Lonigro v WFP Tower B Co. L.P.
2020 NY Slip Op 33833(U)
November 19, 2020
Supreme Court, New York County
Docket Number: 152232/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** ***Justice*** **PART** **IAS MOTION 12**

---X

FRANK LONIGRO and GIROLAMA LONIGRO,

Plaintiffs,

- v -

WFP TOWER B CO. L.P., BROOKFIELD ASSET MANAGEMENT, LLC, HUGH L. CAREY BATTERY PARK CITY AUTHORITY, BATTERY PARK CITY AUTHORITY, THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

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INDEX NO. 152232/2015

MOTION DATE

MOTION SEQ. NO. 006 007 008 009 010

DECISION + ORDER ON MOTION

WFP TOWER B CO. L.P., BROOKFIELD ASSET MANAGEMENT, LLC,

Third-party Plaintiffs,

-against-

STRUCTURE TONE, INC.,

Third-party Defendant.

---X

Third-Party Index No. 595096/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 190-236, 239-241, 243-256

were read on this motion to dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 257-269, 273-276, 289, 290, 336

were read on this motion to quash subpoena.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 277-287, 337, 343-351

were read on this motion to sever action.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 297-333, 338, 340-

342
were read on this motion for summary judgment .

The following e-filed documents, listed by NYSCEF document number (Motion 010) 352-375
were read on this motion to quash subpoena .

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Frank LoNigro on April 4, 2014 when, while in the premises known as 225 Liberty Street in Manhattan, also known as 2 World Financial Building (the premises), the elevator he had entered malfunctioned and rapidly descended several floors before coming to an abrupt stop.

Defendants/third-party plaintiffs WFP Tower B Co. L.P. (WFP) and Brookfield Asset Management (Brookfield), as well as defendants Hugh L. Carey Battery Park City Authority, Battery Park City Authority (collectively, BPC defendants) and Thyssenkrupp Elevator Corporation (TEC) (collectively, defendants) move pursuant to CPLR 3212 for summary dismissal of the complaint as against them (mot. seq. 006). Plaintiffs oppose and, by notice of cross motion, move for an order precluding defendants from relying on the affidavit of Yong Kim, MD, and an order finding that defendants had spoliated evidence and that, therefore, plaintiffs are entitled to an adverse inference. Defendants oppose the cross motion.

Once nonparty, now third-party, defendant, Structure Tone Inc. (Structure) moves pursuant to CPLR 2304 and 3101(a)(4) for an order quashing a nonparty subpoena issued by defendants on December 24, 2019, and for a protective order precluding defendants from further efforts to enforce it (mot. seq. 007). Defendants oppose.

Plaintiffs move pursuant to CPLR 603 for an order severing the third-party action (mot.seq. 008). Defendants oppose.

In motion sequence 009, Structure moves pursuant to CPLR 1008 and CPLR 3212 for orders: (1) dismissing the complaint as against WFP and Brookfield, (2) granting summary

judgment in favor of WFP against TEC on WFP's cross claims against TEC; (3) dismissing the third-party complaint as against it, and/or, pursuant to CPLR 1010, severing the third-party action, while permitting Structure to participate in the main action and; (4) disqualifying defendants' counsel due to conflicts of interest. Defendants oppose and plaintiffs oppose dismissal of the complaint.

In motion sequence 0010, plaintiffs move pursuant to CPLR 3103 for a protective order seeking to "vacate" TEC's deposition subpoena of nonparty witness Kim. Defendants oppose.

The motions are consolidated for decision.

I. BACKGROUND AND PROCEDURAL HISTORY

On April 23, 2012, WFP and TEC entered into an elevator servicing agreement, which provides, *inter alia*, that

> 2.1 The term "Services" shall consist of the regular maintenance of the System . . . as well as repairs and replacements required to maintain the System in proper operating condition.
>
> * * *
>
> 5.1 [TEC] shall not be responsible for the maintenance, repair or replacement of the following items: car enclosures (including but not limited to removable panels, door panels, car gates, plenum chambers, hung ceilings, lighting, light diffusers, light tubes and bulbs, handrails, mirrors and floor coverings), hoistway gates, hoistway inserts, main line disconnect switches, hoistway doors and frames, sills, buried piping . . . computer and microcomputer devices such as terminal keyboards and CRTs that are not exclusively dedicated to the elevator system and not installed by [TEC] . . .
>
> * * *
>
> 6.1 Owner shall maintain the existing environment in all motor rooms, and shall rectify any condition of excess humidity, excessive temperature or any other condition affecting the performance of the System or safety of persons.
>
> * * *

> 9.1 Owner shall not allow the System to be serviced by others from and after the date hereof throughout the term of this Agreement. Contractor shall be solely responsible for the maintenance of the System and the performance of its obligations hereunder.

(NYSCEF 195).

On March 4, 2015, plaintiffs filed their complaint, alleging two causes of action, one for negligence as against defendants for failing to maintain, inspect and/or repair the elevator, with an allegation that they intend to rely on *res ipsa loquitor*, and the other for loss of consortium. (NYSCEF 191).

In their bill of particulars, plaintiffs allege, among other things, an "[a]ggravation and exacerbation of a pre-existing condition of lumbar radiculopathy" and bulging L4-L5 discs, and that Frank is totally disabled and unable to work (NYSCEF 196).

A. Depositions

1. Frank (NYSCEF 197)

Frank had suffered from intermittent back pain for approximately 30 years before the accident. His back pain gradually increased in severity from 2000 through 2008, and he began treatment with a pain management specialist in 2008, and in 2009, with Yong Kim, MD, who diagnosed Frank with disc herniations and recommended that he undergo a laminectomy, or decompression, to relieve pressure on the spinal cord to help reduce pain. The laminectomy was performed in 2010. After the surgery, Frank's pain level became "mild" (*id.* at 47), and remained tolerable until after the accident.

On the day of the accident, Frank was employed by Structure as a construction supervisor. He ran the project's day to day, multi-floor activities from his 16th floor office.

That day, to attend a meeting on the 10th floor, Frank walked to the elevator bank and waited for an elevator to arrive. The elevator door opened normally and the elevator car was

even with the floor. Frank stepped into the empty car and stood in the middle of it. The doors closed normally and then the elevator "just dropped. Just free-fall" and then "slammed" to a stop in between floors and "vibrated" (*id.* at 70, 71). Frank fell to one knee, unable to stand. He pressed the help button and briefly spoke with a woman over the intercom. Shortly thereafter, the elevator began moving at a normal speed, and opened on the 10th floor. Frank exited and began to feel pain radiating from his back down his legs.

After the accident, Frank's back pain increased in severity, duration, and frequency, returning to the pain levels preceding his 2010 laminectomy, even with pain medication.

<u>2. Deposition of WFP's assistant property manager (NYSCEF 200)</u>

WFP's assistant property manager (assistant PM) for the premises had the responsibilities of reviewing contracts and supervising contractors. The premises contained four banks of elevators plus freight and service elevators, and TEC was the elevator maintenance company for all of the them. The assistant PM confirmed that the service agreement between WFP and TEC covered the premises and was operative at the time of Frank's accident, that TEC was the exclusive maintenance company for the premises, and that WFP performed no maintenance work on the elevators. If an elevator had a problem, TEC would notify the assistant PM of the issue and then take the elevator out of service for repairs. WFP kept no records of elevator repair issues.

At the time of Frank's accident, TEC was modernizing the elevators at the premises, upgrading the mechanical systems and elevator interiors. The subject elevator had been modernized before Frank's accident and the assistant PM was unaware of any issues with the elevator before Frank's accident, nor was he aware that the elevator had rapidly descended. A copy of an elevator issue report includes Frank's "entrapment" in the subject elevator at 8:30 am

(*id.* at 54), along with the information that at 8:28 am on the same day, there was a "malfunction/ entrapment" of another person in the same elevator (*id.* at 62).

After the first entrapment incident, TEC advised the assistant PM that the elevator had been placed out of service. The assistant PM did not know whether the elevator had been taken out of service before Frank's accident or whether it was immediately returned to service before the accident.

The assistant PM spoke with Frank after the accident, and later that day, Frank emailed him to advise that he was going to the doctor. TEC was told to stop work on the elevator and put it out of service until the Department of Buildings (DOB) could perform an inspection.

3. Deposition of a TEC elevator mechanic (NYSCEF 202)

A TEC elevator mechanic testified that his responsibilities included performing annual elevator inspections at the buildings TEC maintained, including the premises in issue, and fixing any violations found during inspections. He inspected the elevator in March 2014 and prepared a report. While the report includes several minor issues with the elevator, none is safety-related. He did not inspect or otherwise work on the elevator after Frank's accident.

According to the mechanic, the speed of an elevator's descent is governed by electronic and mechanical devices, including an electrical and mechanical speed governor, which are primarily located in the machine room, not on the elevator itself. If the governors detect an "overspeed," they slow the elevator or stop it by cutting power to the elevator's drive system or by triggering the deployment of emergency clamps. His March 2014 inspection report reflects no problems with these systems.

A report prepared by TEC's supervisor indicates that immediately before the accident, "the elevator was moving at 165 [feet per minute] . . . when an 1104 fault occurred" (*id.* at 106).

According to the mechanic, an 1104 fault likely means that the elevator "clipped the door lock" which "[is] a safety contact that the elevator doors must be shut, and that it completes the safety circuit in order for the elevator to move. So, if the elevator happens to clip the lock, it breaks the circuit and stops the elevator" (*id.* at 107).

4. Deposition of a second TEC elevator mechanic (NYSCEF 203)

At his deposition, a second mechanic reviewed the elevator's event logs and confirmed that an 1104 door lock error had been recorded on the day of Frank's accident, observing that the elevator's speed was 165 feet per minute at the time of the error, which he described as "not that fast" (*id.* at 36). According to the event log, the elevator stopped because of the door lock error. Although unsure as to whether there was an error code specifically related to a rapid descent, the mechanic allowed that if there is one, it was not listed in the log.

Shortly after Frank's accident, at the assistant PM's request, the second mechanic removed the elevator from service until representatives from the DOB arrived and inspected it, approximately one week later. The second mechanic made no repairs on the elevator, nor did he remove the elevator's central processing unit (CPU).

5. Deposition of TEC's maintenance manager (NYSCEF 205)

On the day of the accident, TEC's maintenance manager was familiar with the workings of the computer on the elevators, although he did not program or otherwise work on them. He testified that an elevator's CPU would "control the speed of the elevator, depending on where it was going," and that there are "a couple of different ways" that an elevator prevents "overspeeding," including electrical shutdowns and mechanical governors (*id.* at 23, 25). He explained that an "overspeed" occurs when an elevator begins moving at a speed above its maximum rated speed, while a "rapid descent" refers to "how fast [an elevator] comes into the

floor. It's supposed to come in with a nice controlled stop. A rapid descent would be an uncontrolled fast stop" (*id.* at 92). Had the CPU detected an overspeed, the manager stated that it would have generated an error in the error log and slowed or stopped the car, and if the car did not slow or stop, the mechanical governor would have "drop[ped] the brake [and] cause[d] the car to stop" (*id.* at 26). The mechanical system is independent of the computer-based system.

Although the manager knew of no instance of a CPU causing an elevator to overspeed or rapidly descend or stop short, he allowed that it could cause a rapid descent, and stated that while there should be an error code for both overspeed events and rapid descent events, he was unsure what they were, and that after the accident, he saw nothing in the error log showing that the elevator had sustained an overspeed or that it had dropped rapidly several floors. Rather, the error log indicated that the elevator door's electronic interlock had been interrupted, which caused its computer to believe that the doors were open, resulting in the computer then stopping the elevator. He nonetheless contended that a door lock error cannot cause an elevator to drop rapidly.

The manager was shown an email he had written to the assistant PM, wherein he stated "[w]e are still working on [the elevator] [and] . . . are replacing the CPU at this time" (*id.* at 82). He did not recall why the CPU was being replaced, who replaced it, or whether it had been replaced.

<u>6. Deposition of a TEC apprentice mechanic/helper (NYSCEF 204)</u>

On the day of the accident, a TEC apprentice mechanic/helper was at the premises. His duties included routine maintenance of the elevators, which entailed keeping the elevators and motor rooms clean.

At the time of the accident, the premises was under construction, with more than half of it

gutted, although the apprentice was unsure exactly where in the premises the construction was being performed. He agreed that dust and debris can interfere with elevator door interlocks and cause an elevator to stop. By the time he arrived at the elevator to investigate the accident, it was empty and running normally and he did not recall performing any maintenance work on it as a result of Frank's accident.

7. Deposition of TEC's modernization adjuster (NYSCEF 206, 207)

The duties of TEC's modernization adjuster entailed renovating and replacing elevators, and specifically setting up and testing new elevators. He and his team performed elevator modernization services at the premises for three years, including modernizing the subject elevator. The adjuster explained that the CPU is located in the elevator machine room, and that it stores information such as the floor landings and acceleration and deceleration rates. The CPU's data is recorded through fault or error logs. Moreover, he stated, a CPU is not a piece of machinery that you can test for maintenance purposes, but a piece of equipment that is investigated only "[i]f you start to have a problem" (*id.* at 33). However, he maintained, a CPU error would not cause a faulty door issue and a door lock fault is not indicative of a faulty CPU. He was unable to recall replacing the subject elevator's CPU after the accident and did not know who replaced it or why it was replaced.

A replacement request form, dated several months after the accident, reflects that replacements for a CPU and a computer board, or CNA, were requested after Frank's accident. According to the adjuster, the form does not indicate which elevator needed the replacement parts or the reason why the parts were requested. And, while a CNA can control many things, it does not control speed.

B. Kim's affidavit and affirmation

On or about March 29, 2016, defendants served plaintiffs with a notice for discovery and inspection which sought, among other things, "[a]uthorizations pursuant to *Arons v Jutkowitz*, 9 NY3d 393 (2007) permitting defendant to speak with Dr. Yong Kim regarding Frank's treatment." (NYSCEF 227). Kim was one of Frank's treating physicians before and after the accident.

On April 21, 2016, Frank executed a HIPAA authorization permitting the release of his health information by Kim which included the following information:

> THIS IS NOT A SUBPOENA AND YOU ARE NOT COMPELLED OR OBLIGATED TO SPEAK WITH THE ATTORNEYS REPRESENTING ANY PARTY IN THIS LITIGATION, NOR ARE YOU COMPELLED TO PROVIDE ANY MEDICAL OPINIONS ABOUT THE PATIENT.
>
> THE PURPOSE OF THE INTERVIEW IS TO INVOLVE YOU IN THIS PENDING LITIGATION IN ORDER TO ASSIST THE DEFENDANTS IN THE DEFENSE OF A LAWSUIT BROUGHT BY FRANK AND TO REDUCE THE PATIENT'S RECOVERY OF DAMAGES TO THE GREATEST EXTENT POSSIBLE AND, PREFERABLY, TO DENY THE PATIENT ANY COMPENSATION WHATSOEVER.
>
> THE INTERVIEW IS NOT AT THE REQUEST OF THE INJURED VICTIM.

(NYSCEF 199).

On June 7, 2017, Kim executed and notarized an affidavit which he signed at defense counsel's request. Kim stated therein that he was and had been Frank's physician since March 2010, and that Frank had pre-existing lower back pain, radiculopathy, and pre-existing damage to his L4-L5 discs. Kim detailed the treatments he had provided to Frank between 2010 and 2014 and described Frank's symptoms as follows:

> [Frank's] symptoms have been prevalent for more than 20 years

> and pre-date his elevator incident of April 4, 2014. He continued to be symptomatic after his surgical procedure of November 3, 2010, with continuing complaints of lower back pain and left leg pain. Although he subjectively complained that his accident of April 4, 2014 aggravated his back pain and left sided leg pain, the MRI films indicate a progression of degenerative disc disease . . . . This condition was the source of his pain prior to his incident of April 4, 2014 and continues to be the source of his condition today.

(*Id.* at 9). Kim then opined that:

> [Frank's] current condition and pain is the result of chronic and worsening degenerative disc disease that pre-dates his accident of April 4, 2014. . . . It is because of the pre-existing degenerative disc condition that he is unable to work and is totally disabled.

(*Id.* at 10).

Discovery progressed and on February 1, 2019, plaintiffs filed the note of issue. On April 1, 2019, defendants filed their summary judgment motion, relying, in part on Kim's opinion as set forth in his June 2017 affidavit, that Frank's injuries predated, and were not caused by, the accident.

In opposition to defendants' motion, plaintiffs submitted a second affidavit from Kim, dated May 31, 2019, in which he states that he "does not endorse" his prior affidavit, and that after the accident, Frank's complaints of pain increased. (NYSCEF 248). Specifically, Kim stated:

> [After the accident] I continued to treat [Frank]. There was a qualitative difference in [Frank's] report of symptoms. He was now stating that he had 'severe low back pain radiating to his lower extremities.'

(*Id.* at 6). Kim also observed that in 2016 he had informed the Workers Compensation Board that the accident was the cause of Frank's disability, and opined to the Board that:

> [Frank] had preexisting left-sided lumbar radiculopathy that predated the accident of April 4, 2014. However, this accident in my opinion . . . was a competent medical cause of his injuries

> which are an aggravation and exacerbation of his preexisting low back condition . . . .

(*Id.* at 9).

2. Subpoena of Kim

On June 17, 2020, 16 months after the filing of the note of issue and 12 months after defendants learned of Kim's May 2019 affidavit, defendants issued to Kim a subpoena *ad testificandum*, demanding his appearance for a deposition in July 2020.

C. Structure subpoena and third-party action

By subpoena *duces tecum* dated December 24, 2019, over 10 months after the filing of the note of issue, defendants sought from Structure, then a nonparty: (1) any contracts related to the project at the premises on the date of Frank's accident and (2) all insurance policies maintained by Structure on the accident date.

On January 15, 2020, Structure moved to quash the subpoena due to its untimeliness. Subsequently, on January 30, 2020, WFP and Brookfield filed a third-party summons and complaint against Structure. (NYSCEF 270). On February 27, 2020, Structure filed its third-party answer. (NYSCEF 295).

II. DISCUSSION

"[T]he proponent of a summary judgment motion 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. . . . Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once *prima facie* entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being

established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). Any doubt as to the existence of a triable fact, requires the denial of the motion. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Procedural issues

The motions raise several procedural issues that must first be addressed.

1. *Arons* authorization and Kim's June 2017 affidavit (cross motion to seq. no. 006)

In *Arons*, the Court held, quoting from *Niesig v Team I*, 76 NY2d 363, 372 (1990), that a defense counsel may informally interview a nonparty physician fact witness who participated in the treatment of a plaintiff who has placed his medical condition in controversy, as

> [a]ttorneys have always sought to talk with nonparties who are potential witnesses as part of their trial preparation. Article 31 does not 'close[ ] off' these 'avenues of informal discovery,' and relegate litigants to the costlier and more cumbersome formal discovery devices.

(9 NY3d at 409).

Thus, the Court of Appeals observed, there is "no reason why a nonparty treating physician" should not be available for an "off-the-record interview." (*Id.* at 409; *see also Rucinski v More Restoration Co. Inc.*, 147 AD3d 485, 486 [1st Dept 2017] [informal interview of adverse party's treating physician permitted provided that valid authorization provided, and that attorney makes clear that any discussion with counsel is "entirely voluntary and limited in scope to the particular medical condition at issue"] [internal quotation marks and citation omitted]).

Plaintiffs cross move for an order precluding defendants' use of Kim's June 2017 affidavit, arguing that it was improperly obtained by defendants and in violation of the scope of the authorization.

According to defendants, as the authorization does not explicitly prohibit them from obtaining a written affidavit from Kim, the June 2017 affidavit was properly obtained. (NYSCEF 239). They rely *Arons*, wherein the Court stated that a defense counsel might obtain "copies of all written statements and notations obtained from the physician during the private interviews." (*Arons*, 9 NY3d at 416).

In so indicating, the Court addressed whether counsel must turn over to the plaintiff documents obtained during an informal interview of a nonparty treating physician. It did not address whether counsel may seek or obtain a notarized affidavit from such a physician. (*See eg, Rucinski*, 147 AD3d at 486-487 [request for deposition of treating physician outside scope of *Arons* authorization]).

Thus, defendants' interpretation unduly expands the holding in *Arons* which allows only for "informal, off the record" interviews of treating physicians and other medical providers. (*See e.g. Caminiti v Extel W. 57th St. LLC*, 139 AD3d 482, 483 [1st Dept 2016] [allowing defense counsel to "interview" plaintiff's healthcare provider via use of "speaking authorizations"]; *Jones v LeFrance Leasing Ltd. Partnership,* 127 AD3d 819, 820 [2d Dept 2015] [requiring plaintiff to provide "speaking authorization" limited to medical issues in controversy]; *McCarter v Woods*, 106 AD3d 1540, 1541-1542 [4th Dept 2013] [noting that *Arons* "is narrow in scope and provides a framework as to how parties must procedurally comply with [HIPAA] when attempting to speak with an adverse party's treating physician"]; *Shefer v Tepper,* 73 AD3d 447, 447 [1st Dept 2010] [*Arons* allows for "informal, ex parte interviews" of treating physician before or after filing note of issue]; *Porcelli v Northern Westchester Hosp. Center*, 65 AD3d 176 [2d Dept 2009] [discussing general scope and requirements set forth in *Arons*).

Accordingly, defendants' procurement of Kim's June 2017 affidavit pursuant to an *Arons*

authorization went beyond the scope of the authorization, was improperly obtained, and will not be considered. Thus, defendants are precluded from using it in support of their instant motion.

2. Structure's motion to disqualify defense counsel (mot. seq. no. 009)

Structure moves, pursuant to rule 1.7 of New York's Rules of Professional Conduct, for an order disqualifying defense counsel on the ground that they have a conflict of interest, as they represent two purportedly adverse parties, TEC and WFP.

At the outset of this action, counsel represented TEC only. WFP, in its answer to the complaint, alleged five cross claims against TEC, sounding in apportionment, contribution, common-law indemnification, contractual indemnification, and breach of contract for the failure to procure insurance. In TEC's answer to the complaint, it advanced two cross claims against WFP, sounding in apportionment and contribution. By stipulation dated June 27, 2017, counsel was substituted as the attorney for WFP and the BPC defendants, and has represented both since that time. (NYSCEF 303).

Structure argues that, in seeking summary judgment for WFP and TEC, the firm failed to argue as to WFP's lack of negligence, and thus has no interest in representing WFP.

A review of defendants' motion papers demonstrates that the firm addresses the negligence cause of action with respect to both defendants.

Structure also argues that the cross claims in the main action place WFP and TEC in conflict with one another. Apart from the cross claim for contractual indemnification, as Structure does not address the other cross claims or explain how they are problematic, it fails to establish a conflict of interest as to the other cross claims.

While a conflict could exist if TEC has not agreed, without reservation, to indemnify WFP in the event WFP is found liable in this action, no party addresses whether such a

reservation exists.

In any event, as discussed, *infra*, WFP establishes that it may not be held liable for Frank's injuries, and therefore, the possibility of a conflict no longer exists.

Structure thus fails to demonstrate that counsel must or should be disqualified from representing any party in this litigation at this time.

3. Structure's motion to quash a subpoena (mot. seq. no. 007)

Structure moves for an order quashing a nonparty subpoena issued by defendants on December 24, 2019, and for a protective order precluding defendants from further efforts to enforce it. The note of issue was filed on February 1, 2019, 10 months before the subpoena was issued.

Structure observes that defendants were aware of Structure's existence and its relevance to this action by March 29, 2016, at the latest, when Frank was first deposed, testifying that he was employed by Structure at the time of the accident, and was present at the premises for the purposes of his work for Structure. Structure thus argues that defendants could have subpoenaed it at any time between that date and the date of the filing of the note of issue, but failed to do so.

In opposition, defendants argue only that a nonparty to an action has no standing to move to quash a subpoena issued against it.

"The Uniform Rules for Trial Courts provide two distinct methods for obtaining disclosure after a note of issue is filed." (*Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]). Pursuant to 22 NYCRR § 202.21(e), a party may move to vacate a note of issue on the ground that the case is "not ready for trial . . . [w]ithin 20 days after service of a note of issue and certificate of readiness." (*Id.* [internal quotation marks and citation omitted]). And subdivision (d) provides that:

> Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

While the subpoena issued 10 months after the note of issue was filed, defendants did not first seek to vacate the note of issue or move this court for permission to seek post-note discovery. Having failed to comply with the applicable rules, the subpoena is unenforceable, especially absent an explanation for their delay in issuing the subpoena or an articulation of any unusual or unanticipated circumstances that developed after the filing of the note of issue.

4. Plaintiffs' motion to quash subpoena of Kim (mot. seq. no. 010)

Plaintiffs move to quash defendants' subpoena of Kim, issued on June 17, 2020, whereby they seek to depose him to explore the discrepancies between his two affidavits.

It is undisputed that defendants first learned of the conflict between the two affidavits on June 6, 2019, when plaintiffs filed the second affidavit and moved to quash the first one, and did not issue a subpoena for another year. They also failed to seek, post-note of issue, to depose Kim, as required by 22 NYCRR § 202.21(d).

Given defendants' dilatory conduct and failure to seek post-note of issue discovery, the subpoena may not be enforced.

5. Plaintiffs' spoliation claim (cross mot. no. 006)

Plaintiffs argue that defendants, and specifically TEC, failed to preserve evidence relating to Frank's accident when they discarded the elevator's CPU, and thus claim entitlement to an adverse inference "that the [CPU] contained information which would have been helpful to [Frank] in prosecuting [his] case." (NYSCEF 230).

Although TEC concedes that it had control over the CPU and that it removed the CPU,

replaced it, and did not preserve it, it disputes that it had an obligation to preserve the CPU and whether the CPU is related to Frank's accident.

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense . . . . Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed. . . . On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense.

(*Pegasus Aviation I, Inc. v Varig Logistica S.A.,* 26 NY3d 543, 547-548 [2015] [internal quotation marks and citations omitted]). "The burden is on the party requesting sanctions to make the requisite showing." (*Duluc v AC & L Food Corp.*, 119 AD3d 450, 452 [1st Dept 2014]).

Initially, the obligation to preserve evidence arises when a party reasonably anticipates litigation. (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 36 [1st Dept 2012] [internal quotation marks and citation omitted]). Here, while it is undisputed that TEC was notified of the accident and Frank's injury on the day of the accident, plaintiffs cites no authority for the proposition that an entity must automatically preserve any and all tangible things and electronic information on becoming aware of an accident and/or an injury.

Even if TEC's awareness of Frank's accident and injury gave it reason to anticipate litigation, and even if it thereupon undertook the obligation to preserve the CPU, plaintiffs must also demonstrate that the CPU is relevant to the accident. Plaintiffs rely on the testimony of TEC's maintenance manager that in his experience, a CPU could cause an elevator to stop short

in the event that the elevator descends too rapidly.

Even had the CPU caused the elevator's malfunction, plaintiffs do not dispute that they received the CPU's error log and offer no evidence, expert or otherwise, explaining what information might have been obtained from a physical inspection of the CPU that would not be accounted for in the error log. Moreover, plaintiffs do not allege that TEC's failure to preserve the CPU was willful or intentional, such that its relevance would be deemed admitted.

Plaintiffs thus fail to meet their burden of establishing that the missing CPU is relevant to their claim and are therefore not entitled to spoliation sanctions.

B. Substantive motions

1. Structure's partial motion for summary judgment (mot. seq. no. 009)

Structure moves, in part, pursuant to CPLR 1008 and CPLR 3212, for summary judgment dismissing the complaint as against WFP. It additionally seeks to move, on behalf of WFP, for summary judgment on WFP's contractual indemnification cross claim against TEC.

CPLR 1008 provides the following, in pertinent part:

> The third-party defendant may assert against the plaintiff in his or her answer any defenses which the third-party plaintiff as to the plaintiff's claim except an objection or defense that the summons and complaint . . . was not properly served, or that jurisdiction was not obtained over the third-party plaintiff.

Relying on this statute, Structure seeks to step into WFP's shoes to enforce WFP's cross claim against TEC.

While CPLR 1008 permits a third-party defendant to assert against the plaintiff any defenses that the third-party plaintiff has to the plaintiff's claim, Structure attempts, without citation to any authority, to prosecute WFP's cross claim against cross-claim defendant TEC.

2. Defendants' summary judgment motions (mot. seq. nos. 006 and 009)

Defendants move for summary judgment dismissing the complaint as against them, and Structure, in its capacity as a third-party defendant, moves to dismiss the complaint as against WFP. While counsel for defendants include the BPC defendants as participants in their motion, they do not identify the BPC defendants' status in this action, nor do they address any argument as to the BPC defendants or supply any rationale as to why this action should be dismissed as to them.

"To establish a *prima facie* case for negligence, a plaintiff must prove (1) that defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (*Friedman v Anderson*, 23 AD3d 163, 164 [1st Dept 2005]).

a. Causation

Defendants argue that Frank's injuries preexisted the accident and were not exacerbated by it, relying on Kim's opinion as set forth in his first affidavit. As the affidavit is not considered (*supra*, II.A.1), and defendants offer no other evidence to support their argument, they fail to establish, as a matter of law, that Frank's injuries were preexisting and not caused or exacerbated by the accident. In addition, absent admissible medical expert testimony, defendants' reliance on Frank's medical records is insufficient to meet their burden of establishing that Frank suffered from a pre-existing condition.

b. Actual or constructive notice

"The owner of a premises may be held liable for an accident caused by a dangerous condition on the property if the plaintiff can demonstrate that the owner created the condition or had actual or constructive notice of it. (*Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011]). "To be entitled to summary judgment, a property owner is required to establish that

it maintained its premises in a reasonably safe manner and that it did not create a dangerous condition that posed a foreseeable risk of injury to individuals expected to be present on the property." (*Matos v Azure Holdings II, L.P.*, 181 AD3d 406, 406 [1st Dept 2020]). "An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the accident to permit the owner's employees to discover and remedy the problem." (*Pintor*, 90 AD3d at 451).

Defendants and Structure argue that neither WFP nor TEC created or had actual or constructive notice of the elevator's defect, claiming that no defect was visible or existed before the accident such that they had sufficient notice of a hazardous condition.

In opposition, plaintiffs do not claim that defendants created the condition that caused the elevator to function improperly. Rather, they argue that WFP and TEC had actual and constructive notice of a problem with the elevator as TEC was made aware two minutes before Frank's accident that the elevator's doors had failed to open timely for a different passenger.

In attempting to establish actual notice, plaintiffs fail to articulate how WFP was made aware of the event two minutes before Frank's accident, and even if WFP and TEC had such notice, they offer no evidence that the earlier incident, where the elevator door failed to open, was related to the elevator's speed or abrupt stop that led to Frank's accident.

In considering plaintiffs' claim of constructive notice, it is undisputed that there is no evidence of a defect related to the elevator before the day of Frank's accident. Moreover, the incident that occurred two minutes before Frank's accident provided insufficient time for defendants to discover and remedy it, even assuming that the earlier incident had put them on notice of the potential for the elevator to descend rapidly or stop suddenly.

To the extent that plaintiffs argue that the elevator's malfunction occurred due to

defendants' failure to clean the elevator's door lock sensors properly during the ongoing construction at the premises, there is no evidence establishing that dust or other construction debris was present on the sensors, and even if so, there is no indication as to how long it was there before the accident for determining whether there was sufficient time to remedy it. (*See e.g. Gibbs v Port Auth. of N.Y.,* 17 AD3d 252, 255 [1st Dept 2005] [no proof in record as to how long the water was on floor; no evidence from which jury could infer that condition existed for sufficient period to allow defendant or its employees to discover and remedy it]).

Defendants thus establish that they lacked actual or constructive notice of a hazardous condition related to the elevator, and plaintiffs fail to raise a triable issue in opposition.

c. *Res ipsa loquitor*

Absent actual or constructive notice, negligence may be inferred in certain circumstances (*Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015]), such as when an event

> (1) was of a kind that ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant and (3) was not due to any voluntary action or contribution on the part of the plaintiff.

(*Singh v Utd. Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 276-277 [1st Dept 2010] [internal quotations and citation omitted]). And, it has long been recognized in the First Department that elevator malfunctions do not occur in the absence of negligence. (*Ezzard,* 129 AD3d at 163). "A defendant is free to rebut the inference by presenting different facts or otherwise arguing that the jury should not apply the inference in a particular case." (*Id.* at 162).

Defendants' argument that negligence may not be inferred here absent a showing by plaintiffs of actual or constructive notice is incorrect (*id.*), and it is undisputed that Frank did not

contribute in any way to the incident. His unrebutted testimony establishes that the elevator suddenly and rapidly dropped several stories before coming to an abrupt stop. An elevator incident that occurs in this manner does not happen in the absence of negligence. (*See e.g. Ruiz-Hernandez v TPE NWI Gen.*, 106 AD3d 627, 628 [1st Dept 2013] ["an elevator would not suddenly drop into a free fall in the absence of negligence"]).

Even if defendants' expert's opinion as to how the accident may have occurred establishes, as a matter of law, that no negligence caused the accident, Frank's testimony raises a triable issue as to whether an inference of negligence arises here. (*See Miller v Schindler El. Corp.,* 308 AD2d 312, 313 [1st Dept 2003] [plaintiff's testimony that a malfunction occurred sufficient to create triable issue of fact; plaintiff entitled to invoke *res ipsa loquitor* based on her testimony that elevator began falling when she pushed button for basement, which testimony must be treated as true on defendant's motion for summary judgment]).

Moreover, in terms of an individual defendant's liability in a case arising from an elevator accident, an inference of negligence may be relied on where more than one defendant exercised exclusive control. (*Myron v Millar El. Indus.*, 182 AD2d 558, 559 [1st Dept 1992]; *see also Ruiz-Hernandez,* 106 AD3d at 628). The "true nature of [the owner's] relationship with [the elevator maintenance company] in terms of the relative control each exercised over the elevators prior to and at the time of the accident" must be examined. (*Hodges v Royal Realty Corp.*, 42 AD3d 350, 352 [1st Dept 2007]).

Here, as it is undisputed that TEC was responsible for maintaining the elevator pursuant to its agreement with WFP, it had exclusive control over the elevator and thus may be held liable. As the agreement between WFP and TEC provides that WFP cedes all maintenance authority for the elevators to TEC, WFP may not be held liable. (*Sanchez v New Scandic Wall*

L.P., 145 AD3d 643, 644 [1st Dept 2016] [*res ipsa loquitur* inapplicable as defendant ceded all maintenance and repair to elevator maintenance company]; *Fasano v Euclid Hall Assoc., L.P.*, 136 AD3d 478, 479 [1st Dept 2016] [*res ipsa loquitor* does not apply to owner which ceded all responsibility for daily operation, repair, and maintenance of elevator to elevator maintenance company). Nor did WFP retain maintenance authority pursuant to other sections of the agreement sufficient to render it liable, and plaintiffs offer no authority to support their argument that WFP may be held liable based on its retention of inspection rights.

3. Structure's motion for summary dismissal of third-party complaint (mot. seq. no. 009)

While Brookfield was dismissed from this action with prejudice on July 6, 2017 (NYSCEF 97), the third-party action was not filed until January 30, 2020. Thus, Brookfield, who by then was no longer a defendant, is not a proper third-party plaintiff. (*See* CPLR 1007 ["a defendant may proceed against a person who is not a party"]).

WFP alleges four causes of action against Structure: (1) contractual indemnification; (2) common law indemnification; (3) contribution; and (4) breach of contract for the failure to procure insurance.

a. Contractual indemnification

One seeking contractual indemnification need only establish its freedom from any negligence and is held liable solely by virtue of statutory liability. (*Correia v Prof. Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]).

Here, as the complaint against WFP is dismissed and it has not been held liable by virtue of statutory liability, WFP's claim for contractual indemnification is academic.

b. Common-law indemnification/contribution

A claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part." (*McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011]). WFP has not been found vicariously liable for Frank's injuries.

"An essential requirement for contribution is that the parties must have contributed to the same injury (*Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2d Dept 2018] [internal quotation marks and citation omitted]). Here, as the case against WFP has been dismissed, it cannot be said that WFP contributed to Frank's injury.

c. Failure to procure insurance

Structure argues that, even assuming that it failed to procure insurance, WFP has no claim against it as WFP is itself insured and TEC has taken over its defense. Therefore, Structure argues, WFP has no damages against Structure except for out-of-pocket expenses, which it has neither alleged nor identified. (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001] [limiting movant's damages for failure to procure insurance to out-of-pocket expenses where that movant was otherwise insured for subject loss]).

In opposition, WFP does not argue or provide any evidence supporting the claim that it has sustained out-of-pocket expenses. Rather, it argues, without merit, that *Inchaustegui* applies only to landlord/tenant actions and, therefore, should not limit its relief against Structure (*Kwoksze Wong v New York Times Co.,* 297 AD2d 544, 548 [1st Dept 2002] [attempt to limit *Inchaustegui* to landlord/tenant cases unavailing]).

To the extent that WFP argues that this claim should not be dismissed because questions remain as to whether Structure's insurer should share defense costs with WFP and/or TEC's

insurer, such a question is properly raised by the insurers themselves in a declaratory judgment and/or subrogation action. (*See e.g. Am. Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 307 AD2d 939, 941 [2d Dept 2003] [insurer stepping into shoes of its insured to recoup reasonable defense costs not barred by *Inchaustequi*]). The insurers are not a party to the instant action, and no request for a declaration of rights is presented here.

Thus, in the absence of evidence supporting damages arising from WFP's breach of contract for the failure to procure insurance claims, Structure is entitled to summary judgment dismissing said claims, Structure is also entitled to dismissal of the third-party complaint in its entirety, and plaintiffs and Structure's motions to sever the third-party action are denied as academic.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants WFP Tower B Co. L.P., Brookfield Asset Management, Hugh L. Carey Battery Park City Authority, Battery Park City Authority and Thyssenkrupp Elevator Corporation motion (mot. seq. 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted with respect to WFP Tower B Co. L.P. only, and the complaint is severed and dismissed as against WFP with costs and disbursements as taxed by the Clerk of the Court, and the motion is otherwise denied; it is further

ORDERED, that plaintiffs' cross motion to preclude the affidavit of Dr. Yong Kim, dated June 7, 2017, is granted, and the cross-motion is otherwise denied; it is further

ORDERED, that third-party defendant Structure Tone, Inc.'s motion (mot. seq. 007) to quash defendants' nonparty subpoena of Structure is granted and the subpoena is quashed; it is further

ORDERED, that plaintiffs' motion (mot. seq. 008) to sever the third-party action is denied as academic; it is further

ORDERED. that the part of Structure's motion (mot. seq. 009) for summary judgment dismissing the complaint as against WFP, and for summary judgment dismissing the third-party complaint in its entirety is granted, and the third-party complaint is severed and dismissed with costs and disbursements as taxed by the Clerk of the Court, and the motion is otherwise denied; it is further;

ORDERED, that plaintiffs' motion (mot. seq. 010) to quash the post-note of issue subpoena of Dr. Yong Kim is granted and the subpoena is quashed; and it is further

ORDERED, that the parties contact the court jointly by email to cpaszko@nycourts.gov to schedule a remote settlement conference with Justice Jaffe.

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11/19/2020
DATE

BARBARA JAFFE, J.S.C.

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