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| <b>Pecoraro v City of New York</b>   |
| 2023 NY Slip Op 30382(U)   |
| February 3, 2023   |
| Supreme Court, New York County   |
| Docket Number: Index No. 160517/2018   |
| Judge: Nicholas W. Moyne   |
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| This opinion is uncorrected and not selected for official publication.   |

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

**PRESENT: HON. NICHOLAS W. MOYNE PART 52**

*Justice*

-----X

FRANK MARIO PECORARO,  
  
Plaintiff,

INDEX NO. 160517/2018

MOTION DATE 11/09/2022

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE CARNEGIE HALL  
CORPORATION, TRANSEL ELEVATOR & ELECTRIC, INC.  
D/B/A TEI GROUP

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

THE CARNEGIE HALL CORPORATION.

Third-Party Plaintiff

-v-

TRANSEL ELEVATOR & ELECTRIC, INC. d/b/a  
TEI GROUP.

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

Defendant/Third-Party Plaintiff The Carnegie Hall Corporation (“Carnegie”) moves for an order compelling third-party defendant Transel Elevator & Electric, Inc. (“TEI”) to provide a response to Carnegie’s post-deposition demand for discovery and inspection dated June 21, 2022; to provide a supplemental response to the notices for discovery and inspection dated November 8, 2021 and November 9, 2021; to produce Raymond Downs for a deposition; and for an order pursuant to CPLR §§ 3124 and 3126 precluding TEI from producing any evidence at the time of trial. TEI opposes the motion, contending that the motion is moot as they have

responded to the outstanding discovery demands. The motion is also supported by the plaintiff, who filed an affirmation in support.

### **Responses to discovery demands**

Carnegie contends that TEI should be compelled to produce discovery and/or be precluded from presenting evidence at trial due to the failure to timely provide sufficient responses to Carnegie's post-EBT discovery demands dated November 8, 2021 (Exh. D), November 9, 2021 (Exh. E), and June 21, 2022 (Exh. O). TEI did not provide responses to the November 2021 discovery demands until March 8, 2022 (Exh. K), despite a so-ordered stipulation requiring responses by December 22, 2021 (Exh. F), and a second so-ordered stipulation requiring responses by February 18, 2022. TEI did not respond to the June 21, 2022 demand until November 3, 2022, which was after the instant motion to compel was served upon them. This despite the fact that, pursuant to a so-ordered stipulation (Exh. N), they were to respond on or before October 11, 2022, and pursuant to this court's October 19, 2022 Order, TEI was required to respond by October 28, 2022. TEI's responses to several of the demands indicates that they are not in possession of the materials sought or that they have not yet identified any responsive materials. However, TEI's responses to the demands lack affidavits adequately setting forth their good faith efforts to comply with discovery with averments, inter alia, that TEI's personnel had conducted a thorough search for requested documents in all areas where said documents and/or information were likely to be found; (ii) no documents were knowingly disposed of by defendants so as to undermine plaintiffs' right to full discovery (*see Trade Expo Inc. v Sterling Bancorp*, 171 AD3d 634, 635 [1st Dept 2019]; *see also Abbadessa v Sprint*, 291 AD2d 363, 364 [2d Dept 2002] [if a particular document is unavailable, a detailed affidavit explaining the unavailability is needed]). Therefore, TEI shall, within thirty (30) days

of service of a copy of this order with notice of entry, either provide materials responsive to each of the demands where TEI indicated that they are not in possession of the materials sought or that they have not yet identified any responsive materials, or shall provide a detailed affidavit setting forth the good faith efforts made to comply with the discovery demands. If TEI fails to comply with this order, they shall be precluded from using these records at trial if they are found prior to trial, except at Carnegie's option (*see Orner v Mount Sinai Hosp.*, 305 AD2d 307, 310 [1st Dept 2003]).

### **Further deposition of TEI**

Carnegie contends that it is entitled to a deposition of TEI safety director Ray Downs, despite already having taken the deposition of a TEI employee, because the prior witness was unable to recall who approved the work on the roof of the building and because Mr. Downs runs all safety meetings on site that would have addressed any hazardous conditions on the roof. Therefore, they contend, Mr. Downs' deposition is necessary as the work being performed on the rooftop, and safety concerns existing thereat, is directly at issue in this case as the Plaintiff claims that this work caused his accident. TEI contends that their prior deponent, Eric Nichols, provided sufficient testimony about TEI safety procedures. To obtain an additional deposition of a party, the party seeking such further deposition should demonstrate that the person to be deposed possess nonduplicative, material and necessary information pertinent to the disputed issues (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007], *affd*, 11 NY3d 843 [2008]). Here, Carnegie has shown that Mr. Downs is likely to be the person with knowledge of why the plaintiff was permitted to work on what has been described as an "obstacle course" (Exh. Q, Nichols Tr at p. 81, ln. 19), and because he would be the person with knowledge of TEI's safety briefings. Since this is central to

Carnegie’s claims and defenses, Carnegie should be allowed to take the deposition of Ray Downs (see *Alexopoulos v Metro. Transp. Auth.*, 37 AD3d 232, 233 [1st Dept 2007]).

**Conclusion**

For the reasons set forth herein, it is hereby

ORDERED that the motion is granted to the extent set forth below and otherwise denied; and it is further

ORDERED that within thirty (30) days of service of a copy of this order with notice of entry, Transel Elevator & Electric, Inc. shall either provide materials responsive to each of the demands where they indicated that they are not in possession of the materials sought or that they have not yet identified any responsive materials, or shall provide a detailed affidavit setting forth the good faith efforts made to comply with the discovery demands; and it is further

ORDERED that If Transel Elevator & Electric, Inc. fails to comply with the time limits set forth above, they shall be precluded from using these records at trial if they are found prior to trial, except at Carnegie’s option; and it is further

ORDERED that within ninety (90) days of service of a copy of this order with notice of entry, Transel Elevator & Electric, Inc. shall produce Ray Downs for an Examination Before Trial.

This constitutes the decision and order of this court.

2/3/2023  
DATE

  
NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE