SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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KARL BAUERLEIN, DONNA BAUERLEIN and ERIK REX,

Plaintiffs,

-against-

THE SALVATION ARMY, ALLIANCE ELEVATOR COMPANY, ALLIANCE ELEVATOR GROUP, LLC a/k/a AEG, LLC, LANDMARK ELEVATOR SERVICES COMPANY, KNU CORP., Formerly known as, KNUDSON ELEVATOR COMPANY and INCLINATOR COMPANY OF AMERICA, INC.,

Defendants.

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ALLIANCE ELEVATOR COMPANY

Third-Party Plaintiff,

-against-

P.M. ASSOCIATES, DAVID TALCOTT, MICHAEL CARNEVALE, JOHN DiCAPUA and RICHARD CALDIERI,

Third-Party Defendants.

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INCLINATOR COMPANY OF AMERICA, INC.,

Second Third-Party Plaintiff,

-against-

SCHINDLER GROUP; SCHINDLER ELEVATOR CORPORATION; PM ASSOCIATES; PM ASSOCIATES, INC., DAVID E. TALCOTT and/or DAVID TALCOTT, as member, principal, officer, director of KNUDSON ELEVATOR COMPANY, KNU CORP.; AEG, LLC; ALLIANCE ELEVATOR GROUP, ALLIANCE ELEVATOR COMPANY; LANDMARK ELEVATOR CONSULTANTS, INC.; UNITED TECHNOLOGIES CORPORATION OF

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 3895/05
Motion Seq. Nos.: 28 - 30
22

DECISION AND ORDER

Third-Party Index No.: 003895/05

Second TP Index No.: 003895/05

NEW YORK CITY and/or UNITEC ELEVATOR SERVICES COMPANY; and DAVID TALCOTT individually, REPUBLIC ELEVATOR CORP., UNITED TECHNOLOGIES CORPORATION OF NEW YORK CITY; and SODEXHO,

Second Third-Party Defendants.

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DAVID TALCOTT,

Third Third-Party Plaintiff,

-against-

KENNETH MARGHERINI and PATRICK MCEVOY,

Third Third-Party Defendants.

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Defendant Inclinator Company of America ("I.C.O.A.") moves and Landmark Elevator Consultants, Inc. ("Landmark"), Sodexho (second Third-Party Defendant) cross-move for summary judgment. Plaintiffs Karl Bauerlein and Donna Bauerlein cross-move for summary judgment as to The Salvation Army ("T.S.A.") and Landmark. T.S.A. cross-moves for conditional summary judgment as to Alliance Elevator Company ("A.E.C.") and Landmark. A.E.C. cross-moves to consolidate action number one (Index No. 003895/05) and action number two (Index No. 6366/07). Finally, A.E.C. seeks to renew/reargue a prior determination of the court.

The Plaintiffs Karl Bauerlein and Donna Bauerlein (the "Bauerlein Plaintiffs") commenced this action for injuries allegedly sustained by Karl Bauerlein (the co-Plaintiff, Eric Rex ["Rex"] has settled his action and is no longer an active Plaintiff herein). Karl Bauerlein was employed by Schindler Elevator Corp., as was Rex (the second Third-Party action against the Schindler Defendants has been dismissed). Karl Bauerlein was to conduct a survey of the elevators in the building owned by Defendant T.S.A. located at 123 West 13th Street, New York, N.Y., and submit a bid to T.S.A. for the upgrade of the elevators. Included in the elevators to be upgraded was a small elevator or "elevette" that ran only between the 16th and 17th floors of T.S.A.'s building. On April 24, 2004, Karl Bauerlein and Rex entered the elevette on the 16th floor. The elevette went up to the 17th floor and then it fell back to the

16th floor with Bauerlein and Rex inside as it fell. Both Karl Bauerlein and Rex alleged they were injured in the fall (co-Plaintiff Donna Bauerlein's cause of action is a derivative one).

I.C.O.A. states the elevette was manufactured by I.C.O.A. The subject unit was sold to and installed by Inclinator Elevator Co. of N.Y., a separate entity from I.C.O.A., in 1977. In May 2001 I.C.O.A. claims the elevette was materially altered by a contractor hired by T.S.A. to service the elevette. I.C.O.A. contends the service done in May 2001 caused the steel cables to be replaced by fiber cables with less strength than the original steel cables. I.C.O.A. also alleges that in May 2001 the swaged ferule ended cables (i.e., blocks of steel forged into the ends of the steel cables) were replaced by the fiber cables and U-bolts. I.C.O.A. contends the installation of U-bolts in elevators was expressly prohibited by the ANSI code and OSHA rules and regulations, and by I.C.O.A.'s recommendation. I.C.O.A. notes the elevator fall occurred three years later on April 21, 2004. I.C.O.A. alleges the fall occurred due to the fiber cables and U-bolts installed on May 1, 2001 in that the U-bolts caused the elevette cables to break and caused the safety mechanism on the elevette not to operate. I.C.O.A. alleged the May 1, 2001 repair was a material alteration of the original design and, as such, I.C.O.A. should be released from any liability.

I.C.O.A. has offered the expert affidavit of Frederick M. Hoch (see Exhibit 11 annexed to I.C.O.A.'s motion). Mr. Hoch is a research engineer with I.C.O.A. Mr. Hoch stated that the use of U-bolts would materially alter the elevator in that the U-bolts prevented the safety device on the elevette from operating and stopping the elevette from falling.

I.C.O.A. also offered the affidavit of Alfred M. Verschell (see Exhibit 12 annexed to I.C.O.A.'s motion). Mr. Verschell is an expert in elevators and private residence elevators such as the elevette herein. He stated U-bolts should not be used and that an elevette was not made to accommodate public

usage nor usage as a freight elevator. In his reply affidavit (dated June 17, 2008) Verschell states only improperly trained mechanics would use U-bolts in elevators. I.C.O.A. also offered the affidavit of Carl Abraham (see Exhibit 13 annexed to I.C.O.A.'s motion). Mr. Abraham is a professional engineer who stated U-bolts would prevent the "stop fall" mechanism from working. He stated the use of U-bolts caused the elevator to fall.

T.S.A. contends faulty design of the elevette by I.C.O.A. is an issue. T.S.A. contends that if U-bolts were put in May 2001, then it could be a design flaw when a product's safety device is designed to be easily removed, bypassed or modified (*see Liriano v Hobart Corp.*, 92 NY2d 232 [1998]) such as presented by the U-bolt issue.

A manufacturer is not responsible for injuries resulting from substantial alterations to or modifications of a product by a third-party that render the product defective or otherwise unsafe (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471 [1980]; *Pichardo v C.S. Brown Co., Inc.*, 35 AD3d 303 1st Dept 2006).

A defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use (*Donovan v All-Weld Products Corp.*, 38 AD3d 227 [1st Dept 2007]).

A defendant manufacturer is liable if the plaintiff can establish that the duty to warn was breached and that the failure to warn was a substantial or proximate cause of the injury (*Howard v Poseiden Pools, Inc.*, 133 Misc2d 874 [Supreme Court, Allegany County 1986]). Whether warnings were (needed or) adequate to deter potential misuse and whether the failure to warn was a substantial cause of the injury is ordinarily a question for the jury (*Howard v Poseiden Pools, Inc., supra; see Schiller v National Presto Industries, Inc.*, 225 AD2d 1053[4th Dept 1996]).

Of course, a manufacturer may not be cast in damages, either on a strict products liability or negligence cause of action where, after the product leaves the possession and control of the manufacturer there is a substantial modification which substantially alters the product and is the proximate cause of the plaintiff's injuries (*Robinson v Reed-Prentice Div. of Package Machinery, Co., supra*).

T.S.A.'s expert Patrick McPartland (see Exhibit B annexed to T.S.A.'s affirmation in opposition dated May 12, 2008) stated that the placement of the cable hitch (to which the cables were attached) and the "safety dogs" on the elevette by I.C.O.A. made them unavailable for inspection and there was only one "safety dog" for one cable even though there were two cables, i.e., the elevette should have been designed better. McPartland also indicated that the I.C.O.A. manual for the elevette does not instruct persons or how to test for the safety of the elevette. As to any code prohibitions of U-bolts, Mr. McPartland states that such does not pertain to small elevettes wherein U-bolts are commonly used.

Carlos Soto (the employee of Alliance Elevator Group, LLC) who serviced the elevette on May 1, 2001 stated if the elevette had U-bolts on it, he replaced the old U-bolts with new U-bolts (see Exhibit 10, pg. 83 annexed to I.C.O.A.'s motion; see also Exhibit A annexed to I.C.O.A.'s affirmation in opposition dated June 10, 2008). T.S.A. indicated that Soto was an expert mechanic and he, Soto, was not familiar with the problems, or prohibition of U-bolts. Soto's supervisor, Kenneth Mulderigy indicated that if Soto saw U-bolts on the elevator cables, he, Soto, would replace U-bolts with U-bolts (see Exhibit 8, pg. 98 annexed to I.C.O.A.'s motion). Mulderigy stated if Soto replaced U-bolts, Soto must have thought that U-bolts were part of the original design by I.C.O.A.

Mulderigy stated that 90% of elevator repair persons were not aware of the U-bolt issue (see Exhibit 8, pgs. 99-100). T.S.A. indicated warnings should have been placed on the elevette as to any

alleged prohibition of U-bolts. T.S.A. notes that there is also a design issue.

There is no duty to warn where a plaintiff or party states he or she was aware of the danger involved (*Petrie v B. F. Goodrich Co.*, 175 AD2d 669 [4th Dept 1991]). Here, Soto stated he put in U-bolts on the elevette because he replaced the original equipment as it was on the elevette, i.e., he replaced a U-bolt with a U-bolt. He was not aware of the alleged potential dangers of U-bolts. Here, T.S.A. alleges there was no service manual provision or warning labels as to the elevette U-bolt prohibition (*see Warlikowski v Burger King Corp.*, 9 AD3d 360 [2d Dept 2004]).

There was testimony that the hitch or hitch plate on elevettes is usually found on the roof of the elevette (possibly, for easier inspection) rather than on the side of the elevette herein (see Exhibit D, pgs. 55-56 annexed to Landmark's cross motion). Again, this could go to design issues.

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]).

Summary judgment is not appropriate when the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution (*Roca v Perel*, 51 AD3d 757 [2d Dept 2008]; *Barbuto v Winthrop University Hospital*, 305 AD2d 623 [2d Dept 2003]).

Here, there are issues of fact as to design defects since expert affidavits have been submitted that offer conflicting opinions on whether or not there were defects in the elevette when it left the I.C.O.A. factory, for the manufacturer is under a duty to use reasonable care in designing the product when used in the manner for which the product was intended as well as an unintended yet reasonable, foreseeable use (*see Robinson v Reed-Prentice Div. of Package Machinery Co.*, 49 NY2d 471 [1980]).

Summary judgment is seldom appropriate in a negligence action (*Vanderwater v Sears*, 277 AD2d 1056 [4th Dept 2000]). That appears to be the case herein.

Were there sufficient warnings on the elevette (as against the use of U-bolts)? Was the use of U-bolts an open and obvious danger? Should the elevette maintenance man have been aware of the U-bolt issue? Was the elevette improperly modified? Were U-bolts placed in the elevette when the elevette was first installed? Was the elevette designed to use U-bolts? These are all issues of fact which should be addressed at trial.

The following questions are also for trial: Additionally, whether the elevator technician should have been aware of the potential U-bolt hazard? Was the elevette originally equipped with U-bolts? Were U-bolts in the elevette a hazard?

There is also an allegation by I.C.O.A. that the original steel cables used on the elevette were replaced by Soto with "fiber" cables. The court has no way of knowing if the "fiber" cables had less strength, durability, etc., than the steel cables or if they were "super strong" "space age" fiber cables, i.e., stronger than steel.

Plaintiffs cross move for summary judgment as to Landmark. Landmark seeks summary judgment as to the Plaintiffs' complaint, all cross claims, as well as summary judgment as to the second third-party complaint.

Landmark's employee inspected the elevette in issue on May 12, 2003, approximately eleven months before the incident of April 14, 2004. Landmark was given the task to do the Local Law 10 elevator and elevette inspections. Landmark's inspector, Paul Megna, performed the inspection on the elevette. Mr. Megna did not "pass" the elevette since the elevette did not have a five-year inspection test tag (see Exhibit C, pg. 121 annexed to Landmark's cross motion). Megna was "overruled" by his

supervisor, Hank Krussman, who indicated the elevette did not need a five-year inspection test tag (see Exhibit D, pgs. 73, 84) since the elevette was a "handicapped elevator" (pgs. 87-88).

Here, Megna did see the hitch plate on the elevette (see Exhibit C, pg. 147 annexed to Landmark's motion), but he did not see what secured the hitch plate to the elevette (Exhibit C, pg. 148). Thus, Megna did not see if U-bolts were being used in the elevette. Krussman, Megna's supervisor, did state that U-bolts used in an elevator/elevette could cause the elevator/elevette cables to break (see Exhibit D, pg. 59 annexed to Landmark's cross motion).

According to Krussman, a routine inspection did involve the hoist ropes (cables) and the connection of the cables to the hitch plate (see Exhibit D, pg. 49 annexed to Landmark's cross motion). If the elevator is a "handicapped elevator," the cables of the elevator are wound on a driver. If you cannot see where the cables are connected on a handicapped elevator and you cannot see where the cables are connected to the car, then you cannot inspect the connection in a routine inspection (pg. 50). Krussman categorized the elevette in issue as a "residential lift" (pg. 54). The hitch plate herein was not generally visible (pg. 55) since the hitch plate was on the side (pg. 56). Krussman indicated he had worked on similar elevators as the elevette and the hitch was on top of the elevator (pg. 55-56). Megna indicated that the use of the elevette from a private residential elevator to a public elevator would have made a difference in Megna's inspection on May 12, 2003 and Megna was not aware the elevette was being used by the public (see Exhibit C, pg. 307 annexed to Landmark's cross motion).

Krussman stated Landmark did the inspection on the elevette for "Republic Alliance" (see Exhibit D, pg. 75 annexed to Landmark's motion). Landmark was licensed to do the Local Law 10 elevator inspection by New York City Department of Buildings (see Exhibit D, pg. 34 annexed to Landmark's cross motion).

Landmark contends it had no duty to Bauerlein and T.S.A., as the building owner, had a duty to inspect and maintain the elevette. Landmark contends its inspection of the elevette did not make the elevette less safe. Both T.S.A. and Alliance allege the inspection by Landmark and Megna was not properly done in that the use of U-bolts in the elevette was not detected by Megna.

A negligent failure to discover a condition that should have been discovered can be no less of a breach of due care than a failure to respond to the actual notice of such a condition (*Blake v City of Albany*, 48 NY2d 875 [1979]). One who undertakes to perform inspections becomes subject to a duty to perform such inspections in a non-negligent manner (*West Side Corp. v PPG Industries*, 225 AD2d 459 [1st Dept 1996]).

Here, there is an issue of fact as to whether Landmark's employee properly performed inspection of the elevette.

An elevator company which agrees to maintain an elevator in a safe operating condition may be liable to a passenger for the failure to correct conditions of which it has knowledge or for failure to use reasonable care to discover and correct a condition which it ought to have found (*Rodgers v Dorchester Associates*, 32 NY2d 553 [1973]; *Fyall v Centennial Elevator Industries, Inc.*, 43 AD3d 1103 [2d Dept 2007]; *Johnson v Nouveau Elevator Industries, Inc.*, 38 AD3d 611 [2d Dept 2007]).

While a maintenance agreement between an owner and an elevator maintenance company may not be a comprehensive maintenance obligation which displaces a property owner's duty to safely maintain the premises (*see Polka v Servicemaster Management Service Corp.*, 83 NY2d 579 [1994]), the elevator maintenance company must still demonstrate that it did not fail to perform or negligently performed under the terms of the contract (*Lithgow v London Park Realty Corp.*, 6 AD3d 668 [2d Dept 2004]).

Landmark was specifically hired to perform an inspection of the elevette. Did Landmark's employee perform the inspection in a non-negligent fashion? Should Megna, Landmark's employee/inspector have checked for the presence of U-bolts on the hitch? Clearly, Plaintiffs' request and Landmark's request for summary relief must both be denied due to the many issues of fact present herein.

Sodexho cross-moves for summary judgment dismissing all causes of action against Sodexho. Sodexho was the property/building manager for T.S.A.'s property/building at 123 West 13th Street, New York, N.Y. at the time of the elevette incident of April 21, 2004 (it took over the position as of April 2003). Sodexho contends there is no evidence to suggest it, Sodexho, had any notice of previous service/repairs done to the elevette. Sodexho alleges it took no actions or inactions that caused Bauerlein's alleged injuries. Inclinator contends that Sodexho, as manager of the T.S.A. building, had a duty to keep it in a reasonably safe condition. I.C.O.A. contends Sodexho allowed the elevette, allegedly designed for limited private residence use, i.e., a limited number of persons per day using same, to be used by every employee and occupant of the 17-story structure as well as allowing the elevette to be used for freight and building/construction materials, i.e., heavier than a few passengers per day designed usage. I.C.O.A. contends that Sodexho, as building manager, should have made a diligent inspection of the premises including the elevette wherein the use of U-bolts on the elevette would have been revealed. I.C.O.A. contends the use of U-bolts in the elevette may have been a violation of the New York City Code Ordinance and is evidence of negligence (*see Elliott v City of New York*, 95 NY2d 730 [2001]). The Landmark inspector, Megna, who did the elevette inspection, indicated if he, Megna, saw anything in the elevette that was damaged or not being used correctly, he, Megna, would tell the building manager right away (see Exhibit C, pg. 310 annexed to Landmark's

cross motion).

The owner of a multiple dwelling owes a nondelegable duty to persons on its premises to maintain the premises in a reasonably safe condition (*Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680 [1970]).

A managing agent for a building may be subject to liability for nonfeasance where the managing agent has complete and exclusive control of the management and operation of the building (*Lennon v Oakhurst Gardens Corp.*, 229 AD2d 897 [3d Dept 1996]; *see also Duke v Duane Broad Co.*, 181 AD2d 589 [1st Dept 1992], *app dismissed* 79 NY2d 977 [1992]).

The following questions are for trial: The issues of whether Sodexho, T.S.A.'s managing agent, had or should have had notice of any prior elevette issues? (*see Linares v Fairfield Views, Inc.*, 231 AD2d 418 [1st Dept 1996]).

There are too many unresolved issues as to whether or not Sodexho, as building manager, did a reasonable job to safeguard Bauerlein as to the elevette in the T.S.A. building for Sodexho to be granted summary relief.

The Court will now consider the Plaintiffs' cross motion for summary judgment against T.S.A..

An owner or possessor of premises is not an insurer of the safety of the occupants or those who use the premises (*see Dillman v Bohemian Citizens Benevolent Society of Astoria, Inc.*, 227 AD2d 434 [2d Dept 1996]). An owner has no duty to render the premises absolutely safe (*Serrano v Spengler*, 96 AD2d 935 [2d Dept 1983]).

The owner/operator of an elevator is required to exercise ordinary, reasonable cause and caution in the installation, inspection and operation of the elevator (*Grifhahn v Kreizer*, 62 AD 413 [2d Dept 1901], *aff'd* 171 NY 661 [1902]).

An owner/operator of an elevator has a nondelegable duty to maintain an elevator in a reasonably safe condition (Multiple Dwelling Law § 78; *Comaj v East 52nd Partners*, 215 AD2d 150 [1st Dept 1995]).

A building owner will not be liable for injuries sustained by an elevator passenger in an elevator mishap where there is no evidence that the owner or the maintenance company caused the defective condition or had actual or constructive knowledge of it (*Vaynshteyn v Cohen*, 266 AD2d 280 [2d Dept 1999]; *Tashjian v Strong and Associates*, 225 AD2d 907 [3d Dept 1996]).

There was no indication that the elevette had malfunctioning issues in the months prior to the incident of April 23, 2004.

As is evident from the I.C.O.A. motion, there are many unresolved issues of fact surrounding the elevette and the incident involving Plaintiff as to design maintenance most importantly, what is permitted as to an elevette versus an elevator.

Did T.S.A. have something to do with the maintenance or operation which would warrant the conclusion that T.S.A. did something or failed to do something that caused the elevette to fall? Did T.S.A. have any notice, actual or constructive, that a condition existed in the elevette that would cause it to fall? The above issues must be resolved by the trier of fact.

T.S.A. seeks conditional summary judgment against Defendants Alliance Elevator Co. and Landmark Elevator Consultants Inc. Thus, if this Court finds summary judgment against T.S.A., it seeks summary relief against Alliance Elevator Co. and Landmark Elevator on the issue of common law indemnification. Any conditional summary judgment by T.S.A. as against Alliance and Landmark must be denied. There are allegations in the extensive record herein to raise issues of fact as to whether or not T.S.A. was actively negligent (*see Colozzo v National Center Foundation, Inc.*, 30 AD3d 251 [1st

Dept 2006]) in its operation of the elevette (allegedly overloading by using the elevette as a public elevator, freight elevator, etc.), i.e., the relative culpability between T.S.A. and Alliance and T.S.A. and Landmark. In support of a motion for summary judgment the movant (here, T.S.A.) has the burden of establishing *prima facie* entitlement to judgment as a matter of law by offering sufficient evidence to eliminate any triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Quinn v Nyack Hospital*, 286 AD2d 675 [2d Dept 2001]). Here, T.S.A. has failed to show that the elevette was not negligently operated. Thus, there can be no conditional summary judgment for T.S.A. as to Alliance and Landmark.

The Court will now consider the cross motion by A.E.C. for consolidation of actions one and two.

A motion for consolidation is addressed to the sound discretion of the court (*Skelly v Sachem Central School District*, 309 AD2d 917 [2d Dept 2003]) and, absent a showing of substantial prejudice by the party or parties opposing the consolidation motion, consolidation is proper where there are common questions of law and fact (*RCN Construction Corp. v Fleet Bank, N.A.*, 34 AD3d 776 [2d Dept 2006]).

The two actions are at completely different stages of discovery. Action number one has generated a small mountain of information. Action number two is in the embryonic stages of discovery. True, an undue delay in the resolution of action number two could be a reason to deny consolidation (*see Barnes v Cathers and Dembrosky*, 5 AD3d 122 [*1st Dept 2004]; Abrams v Port Authority Trans-Hudson Corp.*, 1 AD3d 118 [1st Dept 2003]). Clearly, both action number one and action number two revolve around the fall of the elevette on April 24, 2004 which Bauerlein was riding.

Consolidation is favored by the courts as serving the interests of justice economy (*Zupich v*

Flushing Hospital and Medical Center, 156 AD2d 677 [2d Dept 1989]).

However, two separate actions could result in duplication of effort and expense as well as a waste of judicial resources (*see Wieder v Skala*, 218 AD2d 507 [1st Dept 1995]).

Mere delay is not a sufficient basis upon which to deny consolidation (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 494 [2d Dept 2004]). Thus, opposition to the consolidation of the actions herein on the ground that substantial prejudice would result in delay of one action, action number two, being consolidated with action number one, is unavailing.

Clearly a trial court can minimize any prejudice by taking steps to insure that discovery in both actions is expeditiously completed (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc., supra*).

When consolidation is proposed, the burden of proof is on the opposing party to show consolidation would prejudice the opposing party (*Vigo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]). Opponents have failed to meet the above burden.

Here, the Court will monitor closely any requests for discovery in action number two, and it will act to ensure that any discovery requested by the parties in action number two is not wasted by duplication of efforts, i.e., new depositions, etc., in the vast amount of material already generated in action number one. Alliance Elevator Company's motion for consolidation is granted. A conference shall be held on November 5, 2008 to determine and evaluate any discovery requests by the parties in action number two. Both actions shall maintain their respective index numbers and appear before Justice Woodard.

Finally, the Court will consider the cross motion by A.E. C. to renew/reargue a portion of a prior determination of this Court.

Previously, Alliance sought to amend the herein caption to delete Alliance's former name,

United Technologies Corporation of New York, as well as a business name, Unitec Elevator Company, from the caption. The court denied Alliance's request. Alliance has offered much information (depositions, etc.) in seeking its renew/reargue motion.

A party's motion to renew may be denied in absence of a proper explanation for a party's failure to submit the new materials on the original motion (*Wal-Mart Stores, Inc. v United States Fidelity and Guaranty Co.*, 11 AD3d 300 [1st Dept 2004]).

A motion for leave to renew should not be based on evidence that could have been discovered and presented with due diligence (*Yarde v New York City Transit Authority*, 4 AD3d 352 [2d Dept 2004]).

A more detailed explanation, i.e., a more detailed deposition, in a motion to renew is not new evidence and the movant must present a reasonable explanation or justification for not submitting the more detailed explanation in the original motion (*see Stocklas v Auto Solutions of Glenville, Inc.*, 9 AD3d 622).

A party is not entitled to renew a request for relief based on deposition testimony absent a demonstration of reasonable justification for the party's initial failure to present the information revealed in the "renewal" deposition on the prior original request for relief (*Petersen v Lysaght, Lysaght & Kramer, P.C.,* 19 AD3d 391 [2d Dept 2005]).

No such valid reason is set forth by Alliance as to why the more "detailed" deposition testimony, affidavit, etc., was not offered when the deposition in issue was completed before the original motion was submitted.

As an example, the affidavit of David Talcott (see Exhibit D annexed to A.E.C.'s cross motion dated May 2, 2008) and detailed deposition of Richard Buckley dated October 19, 2006 (see Exhibit G

annexed to A.E.C.'s cross motion dated May 2, 2008) both could have been presented with the original motion by A.E.C.. No valid reason is given why they were not.

As to A.E.C.'s branch of its motion to reargue, a motion to reargue is addressed to the sound discretion of the court which decided the prior motion and said motion may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its earlier decision (*Long v Long*, 251 AD2d 631 [2d Dept 1995]).

Having reviewed its prior determination and the papers submitted herein, this Court concludes that it has not overlooked or misapplied any controlling principles of Law (*Pahl Equip. Corp. v Kassis*, 182 AD2d 22 91st [Dept 1994], *lv to app dismd. in part den. in part* 80 NY2d 1005 [1992], *rearg den.* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979], *app after remand* 86 AD2d 887 [1982], *app den.* 56 NY2d 507. Nor can the court glean from the record herein where it had, for some other reason, mistakenly arrived at its earlier decision (*Long v Long, supra*).

Also, Alliances request is untimely under CPLR §2221(d)(3).

Accordingly, the Court adheres to its original determination and decision.

The cross motion by A.E.C. to consolidate is **granted** for the reasons set forth herein. All other eight (8) motions/cross motions are **denied** for the reasons set forth above. It is hereby

ORDERED, that all parties are directed to appear before the undersigned for a Certification Conference on November 18, 2008 at 11:00 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: October 31, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\DECISION - SUMMARY JUDGMENT\Bauerlein v Salvation Army.wpd