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

PRESENT: SHAFER Justice

PART 62

PUBLIC ADMINISTRATOR OF BRONX COUNTY, ET AL.

-v-

THE CITY OF NEW YORK, ET AL.

INDEX NO. 102649/03

MOTION DATE

MOTION SEQ. NO. 03

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 is decided pursuant to attached Rem

FILED
APR 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/28/07

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

PUBLIC ADMINISTRATOR OF BRONX COUNTY, as the ADMINISTRATOR of the Estate of STEVIE TUCKER and MARCHANY HARRISON,

Plaintiffs,

-against-

THE CITY OF NEW YORK and LILLY CONSTRUCTION CO., INC.,

Defendants.

INDEX NO. 102649/03

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to 4, were read on this motion for sanctions:

	PAPERS NUMBERED
Notice of Motion	1
Affirmation in Support — Exhibits	2
Affidavit in Opposition — Exhibits	3
Reply Affirmation In Support	4

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that the plaintiffs' motion for sanctions is denied in part and granted in part.

Introduction

Plaintiff's son was shot to death by an unknown assailant while walking under a sidewalk bridge erected by the defendant construction company and attached to a building owned by the

City of New York. Plaintiff alleges that the bulb in the bridge's light fixture was unlit and the resulting darkness created a dangerous condition which contributed to the commission of the crime.

Plaintiff moves for sanctions against the defendant for its lengthy delay in complying with discovery. While the defendant's actions do not warrant judicial resolution of the case, as requested by the plaintiff, a monetary sanction, compensating the plaintiff for its extra time and effort expended, is justified.

Background

This action arises out of the shooting death of STEVIE TUCKER on December 2, 2001, as he walked under a sidewalk bridge located 2423 Seventh Avenue, New York, NY. The bridge was erected by the defendant, LILLY CONSTRUCTION CO., INC., pursuant to a contract with defendant CITY OF NEW YORK, and was equipped with a light fixture which plaintiff alleges was not working at the time of the crime.

Plaintiff timely served a Notice of Claim against the CITY and initiated this action on July 10, 2003. She served a Notice of Discovery and Inspection on LILLY on February 17, 2004, to which LILLY made no objection or response. A Case Scheduling Order was issued on April 2, 2004, setting forth a schedule for the completion of all discovery. Thereafter, two further scheduling orders were issued which included the direction that LILLY comply with the Feb. 17 discovery demand.

The fourth Court order, issued on Feb. 24, 2005, directed LILLY to provide a "Jackson Affidavit."[1] The Court issued two further orders, dated Oct. 28, 2005 and Jan. 19, 2006,

[1] *See, Jackson v City of New York,* 185 AD2d 768 [1st Dept 1992], *supra.*

directing LILLY to produce a "Jackson Affidavit." LILLY served a response to plaintiff's discovery demands, but not a "Jackson Affidavit," on May 18, 2006. The Court issued an order, on Sept. 7, 2006, directing LILLY to serve a

> "Jackson Affidavit" with respect to outstanding documents requested in plaintiff's D& I dated 217/04 by no later than 9/29/06. Failure to comply will result in an order of preclusion, the nature and scope to be set forth upon a showing of default.

LILLY served a "Jackson Affidavit" on September 21, 2006 which stated that LILLY was no longer in possession of the demanded documents. LILLY alleged that it "retains work records only while invoices and bills are outstanding or otherwise unresolved." The job was completed and paid for in January 2002, for which reason it no longer had in its possession the following categories of demanded documents:

a. Correspondence between the City of New York and Lilly Construction relating to the subject sidewalk shed;
b. Records pertaining to inspections of the subject sidewalk shed:
c. work logs and/or work records relating to the subject sidewalk shed;
d. Records concerning inspections of the subject sidewalk shed;
e. Records concerning illumination at the subject sidewalk shed;
f. Records concerning maintenance of the subject sidewalk shed:
g. Records concerning complaints relating to the subject sidewalk shed:
h. Repair orders relating to the subject sidewalk shed; and
i. Records of any individual or agency giving notice of any defective conditions concerning maintenance of the subject sidewalk shed.

Plaintiff alleges on this motion that LILLY's "Jackson Affidavit" is inadequate and moves for sanctions, pursuant to CPLR 3126(1), judicially resolving that LILLY "caused, created and/or had notice of the hazardous condition of the subject sidewalk shed/scaffolding and that such conduct or notice proximately caused the death" of STEVIE TUCKER.

LILLY argues that its submission is adequate. "Jackson Affidavits" are typically sought in litigation against the City of New York, which has thousands of employees and records kept

in hundreds of locations. Its concerns are inapplicable to a small company with a single office and less than 10 employees. LILLY submits a further affidavit confirming that it has produced all the documents in its possession and that it disposed of the records from this job in the normal course of its business before receiving notice of the lawsuit. LILLY further argues that no discovery has proceeded in this case as a result of the plaintiff's failure to pursue discovery against the CITY and refusal to proceed with the depositions of LILLY's employees. Finally, LILLY argues that the documents sought would not, even if they existed, support plaintiff's claims, since they would prove neither that the light was not working at the time of the crime nor that the absence of light caused or contributed to the crime.[2]

Plaintiff, in its reply, does not deny that it has failed to pursue discovery against the City or to conduct depositions and requests the alternative remedy of a financial sanction.

Discussion

CPLR § 3126 provides the Court with great discretion to penalize recalcitrant litigants who fail to comply with discovery demands:

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be

[2] LILLY has submitted a motion for summary judgement which is being separately considered.

determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

LILLY failed to produce any work papers relating to the sidewalk bridge which was the site of the crime. The Court's final order, dated September 7, directed LILLY to submit a "Jackson Affidavit" or be subject to an order of preclusion. LILLY submitted an affidavit stating that the files had been destroyed, in accord with LILLY's standard business practices, prior to LILLY's notice of the crime or the lawsuit. Plaintiff, on this motion, goes beyond the language of the Sept. 7 order and seeks not merely preclusion but judicial resolution of the underlying merits of the case.

The law is clear that in order to establish entitlement to judicial resolution of an issue based upon the destruction of evidence, a party must demonstrate that (1) the failure to preserve the destroyed evidence was intentional, and (2) and the responsible party obtained an unfair advantage from the failure to preserve the evidence.(*Keller v Am Golf Corp*, 223 N.Y. L.J. 31, col. 3 [Sup Ct, Queens Cty, Mar 31, 2000]) The plaintiff cannot satisfy either prong of this test.

The threshold issue is the adequacy of LILLY's "Jackson Affidavit." In *Jackson v City of New York,* 185 AD2d 768 [1st Dept 1992], the plaintiff sought discovery of the City's maintenance records to demonstrate that it had notice of the defective condition which caused her injury. The City submitted an affidavit stating that the records could not be found. The Court found that the affidavit "made no showing as to (1) where the subject records were likely to be kept, (2) what efforts, if any, were made to preserve them, (3) whether such records were routinely destroyed, or (4) whether a search had been conducted in every location where the

records were likely to be found." *Jackson,* 185 AD2d 770. The Court concluded that the City's affidavit failed to demonstrate that it had made a good faith effort to locate the necessary records and judicially resolved the issue of notice in the plaintiff's favor. "The City's failure to locate the requested records should not inure to its benefit." *id*

This Court finds that, under the test articulated in *Jackson*, LILLY's submissions are adequate to demonstrate that it made a good faith effort to locate the requested documents. The Affidavits were made by officers of the company who described the premises which were searched, the dates of the search, the premises which the company had occupied, and the policy pursuant to which the records were routinely discarded. LILLY's submissions establish that the documents were destroyed prior to notice of the instant lawsuit. They are are adequate to establish that LILLY's destruction of its records was not motivated by the desire to frustrate discovery or to obtain an unfair advantage in the litigation. (*Hartford Fire Ins Co v Regenerative Bldg Const Inc*, 271 A.D.2d 862 [3d Dept 2000])

The law is clear that spoilation of evidence which does not result in prejudice can be disregarded. (*Lane v Fisher Park Lane Co*, 276 A.D.2d 136 [1st Dept 2000]) Even if LILLY's destruction of its records was intentional, plaintiff would not be entitled to relief absent a showing of prejudice.

The plaintiff has failed to articulate any prejudice to her ability to prosecute this action resulting from the absence of LILLY's work records. Nor has she described a single advantage gained by LILLY though their absence. She has made no effort to refute LILLY's argument that the documents, even if they existed, would not help her establish any liability against LILLY. Where, as here, the party fails to make the requisite showing of an unfair advantage gained by the destruction

of evidence, the Courts have denied the request for sanctions. *(Smith v New York City Health & Hosps Corp*, 284 AD2d 121 [1st dept 2001]); (*Tawedros v St Vincent's Hosp*, 281 AD2d 184 [1st Dept 2001]) [The careless loss of a record is not willful]; (*Sage Realty Corp v Proskauer Rose*, 275 AD2d 11, 17-18 [1st Dept 2000]) [Defendant's answer should not be stricken on the basis of the common-law doctrine of spoliation of evidence since it does not appear that plaintiff will be unable to prove his case without the items of information missing from the copy of the record that defendant provided, or that defendant has otherwise gained an unfair advantage as a result of the missing information].

We have read the cases cited by the plaintiff in support of her request and find them to be inapposite. Plaintiff has failed to produce a single case in which the relief she seeks, judicial resolution of liability against a party has been granted. Nor has she produced a single case in which sanctions were imposed absent a showing of prejudice to the movant and an unfair advantage to the other party.

However, while the discovery noncompliance by LILLY cannot be found to have been of such a nature that a harsh sanction pursuant to CPLR 3126 should be imposed, the Court nevertheless find that the imposition of monetary penalty is warranted in view of LILLY's lengthy, willful, and unexcused delay and consistent disregard of court orders. (*Holliday v Jones, 297* AD2d 471 [1st dept 2002]) It appears from the record that the absence of responsive records was not raised by LILLY until one full year after plaintiff's discovery demands were served, and 3 separate court orders were issued directing compliance. Thereafter 3 more orders, directing service of a"Jackson Affidavit" were issued before LILLY responded, and that response was not in the form specified. A party who is unable to comply with discovery sought by the opposing party is under an obligation

to so inform the court in order to avoid sanctions. (*Shrager v RH Macy & Co,* 109 AD2d 671 [1st Dept 1985]) The nature and degree of the penalty to be imposed is within the discretion of the trial court. (*Jaffe v Hubbard*, 299 AD2d 395 [2d Dept 2002]) The Court of Appeals has unambiguously addressed the seriousness of disregarding court ordered discovery:

> If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders ... as are just," including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully. (*Kihl v Pfeffer*, 94 NY2d 118 [1999]).

Conclusion

Accordingly it is hereby

ORDERED that plaintiff's motion for sanctions, judicially resolving liability, is denied; and it is further

ORDERED that the plaintiff's motion for monetary sanctions is granted; and it is further

ORDERED that plaintiff submit a Bill of Costs within 30 days of the date hereof; and it is further

ORDERED that defendant submit its response, if any, within 14 days of service of plaintiff's Bill of Costs.

This reflects the decision and order of this Court.

Dated: 3/28/07

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION