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COUNTY OF ERIE

MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

January 6, 2014

Mr. Scott W. Kroll, Clerk
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Dear Mr. Kroll:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Tomasello, Debra v. County of Erie, DCB Elevator Co., Inc. and American Loss Prevention Services*
Document Received:	Order to Show Cause
Name of Claimant:	Debra Tomasello
Claimant's attorney:	Frank J. Dolce, Esq. Cantor, Dolce & Panepinto, P.C. 1600 Main Place Tower 350 Main Street Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker (dld)
Michelle M. Parker
First Assistant County Attorney

MMP:dld

Enc.

At a Special Term of the Supreme Court held in and for the County of Erie at Buffalo, New York on the 20 day of December, 2013.

Hon. Diane Y Devlin
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DEBRA TOMASELLO

Claimant,

v.

COUNTY OF ERIE
DCB ELEVATOR CO., INC.
AMERICAN LOSS PREVENTION SERVICES

Respondents.

ORDER TO SHOW CAUSE

Index No. 804432/2013

Upon reading the annexed Affirmation of Frank J. Dolce, Esq., duly affirmed on the 12th day of December, 2013, it is hereby

ORDERED, that the respondents show cause at a Special Term of the Supreme Court of New York to be held in and for the County of Erie at Part 32, 50 Delaware Avenue/Franklin Street, Buffalo, New York on the 30 **day of** January ~~**2013**~~**/2014 at** 9:30 **a.m./p.m.** of that day or as soon thereafter as counsel can be heard, why an order should not be granted compelling the respondents to submit to pre-litigation discovery pursuant to CPLR 3102(c) and directing the respondents to preserve evidence and produce the following:

- A copy of the elevator maintenance contract in effect at the Rath Building on the date of the claimant's incident, September 4, 2013;
- Any and all maintenance reports/records, maintenance invoices, and elevator inspection records for all elevators located in the Rath Building from September 1, 2012 through September 30, 2013.
- Any and all incident reports documenting malfunctioning elevators from September 1, 2011 up to, and including, September 4, 2013.

- Any and all materials including, but not limited to, documents, photographs, surveillance video, statements and reports regarding the claimant's workplace accident of September 4, 2013.

ORDERED, that service of a copy of this order and the papers upon which it is granted be sent by certified mail to the main places of business or residence of the respondents;

COUNTY OF ERIE
95 Franklin Street, 16th Floor
Buffalo, NY 14202

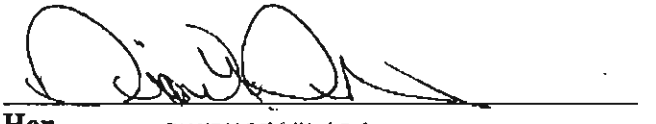
DCB ELEVATOR CO., INC.
916 Center Street
Lewiston, NY 14092

310 Center Street
Lewiston, NY 14092

AMERICAN LOSS PREVENTION SERVICES
P.O. Box 605
Buffalo, NY 14207

on or before December 30TH, 2013, which shall be deemed good and sufficient service.

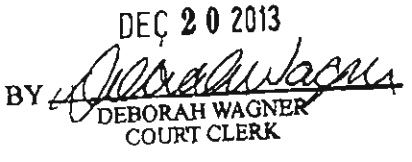
DATED: Buffalo, New York
December 20, 2013



Hon. DIANE Y. DEVLIN, J.S.C.

GRANTED

DEC 20 2013

BY 
DEBORAH WAGNER
COURT CLERK

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DEBRA TOMASELLO

Claimant,

v.

COUNTY OF ERIE
DCB ELEVATOR CO., INC.
AMERICAN LOSS PREVENTION SERVICES

Respondents.

ATTORNEY AFFIRMATION

Index No.

Frank J. Dolce, Esq., affirms the following under the penalties of perjury:

1. I am an attorney at law duly licensed to practice in the State of New York and am a partner in the law firm of Cantor, Dolce and Panepinto, P.C., attorneys for the claimant, Debra Tomasello. As such, I am fully familiar with the facts and circumstances herein.

2. On September 4, 2013, the claimant was employed by the Erie County Department of Social Services located in the Rath Building, 95 Franklin Street, Buffalo, New York 14202.

3. On that date, the claimant was involved in a workplace incident. The claimant, while walking onto an elevator located in the Rath Building, was violently struck in her right arm and right shoulder by the rapidly closing elevator door. As a result of the incident, the claimant sustained serious injury to her right shoulder and neck.

4. Upon information and belief, the accident and the claimant's injuries were caused by the defective condition of the elevator and the negligent maintenance, inspection, and repair of the elevator.

5. Pursuant to the authority of CPLR 3102(c), the claimant seeks the following disclosure from the respondents both "to aid in bringing an action" and "to preserve

information":

- A copy of the elevator maintenance contract in effect at the Rath Building on the date of the claimant's incident, September 4, 2013;

- Any and all maintenance reports/records, maintenance invoices, and elevator inspection records for all elevators located in the Rath Building from September 1, 2012 through September 30, 2013.

- Any and all incident reports documenting malfunctioning elevators from September 1, 2011 up to, and including, September 4, 2013.

- Any and all materials including, but not limited to, documents, photographs, surveillance video, statements and reports regarding the claimant's workplace accident of September 4, 2013.

6. Additionally, this order to show cause for pre-litigation discovery requests production of all documents, evidence, and materials in whatever form maintained relating to the above matter and further seeks an injunction directing respondents to preserve and not alter, dispose of, or destroy any of the information requested herein.

7. Upon information and belief, the materials which the claimant seeks are kept in the usual and regular course of business by the respondents.

8. CPLR 3102(c) provides that "before an action is commenced, disclosure . . . to aid in bringing an action [and] to preserve information . . . may be obtained, but only by court order." In accordance with this provision, a claimant may "seek or obtain a court order to compel the preservation" of evidence. Metlife Auto & Home v. Joe Basil Chevrolet, Inc., 1 N.Y.3d 478 (2004).

9. This pre-litigation discovery is necessary to determine and preserve the facts

surrounding the claimant's incident and to identify any and all potential defendants.

10. The claimant recognizes his obligation to bear the reasonable copying costs associated with the requested relief.

11. The claimant has not made a previous application to this court for the same or similar materials from the respondents.

WHEREFORE, the claimant respectfully requests that this court grant an order directing the respondents to comply with pre-litigation discovery; and for such other and further relief as this court deems just and proper.

DATED: Buffalo, New York
December 12, 2013

Frank J. Dolce, Esq.
CANTOR, DOLCE & PANEPINTO, P.C.
Attorneys for Claimant
1600 Main Place Tower
350 Main Street
Buffalo, New York 14202
(716) 852-1888