1199 Housing Corporation v Kelly Tank Company, Inc.
2005 NY Slip Op 30197(U)
December 5, 2005
Supreme Court, New York County
Docket Number: 0600525/2002
Judge: Richard B. Lowe
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SCANNED ON 12/12/2005

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

PRESENT: HON. RICHARD B. LOWE, III, Justice

PART 56

1199 Housing Corp

- v -

Kelly Tank Comp

INDEX NO. 600525/02

MOTION DATE 5/17/05

MOTION SEQ. NO. 007

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 12 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

Dated: 12/5/05

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

---X

1199 HOUSING CORPORATION,

Plaintiff,

-against-

Index No. 600525/02

DECISION AND ORDER

KELLY TANK COMPANY, INC., and INTERNATIONAL FIDELITY INSURANCE COMPANY, ANTONUCCI & LAWLESS ARCHITECTS & ENGINEERS, LLP, LAWLESS & MANGIONE ARCHITECTS & ENGINEERS, LLP, individually and as successors in interest to Antonucci & Lawless Architects & Engineers, Llp, ROBERT T. LAWLESS, ROBERT ANTONUCCI, RONALD P. MANGIONE, and JOSEPH S. LEA,

Defendants.

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ANTONUCCI & LAWLESS ARCHITECTS & ENGINEERS, LLP, LAWLESS & MANGIONE ARCHITECTS & ENGINERS, LLP, individually and as successors in interest to Antonucci & Lawless Architects & Engineers, Llp, ROBERT T. LAWLESS, ROBERT ANTONUCCI, RONALD P. MANGIONE, and JOSEPH S. LEA,

Third-Party Plaintiffs,

-against-

MARION SCOTT REAL ESTATE, INC.,

Third-Party Defendant.

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FILED
DEC 12 2005
COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE, III, J:

Motion sequence numbers 007-011 are consolidated for disposition. In motion sequence 007, third-party defendant Cascade Water Services, Inc. (Cascade) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party claims, and all cross

claims asserted against Cascade.

In motion sequence 008, defendants Antonucci & Lawless Architects & Engineers, LLP and Lawless & Mangione Architects and Engineers, LLP (collectively, A&L/L&M or, alternatively, the Engineers) move, pursuant to CPLR 3126, to strike plaintiff 1199 Housing Corporation's (1199 Housing) second amended complaint, as a result of the spoliation of critical evidence; or alternatively, pursuant to CPLR 3212 (e), granting defendants A&L/L&M partial summary judgment: (1) dismissing all claims concerning alleged improper chemical treatment; (2) dismissing the negligence claims, and the eleventh, twelfth, thirteenth and fourteenth causes of action in the second amended complaint; and (3) dismissing the cross-claims for indemnification and contribution by co-defendants Kelly Tank Company, Inc. and International Fidelity Insurance Company (Fidelity), and Cascade. Cascade cross-moves, pursuant to CPLR 3126, to strike the amended complaint based upon spoliation of evidence necessary to the trial of this matter.

1199 Housing cross-moves to: (1) strike the Engineers' answer on the grounds of spoliation of evidence based upon a) the Engineers' loss of their file regarding the work they performed for 1199 Housing from 1995-1997 with respect to a Physical Conditions Survey and Phase I of the heating plant upgrade, and b) the defendants failure to preserve and test radiator parts and valves that constituted evidence in this case; and (2) to strike the Engineers' references to the deposition testimony of Peter Scherz, a former KeySpan employee who was subpoenaed by the Engineers but never examined by 1199 Housing.

Defendant A&L/L&M cross-moves to compel Ezra Goodman, Esq. of the law firm of Szold & Brandwen, P.C. (S&B), to answer questions upon deposition and to produce certain

documents, to disqualify the law firm of S&B as counsel for the plaintiff, for leave to take the non-party deposition of Amauris Baez, and for sanctions against 1199 Housing.

1199 Housing cross-moves to strike the Engineers' cross motion to compel, and for a protective order regarding the non-party deposition testimony sought by the Engineers.

In motion sequence 009, plaintiff 1199 Housing moves, pursuant to CPLR 3212 , for partial summary judgment on its ninth and tenth causes of action against Kelly Tank and Fidelity for liquidated damages in the amount of $465,500 plus pre-judgment interest, and on its eighth cause of action for attorney's fees and costs. The Court has been informed that a settlement has been reached between 1199 Housing and defendant Fidelity, and that plaintiff's motion for summary judgment is withdrawn as to Fidelity.

In motion sequence 010, defendant Marion Scott Real Estate, Inc (Marion Scott) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint as to Marion Scott on the grounds that the third-party plaintiffs have failed to set forth a sufficient and valid impleader claim. It also cross-moves for a protective order with respect to the deposition testimony sought by the Engineers in their cross motion

In motion sequence 011, 1199 Housing moves, pursuant to CPLR 3215 and 321, for a default judgment against Kelly Tank based upon its failure to obtain counsel within the time directed by this Court, and upon its failure to submit opposition papers to the motion for summary judgment. Kelly Tank cross-moves for summary judgment dismissing 1199 Housing's claims for liquidated damages.

Background

Plaintiff 1199 Housing brings this action to recover damages for breach of contract,

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negligence, and fraud with respect to the upgrading of 1199 Housing's heating system for its apartment complex. 1199 Housing owns and operates a cooperative housing development in East Harlem. Its managing agent at all relevant times has been defendant Marion Scott.

In 1995, 1199 Housing hired the defendant Engineers to conduct a conditions survey of its building and mechanical systems, including the heating plant and heat distribution system. In 1996, 1199 Housing and the Engineers entered into a contract under which the Engineers were to provide 1199 Housing with professional services including, *inter alia*, preparing construction contract documents and specifications, and overseeing construction projects related to 1199 Housing's heating plant and heat distribution system.

On June 9, 1997, 1199 Housing contracted with Kelly Tank to perform "Phase 2" of the heating system upgrade at 1199 Housing. Kelly Tank was to be paid $805,510.00 to install three new boilers and burners, and to replace approximately 10,000 radiator parts in several thousand radiators located in approximately 1600 residential apartments, as well as in various commercial spaces and common areas. The Kelly Tank drawings, specifications, and scope of work were prepared by the Engineers.

Pursuant to its contract, Kelly Tank was also to provide chemical water treatment, including both chemical treatment to clean the boilers and also, a regular regime of water treatment that would affect both the boiler water and the steam that was distributed through the heating system.

1199 Housing alleges that Kelly Tank missed two "time of the essence" deadlines to have new boilers ready for the 1997 and 1998 heating seasons, that it never got the three new boilers running properly, that it submitted, and received payment for fraudulent invoices, claiming

renovations of apartment radiators that were never performed, and that it performed faulty work on the piping and traps and valves in the crawl spaces of the building.

1199 Housing further alleges that Kelly tank hired a subcontractor (third-party defendant Cascade), who put the wrong chemicals into the heating system water supply, causing massive damage throughout the system.

As against the Engineers, 1199 Housing alleges that the design of the heating plant upgrade project was defective, and that they did not properly inspect and supervise the work performed by Kelly Tank in the implementation of the project. 1199 Housing alleges that Kelly Tank's defective work had to be redone, and that it caused damage to the heating system that had to be repaired. 1199 Housing further alleges that the Engineers' supervision was so grossly deficient that they issued payment certifications for hundreds of thousands of dollars of work that had not been performed at all, and for hundreds of thousands of dollars of defective work.

The Engineers allege claims for indemnification and contribution against Marion Scott Real Estate, Inc. (Marion Scott), the managing agent of the housing complex. Marion Scott's employee, Vernon Cooper was the construction manager for the project. The Engineers allege that they were prevented from inspecting a number of the individual apartment radiators because Cooper did not want to disturb the tenants, and that it was Cooper that approved payments to Kelly Tank.

Defendants Fidelity and Kelly Tank impleaded Cascade, alleging that Kelly Tank subcontracted with Cascade to provide chemical treatment for the water in the boilers, but that Cascade put the wrong chemicals into the system, thereby damaging the system.

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CASCADE'S MOTION TO DISMISS

Cascade provided water treatment services to 1199 Housing in 1997 and 1998. Cascade commenced work at the premises in November 1997, following an oral request made by a representative of Rockmills Steel Products Corp (Rockmils) to provide corrosion-minimization treatment for the six boilers in the system at 1199 Housing. Rockmills is a commercial boiler fabricator, which was at one time at least partially owned by the father of the founders of Kelly Tank. According to Cascade, it was common for a company such as Rockmills to direct Cascade as to the type of water treatment that was sought.

Cascade alleges that in November 1997, it began to treat all six boilers with two proprietary nitrite products; B939L and B940L. Both boiler treatment products are in liquid form and are water-soluble. Cascade states that both products are designed to coat the boiler and form a protective barrier between the metals and the water. The barrier impairs the oxygen in the water from interacting with the metal and thus reduces the rate of corrosion. The nitrate product is designed to remain in the boiler and does not escape in the produced steam.

1199 Housing counters that its contract with Kelly Tank, which was prepared by the Engineers, called for its heating plant to be protected with a *system treatment*, that is, a chemical that would not only reside in the boiler water, but would also go up with the steam into the distribution system and provide corrosion protection throughout the system. However, B939L and B940L were nitrite based chemicals that were only supposed to treat the interior of the boilers, not the system piping (Cooper Aff., ¶ 20). 1199 Housing alleges that Cascade "should have known" about the boiler replacement project that was underway, and that Cascade's products B939L and B940L were not in accordance with the project specifications.

In addition, 1199 Housing alleges that in March 1998, it was receiving complaints from its shareholder-tenants that they were not receiving adequate heat in their apartments. At that time, KeySpan Energy Management, Inc. (KeySpan) was providing services to 1199 as the operator of its heating plant. KeySpan investigated these heat-related complaints, and found that in some instances there were radiators that had new valves and traps in them that had been installed by Kelly Tank, but that these new parts had deposits that appeared to include residue from chemical water treatment products. KeySpan technicians observed that there was evidence of the water treatment product caking up in the steam traps. Some of the parts were sent to Barnes & Jones, the manufacturer, for warranty testing. Barnes & Jones issued a written report dated August 17, 1998, which stated, in part that "each unit is contaminated with what appears to be some type of boiler feed treatment."

Meanwhile, in March 1998, five months after Cascade began treating 1199 Housing's boiler water, the Engineers wrote a letter to Kelly Tank, stating as follows:

> The chemicals presently being used to treat the boiler water system are not in accordance with the specifications. In addition, the method you have used to introduce these chemicals into the boiler water has resulted in concentrations and build-ups of undissolved chemicals in sections of the boilers and other parts of the heating system

(Plf's Opp Aff., Ex. 9).

Cascade alleges that, thereafter, on March 24, 1998, a representative from Rockmills advised it that the Engineers had written specifications setting forth requirements for a different boiler treatment protocol. Cascade states that, prior to March 24th, it was not aware of these specifications.

In response to obtaining these specifications, Cascade forwarded a proposal for chemicals to be added to the boilers. Cascade alleges that it was advised by Rockmills to submit the proposal to the Engineers, and that it did so. Cascade states that on March 31, 1998, the Engineers approved the proposal to add Cascade's product, B691L, to the boilers. This is verified by Exhibit L to the Shearer Affirmation. According to Cascade, B691L is a caustic, polymer, catalyzed sulfite and amine blend. It is designed as a deposit control agent for the boilers and all system piping. The polymer acts as a dispersant to prevent scale-forming ions from depositing on boiler tube surfaces. Cascade alleges that it delivered the B619L to the premises but that it did not add it to the boilers. This is contradicted by 1199 Housing's records, which indicate that Cascade added the product to the boilers (Plf's Opp. Aff., Ex. 12). Cascade also states that, in April 1998, another Cascade product, B89L, was used to clean several boilers.

1199 Housing's second claim against Cascade is that recommended its product B691L and began using that chemical treatment in March or April 1998, but did not warn 1199 Housing, or the Engineers, that the introduction of chemicals into a system that had not had treatment for years would cause corrosion debris to loosen from metal surfaces and travel through the system. 1199 Housing alleges that Cascade's introduction of this product into its system was negligent.

Cascade moves for summary judgment dismissing the complaint on the grounds that both B939L and B940L are chemicals which dissolve in water and thus do not leave a residue or buildup, and are designed to circulate and remain in the boiler. They do not leave the boiler and travel in the steam to the radiators. Cascade further asserts that the evidence, including deposition testimony of a former KeySpan employee, discloses that in March 1998, the boiler facility was in complete shambles and the employee observed signs of neglect and corrosion that

he attributed to *lack* of chemical water treatment (Shearer Aff., Ex. O at 38). This corresponds with a physical conditions survey prepared by the Engineers in 1995. That report was designed to provide 1199 Housing with a general sketch of the state of its physical premises, and recommendations as to what work was needed to bring the premises into a state of good repair. At that time the Engineers noted that the heating system had not been treated with chemicals for a number of years (Shearer Aff., Ex. D). In addition, in a letter dated October 13, 1997, regarding the advisability of using replacement "inserts" in the existing radiator valves and traps, as opposed to replacement of radiator valves and traps, the Engineers stated the following:

> There has been no water treatment in the steam system for a least five years. **As a result, a large amount of minerals, dirt and accumulated debris has spread through out all parts of the system.** The most probable place for this accumulation of minerals, dirt and debris to loge, is in the valve and trap bodies, both of which have orifice type passages. **Removal of a valve insert might loosen all this "gunk", but it would not remove it.** When we put the valve back in service, the "gunk" will lodge in the orifice or right angle connection in the insert, preventing the valve from acting as a shut-off for steam.

(Id., Ex. E).

Finally, Cascade asserts that the Barnes & Jones report, which is the sole basis for 1199 Housing's assertion that Cascade's products damaged the valves and traps, is not conclusive of anything. The Barnes & Jones report states as follows:

> This letter is in response to the six #1750 air vents and eleven #5000 cage units that were sent in for testing and warranty evaluation.
>
> All of the units were tested under live steam and inspected by our cage unit production supervisor. Each unit is contaminated with what appears to be some type of boiler feed treatment. The excess contaminant in the system is causing a buildup of scale and dirt

> along the seating area of the cage units which is preventing them from closing off properly and making a tight seal. . .
>
> The cause of the premature failure of these units is due to the high concentration of chemicals which is causing corrosion of the units' spot welds and scale buildup along the seating area.

(Sshearer Aff., Ex. S). Cascade points out that the report refers to testing of air vents and cage units. It does not reference traps or valves. Further, the report states only that "each unit is contaminated with what appears to be some sort of boiler feed treatment." Despite this lack of conclusiveness, 1199 Housing never did further testing.

In opposition to Cascade's motion for summary judgment, 1199 Housing submits the affidavit of Norman Wesler, a professional engineer, who states, first, that Cascade was unauthorized to put chemicals into 1199 Housing's boiler water, because it was asked to do so by Rockmills, and never sought permission from the Engineers. Wesler contends that, as a result of the chloride levels far in excess of the maximum range, Cascade should have known that there was a substantial possibility that its products BC939L and BC940L would be carried over from the boilers into the steam risers.

Cascade argues that, in March 1998, when the Barnes & Jones valves and traps were removed for testing, the only Cascade products that had been used were the B939L and B940L products, which were designed to stay in the boiler and not even reach the valves and traps. Cascade asserts that water can surge out of the boiler in inches or perhaps feet, but cannot surge out of the boiler into apartments several floors up. Moreover, Cascade asserts that "carryover," which is where the liquid in the boiler goes up into the riser pipes with the steam, is an "operational" problem, meaning that it is the fault of the operator of the boiler, which was not

Cascade's job.

Wesler's legal conclusion that Cascade was unauthorized to treat the boiler water because it was hired by Rockmills, is insufficient to raise an issue of fact. The documentary evidence indicates that Kelly Tank was required, by its contract, to hire an entity to chemically treat the water and that 1199 Housing was aware of Cascade's presence on the site. In addition, the claim that Cascade should have known that a project was being administered by an engineer and therefore should have submitted product information to that engineer is purely speculative.

Nonetheless, on a motion for summary judgment, the Court is required to determine only whether there are legitimate issues of fact to be resolved at trial. The function of a Court is issue finding, not issue determination (Brunetti v Musallam, 11 AD3d 280 [1st Dept 2004]). The issue as to whether there was "carryover" of Cascade's product, is a factual issue which is not resolved by the conflicting affidavits. Moreover, neither party has addressed the issue as to the practice in the industry, and whether a water treatment service generally merely delivers a requested product, or rather, is expected to use its expertise in determining the appropriate water treatment. Further, there is evidence that Cascade did, in fact, put the chemical water treatment into the boiler. Nor is it clear from the papers, exactly what Rockmills had requested of Cascade, and whether Cascade did inspect the boiler system and whether it recommended its products B939L and B940L.

As to the introduction of B691L into the system, the records indicate that B691L was introduced on March 31, 1998, after the removal for testing of the new Barnes & Jones valves & traps. 1199 Housing contends that this product caused further damage to its system. Although it is undisputed that Cascade informed the Engineers as to the B691L's properties, and that the

Engineers approved the product for use in 1199 Housing's system, nonetheless, issues of fact remain as to whether this product did cause further damage to the system and whether, under the common practice in the industry, Cascade would have been responsible to inform the Engineers as to the possible consequences of the use of this product.

Accordingly, Cascade's motion for summary judgment, dismissing the complaint as against it, is denied.

THE SPOLIATION AND DISCOVERY MOTIONS

In motion sequence 008, the Engineers, move, pursuant to CPLR 3126 to strike 1199 Housing's second amended complaint due to the spoliation of critical evidence; or alternatively, pursuant to CPLR 3212 (e), granting the Engineers partial summary judgment: (1) dismissing all claims concerning improper chemical treatment; (2) dismissing the negligence claims in the eleventh, twelfth, thirteenth and fourteenth causes of action; and (3) dismissing co-defendant Kelly Tank's and Cascade's cross-claims for contribution and/or indemnification. Cascade also cross-moves, pursuant to CPLR 3126, to strike the amended complaint based upon spoliation of evidence necessary to the trial of this matter.

The Spoliation Issue

The Engineers assert that 1199 Housings second amended complaint should be stricken in its entirety due to its spoliation of critical evidence. The Engineers allege that, after KeySpan replaced the traps and valves in the residential apartments, Marion Scott and KeySpan took the old valves and traps and placed them in a storage area in the basement of 1199 Housing. Thereafter, in late 2003 or early 2004, Marion Scott discovered that the valves and traps in 1199's storage area had disappeared. According to the Engineers, KeySpan investigated the

disappearance of the valves and traps, and it determined that the valves and traps were stolen by an employee of 1199 and an employee of KeySpan.

The Engineers note that a significant portion of 1199 Housing's claims involve the damage done to radiator components caused by improper chemical water treatment, as well as the Engineers failure to properly certify that Kelly Tank had, in fact, replaced the valves and traps in the residential apartments.

The Engineers note that the valves and traps that existed in the apartments prior to Kelly Tank's work were manufactured by Dunham Bush. The Dunham Bush valves and traps were to be replaced by valves and traps manufactured by Barnes & Jones. As already noted, 1199 Housing alleges that, in August 1998, several of the new Barnes & Jones valves and traps were sent to Barnes & Jones for testing. The valves and traps tested by Barnes & Jones were then returned to 1199 Housing. Thereafter, in September 2001, 1199 Housing retained KeySpan to again replace all the valves and traps.

The Engineers allege that on March 11, 2004, they sent an engineer to conduct an on site inspection at the premises. That expert states, as follows:

> During the site inspection, no valves and traps which were allegedly removed from the apartments subsequent to Kelly Tank's termination were available for inspection. Rather, the only components that were available for inspection were elements which had been removed from the various radiator units by [KeySpan]. The elements are a component of a trap assembly. Apparently, in some instances, [KeySpan] removed and replaced only the elements rather than the entire trap assembly. Significantly, based upon my visual observation of the condition of the elements that were made available for inspection , the elements did not require replacement since they were in satisfactory condition.

(DeSimone Aff. ¶ 9).

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The Engineers contend that, without the ability to inspect the valves and traps which allegedly required replacement, it is impossible to determine whether the valves and traps did, in fact, require replacement. In addition, an inspection of the valves and traps that were removed from the various apartments by the replacement contractor could easily determine whether the Dunham Bush original valves and traps were replaced by Kelly Tank, since an inspection of the valves and traps could determine if they were manufactured by Dunham Bush or Barnes & Jones.

1199 Housing responds that, although some of the used radiator parts were stolen from it, there are still 2,500 parts remaining, and that it is not necessary to have possession of all of the thousands of parts that KeySpan took out of the radiators to determine the physical condition of the parts. Further, these parts have been made available for inspection.

The principal purpose of CPLR 3126 is to penalize parties who wilfully obstruct justice by failing to disclose evidence. As a rule, a party seeking penalties under CPLR 3126 has the burden of proving that a failure or refusal to disclose was the result of willful, deliberate or contumacious conduct (Goodman, Rackower & Agiato v Lieberman, 260 AD2d 599 [2d Dept 1999]).

Spoliation is the destruction of evidence. Under New York law, where 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 (Barahona v Trustees of Columbia Univ. In City of New York, 16 AD3d 445 [2d Dept 2005]; see also Standard Fire Ins co. v Federal Pacific Elect. Co., 14 AD3d 213 [1st Dept 2004]; New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec., 280 AD2d 652 [2d Dept 2003]; DiDomenico v C & S Aeromatic Supplies, 252 AD2d 41 [Dept 2003]). However,

where the physical evidence lost as a result of spoliation is not central to the case, or its destruction is not prejudicial, a lesser sanction than striking the pleading, or no sanction may be appropriate (Klein v Ford Motor Co., 303 AD2d 376 [2d Dept 2003]). Thus, where the evidence is not "crucial" or there is an abundance of other relevant evidence which remains available to a party, sanctions may not be appropriate (see, Myers v Sadlor, 16 AD3d 257 [1st Dept 2005]). The burden is on the moving party to establish that the destroyed evidence was crucial to his or her case (Cameron v Nissan 112 Sales Corp., 10 AD3d 591 [2d Dept 2004]; Tawedros v St Vincent's Hosp. of New York, 281 AD2d 184 [1st Dept 2001]).

Here, there are over 2,000 elements still available for inspection. Further, it appears that the party most harmed by the spoliation of evidence is 1199 Housing, which bears the burden of proof regarding its claims as to improper chemical water treatment and Kelly Tank's failure to replace the valves and traps. The Engineers' expert has stated that based upon his visual observation, those elements which were made available for inspection did not appear to require replacement. This suggests that the Engineers are, in fact, able to refute 1199 Housing's claims with the available evidence, and therefore are not critically prejudiced by the spoliation of evidence. Finally, in 2001, well before the theft of the parts, 1199 Housing's counsel sent written notice to the Engineers, as well as to Kelly Tank, inviting them to conduct site inspections of the heating plant and system. That invitation gave the Engineers ample opportunity to arrange to inspect the radiator parts that were being removed, as well as the contaminated parts. Accordingly, sanctions for the spoliation of evidence are not warranted, and that part of the motion to dismiss 1199 Housing's complaint is denied.

Similarly, the cross motion by Cascade to strike the amended complaint due to spoliation

of evidence, is denied.

Dismissal of Chemical Treatment Claim

The Engineers also seek summary judgment dismissing 1199 Housing's thirteenth cause of action which alleges that the Engineers failed to detect and/or report that the wrong chemical treatment was being put into the system. According to the Engineers, 1199 Housing's sole basis for its claim of improper chemical treatment is the August 17, 1998 Barnes & Jones report, which is inconclusive.

1199 Housing has, however, sufficiently raised an issue of fact as to the Engineers liability on this issue by submission of the Wesler affidavit which alleges that, for five months, the Engineers approved payment for Cascade's initial water treatment, which was materially different than that called for in the Engineer's specifications, and that, thereafter, after the radiator parts were changed, the Engineer's approved of a chemical water treatment product which damaged the new radiator parts through deposits of the product, and which also loosened corrosion debris in the piping with further contamination of the traps and valves.

The Engineers also seek to dismiss the eleventh, twelfth and fourteenth causes of action in 1199 Housing's second amended complaint. The eleventh cause of action alleges design defects in the project manual prepared by the Engineers. The twelfth cause of action alleges that the Engineers did not properly supervise the work done by Kelly Tank thereby resulting in 1199 Housing paying for work that was either not done at all or improperly done. The fourteenth cause of action alleges breach of contract and unjust enrichment and seeks return of the fees paid to the Engineers.

The basis for the Engineers motion to dismiss the negligence claims against it, as well as

claims that it is jointly and severally liable with the co-defendants for 1199 Housing's damages, is that joint and several liability is only applicable to tort claims, it does not apply in this case where 1199 Housing seeks to hold the Engineers liable for breach of contract.

It is well settled that "in claims against professionals, '[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties relationship. Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (17 Vista Assoc. v Teachers Ins. & Annuity Assoc. of Am., 259 AD2d 75, 83 [1st Dept 1999] quoting, Sommer v Fed. Signal Corp., 79 NY2d 540, 551 [1992]). 1199 Housing has stated valid claims in tort, based upon the Engineers professional malpractice.

Similarly, the Engineers seek to dismiss their co-defendants' claims for indemnification and contribution on the grounds that neither Kelly Tank, Fidelity, nor Cascade may seek contribution from the Engineers, since the claims against the Engineers are solely for breach of contract. As to Cascade's claims, since the claims against the Engineers include negligence, Cascade may cross-claim for contribution (c.f., Board of Education of the Hudson City School District v Sargent, Webster Crenshaw and Folley, 71 NY2d 21 [1987]). Cascade's cross-claim for indemnification is dismissed in that Cascade has not asserted either a contractual or common law right to indemnification from the Engineers. As to Kelly Tank and Fidelity, the motion is granted without opposition.

Accordingly, the Engineers motion is denied except as to that part of the motion seeking dismissal of the cross claims asserted by Kelly Tank and Fidelity, and claims for indemnification made by Cascade.

The Discovery Motions

1199 Housing cross moves to: (1) strike the Engineers' answer on the grounds of spoliation of evidence based upon a) the Engineers' loss of their file regarding the work they performed for 1199 Housing from 1995-1997 with respect to a Physical Conditions Survey and Phase I of the heating plant upgrade, and b) the defendants failure to preserve and test radiator parts and valves that constituted evidence in this case; and (2) to strike the Engineers references to the deposition testimony of Peter Scherz, a former KeySpan employee who was subpoenaed by the Engineers but never examined by 1199 Housing.

1199 Housing states that files covering the work performed for it is 1995-1996, and in part of 1997 were produced for inspection, but then somehow lost. 1199 Housing asserts that these files should contain material information about how the Engineers performed their services and what they discovered, and did not discover about the conditions of 1199 Housing's heating plant and heat distribution system.

As I have already noted, the sanction of striking a pleading is reserved for the destruction of crucial evidence, and the burden is on the moving party to demonstrate that the evidence lost was central to its claim or defense (Cameron v Nissan 112 Sales Corp., 10 AD3d 591 [2d Dept 2004]; Tawedros v St Vincent's Hosp. of New York, 281 AD2d 184 [1st Dept 2001]). Where the evidence is not crucial, or there is an abundance of other relevant evidence which remains available to a party, sanctions may not be appropriate (see, Myers v Sadlor, 16 AD3d 257 [1st Dept 2005]). Here, 1199 Housing has demonstrated that certain aspects of the Phase I documents may have been relevant to this action, but it has not proved that these documents were crucial.

As to the used radiator valves and traps, it is undisputed that 1199 Housing, not the

Engineers, had possession of the valves and traps. Nor is there any allegation that 1199 Housing sought to have the Engineers take possession of them. It is therefore inappropriate to sanction the Engineers for their loss.

As to the deposition of Peter Scherz, 1199 Housing states that when Mr. Scherz appeared for an examination pursuant to a subpoena issued by the Engineers, 1199 Housing was able to begin its cross-examination of the witness but, that it was unable to finish due to the time of day. 1199 Housing has not stated that it was unable to issue its own subpoena so that it could continue its examination of the witness. Sanctions against the Engineers are therefore inappropriate.

In a second cross motion, the Engineers seek to compel Ezra Goodman, an attorney with 1199 Housing's counsel, Szold & Brandwen (S&B) to provide answers to questions asked at his deposition and produce documents he used to refresh his recollection for his deposition. The Engineers further seek to disqualify the law firm of S&B from representing 1199 Housing in this action, and for leave to take the non-party deposition of Amauris Baez, an employee of KeySpan.

The Engineers assert that, at Ezra Goodman's deposition, his counsel, Arthur Block of S&B, refused to let Goodman answer questions regarding documents Goodman reviewed in preparation for his testimony, on the grounds that they were attorney work product. The Engineers contend that counsel is required to produce documents that a deposition witness uses to refresh his recollection. Block refused to let Goodman answer questions as to which documents he had reviewed, on the grounds that the questions posed were subject to attorney work product. The Engineers counter that the privilege was waived by Goodman's review of these documents in preparation for his testimony. As an initial matter, if the documents were privileged prior to deposition, the fact that they were reviewed in preparation for an examination

before trial does not constitute a waiver of the privilege under CPLR 3101, subd. [c] (Geffers v Canisteo Central School Dist. No 463201, 105 AD2d 1062 [4th Dept 1984]). If the documents were not privileged, then the parties have already had the opportunity to obtain them through discovery, and the relevance in questioning counsel as to which documents were reviewed, is to determine counsel's thought process, which is attorney work product. Finally, the court notes the failure to comply with Commercial Division Rule 15 which requires that before an "aggrieved party" in a discovery dispute may make a motion, its counsel "shall contact the Clerk of the Part to arrange a conference." A conference would have been the appropriate forum to review this dispute. The Engineers chose not to do so, and waited to bring this issue up as a cross-motion.

The Engineers also contend that Block refused to let Goodman answer questions as to whether S&B placed its malpractice carrier on notice of a potential claim in light of S&B's handling of the performance bond for the Project. The Engineers claim that this information is relevant with respect to mitigation of damages, based upon Fidelity's position that an alleged conditions precedent in the performance bond was not satisfied. This Court sees no relevance to this question since the Performance Bond was intended to provide a source of funds to back up Kelly Tank's responsibilities and liabilities, not the Engineers.

The Engineers also seek disqualification of S&B on the ground that attorneys who are members of S&B may be called as a witnesses by the Engineers regarding their failure to mitigate damages regarding the Performance Bond and regarding ambiguities in the contract between 1199 Housing and the Engineers. As noted, there appears to be no relevance with regard to Fidelity's obligations under the Performance Bond, which has to do with Kelly Tank's negligence and/or breach of contract, and the Engineers. As to the parties' contract, which was

drafted by 1199 Housing's attorneys, the Engineers have not even attempted to demonstrate that testimony of these attorneys is *necessary,* as is required to disqualify opposing counsel (S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437 [1987]).

The Engineers also seek to take the non-party deposition of Amaris Baez, a KeySpan employee who signed a witness statement to the effect that he saw Michael Rueger, another KeySpan employee, putting the "old parts" presumably the traps and valves, in Reuger's car. Baez also states that he saw "George," an employee of 1199 Housing, in the cage where the old parts were stored. After that, Baez discovered that the old parts were missing (the Engineer's Reply Aff., Ex. L).

The discovery cut-off date in this case was December 8, 2004. The Engineers delayed taking the deposition of nonparty witness John Guidone of KeySpan, until December 7, and 21, 2004. At his deposition John Guidone informed the Engineers of the witness statement. The Engineers then delayed another four months before seeking leave to take the non-party deposition of Baez. Baez's statement does not state that he saw "George" taking the old parts–rather he saw an employee of KeySpan putting them in his car. Baez' statement is not sufficient grounds upon which to further delay this action from proceeding to trial.

Finally, the Engineers seek to impose sanctions on 1199 Housing for frivolous motion practice based upon 1199 Housing's claim that the Engineers spoliated evidence. The Engineers point out that they never had possession or control of the valves and traps that were tested and that are now missing. The Engineers also assert that, as to their missing files, 1199 Housing has not even shown that the Phase I files are relevant to any issues presented herein. Given the excessive motion practice by the Engineers, the motion for sanctions is denied.

1199 Housing cross moves a second time, to strike the Engineers' cross motion to compel, and for a protective order regarding the non-party deposition testimony sought by the Engineers. Inasmuch as the Engineer's motion has been denied, this motion is denied as unnecessary.

Based upon the foregoing, the motion and each of the cross motions are denied.

1199 HOUSING'S MOTIONS FOR SUMMARY JUDGMENT AND DEFAULT JUDGMENT AGAINST KELLY TANK

In Motion sequence 009, 1199 Housing moves, pursuant to CPLR 3212, for summary judgment on its eighth and ninth causes of action against Kelly Tank, and on its tenth cause of action against Fidelity. Fidelity cross-moves for partial summary judgment. As already noted, the action has been settled against Fidelity, and that portion of the motion against Fidelity, as well as Fidelity's cross-motion have been rendered moot.

1199 Housing's eighth and ninth causes of action, asserted against Kelly Tank, are based upon the liquidated damages provision of the construction contract between the parties and a provision which states that Kelly Tank's indemnity to 1199 Housing shall include reasonable attorneys fees.

In motion sequence 011, 1199 Housing moves, pursuant to CPLR 3215 and 321 (a) for a default judgment against Kelly Tank based upon its failure to obtain counsel within the time directed by this Court, and upon its failure to submit opposition papers to the motion for summary judgment. Kelly Tank cross-moves for summary judgment dismissing the claims asserted in 1199 Housing's eighth, ninth and tenth causes of action, and, pursuant to CPLR 3126 to strike the Second Amended Complaint due to the spoliation of critical evidence.

In June 1997, 1199 Housing and Kelly Tank entered into a standard form construction contract for Phase II of 1199 Housing's heat renovation project. The job, as noted, was for the replacement of Boiler Nos. 3, 4, and 6 (the Contract), (Plf's. Ex. C). The Contract contained a Construction Schedule that provided that all specified work on Boiler No. 3 be completed on or before October 15, 1997, with the balance of all other work under the Contract, including specified work for Boiler Nos. 4 and 6, to be completed on or before October 15, 1998. The Contract further provided that "time is of the essence" and that Kelly Tank must achieve "Substantial Completion" of all work no later than the dates set forth in the Construction Schedule. The Contract contains a liquidated damage clause which provided as follows:

> In the event [Kelly Tank] shall fail to complete any of the phases of the work described above by the specified completion date, except to the extent such delay is certified by the Architect to be excusable delay, [Kelly Tank] shall pay to [Plaintiff] the sum of $500.00 for each day of delay, which payment shall be in addition to all other rights and remedies of [Plaintiff] hereunder or at law or equity for loss, cost, expense or damage caused by the delay.

It is undisputed that Kelly Tank did not obtain substantial completion in accordance with the Construction Schedule deadlines. Despite Kelly Tank's failure to meet both the October 15, 1997, and October 15, 1998 Construction Schedule deadlines, 1199 Housing retained Kelly Tank and it continued to perform work for another two and one-half years. Plaintiff terminated Kelly Tank by letter dated April 17, 2000, effective May 2, 2000, more than two and one-half years after the original deadline of October 15, 1997.

Kelly Tank did not timely submit opposition papers to 1199 Housing's motion, but now urges that this Court consider the opposition papers of Fidelity, which argued that, based upon

City of Elmira v Larry Walter, Inc. (76 NY2d 912 [1990]), a contractor who has been fired will not be liable for liquidated damages unless the clause providing for liquidated damages expressly so provides.

Even if this Court were to consider that argument, Elmira does not apply here. In Elmira, the Contractor walked off the job and repudiated the contract five months prior to the contractually defined deadline. The Court found that the liquidated damage clause, by its terms, represented an attempt by the parties to anticipate and provide for the specific possibility that the contractor's satisfactory completion of the project might be delayed beyond the agreed-upon date. The clause did not provide that it would also apply to the contractor's outright abandonment of the project. Here, 1199 Housing seeks liquidated damages from the contractually designated completion date–of October 1997, until the time it fired Kelly Tank, in May 2000. Kelly Tank was on the job during that time, and there is no issue of fact that the project was not completed.

Accordingly, 1199 Housing shall have judgment on its ninth cause of action for liquidated delay damages in the amount of $465,500.00, representing the period of delay from October 15, 1997 to May 2, 2000, plus pre-judgment interest pursuant to CPLR 5001. 1199 Housing shall also have judgment on its eighth cause of action for reasonable attorney's fees, to be determined upon a hearing.

In motion sequence 011, 1199 Housing moves to strike Kelly Tank's Verified Answer, on the ground that after the expiration of the deadline imposed by this Court's Order, dated January 7, 2005, Kelly Tank nonetheless failed to appear in this action. Kelly Tank cross moves for summary judgment dismissing the claims asserted in 1199 Housing's eighth, ninth and tenth

causes of action, and, pursuant to CPLR 3126 to strike the Second Amended Complaint due to the spoliation of critical evidence.

On January 7, 2005, Kelly Tank's former attorneys, the law firm of Wasserman, Grubin & Rogers, LLP (Wasserman) moved, by Order to Show Cause, to be relieved of counsel for Kelly Tank. On January 7, 2005, a hearing was held in open court on Wasserman's motion to be relieved. One of Kelly Tank's principals, James O'Brien was at that hearing. Mr. O'Brien was instructed Kelly Tank could only appear in this action through an attorney. He was further that Kelly Tank had aa thirty-day period by which to appear by counsel, and that a hearing would be held on February 7, 2005. These directions were included in a written order, dated January 7, 2005, which further provided that no further proceedings could be taken against Kelly Tank for thirty days without leave of this Court.

On February 7, 2005 Kelly Tank appeared by an attorney, Stephen R. Loeb, who participated in a meeting at which counsel set a briefing schedule for motion sequence nos. 007 through 010. However, on February 23, 2005, Mr. Loeb informed counsel that Kelly Tank had opted not to retain his legal services. Kelly Tank failed to retain an attorney until June 2005.

1199 Housing's motion for a default judgment is denied. This Court views Kelly Tank's failures to appear as coming close to warranting a default judgment in this matter. However, it is the longstanding preference of the First Department that matters be decided on the merits. Further, Kelly Tank has clearly demonstrated its intention of defending this action, and 1199 Housing has not shown that it suffered any prejudice as a result of Kelly Tank's delay in obtaining an attorney (see e.g., M.S. Hi-Tech, Inc. v Thompson, ___ AD3d ____ [2d Dept 2005],

2005 WL 3059628).

As to Kelly Tank's cross motion for partial summary judgment dismissing 1199 Housing's eighth and tenth causes of action for delay damages, as set forth above, 1199 Housing is entitled to delay damages under the terms of its Contract with Kelly Tank and the motion is denied. As to that part of the motion to dismiss the Second Amended Complaint due to the spoliation of critical evidence, the motion is denied for the reasons set forth in the Engineers' motion to dismiss on the same grounds.

THE MARION SCOTT MOTION

In motion sequence 010, third-party defendant Marion Scott moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, on the grounds that the third-party plaintiffs, the Engineers, have failed to set forth a valid impleader claim, and that Kelly Tank and Fidelity have each failed to set forth a valid cross-claim.

Marion Scott was the managing agent for 1199 Housing during the heating upgrade project. Vernon Cooper of Marion Scott was the construction manager for the project. Pursuant to paragraph 4(a) of the rider to the management agreement, Marion Scott was obligated to oversee on-site work performed by vendors and contractors, pursuant to procedures approved by 1199 Housing.

As noted, 1199 Housing's claims against the Engineers include claims of breach of contract and negligence. 1199 Housing asserts, for example, that the Engineers' design of the new heating system was defective. It also claims that the Engineers did not properly inspect and supervise the work performed by Kelly Tank. The Engineers respond that they were not solely

responsible for those negligent acts. For one, the Engineer's allege that their representative, Joseph Lea inspected the valve and trap replacements in some apartments but was prevented by Cooper from conducting further inspections because Cooper did not want to disturb the tenants in the apartments. In addition, the Engineers allege that Kelly Tank's payment requisitions were submitted to Copper for approval. The Engineers also allege that, during the installation of the radiator valves and traps, Lea showed Cooper that the piping to the valves and traps was incorrectly pitched as part of the original construction of the heating system. Lea advised Cooper that correcting the pitch of the piping was not part of Kelly Tank's contract and would be a costly extra to the contract. As a result, Cooper directed that the incorrect pitch of the pipes would be left as is.

In their responsive pleading to the complaint, the Engineers assert as a third affirmative defense that:

> The damages allegedly sustained by the plaintiff were caused in whole or in part by the negligence, carelessness and/or culpable conduct of the plaintiff, its servants, agents or employees and others for whom the plaintiff was legally responsible and that the amount of damages recovered, if any, shall therefore be diminished in proportion to which said negligence, carelessness and/or culpable conduct attributable to the plaintiff bears to the culpable conduct which caused the damages alleged

(Shearer Aff., Ex. A, Verified Answer to Plaintiff's Verified Second Amended Complaint, ¶ 109). The Engineers also assert a third-party action against Marion Scott in which they seek common law and contractual indemnification (first cause of action) and contribution (second cause of action) as against Marion Scott.

Similarly, in their answer to the second amended verified complaint, defendants Kelly

Tank and Fidelity assert, as their ninth affirmative defense that:

> [A]ny damages allegedly sustained by plaintiff were caused, in whole or in part, by the culpable conduct, carelessness, recklessness, negligence or wrongdoing of plaintiff, its agents and others for whom plaintiff was responsible, and therefore, the amount of any damages otherwise recoverable by plaintiff should be extinguished or reduced to the extent such conduct caused plaintiff's alleged damages

(Id., Verified Answer to Verified Second Amended Complaint, ¶ 313). Kelly Tank and Fidelity have also asserted a cross claim against Marion Scott alleging contributory negligence and demanding indemnity and/or contribution.

Marion Scott's argument for dismissal of the third-party complaint and the cross claims against it are twofold. First, it contends that it is not liable under theories of either contractual or common law indemnity because there was no contract between Marion Scott and either the Engineers or Kelly Tank, and second, because the law of common law indemnity requires that the proposed indemnitee be *without fault*. Marion Scott asserts that since both the Engineers and Kelly Tank are accused of both breach of contract and negligence, neither are without fault. In addition, Marion Scott contends that it cannot be liable for contribution, since at all times it acted within the scope of its authority as agent for 1199 Housing and it is therefore not liable to the Engineers as required by CPLR 1007.

As to the issue of contractual indemnity, there was no contract between Engineers and Marion Scott, nor have Engineers demonstrated a relationship between the two which was the functional equivalent of privity. As to common law indemnity, it is settled law that a party who has actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of common law indemnity (Dormitory Auth. of State of N.Y. v Scott, 160 AD2d 179,

181 [1st Dept 1990], app denied 76 NY2d 706 [1990]). Here, since the claims against both the Engineers and Kelly Tank are dependant upon either breach of contract or negligence, both of which involve wrongdoing, neither party is entitled to common law indemnification from Marion Scott.

As to the issue of contribution, to the extent that 1199 Housing has sued the Engineers and Kelly Tank for breach of contract, there is no right to contribution (Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 26 [1987]).

As to that part of the complaint which asserts negligence, CPLR 1007 permits third-party complaints against a person not a party "who is or may be liable" to the defendant for all or part of the plaintiff's claim against him (see George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc., 51 NY2d 358 [1980]). Here, the Engineer's third party complaint is based upon Marion Scott's alleged negligence in the performance of its job as construction manager. However, where an employee is acting within the scope of his employment, any negligence in the performance of his duty is chargeable to the employer (see 3 NY Jur 2d Agency, § 254 p. 76; Republic Nat. Bank of NY v Eastern Airlines, Inc., 639 F Supp 1410 [SD NY 1986]). There is no question but that the negligence alleged against Marion Scott occurred within the scope of its employment, and, therefore, 1199 Housing is liable for any negligence attributable to Marion Scott. Thus, 1199 Housing is the real party in interest, and there is no basis upon which Marion Scott can be held liable in contribution to the Engineers (see State of NY v Popricki, 89 AD2d 391 [3d Dept 1982]). As noted in Popricki, where, as here, the defendants have asserted an affirmative defense that the damages are the result of negligence of the plaintiff or "some other person", i.e. the plaintiff's agent, the issue of contribution is raised in the main action.

Therefore, the motion by Marion Scott to dismiss the third-party complaint and the cross claims asserted against it is granted.

Accordingly, based upon the foregoing, it is

ORDERED that, as to motion sequence 007, Cascade's motion to dismiss the complaint, the third-party claims, and all cross claims asserted against it, is denied; and it is further

ORDERED that, as to motion sequence 008, that part of the Engineers' motion to strike the second amended complaint based upon the spoliation of evidence is denied, as is that part of the motion to dismiss the eleventh through fourteenth causes of action. That part of the Engineers' motion to dismiss the cross claims for indemnity and contribution is granted, without opposition, as to Kelly Tank and Fidelity. As to Cascade, the Engineers motion to dismiss the cross claims is granted only to the extent that Cascade's cross claim for indemnification is dismissed; and it is further

ORDERED that the cross motion by Cascade to dismiss the second amended complaint based upon the spoliation of evidence, is denied; and it is further

ORDERED that 1199 Housing's cross motion to strike the Engineers' answer on the grounds of spoliation is denied, as is that part of the motion to strike references to the deposition testimony of Peter Scherz; and it is further

ORDERED that the Engineers' cross motion to compel testimony of Ezra Goodman, to disqualify the law firm of Szold & Brandwen from representing 1199 Housing, to take the non-party deposition of Amaris Baez, and for sanctions is denied in all respects; and it is further

ORDERED that, as to motion sequence 010, the motion by 1199 Housing for partial summary judgment is granted to the extent that 1199 Housing shall have judgment against Kelly

Tank on its ninth cause of action for liquidated delay damages, in the amount of $465,000.00 plus prejudgment interest pursuant to CPLR 5001, as calculated by the Clerk of the Court. It is further

ORDERED that 1199 Housing shall have judgment against Kelly Tank on its eighth cause of action for reasonable attorney's fees, and it is

ORDERED that the issue of reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, except upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED judgment hereon is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that, as to motion sequence 010, the motion by Marion Scott to dismiss the third-party complaint and all cross claims asserted against it is granted, and the remainder of the action is severed and shall continue; and it is further

ORDERED that, as to motion sequence 011, the motion by 1199 Housing for a default judgment against Kelly Tank is denied; and it is further

ORDERED that the cross motion by Kelly Tank for summary judgment dismissing 1199 Housing's eighth, ninth and tenth causes of action, and to strike the second amended complaint

[* 33]

based upon the spoliation of evidence, is denied.

This shall constitute the decision and order of the Court.

Dated: December 5, 2005

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III

FILED

DEC 1 2 2005

COUNTY CLERK'S OFFICE
NEW YORK