

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15337
G/cb

_____AD3d_____

Argued - April 20, 2007

WILLIAM F. MASTRO, J.P.
FRED T. SANTUCCI
GABRIEL M. KRAUSMAN
EDWARD D. CARNI, JJ.

2006-04512

DECISION & ORDER

Joseph Denoyelles, et al., appellants, v Michael
Gallagher, etc., respondent.

(Index No. 03-6435)

Gary Greenwald, Chester, N.Y. (Marc R. Leffler, Lisa M. Cobb, and David A. Brodsky of counsel), for appellants.

Meiselman, Denlea, Packman, Carton & Eberz, P.C., White Plains, N.Y. (Wayne M. Rubin and Myra I. Packman of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Orange County (McGuirk, J.), dated April 7, 2006, as denied that branch of their motion which was to strike the defendant's answer pursuant to CPLR 3126.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The "drastic remedy" of striking an answer pursuant to CPLR 3126 is warranted when there is "a clear showing" that the failure to comply with discovery demands was willful and contumacious (*Fellin v Sahgal*, 268 AD2d 456, 456). Similarly, under the common-law doctrine of spoliation, "[w]hen a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading" (*Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342-343; see also *Barahona v Trustees of Columbia Univ. in City of N.Y.*, 16 AD3d 445, 445-446; *Iannucci v Rose*, 8 AD3d 437, 438). However, a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense (see *Gerber v Rosenfeld*, 18 AD3d 812). The determination of spoliation sanctions is within the broad discretion of the court (see *Dennis v City of New York*, 18 AD3d 599). Here, the

May 29, 2007

Page 1.

DENOYELLES v GALLAGHER

plaintiffs failed to demonstrate that the “modification” of the defendant’s computer records was done in bad faith, or that said modification rendered the plaintiffs “prejudicially bereft of appropriate means” to prove their claims (*DiDomenico v C&S Aeromattick Supplies*, 252 AD2d 41, 53; *cf. Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assocs.*, 286 AD2d 320). Accordingly, under such circumstances, the Supreme Court did not improvidently exercise its discretion in denying that branch of the plaintiffs’ motion which was to strike the defendant’s answer.

The plaintiffs’ remaining contentions are without merit.

MASTRO, J.P., SANTUCCI, KRAUSMAN and CARNI, JJ., concur.

2006-04512

DECISION & ORDER ON MOTION

Joseph Denoyelles, et al., appellants, v Michael
Gallagher, etc., respondent.

(Index No. 03-6435)

Motion by the respondent on an appeal from an order of the Supreme Court, Orange County, dated April 7, 2006, to strike stated portions of the appellants’ reply brief on the ground that it contains arguments which were not raised before the Supreme Court or in the appellants’ main brief. By decision and order on motion of this court dated January 26, 2007, the motion was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission of the appeal.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and the argument of the appeal, it is

ORDERED that the motion is granted, and subdivision “F” of Point I at pages 10 to 14, the carryover paragraph at page 18, the second full paragraph at page 33, and the second and third full paragraphs at page 34 of the reply brief are stricken and have not been considered in the determination of the appeal.

MASTRO, J.P., SANTUCCI, KRAUSMAN and CARNI, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court

May 29, 2007

Page 2.

DENOYELLES v GALLAGHER