

**Bortugno v Schindler El. Corp.**

2023 NY Slip Op 30618(U)

March 2, 2023

Supreme Court, New York County

Docket Number: Index No. 150623/2013

Judge: Judy H. Kim

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

**PRESENT: HON. JUDY H. KIM**

**PART 5**

*Justice*

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NICHOLAS BORTUGNO and JOSEPHINE BORTUGNO,  
Plaintiff,

- v -

SCHINDLER ELEVATOR CORPATION and MIDLAND  
ELEVATOR CO INC,  
Defendants.

INDEX NO.	150623/2013
MOTION DATE	01/27/2023, 02/28/2023
MOTION SEQ. NO.	006 & 008
<b>DECISION + ORDER ON MOTION</b>	

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 313, 314

were read on this motion to PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 331, 332, 333

were read on this motion to PRECLUDE.

In advance of the trial in this action, plaintiffs and defendants each submitted motions in limine. In motion sequence 006, plaintiffs move to preclude the testimony of: (i) biomechanical engineer, Robert Cargill, PhD, as to the medical causation of plaintiff's injuries; (ii) elevator expert, Jon B. Halpern, regarding: the "safe operation" of the elevator gate on the date of the incident, whether the installation of a chain-link fence across the north loading dock in the "western annex" garage of the subject premises forced Nicholas Bortugno to walk through the subject elevator to access the passageway behind it, and "medical causation"; and (iii) expert neurologist Diego Herbstein, M.D., as to his neurological examination of plaintiff Nicholas Bortugno.

In motion sequence 008, defendants Schindler Elevator Corporation ("Schindler") and Midland Elevator Co., Inc. ("Midland") move to preclude the admission of all evidence pertaining to any other elevators in the subject building that were not involved in the incident.

These motions are consolidated for disposition. For the reasons set forth below, plaintiffs' motion is granted in part, to the extent set forth below, and defendants' motion is granted in its entirety.

### Plaintiffs' Motion In Limine

The branch of plaintiffs' motion which seeks to preclude the testimony of defendants' biomechanical engineer, Robert Cargill, PhD, is denied. To the extent that plaintiff argues that such testimony will be cumulative, this is an issue properly determined at trial. The Court is not persuaded by plaintiffs' argument that Cargill is not qualified to testify as to whether the alleged impact of the elevator gate caused traumatic brain injury. The fact that Cargill "lack[s] medical training [does] not render him unqualified to render an opinion as an expert that the force of the subject ... [gate] could not have caused the injuries allegedly sustained" (Vargas v Sabri, 115 AD3d 505 [1st Dept 2014] [internal citations omitted]). Rather, his "education, background, experience, and areas of specialty, render[] him able him to testify as to the mechanics of injury" (Id. [internal citations omitted]). To the extent that plaintiffs challenge Cargill's qualifications and the publications on which he will rely, these arguments go to "the weight and not the admissibility of his testimony" (Id. [internal citations omitted]).

As to that branch of plaintiffs' motion to preclude the testimony of Jon B. Halpern, it is granted in part, to the extent that Halpern is precluded from testifying about whether the addition of a chain-link fence across the north loading dock in the "western annex" garage of the subject premises was a cause of the incident. It has already been determined in this action that such fencing was not a proximate cause of any injury alleged by plaintiff here (See Bortungo v New York State Urban Dev. Corp., 2019 NY Slip Op 33316[U], 15 [Sup Ct, NY County 2019] aff'd Bortugno v

New York State Urban Dev. Corp., 191 AD3d 422 [1st Dept 2021]). The remainder of plaintiffs' motion is denied as follows.

The Court denies plaintiffs' motion to preclude Halpern from offering any testimony as to whether the elevator gate was operating safely on the date of the incident. The fact that Halpern's testimony may be contradicted by the testimony of Mr. Bortugno and other witnesses to the incident is not grounds for preclusion. Instead, any discrepancy is an issue of fact to be decided by the jury. Although Halpern's testimony may be based on an inspection of the elevator conducted years after the subject incident, this does not present a bar to his testimony—his opinion is not expected to be based solely on his inspection of the elevator but also records related to the maintenance of the elevator both before and after the incident occurred.

The Court also denies that part of plaintiffs' motion seeking to preclude Halpern from testifying about the "medical causation" of Mr. Bortugno's injuries as there is no indication that Halpern intends to testify about this issue and counsel for the defendants represents that Halpern's testimony "is expected to be limited to discussing the design of the door/gate closing and retracting functions of the #105 freight elevator, how its design conforms to the ANSI A17.1 performance standards which are intended to avoid injury to freight operators and damage to the freight being transported in the freight elevator" (NYSCEF Doc. No. 313 [Sabitini Affirm. in Opp. at p. 9]).

Finally, plaintiffs' motion to preclude the testimony of Dr. Diego Herbstein, as cumulative or duplicative of Dr. Douglas Cohen's testimony, is denied without prejudice, as premature. Whether this testimony is cumulative is an issue to be determined at trial.

#### Defendants' Motion In Limine

Defendants' motion to preclude plaintiffs from introducing any evidence pertaining to elevators that were not involved in the subject incident is granted in its entirety. Such evidence has

little, if any, probative value. As defendants note, each elevator necessarily “has a different history, has been subject to different repairs, and in the case of a specialized freight elevator like at issue here, different equipment installed on it” and testimony or documentary evidence as to these elevators is therefore largely irrelevant to the question of whether the subject elevator was properly maintained or repaired (See e.g., Jones v Lefrance Leasing Ltd. Partnership, 81 AD3d 900, 903 [2d Dept 2011] [“Supreme Court properly denied that branch of their cross motion which was to compel the defendants to provide the repair and maintenance records of all the elevators in LeFrak City for the two years preceding the accident...”]). In any event, any minimal probative value that such evidence may have as to this issue is outweighed by the risk of prejudice in confusing the jury about what repairs were performed on which elevator.

In light of the foregoing, it is

**ORDERED** that plaintiffs’ motion in limine is denied except to the extent that defendants’ witness, Jon B. Halpern, is precluded from testifying about any alleged unsafe conditions created by the addition of a chain-link fence across the north loading dock of the subject premises; and it is further

**ORDERED** that defendants’ motion in limine is granted in its entirety such that plaintiffs are precluded from introducing any evidence pertaining to elevators other than the elevator involved in the subject incident.

3/2/2023

DATE



HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: