

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

D25344  
W/kmg

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Submitted - November 4, 2009

REINALDO E. RIVERA, J.P.  
JOSEPH COVELLO  
DANIEL D. ANGIOLILLO  
JOHN M. LEVENTHAL  
SHERI S. ROMAN, JJ.

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2009-05064

DECISION & ORDER

Georgina Huevo, et al., respondents, v Silvercrest,  
et al., defendants, Silvercrest Extended Care Facility,  
appellant.

(Index No. 2455/07)

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Catalano Gallardo & Petropoulos, LLP, Jericho, N.Y. (Domingo R. Gallardo and  
June D. Reiter of counsel), for appellant.

Lorenzo J. Tasso, Long Island City, N.Y., for respondents.

In an action to recover damages for personal injuries, etc., the defendant Silvercrest Extended Care Facility appeals from so much of an order of the Supreme Court, Queens County (Grays, J.), entered April 28, 2009, as granted the plaintiffs' motion to strike its answer based upon the loss or spoliation of evidence unless it produced certain discovery by a date certain.

ORDERED that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and the plaintiffs' motion to strike the answer of the defendant Silvercrest Extended Care Facility is denied.

The Supreme Court improvidently exercised its discretion in granting the plaintiffs' motion to strike the appellant's answer based upon the loss or spoliation of evidence unless it produced certain discovery by a date certain. When a party negligently loses or intentionally destroys key evidence, thereby preventing its opponent from being able to prove its claim or defense, the spoliator may be sanctioned by the striking of its pleading (*see Donoyelles v Gallagher*, 40 AD3d 1027; *Friel v Papa*, 36 AD3d 754; *Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342-343). Furthermore, the sanction of dismissal of a pleading may be imposed even absent willful and

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contumacious conduct if a party has been so prejudiced that dismissal is necessary as a matter of fundamental fairness (see *Friel v Papa*, 36 AD3d at 755; *Iannucci v Rose*, 8 AD3d 437, 438; *Mylonas v Town of Brookhaven*, 305 AD2d 561, 563). Here, however, the plaintiffs failed to show that the appellant's alleged "daily sheet" for June 28, 2006, and the file referred to in the appellant's security log book entry on June 28, 2006, were central to their case, or that they were prejudiced by the purported loss of this evidence (see *Friel v Papa*, 36 AD3d at 755; *Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695, 696; *Klein v Ford Motor Co.*, 303 AD2d 376, 377). Furthermore, the plaintiffs failed to demonstrate that the purported loss of the daily sheet and file was the result of intentional or negligent conduct on the appellant's part after it was placed on notice that this evidence might be needed for future litigation (see *Dennis v City of New York*, 18 AD3d 599, 600; *Goll v American Broadcasting Cos., Inc.*, 10 AD3d 672, 673; *Andretta v Lenahan*, 303 AD2d 527, 528).

RIVERA, J.P., COVELLO, ANGIOLILLO, LEVENTHAL and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court