

**Pomari v NW 100 Broadway Prop. Owner, LLC**

2023 NY Slip Op 35034(U)

January 13, 2023

Supreme Court, Queens County

Docket Number: Index No. 70022/2021

Judge: Pam Jackman Brown

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This opinion is uncorrected and not selected for official publication.

**NEW YORK STATE SUPREME COURT  
COUNTY OF QUEENS - IAS Part 19**

**Present: HONORABLE PAM JACKMAN BROWN  
Justice**

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**Index No.: 700022/2021**

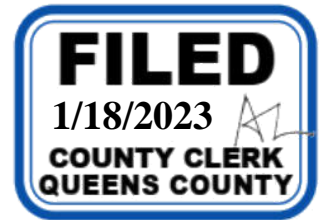
**BRUNA POMARI,**

**Mot. Seq.: 001 & 002**

**Plaintiff,**

**-against-**

**NW 100 BROADWAY PROPERTY OWNER,  
LLC, : CENTENNIAL ELEVATOR  
INDUSTRIES INC. and CRAVEN  
MANAGEMENT CORPORATION,**



**Defendants.**

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The following numbered papers read on this motion sequence #1 by Plaintiff for an Order, pursuant to CPLR 3126, to strike the answer of Defendants, NW 100 Broadway Property Owner LLC (hereinafter referred to as "Owner") and Craven Management Corporation (hereinafter referred to as "Manager"), for their willful spoliation of evidence; and on this motion sequence #2 by Defendant Centennial Elevator Industries Inc. (hereinafter referred to as "Centennial") for an Order pursuant to CPLR 3126 striking Owners' answer and cross claims due to the spoliation of evidence, or in the alternative, preclude Owners from offering any evidence or testimony at the time of trial in support of their cross claims against Centennial, or in the alternative, for an adverse inference to be assessed against Owners at the time of trial.

**E-Filed Papers  
Numbered**

**Motion Seq. No. 1**

Notice of Motion – Affidavits – Exhibits	49 – 61
Answering Affidavits – Exhibits	78 – 86
Reply Affidavits – Exhibits	95 – 97

**Motion Seq. No. 2**

Notice of Motion – Affidavits – Exhibits	63 – 75
Answering Affidavits – Exhibits	87 – 94
Reply Affidavits – Exhibits	98

Upon the foregoing papers it is ordered that the motions, sequence 001 and 002 are determined in accordance with this Decision/Order.

### *Background*

On January 4, 2021, Plaintiff commenced this action to recover for personal injuries she allegedly sustained on January 21, 2020, while utilizing the elevator at the Owner’s premises. She alleged that the elevator descended rapidly and came to a short and sudden stop, was stuck for a period of time, and then again descended rapidly before coming to another short and sudden stop. It is not disputed that this incident was captured on video and that building personnel were aware of the incident as it occurred. The Owner and Manager had entered into an agreement with Centennial to provide maintenance and repair work and their contract was terminated on December 1, 2020. Now, Plaintiff and Centennial move to strike the Owner and Manager’s answer pursuant to the doctrine of spoliation of evidence. The Owner and Manager submit opposition to both the motions.

On January 24, 2020, after the subject accident, the Owner and Manager hired nonparty Van Deusen & Associates (hereinafter referred to as “VDA”), an elevator consultant, who investigated and took photographs of the subject elevator. VDA reported that the level of maintenance of the subject elevator was satisfactory, and that the elevator system responded the way it was designed to.

On August 30, 2021, Plaintiff served the Owner and Manager with a Notice to Permit Entry Upon Real Property, for her expert to inspect, examine and photograph the subject elevator. Plaintiff provides email communication with the Owner and Manager on October 13, 2021, and was informed that all the elevators were going through a renovation process. The Owner and her counsel Manager’s email further stated that “[i]n light of the planned inspection, can you make a list for me what cables and parts, your experts wish to inspect, and I will work on keeping those locked up. The actual elevators are not being changed, so they can be inspected on site.”

On December 7, 2021, the parties appeared for a site inspection. At that time, the subject elevator had been replaced and modernized, and Plaintiff’s expert was told that there were no parts left of the original elevator.

### *Spoliation of Evidence*

“Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126” (*Fajardo v Mainco El. & Elec. Corp.*, 143 AD3d 759, 761-762 [2d Dept 2016], quoting *Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 713 [2d Dept 2013]; see *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009]).

A party seeking CPLR 3126 sanctions for spoliation of evidence must show the party having control over the evidence possessed an obligation to preserve it at the time of its destruction; the evidence was destroyed with a culpable state of mind; the trier of fact could find the evidence one party destroyed was relevant to and would support the opposing party’s claim or defense; and the resulting prejudice must be “severe” (*Sarris v Fairway Group Plainview, LLC*, 169 AD3d 734, 736 [2d Dept 2019], quoting *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]; see *Kirschen v Marino*, 16 AD3d 555, 555-556 [2d Dept 2005]). Under the second prong, “a culpable state of mind for purposes of a spoliation sanction includes ordinary negligence” (*Richter v BMW of N. Am., LLC*, 166 AD3d 1029, 1030 [2d Dept 2018]; see *Popfinger v Terminix Intl. Co. Ltd. Pshp.*, 251 AD2d 564, 564-565 [2d Dept 1998]).

Additionally, for all evidence, “where evidence has been intentionally or willfully destroyed, its relevance is presumed. However, where evidence has been destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party’s claim or defense” (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1095 [2d Dept 2018]). The Plaintiff must demonstrate that the loss of evidence left her without a means to prosecute her case (see *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 719 [2d Dept 2009]). Crucially, the evidence must be destroyed “before the adversary had an opportunity to inspect them” (*Kirschen*, 16 AD3d at 556; see *Richter*, 166 AD3d at 1030). In other words, the party seeking spoliation sanctions must demonstrate prejudice (see *Kirschen*, 16 AD3d at 555-556). Thus, “[i]f the moving party is still able to establish or defend a case, then a sanction less severe than striking the pleadings of the offending party is appropriate” (*McDonnell*, 165 AD3d at 1095). Where evidence has been found to have been negligently destroyed, adverse inference charges have been found to be appropriate (see *Pegasus Aviation I, Inc.*, 26 NY3d at 554).

### *Motion sequence 001*

In support of her motion, Plaintiff submits, among other things, an incident report, inspection correspondences, Owner and Manager’s employee Mike Kahn’s (hereinafter referred to as “Kahn”) examination before trial (hereinafter referred to as “EBT”) transcript dated October 15, 2021, and the affidavit of elevator consultant William Seymour (hereinafter referred to as “Seymour”). Plaintiff alleges that the Owner and Manager had written notice dated August 30, 2021, of her intention to inspect the subject

elevator, and yet they allowed the renovation of the subject elevator to commence on October 8, 2021, before the Plaintiff and Seymour had a chance to inspect it. Plaintiff further alleges that the Owner and Manager did not inform her about the renovation of the subject elevator prior to the inspection.

Seymour's affidavit states, in pertinent part, "[a]n examination of the elevator before modernization would have allowed us to examine the controller and selector since they control the functions of speed and stopping which are issues in this litigation. Other equipment that can cause or contribute to an overspeed and/or abrupt stop include the motor-generator or drive, hoist motor, tachometer speed reference device and various top of car devices. These are important items to look at to determine probable causes of this accident." Furthermore, Seymour avers that "modernization harmed Plaintiff's ability to prove her case to some degree". Plaintiff asserts that Seymour's affidavit sets forth the evidence that was destroyed during renovation of the subject elevator cannot be replaced by other means thereby severely prejudicing the Plaintiff in prosecuting her claim. Furthermore, Plaintiff alleges that Kahn's testimony establishes that the Owner and Manager were aware of the instant lawsuit and scheduled inspection request regarding the subject elevator, and that the renovation of the subject elevator in the second phase of the project commenced one week prior to Kahn's EBT.

*Motion seq. no. 2*

In support of its motion, Centennial submits, among other things, inspection correspondences, the VDA report dated January 29, 2020, Centennial's vice president of service operations Joseph Sena's affidavit, Kahn's EBT transcript, and the affidavit of consulting engineer Jon Halpern. Centennial submits similar arguments as the Plaintiff. In addition to those arguments, Centennial contends the inspection would have allowed it to determine the stopping forces of the subject elevator, examine the controller, motor and sheaves as well as the safety mechanisms. Halpern averred that on the day of the inspection, he found various components of the elevator, including the hoist motor, cables, speed control, brake, and governor (a safety mechanism that stops the elevator in the event of an overspeed condition) had already been replaced.

In opposition to both the motions, the Owner and Manager submit, among other things, an affidavit of a licensed New York Elevator Director, Inspector and Expeditor Scott Schindler (hereinafter referred to as "Schindler"), VDA reports dated August 19, 2019, and January 29, 2020, and March 6, 2020, a Centennial call ticket, a "Good Bill of Health", and excerpts of Kahn's EBT transcript. The Owner and Manager argue that a sanction is not warranted for spoliation of evidence because the Plaintiff and Centennial have not shown that the Owner and Manager intentionally or negligently disposed of critical evidence and failed to show that the lost evidence fatally compromises Plaintiff's and Centennial ability to prove their respective claims and defenses.

The Owner and Manager further contend that, per Schindler's affidavit, "the cause of the accident is not controverted or in dispute; the governor cable of the subject elevator frayed open, which triggered the compensation switch, and shut the subject elevator down." The Owner and Manager further assert that the subject cable was replaced within a month of the accident, prior to any lawsuit of notice to preserve, and there is a full record of the subject elevator, its inspections, and repairs. The Owner and Manager further argue that Schindler reviewed the record and concluded "that inspection of the subject elevator prior to its modernization would not have revealed additional information or changed [sic] the cause of the incident." This Court notes that Schindler conducted his on-site inspection of the subject premises on December 7, 2021, after the subject elevator was modernized<sup>1</sup>.

### *Discussion*

This Court finds that Plaintiff and Centennial have sustained their burden of establishing that the Owner and Manager were obligated to preserve the subject elevator for the scheduled inspection at the time of its modernization in October 2021, that the evidence was negligently destroyed before Plaintiff and Centennial had an opportunity to inspect it, and that the destroyed evidence raises the presumption of relevance (*see Pegasus Aviation I, Inc.*, 26 NY3d at 547; *Sarris*, 169 AD3d at 736).

While Owner and Manager argue that the "actual modernization started in February 2021, many months prior to the inspection notice served by [p]laintiff," this Court is not persuaded by this argument where the Owner and Manager were on notice of this lawsuit when served with the summons and complaint on January 15, 2021. Moreover, the modernization of the subject elevator deprived Plaintiff and Centennial the opportunity to prove their respective claims and defenses, as the subject elevator in which Plaintiff fell was crucial evidence destroyed and removed (*see Lentini v Weschler*, 120 AD3d 1200, 1201 [2d Dept 2014]). Plaintiff and Centennial have been denied an opportunity for an expert inspection of the condition of the elevator prior to the modernization and an opportunity to present the condition of the subject elevator to the jury for evaluation (*id.*). The Owner and Manager's culpability is further evidenced by their failure to comply with Plaintiff's request to inspect the subject elevator (*see Dzikowska v Related Cos., L.P.*, 148 AD3d 480, 480 [1st Dept 2017]).

Consequently, this Court finds that there is an insufficient explanation as to why the subject elevator was not preserved once the parties reasonably anticipated litigation and once the inspection request was implemented. Schindler's conclusion "that inspection of the subject elevator prior to its modernization would not have revealed

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In addition, the Owner and Manager's argue that Plaintiff's motion should be denied for failure to comply with section 202.20-f (c) of the Uniform Civil Rules for the Supreme Court and the County Court. However, as Plaintiff correctly argues, this is not a discovery motion wherein "informal resolution" as envisioned by the Rule is relevant.

additional information or changed [sic] the cause of the incident” does not satisfactorily absolve the failure to somehow insure the preservation of the subject elevator. Furthermore, Plaintiff and Centennial should not be forced to rely on the Owner and Manager’s expert inspection and records of the subject elevator.

However, the relief requested by Plaintiff, striking of the answer is a drastic remedy (*see McDonnell*, 165 AD3d at 1095). Plaintiff and Centennial have not fully demonstrated that they do not have any other evidence so that the loss of the subject elevator has left them without a means to prosecute or defend their case. In fact, Plaintiff’s own expert opined that the loss compromised her case “to some degree”. Considering the foregoing, the Court finds that Plaintiff and Centennial have carried their burden to the extent that the Owner and Manager shall be precluded from offering evidence at trial concerning the VDA report on the subject elevator, insofar as the inspection was conducted prior to its modernization. Additionally, an adverse inference charge shall be made against the Owner and Manager at trial (*see Utica Mut. Ins. Co.*, 58 AD3d at 719). The language of such adverse language shall be left to the discretion of the Trial Judge upon the evidence adduced at trial.

#### *Conclusion*

Accordingly, Plaintiff’s motion, sequence 001 and Centennial’s motion, sequence 002, for the spoliation sanction of striking the Owner and Manager’s answer are granted only to the extent set forth above.

This constitutes the Decision and Order of the Court.



**Dated: January 13, 2023**  
**Jamaica, New York**

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**HON. PAM JACKMAN BROWN, J.S.C.**