At an **IAS** Term, Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of July, 2003

PRESENT:

HON. GERALD S. HELD,
Justice.

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730 J & J, LLC,
Plaintiff,

- against -

Index No. 5415/01

FILLMORE AGENCY INC., et al.,
Defendants.

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The following papers numbered 1 to 16 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 7-8 13-14
Opposing Affidavits (Affirmations)	4-5 9-10 15-16
Reply Affidavits (Affirmations)	6 11-12
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action by plaintiff 730 J & J, LLC (730 J & J) alleging failure to procure proper insurance coverage for it, defendant Fillmore Agency Inc. (Fillmore) moves for summary judgment dismissing 730 J & J's complaint as against it. Defendant Kerwick & Curran, Inc. of New Jersey (Kerwick) cross-moves for summary judgment dismissing 730 J & J's complaint as against it or, in the alternative, for an order,

pursuant to CPLR 3126, dismissing 730 J & J's complaint as against it based upon 730 J & J's alleged spoliation of evidence. Kerwick's cross motion further seeks, in the alternative, an order, pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e), vacating 730 J & J's note of issue. Defendant Fillmore additionally cross-moves for an order, pursuant to CPLR 3126, dismissing 730 J & J's complaint as against it based upon 730 J & J's alleged spoliation of evidence.

On April 30, 1997, 730 J & J, as a result of an assignment, became the mortgagee of certain real property, located at 730 Flatbush Avenue, in Brooklyn, New York, and owned by Gabriel Williams. In October 1997, 730 J & J contacted Fillmore, an insurance broker, and advised it that Gabriel Williams was the owner of the property, that it held a mortgage on the property, and that it was seeking to obtain insurance to protect its interest as a mortgagee of the property. Fillmore then contacted Kerwick, a wholesale insurance broker, and advised it of the relationship of Gabriel Williams and 730 J & J to the property. Kerwick, in turn, requested a quote for insurance coverage from First State Management Group, Inc. **(First State),** which **was the managing agent** of, among other insurance companies, Twin City Fire Insurance Company (Twin City), and which underwrites and administers insurance policies on Twin City's behalf. Fillmore provided the quote to 730 J & J, who decided not to purchase the coverage.

On February 17, 1998, 730 J & J again contacted Fillmore about obtaining insurance coverage for the subject real property. At this time, it advised 730 J & J that although

Gabriel Williams was still the owner of the property, it, as the mortgagee, was going to foreclose on the property in the near future. Fillmore again contacted Kerwick and advised it of the change in 730 J & J's situation and the anticipated imminent foreclosure by it. In response, by a facsimile dated February 18, 1998, Kerwick informed First State that it "really need[ed] a hand on this [, that it had] quoted it . . . back on 10/16/1997 [at a certain] rate . . . [, but] what [was] happening now wa[s that] the proposed insured [wa]s actually the mortgage holder of the subject property." Kerwick's facsimile further explained that 730 J & J was "force placing coverage on [the] current owner Gabriel Williams as his insurance coverage [wa]s lapsing [that day] and he basically [wa]s going to lose the whole building via a foreclosure by [730 J & J]."

By facsimile dated February 19, 1998, Kerwick sent Fillmore a written quote for insurance coverage, which listed 730 J & J and Gabriel Williams as the named insureds. After receiving this quote, Fillmore advised 730 J & J of this quote, and 730 J & J agreed to purchase the insurance coverage. Fillmore then advised Kerwick of 730 J & J's agreement, and by facsimile, also dated February 19, 1998, Kerwick sent Fillmore a binder issued by it. This binder, however, only listed 730 J & J as the named insured. The binder issued by Kerwick additionally listed certain warranties, which would be contained in the insurance policy, regarding heat maintenance and/or water drainage and requiring that vacant portions of the property be kept locked, secured, and boarded.

Thereafter, First State, in response to Kerwick's request, issued a binder dated March 5, 1998, b'nding insurance coverage with Twin City under only the name of 730 J & J for the policy period of February 19, 1998 to February 19, 1999. This binder also specifically listed the aforesaid warranties. A formal policy of insurance dated March 12, 1998 was issued by Twin City. That policy did not list 730 J & J as a mere mortgagee, but listed it as the only named insured. The policy also contained the warranties that the subject property "shall be kept locked and secured against unauthorized entry throughout the currency of th[e] policy," and that "heat w[ould] be maintained within the insured premises to a minimum of 35 degrees F[ahrenheit]" or that the "pipes [would be] drained of all liquids." The policy provided that the "failure to comply with the[se] warranties shall suspend all coverage under this policy until such time as the protection of the premises meets the warranted conditions stated above." The policy did not contain a standard mortgagee clause, which insulates a mortgager from the property owner's violation of the insurance policy's warranty provisions.

On April 14, 1998, the subject property suffered a loss by fire, and 730 J & J fsled an insurance claim with Twin City. By letter dated Jane 29, 1999. Twin City denied 730 J & J's claim based upon the ground that it had breached the above stated warranties contained in the insurance policy because the fire had been set by squatters, who were able to gain access to .he building by ladder through open windows on the second floor, and there had been no h :at, electricity, or gas maintained at the premises.

Consequently, on July 6, 1999, 730 J & J commenced an action against Twin City for

breach of the subject insurance policy. By order dated December 18, 2000, this court granted a motion by Twin City for summary judgment dismissing 730 J & J's complaint as against it. In doing so, it rejected 730 J & J's argument that Twin City had made a mistake as to its status as a mortgagee, and that the insurance policy should be reformed to include a standard mortgagee clause. It found that 730 J & J had failed to establish that Twin City was mistaken as to 730 J & J's status as a mortgagee since it had been explicitly advised by Kerwick's February 18, 1998 facsimile that 730 J & J was a mortgage holder about to foreclose upon the subject property. It noted that there was no indication in the record that Twin City had ever promised to include a standard mortgagee clause in the policy, and ruled that 730 J & J, as the only named insured in the insurance policy, was bound by the warranties contained therein.

On February 13, 2001, 730 J & J commenced this action against Fillmore, Kerwick, and First State, alleging that they owed it a duty to exercise the reasonable care, technical skill, ability, and diligence ordinarily required of insurance brokers and agents in the procurement of the subject insurance policy, that they did not adhere to this accepted standard of care due to their failure to obtain proper mortgagee coverage in the insurance policy, and that, as a result of this negligence, it has sustained damages in the amount of $675,561.35.

By decision and order dated December 6, 2001, this court granted a motion by First State to dismiss 730 J & J's complaint as against it. The court held that there was no failure

to procure specifically requested insurance by First State since Kerwick's February 18,1998 facsimile requesting a quote from First State did not request that 730 J & J be named as a mere mortgagee on the policy, but, instead, informed First State that "the proposed insured [wa]s actually the mortgagee holder" which was about to gain control of the property by foreclosure. It noted that it was uncontroverted that at no time did Kerwick request that the subject policy contain a standard mortgagee clause, and that the binders issued by both Kerwick and First State did not indicate that such a clause would be included in the subject policy. Thus, the court found that the policy conformed exactly to the terms and conditions of the binders issued by both Kerwick and First State, which listed only 730 J & J as the named insured, and which specifically set forth the warranties at issue.

Discovery proceeded in this action with respect to 730 J & J and the remaining defendants, and, on October 29, 2002, the deposition of Christopher Shea, a non-party witness, who was the agent at First State that handled 730 J & J's insurance, was conducted. By a so-ordered stipulation dated September 23,2002, the parties were required to complete certain discovery. This included, inter alia, a requirement that defendants conduct inspection of the subject real property within 45 days, that the parties respond to all discovery demands resulting from depositions within 30 days, and that 730 J & J provide documents as to periodic payments made by Gabriel Williams on the mortgage. The so-ordered stipulation directed 730 J & J to file a note of issue on or before December 31,2002.

On December 30, 2002, 730 J & J filed its note of issue. Neither Fillmore nor

Kerwick conducted an inspection of the subject real property within the **45** days required by the September 23, 2002 so-ordered stipulation. Fillmore did not seek such inspection. Kerwick alleges that its time to inspect the property was extended by 730 J & J's counsel and scheduled for January 9,2003. On January 9,2003, Kerwick's expert visited the property, and found that he was unable to inspect the fire damage that had existed because such property was already in the process of being renovated and that these renovations were 85 to 90% complete. Kerwick further asserted that 730 J & J never complied with the Septembe . 23, 2002 so-ordered stipulation's requirement to provide the information and document:.requested during its deposition and the documents concerning periodic payments made by Gabriel Williams on the mortgage. On December 10,2002, Fillmore also served notices to ake the non-party depositions of Jack Elo and a representative of Twin City. On January 23, 2003, Fillmore filed the instant motion and, on January 30,2003, Kerwick filed its cross m otion. Fillmore filed its cross motion on May 5,2003.

Fillmore's motion and Kerwick's cross motion, insofar as they seek summary judgment dismissing **730 J** & J's complaint **as** against **them,** rely upon the deposition testimony of Christopher Shea. They point to his testimony, wherein he stated that the general procedure, based upon underwriting guidelines used in connection with insurance, would be that if First State were advised that there was a mortgage on the property, First State would always attach a standard endorsement known as a mortgage clause (i.e., a standard mortgagee clause) to the policy. They state that Christopher Shea acknowledged

receiving the February **18, 1998** facsimile from Kerwick, which, as noted above, stated that "the proposed insured,'' 730 J & J, was actually "the mortgagee," and that 730 J & J was "force placing coverage on current owner Gabriel Williams."

Fillmore and Kenvick assert that Christopher Shea, therefore, admitted in his deposition that he knew 730 J & J was the mortgage holder and that Gabriel Williams was the owner of the property as of the date of the facsimile from Kerwick, but did not follow First State's procedure of issuing a standard mortgagee clause in the policy. They argue that First State's departure from its own practice of including a standard mortgagee clause when it was advised that a mortgage existed, constituted extraordinary and unforeseeable conduct by First State, which severed any causal nexus between their alleged negligence and 730 J & J's damages. They contend that, therefore, their alleged actions or omissions and any negligence on their **part** could not be the proximate cause of 730 J & J's damages.

This contention is devoid of merit. "Only **an** extraordinary and unanticipated act may serve as a basis for ruling as a matter of law that the [causal] chain has been broken," and "[a]n intervening act [by another party] may not serve **as** a superseding cause if the **risk of** the intervening act occurring is the very risk that renders the defendant negligent'' (***McKinnon*** v ***Bell Security,*** 268 AD2d 220,221).

Here, contrary to the arguments by Fillmore and Kerwick, First State's act in not issuing the policy with a standard mortgagee clause was not extraordinary or unforeseeable. It is uncor troverted that at no time did Kerwick specifically request that the subject insurance

policy contain a standard mortgagee clause and the binders issued by both Kerwick and First State do not indicate that such a clause would be included in the subject policy. While Christopher Shea testified at his deposition as to First State's general practice in the ordinary case where property has an owner and a mortgagee, he also specifically testified that in terms of the particular insurance at issue, such insurance was issued solely for 730 J & J as the named insured and not to Gabriel Williams as a named insured because the property was being foreclosed upon by 730 J & J, and, thus, 730 J & J was about to become the property owner. Thus, Christopher Shea's deposition testimony concerning First State's general underwriting practice in the ordinary case of property with a mortgage does not constitute proof of First State's practice where, as here, the situation presented to it was that the property was about to be foreclosed upon by the mortgagee, who was expected to imminently become the owner of the property. Nor does Christopher Shea's deposition testimony establish that Kerwick ever actually requested that 730 J & J be named as a mere mortgagee in the policy or that the policy contain a standard mortgagee clause.

Contrary to Fillmore's assertions, Christopher Shea's deposition testimony is not inconsistent with statements made by him in his prior March 19, 2001 affidavit submitted to this court. In that affidavit, Christopher Shea stated that First State was aware that 730 J & J was, in fact, the mortgagee of the property, but was also aware that 730 J & J was about to become the owner through foreclosure of its mortgage, and that the policy was, therefore, issued solely to 730 J & J as mortgagee with the anticipation that it was shortly to become

the owner. He explained therein that it was never requested that a standard mortgagee clause be included in the policy.

Kerwick and Fillmore further contend that without the receipt of the actual policy, it was impossible for them to discover that First State failed to issue a standard mortgagee clause. Such contention is without merit. Kerwick asserts that the April 14, 1998 fire occurred after an insurance binder was issued, but before the issuance of the actual policy. As stated above, however, the policy was issued on March 12, 1998, which was before the April 14, 1998 fire. In any event, Kerwick's February 19, 1998 binder, which only listed 730 J & J's name under "Named Insured" and contained the subject warranties, was issued nearly two months before the April 14, 1998 fire and was accepted without objection by Fillmore. First State's March 5, 1998 binder also only listed 730 J & J's name and listed the warranties. Thus, Kerwick and Fillmore were aware of the insurance policy's contents and assented to them.

Therefore, since material and triable issues of fact exist as to the insurance coverage which 730 J & J requested from Fillmore and as to the request for coverage relayed by Fillmore to Kerwick, and whether Fillmore and/or Kerwick, as 730 J & J's insurance brokers acting as its agents, breached their duties to it to provide it with the requested insurance coverage, Fillmore's motion for summary judgment and Kerwick's cross motion, insofar as it seeks summary judgment dismissing 730 J & J's complaint, must be denied (*see* CPLR 3212 [b]; *Murphy* v *Kuhn,* 90 NY2d 266,270; *M&E Mfg. Co. v Frank H. Reis,* 258 AD2d

9, 11; ***Brownstein v Travelers Cos.,*** 235 AD2d 811, 813; ***Madhvani v Sheehan,*** 234 AD2d 652,654; ***Wied v New York Cent. Mut. Fire Ins. Co.,*** 208 AD2d 1132, 1133).

In support of Fillmore's cross motion and Kerwick's cross motion insofar as it seeks dismissal of 730 J & J's complaint based upon its alleged spoliation of evidence, Kerwick and Fillmore point out that on February 11,1993, the subject property had sustained a prior loss due to a fire, and that the damages caused by the February 11, 1993 fire were never repaired. They contend that due to the fact that at the time Kerwick's expert visited the property on January 9,2003, the property was already in the process of being renovated and that these renovations were 85 to 90% complete, it is now impossible for them to defend this matter by separating these damages which were caused by the April 14,1998 fire from those which were caused by the February 11,1993 fire. They argue that 730 J & J's renovation of the property, without prior notice to them, constitutes a willful spoliation of evidence, requiring the striking of 730 J & J's complaint, pursuant to CPLR 3126.

In addressing this argument, the court notes that the striking of a pleading for **Spoliation** of evidence is **justified only** when **a party** alters, **destroys. or loses** possession of key physical evidence before it can be examined by its opponents' experts "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence"' ***(New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.,*** 280 AD2d 652, 653, quoting ***DiDomenico v C&S Aeromatik Supplies,*** 252 AD2d 41, 53; ***see also Tommy Hilfiger, USA v Commonwealth Trucking,*** 300 AD2d 58, 60). "[T]he striking of a pleading is a drastic

sanction"(*Klein* ***v Ford Motor Co.,*** 303 AD2d 376,376; ***see also Marro v St. Vincent'sHosp. and Med. Ctr. of N. Y.***, 294 AD2d 341,342). Thus, courts are "reluctant to dismiss a pleading [based upon spoliation of evidence] absent willful or contumacious conduct" and will only do so where the extent of prejudice to a party requires it or when "dismissal is necessary as a 'matter of elementary fairness"' ***(Favish v Tepler,*** 294 AD2d 396, 396, quoting ***Puccia v Farley,*** 261 AD2d 83, 85; ***see also Mylonas v Town of Brookhaven,*** __ AD2d __, 759 NYS2d 752; ***Klein,*** 303 AD2d at 376). "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" ***(Klein,*** 303 AD2d at 376; ***see also Mylonas,*** 759 NYS2d at 752).

Here, the evidence claimed to be lost is not key evidence central to the case ***(see Atlantic v Mut. Ins. Co. v Sea Transfer Trucking*** *Corp.*, 264 AD2d 659,659-660). The key issue in this case is the type of insurance coverage requested by 730 J & J and whether Fillmore and Kerwick breached their duties to 730 J & J to provide it with the requested coverage. The lost evidence is wholly unrelated to and does not concern this issue, but merely concerns **the issue of the amount** of 730 J & J's damages **due** to **the** April **14, 1998** fire. The fact that a fire occurred, resulting in property damages, and the cause of the fire are not disputed. The issue of the amount and extent of damages sustained by 730 J & J has no bearing whatsoever upon the issue of the liability of Fillmore and Kerwick to 730 J & J for their allegzd breach of their duties as insurance brokers ***(compareAmaris v Sharp Electronics***

Corp., 304 AD2d 457,457; ***Horace Mann*** *Ins.* ***Co. v E.T. Appliances,*** 290 AD2d 418,419; ***Squitieri v City of New York,*** 248 AD2d 201,202).

Furthermore, with respect to the claim by Kerwick and Fillmore of spoliation of evidence as to damages, it is noted that the inability to distinguish between damages caused by the earlier February 11, 1993 fire and the April 14, 1998 fire was not created by 730 J & J's performance of the renovations. Fillmore and Kerwick could not have inspected the property prior to the time that the second fire, which **is** the basis of this action, had taken place, and, once this second fire had occurred, it **is** unlikely that an expert would have been able to distinguish between the damages caused by the two fires. In any event, 730 J & J, as the plaintiff, has the ultimate burden of proving the extent and amount of its damages by competent evidence ***(see Fehlhaber*** *Corp.* ***& Horn Constr.*** Co. ***v State of New York,*** 69 AD2d 362, 360; ***R&I Electronics v Neuman,*** 66 AD2d 836, 838; ***Alexander's Dept. Stores v Ohrbach's, Inc.,*** 269 App Div 321,329; ***Burke, Kuipers & Mahoney, Inc. v Dallas Dispatch Co.,*** 253 App Div 206,207; ***Walter Janvier, Inc. v Baker,*** 229 App Div 679,680). In doing so, it must furnish and present a basis for the ascertainment and computation of the amount it seeks to recover (***R&I Electronics,*** 66 AD2d at 838; ***Alexander's Dept. Stores,*** 269 App Div at 329; ***Walter Janvier, Inc.,*** 229 App Div at 680).

While Kerwick and Fillmore also argue that it will be impossible to tell which renovations were performed due to fire damage and which were performed as improvements to the property or because of the building's dilapidation, it is peculiarly within the discretion

of the trier of fact to assess the evidence and the persuasiveness of testimony as to estimates and evaluations of damages ***(see National Conversion*** *Corp.* ***v Cedar Bldg.*** *Corp.*, 23 NY2d 621,630; ***Duane Jones*** Co. ***v Burke,*** 306 NY 172, 190-191). Thus, a jury can assess from the nature of the renovations performed whether they were related to fire damage or merely made as improvements to the property or as a result of the property's dilapidation, and it can draw appropriate inferences as to the reasons these renovations were performed.

Additionally, documents bearing upon the issue of 730 J & J's damages exist ***(see Mylonas,*** 759 NYS2d at 752; ***Klein,*** 303 AD2d at 376; ***Tommy Hilfiger, USA,*** 300 AD2d at 60; ***Favish,*** 294 AD2d at 397; ***Marro,*** 294 AD2d at 342; ***Chiu Ping Chung v Caravan Coach*** Co., 285 AD2d 621,621-622). Specifically, on June 1,1993, A.A. Yorizzo & Co. appraised the subject property and estimated that it sustained a $202,281 loss due to the fire which occurred on February 11,1993, and Kerwick and Fillmore have possession of this appraisal report. Kerwick and Fillmore also have possession of the October 23, 1995 proof of loss statement of Julius Kairy (the principal of 730 J & J and its predecessor corporation), the December 21, 1995 letter of **R.J.S.** Adjustment **Corp.** recommending that the **insurer** for the February 11, 1993 fire pay $70,000 in settlement of Julius Kairy's claim, and the January 2, 1996 $70,000 check paid. In addition, work orders and invoices must exist concerning the renovations made to the property, which 730 J & J will be required to submit as evidence upon the trial of this action in order to support and prove its claim for damages. Therefore, Kerwick and Fillmore are not "prejudicially bereft of appropriate means" of defending

against 730 J & J's damages claim ***(Tommy Hilfiger, USA,*** 300 AD2d at 60; ***see also Fuvish,*** 294 AD2d at 397; ***Chiu Ping Chung,*** 285 AD2d at 621-622).

The argument by Kerwick and Fillmore that 730 J & J's complaint should be stricken as a spoliation sanction because 730 J & J's conduct was a willful destruction of evidence, done in bad faith, is rejected. 730 J & J complied with the September 23,2002 so-ordered stipulation, which required that it make the property available for inspection for 45 days, i.e., up until November 7,2002. While Kerwick argues that 730 J & J's counsel extended its time to conduct its inspection, there was no court order prohibiting 730 J & J from making any renovations to the property after the time set forth in the so-ordered stipulation. Thus, there has been no showing that 730 J & J disobeyed any court order ***(see Klein,*** 303 AD2d at 376). Moreover, at the time of the renovations, it was over four years since the April 14, 1998 fire and almost two years since 730 J & J commenced its action against Fillmore and Kerwick. It is not alleged that either Kerwick or Fillmore sought to conduct an inspection during those two years, prior to December 10, 2002, when Kerwick first attempted to schedule an appointment to do so.

In addition, although Kerwick disputes 730 J & J's assertion that the renovation work was performed on the property in response to the New York City Department of Buildings' declaration of the building as unsafe and its issuance of a notice of unsafe building and structure order, it is undisputed that at Julius Kairy's May 14,2002 deposition on behalf of 730 J & J, he expressed his intention to perform renovation work in order to fix up and rent

the residential portions of the building, and that he was seeking a contractor to do so. Therefore, such deposition testimony establishes that the renovations made were performed in an effort to have the building ready for occupancy and not "in an effort to frustrate discovery" (*O'Reilly III v Yavorskiy,* 300 AD2d 456,457.) Consequently, the drastic remedy of dismissal of 730 J & J's complaint based upon spoliation of evidence is not warranted ***(see Klein,*** 303 AD2d at 376; ***Favish,*** 294 AD2d at 397; ***Marro,*** 294 AD2d at 342; ***Chiu Ping Chung,*** 285 AD2d at 621-622), and Fillmore's cross motion and Kerwick's cross motion insofar as it seeks such relief must be denied.

In support of its cross motion insofar as it seeks an order, pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e), vacating 730 J & J's note of issue, Kerwick asserts that certain discovery required to be completed by the so-ordered September 23,2002 stipulation remains outstanding. Specifically, as discussed above, Kerwick states that 730 J & J did not provide the information and documents requested during its deposition and the documents concerning periodic payments made by Gabriel Williams on the mortgage. It also alleges that the non-party depositions of Jack Elo and Twin City, noticed prior to 730 J & J's service of its note of issue, have not yet been held, and that due to the fact that 730 J & J has almost completed renovations of the property, it also needs disclosure of documentation, such as contracts and payments made to the contractors by 730 J & J. In response, 730 J & J does not deny its failure to provide the required disclosure. Instead, it argues that because Kerwick's cross motion was served on January 28,2003, more than 20 days after service of

its note of issue and certificate of readiness, it is untimely pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e). It contends that based upon this untimeliness, Kerwick is required to demonstrate good cause to vacate its note of issue and to show special, unusual, or extraordinary circumstances warranting further disclosure.

730 J & J's contention is devoid of merit. Kerwick's notice of cross motion was only served four days late and this minimal delay did not cause 730 J & J any prejudice ***(see Poltorak v Blyakham,*** 225 AD2d 600,601). Moreover, the court "may vacate a note of issue at any time . . . if it finds that the representations contained in the certificate of readiness are inaccurate" ***(Covington v Covington,*** 249 AD2d 735,736; ***see also*** 22 NYCRR § 202.21 [e]; ***Spilky v TRW, Inc.,*** 225 AD2d 539, 540; ***Erena v Colavita Pasta & Olive Oil Corp.,*** 199 AD2d 729,730; ***Levy v Schaefer,*** 160 AD2d 1182,1183; ***Savino v Lewittes,*** 160 AD2d 176, 177). Here, 730 J & J's certificate of readiness states that "[d]iscovery proceedings now known to be necessary [have been] completed." Since this material fact contained in the certificate of readiness was incorrect, 730 J & J's note of issue must be vacated ***(see Spilky,*** 225 AD2d **at** 540; ***Erena,*** 199 AD2d at 730; ***Levy,*** 160 AD2d **at** 1183; *Savino,* **160** AD2d at 177).

Accordingly, Fillmore's motion for summary judgment dismissing 730 J & J's complaint as against it is denied. Kerwick's cross motion is granted insofar as it seeks an order, pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e), vacating 730 J & J's note of issue, and is denied insofar as it seeks summary judgment dismissing 730 J

& J's complaint as against it and an order, pursuant to CPLR 3126, dismissing 730 J & J's complaint based upon 730 J & J's alleged spoliation of evidence. Fillmore's cross motion to dismiss 730 J & J's complaint as against it based upon 730 J & J's alleged spoliation of evidence is also denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C