obtain “a full understanding” of a problem’s underlying cause. Although Mr. Mallia testified that the elevator log shows that the elevators were last reset by the building staff, not by Rotavele Elevator, defendants do not proffer the log. The History Report establishes that Rotavele technician James Taylor performed elevator work on 4/15/13, approximately 14 days prior to plaintiff’s incident.

Indemnification

The CHSP defendants assert that Rotavele Elevator is contractually bound to indemnify and defend them in this action and pay their attorneys fees and litigation costs. In support of their position, the defendants proffer the Agreement between Hyatt Place Hotel and Rotavele Elevator Inc. Pertinent provisions of the Agreement’s Contract Rider state as follows:

5. At all times that Contractor (its employee, agent, member, officer and contractor) is to perform any work in the hotel or in

the Owner's premises, Contractor shall procure and maintain insurance coverage, at its sole cost and expense.

6. Contractor shall indemnify, defend and hold Owner (its employees, officers, members, principals, directors, and the hotel manager/operator) (hereinafter the "Indemnified Party") harmless from and against claims, loss, cost, expense, damage and liability, including reasonable attorneys fees, arising out of or resulting from Contractor's activities on or about the Premises, except to the extent such claim, loss, cost, expense, damage or liability is caused by negligence, willful misconduct or fraud on the part of Indemnified party. This provision shall survive the termination of this Agreement.

In opposition, defendant Rotavele Elevator asserts that the defendants' motion for summary judgment is premature and should be denied because there are issues of fact relative to contractual and common-law indemnity. Rotavele maintains that defendants CHSP is not entitled to summary judgment because there is no evidence that any of the defendants were negligent. Specifically, Rotavele contends that the contractual agreement is triggered when it is determined that the injury arose out of its own negligence or omission and here, there is no such finding nor have the CHSP defendants demonstrated that they are free of negligence.

By way of reply, defendants CHSP reiterate that Rotavele is obligated to indemnify CHSP for injuries "arising out of or resulting from Contractor's activities on or about Premises." Although the defendants assert that they have a prima facie entitlement to summary judgment, they rely upon *Ianotta v Tishman Speyer Properties, Inc.* wherein the First Department awarded *conditional* summary judgment for contractual indemnification to the owner "in the absence of a showing of actual negligence on the part of the owner" (*Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297 [1st Dept 2007]).

Defendants CHSP contend that the contract does not require indemnification for injuries that they may have caused but for injuries caused as a result of Rotavele's activities on or about the premises. Significantly, the contract states that CHSP is indemnified "*except to the extent such claim, loss, cost, expense, damage or liability is caused by negligence, willful misconduct or fraud on the part of Indemnified party.*"

After careful review and consideration of the evidence, the court finds that triable issues of fact exist as to whether the elevator went into a free-fall, what caused the elevator to free-fall; and whether it resulted from the movants' negligence or that of defendant Rotavele Elevator. Mr. Guerrero (building engineer) testified that the elevator problems may not have been "maintenance issues" and conceded that he would repeatedly reset the elevator when a problem arose instead of notifying Rotavele Elevators. The History Report contains no reference to work performed on the 4/29/13 incident date; work performed two weeks before the incident date is redacted. Mechanics James Taylor and John Mallia testified that a "free-fall" is not possible and the computer error log is not provided.

Based on the foregoing, defendants CHSP's motion for summary judgment and indemnification is **DENIED**.

Plaintiff Berra's Cross-Motion

Plaintiff Berra cross-moves for partial summary judgment on the issue of liability in his favor and against all defendants; and to strike the defendants' answers. In the alternative, plaintiff seeks that the issue of notice be resolved in his favor or a negative inference be given to the jury because of the defendants' destruction of and/or failure to preserve critical evidence. Specifically, the plaintiff asserts that defendant Hyatt failed to retain surveillance footage from the date of the incident.

Defendants CHSP and Rotavele Elevator separately oppose the plaintiff's cross-motion.

Res Ipsa Loquitor

In support of his cross-motion for summary judgment, plaintiff Berra submits that he played no role in causing the elevator incident and is entitled to summary judgment under the doctrine of *res ipsa loquitor*. "*Res ipsa* permits a jury to draw the inference of negligence from the circumstance of an occurrence when the plaintiff can establish that: (1) the event is of a kind that ordinarily does not occur in the absence of someone's negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it was not due to any voluntary action or contribution on the part of the plaintiff" (*Ianotta v Tishman Speyer Props., Inc.*, 46 A3d 297 [1st Dept 2007] citing *Dermatossian v New York City Tr. Autho.*, 67 NY2d 219, 226 [1986]).

Plaintiff proffers the deposition testimony transcripts of James Burns, John Parker, Raymond Negrón, John Mallia, James Taylor and Michael Guerrero, work tickets, the incident reports of plaintiff and Mr. Guerrero, the hotel's handwritten "Engineering Logbook" and the expert affidavit of Patrick A. Carrajat.

The hotel's "Engineering Logbook" and work tickets describe a myriad of elevator problems. The quality of the proffered xerox copy of the 4/29/13 work ticket written on the date of plaintiff's incident, is poor and its handwritten contents are indecipherable. The court, however, can determine that the copy references elevator #2, a different elevator, which means that no work ticket relative to the date of the accident is proffered.

Patrick Carrajat, plaintiff's expert, attests that he reviewed documents, depositions and examined the elevator on 8/15/17. Based on his review, he determined that the elevator experienced approximately 14 operational failures relative to interlock issues, including problems with the rope gripper and hoistway doors. Mr. Carrajat opined that "it is axiomatic that a properly maintained elevator that is less than two years old will not malfunction repeatedly." He submits that § 27-1006 of the NYC Administrative Code requires the property owner or elevator company to report personal injury accidents that exceed \$100.00 to the commissioner, triggering an investigation of the site.

§[C26-1804.2] 27-1006 Accidents - The owner or person in charge of the equipment or devices listed in article one of this subchapter shall promptly notify the commissioner of every accident involving injury to any person requiring the services of a physician or damage to property or to apparatus exceeding one hundred dollars on, about, or in connection with such equipment, and shall afford the commissioner every facility for investigating such accident or damage. The commissioner shall make an investigation immediately thereafter, and shall prepare a full and complete report of such investigation. Such report shall give in detail all material facts and information available and the cause or causes as far as they can be determined. Such report shall be open to public inspection at all reasonable hours. When an accident involves the failure or destruction of any part of the construction or operating mechanism of such equipment, no such equipment shall be used until it has been made safe, and re-inspected by the commissioner; and the commissioner may order the discontinuance of such equipment until a new use permit has been issued by him or her for its use. No part shall be removed from the premises of the damaged construction or operating mechanism until permission to do so has been granted by the commissioner.

Mr. Carrajat opines that the defendants failed to report the plaintiff's incident because no investigative report is available. Mr. Carrajat concludes, with a reasonable degree of mechanical certainty, that the proximate cause of plaintiff's incident was the failure of Rotavele Elevator or CHSP to perform adequate maintenance.

In opposition, defendant Rotavele Elevator asserts that the first element of *res ipsa loquitor* is inapplicable because the incident could have occurred absent Rotavele's negligence. In support of its position, Rotavele proffers the competing affidavit of Patrick McPartland, the owner of PM Engineering, PLLC, a professional consulting firm that specializes in elevators and escalators. Mr. McPartland opines to a reasonable degree of engineering certainty that the elevator's free-fall, as described by plaintiff, is mechanically impossible. Defendants CHSP's mechanics also testified that a free-fall is impossible. Relying on their respective opinions, Rotavele contends that the cause of the elevator's malfunction has not been established. Rotavele notes that Michael Guerrero, the hotel's building engineer, asserted that the problems were the result of wear, tear, dust and debris, not maintenance issues.

Defendant Rotavele Elevator's counsel refutes the applicability of the Building Code cited by Mr. Carrajat, plaintiff's expert witness. Counsel submits that to the extent that the 1996 Building Code was superseded in 2003 and 2008 and the elevators were built in 2012, the 2008 Code is applicable. Notably, counsel fails to provide a copy of the 2008 updated section in the NYC Administrative Code.

The court's own research yielded Chapter 7 of Title 28 - Section 3012.1, effective 7/1/08, of the New York City Administrative Code entitled, "Elevators and Conveying Systems." Its language is nearly identical to Section 27-1006,³ the section referenced by plaintiff's expert, with one significant difference: section 3012.1 requires only the owner (versus the owner *and* person in charge of equipment) to notify the commissioner of accidents involving injuries to a person or property damage exceeding one thousand dollars (versus one *hundred* dollars).

³ Although NYC Admin Code §27-1006 has no indication that it has been repealed, NYC Admin Code §3012.1 describes the section as "Article 701 Enactment and Update of the New York City Building Code."

§3012.1. Accidents. The owner of any device regulated by this chapter shall promptly notify the commissioner of every accident involving injury to any person requires the services of a physician or damage to property or to apparatus exceeding one thousand dollars on, about, or in connection with such equipment, before commencing any repairs and shall afford the commissioner every facility for investigating such accident or damage. The commissioner shall make an investigation immediately thereafter, and shall prepare a full and complete report of such investigation. Such report shall give in detail all material facts and information available and the cause or causes as far as they can be determined. Such report shall be a public record. When an accident involves the failure or destruction of any part of the construction or operating mechanism of such equipment, no such equipment shall be used until it has been made safe, and re-inspected by the commissioner; and the commissioner may order the discontinuance of such equipment until a new service equipment certificate has been issued by him or her for its use. No part shall be removed from the premises of the damaged construction or operating mechanism until permission to do so has been granted by the commissioner.

Defendant Rotavele asserts that the plaintiff incorrectly references § 27-1006 of the NYC Administrative Code because reporting is required only when the person undergoes medical treatment at the site and the elevator damage exceeds \$1000.00, neither of which is applicable here. Defendant Rotavele correctly maintains that only the owner (defendants CHSP) was required to report any elevator incident requiring the services of a physician. The Code does not specify that medical services must be rendered at the site, however, and the amount of elevator damage herein is unknown.

Defendants CHSP also oppose plaintiff's cross-motion and, like defendant Rotavele, maintain that the second element of *res ipsa loquitur* is inapplicable to them because CHSP was not in exclusive control of the elevator. They proffer the Basic Service Agreement, color photographs of the inspection tag and emergency brake housing for the subject elevator, the Elevator Inspection Certificate and copies of illegible handwritten service tickets.

The CHSP defendants contend that plaintiff Berra produces no evidence that they were involved in the elevator's malfunction or had notice of a dangerous condition that resulted in the alleged free-fall. The defendants posit that Rotavele agreed, pursuant to contract, to maintain and repair the elevators at the subject premises. Defendants CHSP refer to the above-referenced deposition testimony of John Mallia to establish Rotavele's exclusive control over the subject elevator.

The gaps in the defendants' documentary evidence are significant. The plaintiff's motion for summary judgment is **GRANTED** under the doctrine of *res ipsa loquitur* as to liability. A jury, however, must determine the proximate cause of plaintiff's injuries; find what caused the elevator to free-fall; determine who possessed control of the elevator (*see Morejon v Rais Const. Co.*, 7 NY3d 203 [2006]); and apportion liability based on which defendants' negligence caused or contributed to the plaintiff's incident.

Preclusion

The plaintiff cross-moves to strike the defendants' answers on spoliation grounds. The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of the court's discretion. Striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith which must be affirmatively established by the moving party, whereupon the burden shifts to the non-moving party to establish a reasonable excuse, with appropriate findings to be made by the court (*Palmenta v Columbia University*, 266 AD2d 199 [1st Dept 1999]; *Pimental v City of New York*, 246 AD2d 467 [1st Dept 1998]).

In seeking relief on spoliation grounds, the movant must show that (1) the defendants had an obligation to preserve the evidence at the time it was destroyed; (2) the evidence was destroyed with a "culpable state of mind," which may include ordinary negligence; and (3) the destroyed evidence was relevant to the plaintiff's claim or defense (*Duluc v AC&L Food Corp.*, 119 AD3d 450 [1st Dept 2014]).

Here, plaintiff Berra's counsel avers that sanctions are warranted because Hyatt should have anticipated litigation and failed to retain video surveillance footage showing plaintiff's entry into the elevator, where it descended and plaintiff's condition following the incident. Once a party reasonably anticipates litigation, it must suspend its routine retention or destruction policy and employ a "litigation hold" to ensure the preservation of the evidence (*VOOM HD Holdings LLC v Echo Star Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]). In support of his argument, plaintiff posits that an Incident Report prepared by a Jason Crotto on 5/2/13, three days post-accident, described plaintiff's complaints of sustained injuries and placed the defendants on notice of possible litigation. By Order dated 10/16/15, Justice Laura Douglas directed defendants to provide video surveillance footage within 30 days or be precluded. In

the event that such footage was unavailable, the defendants were directed to provide an affidavit detailing whether footage existed, the location of the video, how long the footage was kept and what efforts were made for its preservation. Plaintiff represents that defendants failed to comply with Judge Douglas' 10/16/15 Order but proffers no evidence to show that he took any action to remedy defendants' non-compliance.

Defendants CHSP contend that they are in full compliance with Judge Douglas' Order.⁴ To this end, they submit the 11/12/15 (post-Order) affidavit of James Burns, the Chief Engineer at Hyatt Place, who attests that in April of 2014 he was instructed to search for video footage involving plaintiff Berra. At that time, there were five cameras in the lobby but none in the elevators. Since the video recorder retains information for 180 days, his search, approximately one year post-accident, yielded no relevant or relative results. As to the location of the cameras, Mr. Burns states that he was "unable to determine how the cameras were set on the date of the subject incident."

In opposition, defendant Rotavele maintains that it neither possesses nor maintains the subject hotel's security system.

After reviewing the sequence of events, the court finds that defendants CHSP were timely placed on notice of a possible litigation. The plaintiff's incident occurred on 4/29/13. On the following day, plaintiff Berra wrote in his Daily Activity Report that he was experiencing intense pain and planned to call an ambulance to go to the hospital. On 5/2/13, an incident report was made indicating that plaintiff injured his left knee. On 7/16/13, the plaintiff commenced the underlying action. Significantly, these four events occurred within a 180-day framework, the time frame during which video footage is retained according to Mr. Burns.

A court, when deciding whether to impose sanctions, must determine whether the spoliation of evidence may prejudice a party and whether a sanction is necessary as a matter of "elementary fairness" (*Duluc v AC & L Food Corp.*, 119 AD3d 450 [1st Dept 2014]). Plaintiff Berra bears the burden to establish the requisite showing (*Duluc v AC & L Food Corp.*, 119 AD3d 450, *supra*). Here, the plaintiff proffers no explanation as to how he is prejudiced by the absence of the requested footage or its relevance to his claim. The plaintiff's entry into the

⁴ The defendants incorrectly assert that plaintiff failed to proffer Judge Douglas' 10/16/15 Order.

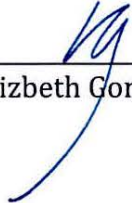
elevator is undisputed; the elevator's drop from the ninth to the eighth floor may be established through expert and other testimony; and plaintiff's condition following the incident may be established through medical evidence. The plaintiff is free to seek a negative inference charge at trial.

Accordingly, plaintiff's cross-motion to strike the defendants' answers on spoliation grounds is **DENIED**.

Service of a copy of this Decision and Order denying defendants CHSP's motion and granting plaintiff's cross-motion in part and denying it in part shall be effected with Notice of Entry within 30 days.

Dated: January 4, 2019

So ordered,



Hon. Lizbeth González, JSC