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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK Justice PART 2

430 Park Ave

INDEX NO. 600285/02

MOTION DATE

-v-

MOTION SEQ. NO. 002

Bank of Montreal

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	SCANNED
Answering Affidavits — Exhibits	NOV 19 2003
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, *it* is ordered that this motion

motion is decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/6/03

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: **IAS** PART 2
..... X
430 PARK AVENUE COMPANY, a New York Limited Partnership,

Plaintiff,

Index No. 600285/02

-against-

BANK OF MONTREAL, COLTEC INDUSTRIES, INC., and GOODRICH CORP.,

Defendants.

----------X

LOUIS YORK, J.:

Motion Seq. Nos. 002 and 003 are consolidated for disposition. In Motion Seq. No. 002, defendant, Bank of Montreal (Lessee) moves, pursuant to CPLR 3212 and **3**126, for an order granting summaryjudgment dismissing the complaint of 430 Park Ave. Co. (Lessor). In Motion **Seq.** No 003, defendant Coltec Industries, Inc ("Coltec") moves for similar relief.

In this action, Lessor alleges that Lessee failed to maintain and surrender the subject building in good condition, and seeks to recover the costs allegedly incurred in restoring the building to good order. Lessor performed a $27 million renovation of the building, and claims that Lessee is responsible for $10 million of those costs. The complaint seeks to compel Lessee to pay for the replacement of entire building systems, such as the electrical system, all of the interior HVAC units, all windows on the west facade, all the roof drains and flashing, and the entire sidewalk around the building. Lessee's defense is that it properly maintained the building,

and that Lessor is attempting to charge Lessee with the costs of constructing a virtually new building, which is far beyond any conceivable obligation imposed upon the Lessee under the terms of the lease.

During depositions, Lessee learned that Lessor had destroyed or altered the building conditions which allegedly gave rise to breaches of the lease. Lessee maintains that Lessor acted in bad faith in destroying or altering the building conditions, that Lessee cannot properly defend this action, and that the action should therefore be dismissed. In order to understand the contentions of the parties, it is necessary to trace the events that took place from the time that Lessor first notified Lessee of the alleged breaches of the Lease, to the time that Lessee learned of the Lessor's alterations.

Lessor is the net lessee of the building located at 430 Park Avenue, between 55th and 56th Streets in Manhattan. The building was originally constructed as a residential hotel in the 1920's, and was converted to an office building in the 1950s. It has eighteen stories, plus retail uses on the ground floor. In July 1969, Lessor entered into a 32-year net sublease with Colt Industries, Inc. (for the sake of simplicity, the sublease is hereinafter referred to as the Lease). The Lease, which was subsequently assigned to Lessee, expired on June 30, 2001. Before vacating the premises, Lessee had occupied nine floors for its own use, and subleased the rest of the building to others.

Article Thirty-First of the Lease provided that the subtenant would surrender the premises in good condition, reasonable wear and tear excepted.

Article Fourth of the Lease stated:

> The Sub-Tenant shall take good care of the***premises and of the

> building, both inside and outside, and keep the same and all parts thereof, including without limitation***the roof, foundations and appurtenances thereto, in good order and condition''''*and shall***promptly make all needed repairs and replacements, structural or otherwise, in and to the building, including***sidewalks,***electrical conduits and equipment, and all other fixtures, machinery and equipment now or hereafter belonging to or connected with said premises or used in their operation. All such repairs and replacements shall be at least equal in quality and class to the original work, and of first class modem character in keeping with the integrity and standard of maintenance, quality and design of similar Park Avenue office buildings completed about 1955.

Approximately five months before the expiration of the lease, Lessor landlord sent Lessee a notice that the lease would not be renewed or extended beyond the June 30,2001 expiration date (Notice). The Notice contained a Schedule A, which demanded the performance of certain renovations and repairs which, according to Lessor, constituted obligations under the Lease:

- removal and replacement of the roof;
- removal and replacement of the window washing rig;
- removal and replacement of the HVAC units and perimeter fan coil units on floors 2 through 19;
- removal and replacement of the windows on the east (Park Avenue) facade;
- removal and replacement of the sidewalk;
- securing bricks on the north, south and west facades;
- removal and replacement of the perimeter heating/cooling risers to the fan coils;

Schedule **A** to the Notice further stated that the electrical system was in a state of disrepair, but did not specify the remedy.

When the Lessee's representatives received the Notice, they did not believe that Lessor seriously expected Lessee to pay for all of the above described work, and construed the Notice as a negotiating ploy to procure a more favorable arrangement with the Lessee regarding exit work. However, Lessee's representatives asked to meet with Lessor's representatives in order to understand the basis for the Notice.

On April 18, 2001, Richard Saddington (a senior vice-president of Lessee) and Sharon Mitchell (Lessee's Division of Property Management) met with Lessor's representatives, including Kevin Cornell (Director of Development). When asked for information, Lessor provided Lessee with copies of reports prepared by Lessee's design consultants and engineers, Jaros Baum & Boiles (JBS), and Gilsanz Murray Steficek LLP. (Gilsanz), but this did not satisfy Lessee's requests.

On April 20, 2001, Lessee's counsel wrote plaintiff's counsel complaining about its lack of information regarding Lessor's demands. The letter stated that while the JBS and Gilsanz reports might be "useful and instructive" for Lessor's "future endeavors" with respect to the building, they did not tie the work to any of the provisions of the Lease or describe the manner in which Lessee had allegedly breached the Lease.

Despite the lack of information about Lessor's specific claims under the Lease, Lessee retained consultants to ascertain the status of the building. It retained the mechanical engineering firm of Meyer, Strong and Jones (MSJ) to review the building's HVAC, plumbing, sprinkler and electrical equipment. Representatives of MSJ visited the building three times in May 2001, to observe the condition of the equipment and to note the presence of any observed code violations. During these inspections, MSJ allegedly visited all floors except the ninth floor. MSJ also had an

opportunity to inspect the building's electrical system and visit to the roof and basement, where it was able to observe and report such items as and the steam pressure reducing valves.

The Lessee also had the building inspected by structural engineers, the VSA Group (VSA). VSA's principals, Vincent Stramandi and Vincent Stramandinoli inspected and reported on the building's roofs, sidewalks, walls, foundations, brick facades, curtain wall, windows and window washing rig.

VSA found only a few relatively minor conditions which Lessee had to repair under the terms of the Lease. For example, VSA pointed out a roof drain that needed repair, and Lessee performed the necessary work.

On June 30,2001, Lessee surrendered possession of the premises. Prior to that time, on June 6, 2001, Cornell, on behalf of Lessor, together with Lessor's litigation counsel, met with a representative from LZA Technology (LZA), an engineering firm which has since been designated as Lessor's expert witness. Lessor asked LZA to inspect the building in order to substantiate the existence of conditions which plaintiff had, six months earlier, listed in the Notice. Lessor told LZA that it planned to begin construction and demolition as soon as possible after July 1, 2001.

Lessee heard nothing further from Lessor until January 2002, when Lessor commenced the instant action. In July 2002, Lessor submitted interrogatory responses claiming nearly $5 million in damages. In January and February 2003, Lessee took a deposition of Comell, who now claimed that Lessee owed $10 million for the work.

When, after commencement of the action, Lessee inquired about the current status of the building, Lessor revealed that the vast majority of the building systems at issue were removed,

replaced or substantially altered between July 2001 and the time of Lessee's inquiry. Thus, in the absence of relief from this court, Lessee would have to defend the action based on whatever it learned from inspections prior to the expiration of the Lease, and upon photographs taken and reports made by Lessor's representatives. Lessee maintains that since Lessor only belatedly revealed the nature of its specific claims, and since an inspection based on those specific claims is now impossible by reason of Lessor's alterations and demolition work, Lessor has improperly deprived Lessee of the opportunity to defend this case.

Lessee points out that the Lessor began plans for a massive renovation of the building as much as two years before the expiration of the Lease. As recently as May 2,2003, the website marketing the building on behalf of plaintiff announced:

> Upon expiration of the lease the owner took possession of the property and seized the opportunity to execute a complete and extensive redevelopment of the entire building into a Class **A** office tower...

Lessee maintains that although the Lease required basic maintenance to keep the building in reasonably good condition, it did not by any means obligate Lessee to give Lessor an essentially new building at the end of the Lease. Lessor maintains that the sum demanded from Lessee covers work that constituted obligations under the Lease. The issue here, however, is whether Lessor's alteration or destruction of the building systems at issue deprived Lessee of a meaningful opportunity to defend the action. For reasons explained below, the answer is in the affirmative, and the action must be dismissed.

Although VSA and MSJ inspected the building on behalf of Lessee while Lessee still had possession of the building, the engineers had to inspect based on very scanty information (i.e. the

Notice and the Gilsanz Reports).

The Notice made no mention of certain building components which are now included in Lessor's claims: the replacement of the west facade windows; significant repairs to the cooling tower, demolition and replacement of the steam station, and the cleaning of the east facade. Although the Notice did indicate that the electrical system was in a state of disrepair, it did not indicate that the remedy was a $3 million replacement of the entire electrical system, which is what Lessor is now demanding. Thus, Lessee's consultants had little to go on when conducting their respective inspections of the building..

As for the HVAC system, Cornell sought to justify replacement of all HVAC units because of conditions that were allegedly discovered inside those units. According to Lessor, a certain number of casings exhibited rust, and internal parts of the units were corroded. However, since the units have now been removed and replaced, Lessee has no way of examining the internal parts of the units in question.

The Notice demanded a complete roof replacement. At his deposition, Cornel1 admitted that the Notice was overly broad, and that it would have been "unfair" to expect Lessee to pay for the entire roof replacement. All of the roof drains, the flashing and the pitch pockets which were purportedly in need of replacement (at a cost of $175,000, according to Lessor) were destroyed by Lessor during the renovations.

The window washing rig has been removed and replaced, and the west facade windows and frames were removed and destroyed.

On the east facade, Lessor did not not do a complete replacement, but did remove and destroy hopper windows (these are small window sections on east facade which were able to be

opened for ventilation).

As for brick work, Lessor removed and destroyed some deteriorated ties. Some of the ties that were preserved are now behind the brick. Inspection of them at this point would require substantial work.

The Lessor removed and replaced a portion of the sidewalk. Lessee believes that some of the replacement may have been necessitated by the wear and tear of the construction process, and that because of Lessor's lack of communication, Lessee had no way of inspecting the sidewalk while the construction was taking place.

Where a party destroys essential physical evidence and the party seeking that physical evidence loses the means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of the pleadings (Madison Avenue Caviarteria v Hartford Steam Boiler Inspection & Ins. Co., 306 AD2d 324 [2d Dept 20031). Spoliation sanctions are not limited to case where it was done in bad faith, because a party's negligent loss of evidence can be just as fatal to another party's ability to present a case or defense (Madison Ave. Caviarteria v Hartford Steam Boiler Ins. Co., supra; Squtieri v City of New York, 248 AD2d 201 [1st Dept. 19981). While courts are reluctant to dismiss a pleading absent willful or contumacious conduct, it may be warranted as a matter of elementary fairness (Madison Ave. Caviarteria v Hartford Steam Boiler Ins. Co., supra; Puccia v Farlev, 261 AD2d 83 (3d Dept. 19991).

A party which is well aware that litigation is likely in the future is subject to sanctions for spoliation of evidence, even though litigation has not yet been commenced, and even though no court order directing preservation of the evidence is in effect (Kirkland v *NYC* Hous. Auth., 236 AD2d 170 [1st Dept. 19971). In Kirkland, the family members of a deceased tenant sued the

Housing Authority and the manufacturer of an allegedly defective stove which supposedly caused the fatal fire. Plaintiffs inspected the stove, but the Housing Authority did not do so. Six years after the commencement of the action, the Housing Authority brought a third-party action against the company that installed the stove. The court held that the installer had no way of defending the case without the opportunity to inspect the stove, and dismissed the action.

In Squitieri v City of New York, 248 AD2d 201 [1st Dept. 1998]), a City worker sued the City, alleging that he had been injured due to exposure to carbon monoxide from a street sweeper. The City brought a third-party action against the manufacturer, alleging that the sweeper was defective. **A** memorandum, labeled "for litigation purposes only," was prepared by a City safety officer and sent to the City's director of safety. It said that the sweeper had been tested for carbon monoxide and had been found to be defective. In other words, the City was well aware that litigation regarding the sweeper was imminent. Thereafter, sometime after the litigation was commenced but before the manufacturer had an opportunity for inspection, the City disposed of the sweeper. The court held that because the City had destroyed this key piece of evidence, the third-party claim had to be dismissed.

In Puccia v Farlev, homeowners brought an action against the installers of a wood stove, alleging that improper installation of the stove led to a fire which destroyed their home. The court that dismissed **the action,** holding that the homeowners' destruction of the stove deprived the installer of a meaningful opportunity to defend the case.

Spoliation of evidence may warrant dismissal even where government or expert reports or photographs of the equipment are available to the defendant (Puccia v Farlev, supra; Thornhill v A.B. Volvo, 304 AD2d 651 [2d Dept 2003][automobile involved in accident was destroyed,

rendering defendant unable to defend a claim that a tie rod was defective]).

In Silvestri v General Motors Corp. (271 F.3d 583 [4th Cir. 2001][applying New York law since the accident occurred in New York]), a motorist brought an action against the manufacturer of an automobile, alleging that the air bag did not inflate as warranted, as a result of which the injuries from crash were more severe. Plaintiff repaired the vehicle without notifying General Motors of the claim. General Motors' theory was that the air bag was not designed to inflate unless the force of the crash exceeded a certain level, that a normally functioning air bag would not have inflated in this accident, and that plaintiffs injuries had no relation to the air bag. The court held that because of the alteration of the car, General Motors was deprived of the opportunity to perform accident reconstruction which could have been used to prove its theory. Therefore the court dismissed the action by reason of spoliation, stating the following::

> The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth. Because non one has an exclusive insight into truth, the process depends upon the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusion- all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. The court must protect the integrity of the judicial process because, as soon as the process falters, the people are then justified in abandoning support for the system. [271 F.3d at 590].

The instant case is analogous to several of the cases described above. Lessor knew that litigation was imminent, and should have known that once extensive construction was under way, any opportunity for further inspection of the property, to determine Lessee's compliance or lack of compliance with the terms of the Lease, would be severely compromised. The fact that the action was not yet commenced, and that no discovery order was in effect at the time of the

spoliation, does not make any difference.

Several of the cases cited by defendant are distinguishable from the instant case. In O'Reilly v Yavorskiv, 300 AD2d 456 [2d Dept. 2002]), the lawsuit arose out of an accident allegedly caused by blown-out tire. The company that towed the car following the accident disposed of the tire without plaintiffs knowledge, before defendant had an opportunity to inspect it. Under the circumstances, the court held that dismissal of the action was not warranted. In the instant case, however, Lessor was in full control of the property once Lessee surrendered possession, and went ahead with construction, knowing full well the effect that the irrevocable alterations would have upon Lessee's inability to defend the case.

In Berweckv v Montgomery Ward, Inc. (214 AD2d 936 [3d Dept. 19951, plaintiffs' residence was damaged by a fire originating in the vicinity of a refrigerator, and plaintiffs sued the store at which they had purchased the refrigerator. By the time that defendant belatedly asked for inspection of the refrigerator, plaintiffs had disposed of it. Defendant sought dismissal of the action on the ground of spoliation, but the court declined to dismiss the case. In Benveckv, plaintiffs insurance carrier[1] had twice contacted the store and offered an opportunity to inspect the refrigerator, and had warned the store that the refrigerator would not be preserved indefinitely, but the store had failed to respond. In the instant case, Lessor maintains that Lessee should have asked for another inspection between the time of its departure from the premises and the date that construction actually began. However, unlike the situation in Berweckv, such an inspection would not have helped the Lessee, who still knew little if anything about Lessor's claims regarding the repair obligations under the Lease.

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1 Apparently this was a subrogation action.

This case differs somewhat from other spoliation cases, in that Lessee had some opportunity to inspect the property between the time of the Notice and the time of expiration of the Lease. The problem, however, was that neither the Notice nor the JBS or Gilsanz reports discussed the connection between any of the work demanded in the Notice and Lessee's obligations under the Lease. Thus, Lessee's consultants, at the time of their pre-July-2001 inspections, were not in a possession to rebut the claims that Lessor is now making.

Lessor, in the course of discovery, obtained certain documents indicating that Lessee's own contractors and subtenants had pointed out problems with air handling units, water treatment, the HVAC system, and the cooling tower. Even if these documents were construed in a light most favorable to Lessor, they do not change the fact that prior to July 2001, Lessee was unaware of what conditions the *Lessor* claimed as breaches of the Lease.

Lessor complains that prior to its surrender of possession, the Lessee did not give Lessor's representatives a fair opportunity to inspect the building, and that this impeded Lessor's efforts to tie its demands for work to specific violations of the Lease. However, even if this were the case, Lessor had the unimpeded right to inspect the building starting in July 2001, once Lessee had vacated the premises.

Lessor should have done a thorough inspection, and should have pointed out to Lessee the specific conditions which, in its view, constituted a breach of the Lease. Then, Lessee's representatives could have conducted a meaningful inspection of the property before construction began.

If Lessor wanted to preserve its rights, it could have commenced the instant action *before* commencing construction, and could have asked this court to set rules on the scope of and time

deadlines for Lessee's final inspection of the property. However, as it turned out Lessor sprang upon Lessee a $10 million claim, only after construction had irrevocably altered the building. As a result, Lessee cannot properly defend the action, and the court thus has no alternative but to dismiss the action by reason of spoliation of evidence.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 11/6/03

ENTER:

J.S.C.
LOUIS B. YORK