

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

D33062
W/prt

_____AD3d_____

Submitted - October 31, 2011

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
SHERI S. ROMAN, JJ.

2010-07857

DECISION & ORDER

Dawn Marie Lentz, respondent, v
Nic's Gym, Incorporated, appellant.

(Index No. 23445/05)

Havkins Rosenfeld Ritzert & Varriale, LLP, New York, N.Y. (Deborah Peters Jordan of counsel), for appellant.

Bennett, Giuliano, McDonnell & Perrone, LLP, New York, N.Y. (Nicholas P. Giuliano and Erika M. Achtziger of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Suffolk County (Baisley, Jr., J.), entered July 6, 2010, which granted the plaintiff's motion pursuant to CPLR 3126 to impose a sanction upon it for spoliation of evidence to the extent of directing that an adverse inference charge be given at trial and that the plaintiff be reimbursed for the costs of an October 2008 site inspection conducted by the plaintiff's expert.

ORDERED that the order is affirmed, with costs.

The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence (*see Iannucci v Rose*, 8 AD3d 437, 438). "It may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the spoliator] was on notice that the evidence might be needed for future litigation'" (*id.* at 438, quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53; *see Favish v Tepler*, 294 AD2d 396).

December 6, 2011

Page 1.

LENTZ v NIC'S GYM, INCORPORATED

Here, given the defendant's failure to produce the physical evidence in question, the Supreme Court providently exercised its discretion in determining that an adverse inference charge and a reimbursement of the costs of an October 2008 site inspection by the plaintiff's expert were appropriate sanctions (*see Yechieli v Glissen Chem. Co., Inc.*, 40 AD3d 988, 989; *Molinari v Smith*, 39 AD3d 607, 608; *Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 334; *see also De Los Santos v Polanco*, 21 AD3d 397, 397-398).

RIVERA, J.P., DICKERSON, ENG and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court