

**Seaport Park Condominium, Inc. v Greater N.Y.  
Mut. Ins. Co.**

2007 NY Slip Op 33772(U)

November 19, 2007

Supreme Court, New York County

Docket Number: 0117645/2004

Judge: Walter Tolub

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SCANNED ON 11/26/2007

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

PRESENT: WALTER B. TOLUP  
Justice

PART 15

Index Number : 117645/2004  
SEAPORT PARK CONDOMINIUM  
vs  
GREATER NEW YORK MUTUAL  
Sequence Number : ~~001~~ 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

is motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**

NOV 26 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/19/07

WALTER B. TOLUP J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
SEAPORT PARK CONDOMINIUM, INC.,

Plaintiff,

-against-

Index No. 117645/04

GREATER NEW YORK MUTUAL INSURANCE COMPANY,  
DJM RESTORATION, INC. and MATCO SERVICE CORP.,

Defendants.

-----X  
DJM RESTORATION, INC.,

Third-Party Plaintiff,

-against-

BOGMAR ENVIRONMENTAL, INC.,

Third-Party Defendant.

-----X  
MATCO SERVICE CORP.,

Second Third-Party Plaintiff,

-against-

ABLE RIGGING CONTRACTORS, INC.,

Second Third-Party Defendant.

-----X  
GREATER NEW YORK MUTUAL INSURANCE COMPANY,

Third Third-Party Plaintiff,

-against-

BOGMAR ENVIRONMENTAL, INC.,

Third Third-Party Defendant.

-----X  
TOLUB, J.:

This action is essentially for spoliation of evidence, and arises out of the August 2004 disposal of a damaged cooling tower after it was removed from the roof of a building owned by plaintiff Seaport Park Condominium.

Motion Sequence Nos. 002, 003, 004 and 005 are consolidated for disposition. In Motion Sequence No. 002, defendant DJM Restoration, Inc. (DJM) moves, pursuant to CPLR 3211 (a) (8), for an order dismissing the complaint and all claims, cross claims and counterclaims against it on the ground that this action may not be maintained due to spoliation of evidence.

In Motion Sequence No. 003, second third-party defendant Able Rigging Contractors (Able) moves for an order, pursuant to CPLR 3212 and 3211 (a) (7), granting it summary judgment: (1) dismissing the second third-party complaint brought by Matco Service Corp. (Matco); (2) dismissing all cross claims against Able; and (3) on the second, third and fourth causes of action of Able's counterclaim against Matco, and directing that Matco is liable for damages in the amount of \$12,800.00, plus interest, from August 21, 2004.

In Motion Sequence No. 004, third-party defendant Bogmar Environmental, Inc. (Bogmar) moves, pursuant to CPLR 3211 (a) (8), for an order dismissing the third-party complaint, and all other claims, cross claims and counterclaims against it.

In Motion Sequence No. 005, defendant Matco moves for summary judgment dismissing plaintiff's complaint against it, dismissing all cross claims against it, and granting it summary judgment on its counterclaims in the amount of \$23,600, together with interest thereon from August 24, 2004.

Plaintiff cross-moves for an order granting it summary judgment on its claims against Matco, and pursuant to CPLR 3126, striking Matco's answer and pleadings.

[\* 4 ]

For the reasons set forth below, defendants' motions are granted, and plaintiff's cross motion is denied.

### **FACTS**

Defendant DJM is engaged in the business of supplying and installing roofs (Complaint, ¶ 3). In the fall/winter of 2003, plaintiff retained DJM to replace the roof of its condominium building located at 117 Beekman Street, New York, New York (the Building) (*id.*, ¶ 5). DJM entered into a subcontract with Bogmar to remove asbestos that was located on the roof.

In early January 2004, during the course of the roof replacement project, the contractors working on the roof severed an electrical line. As a result, there was an electrical outage which interrupted the source of power to the Building's cooling tower, which was located on the roof of the Building (*id.*, ¶ 6). Apparently, the electrical problem was fixed that same day.

The service outage occurred during an extremely cold day. Plaintiff contends that, as result of the loss of power to the cooling tower, the liquid in the cooling tower piping froze, expanded, and caused the interior pipes within the cooling tower to burst, causing severe damage to the cooling tower (*id.*, ¶ 9; Aff. of Jennifer Granda [plaintiff's managing agent], ¶ 3). Plaintiff was not aware of the damage at that time (*id.*). Plaintiff alleges that it did not discover the burst pipes until May of 2004, when the Building turned on its cooling tower in anticipation of providing air conditioning (Granda Aff., ¶ 4).

Defendant Matco is engaged in the business of supplying and installing water coolers (Complaint, ¶ 4). In the spring of 2004, plaintiff retained Matco to inspect the damaged cooling tower (*id.*, ¶ 25). Upon Matco's inspection of the damaged cooling tower, it made the

determination that the entire cooling tower required replacement as a result of the damage (id., ¶ 26). Matco was retained by plaintiff to procure and install a new cooling tower (id., ¶ 27).

Matco subcontracted the rigging portion of that job to second third-party defendant Able. Specifically, Matco hired Able to remove and dispose of the damaged cooling tower, and to rig the new cooling tower into place on the roof, for a price of \$12,800 (Aff. of Barry Lichtenstein [Able's president], ¶ 3).

Upon discovering the burst pipes, plaintiff filed a notice of claim with defendant Greater New York Mutual Insurance Company (GNY), its insurer, seeking reimbursement for the cooling tower (Granda Aff., ¶ 4). GNY then retained an expert to inspect the cooling tower. In late May of 2004, GNY's expert went to the roof and inspected the cooling tower twice. Following the second inspection, it was determined that a further inspection was required by the insurance company's expert to ascertain the cause of the failure of the cooling tower. However, such inspection would require the dismantling of the cooling tower (id., ¶ 5).

Accordingly, at a June 1, 2004 meeting held on the roof and attended by various representatives of Matco, GNY and plaintiff, it was agreed that, when the cooling tower was removed in connection with Matco's installation of a new cooling tower, Matco would retain the old cooling tower at its storage yard to enable the insurance company's representatives to inspect it (id., ¶¶ 6-7; Complaint, ¶ 28).

It is undisputed that there was no written contract between plaintiff and Matco memorializing Matco's agreement to retain the old cooling tower, and that Matco received no additional consideration relating to the storage of the cooling tower. Matco alleges that, in an effort to accommodate plaintiff, its customer, it agreed to retain the tower.

Matco then contacted Able, and verbally requested that Able store the cooling tower in Able's yard for a day or two before Able disposed of it so that it could be inspected (Lichtenstein Aff., ¶ 7). Able alleges that it gratuitously agreed to do so, without the payment of any consideration, as a favor to Matco, its customer (*id.*). It is undisputed that there is no written contract between Matco and Able with respect to the storage of the cooling tower.

However, after Able removed the cooling tower, it was mistakenly not brought back to Able's yard, but was brought directly to the scrap yard, pursuant to ordinary procedure (*id.*, ¶ 10). The cooling tower was destroyed by the scrap yard before it could be retrieved by Able (*id.*).

Based on GNY's inability to inspect the cooling tower after it was disassembled, it rejected plaintiff's claim (Complaint, ¶ 30). Plaintiff alleges that it was then required to replace its entire cooling tower, at significant cost (*id.*, ¶ 10).

Plaintiff commenced the main action against GNY for coverage, DJM for causing the original damage, and Matco for spoliation of evidence and impairment of its insurance claim. DJM commenced a third-party action against Bogmar for common-law contribution and indemnity. Matco commenced a second third-party action against Able for: (1) contribution and indemnity if Matco is held liable to plaintiff for the alleged third-party spoliation of evidence; and (2) seeking to hold Able liable to pay Matco the unpaid balance of Matco's contract price with plaintiff, which plaintiff refused to pay to Matco after it was denied reimbursement for the cooling tower from GNY. Able interposed a counterclaim against Matco for Matco's failure to pay Able the agreed-upon price for the work performed, \$12,800. Finally, GNY commenced a third third-party action against Bogmar.

GNY moved to dismiss this action on the ground that plaintiff had violated the terms of the insurance contract by failing to preserve the damaged cooling tower. This court denied the motion. The Appellate Division reversed, and granted GNY's motion to dismiss this action against it.

It is undisputed that, due to its destruction, none of the defendants have had an opportunity to inspect the damaged cooling tower (Aff. of George Stiefel, ¶ 6).

### **DISCUSSION**

#### **DJM's Motion To Dismiss the Complaint (Motion Sequence No. 002)**

In its second cause of action, plaintiff asserts that, in the course of its work at the Building, DJM damaged the cooling tower "negligently and without proper care and in breach of the contract between DJM and plaintiff" (Complaint, ¶ 21). DJM now moves to dismiss the complaint, and all claims, cross claims and counterclaims against it, on the ground of spoliation of evidence, asserting that it cannot properly defend this action without accessibility to the cooling tower to examine it. DJM contends that it cannot offer any evidence as to how the cooling tower was damaged, as it was deprived of the opportunity to have its expert evaluate the tower prior to its destruction.

"When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation" (Squitieri v City of New York, 248 AD2d 201, 202 [1<sup>st</sup> Dept 1998]). Spoliation sanctions are not limited to cases where the evidence was destroyed willfully or in bad faith, "since a party's negligent loss of evidence can be just as fatal to the other party's ability to present [a case or] a defense" (*id.* at 203; accord Madison Ave. Caviarateria v Hartford Steam

Boiler Inspection & Ins. Co., 2 AD3d 793 [2d Dept 2003]; see also Baglio v St. John's Queens Hosp., 303 AD2d 341, 342 [2d Dept 2003] ["when 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"]; see e.g. Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp., 221 AD2d 243, 243 [1<sup>st</sup> Dept 1995] [dismissing plaintiff's claims due to its "negligent loss of a key piece of evidence which defendants never had an opportunity to examine"]).

The determination of spoliation sanctions is within the broad discretion of the court (see Barahona v Trustees of Columbia Univ., 16 AD3d 445 [2d Dept 2005]; Horace Mann Ins. Co. v E.T. Appliances, 290 AD2d 418 [2d Dept 2002]). Although courts are reluctant to dismiss a pleading absent willful or contumacious conduct, it may be warranted as a "matter of elementary fairness" (Lawson v Aspen Ford, Inc., 15 AD3d 628, 629 [2d Dept 2005] [citation omitted]). In determining whether to strike a party's pleading, the court should ascertain what prejudice, if any, the party seeking the sanction has incurred by the absence of the spoiled evidence (Jones v General Motors Corp., 287 AD2d 757 [3d Dept 2001]). Thus, dismissal of an action or striking of a party's pleading is an appropriate remedy when the evidence spoiled is a "key piece of evidence," whose destruction precludes inspection by an adverse party (Kirkland v New York City Housing Authority, 236 AD2d 170, 173 [1<sup>st</sup> Dept 1997] [citation omitted]; see also Puccia v Farley, 261 AD2d 83, 85 [3d Dept 1999] [the sanction of dismissal is "appropriate for the negligent disposal of evidence deemed crucial to the underlying action when the adversary had not been given an opportunity for inspection"]).

Here, plaintiff's complaint must be dismissed due to the destruction of the cooling

[ 9 ]

tower, a key piece of evidence which is crucial to the defense of this matter. Although it was Able, rather than plaintiff, who caused the inadvertent destruction of the cooling tower, under well-established case law, it is appropriate to hold plaintiff responsible for the spoliation of evidence.

Behrbom v Healthco Intl., Inc. (285 AD2d 573 [2d Dept 2001]) is directly on point. In that case, plaintiffs commenced the action to recover damages for injuries plaintiff dentist allegedly sustained as a result of a leak of nitrous oxide over a one-year period from a nitrous oxide sedation system installed in his office. In 1992, after diagnosis of his illness, plaintiff dentist retained an environmental services firm to conduct on-site testing in his office to determine whether there was a leak in the nitrous oxide sedation system. The firm found high levels of nitrous oxide in the closet where two nitrous oxide tanks were stored and in the main operating room. A consulting engineer performed another on-site test, and concluded that a leak in the valve on one of the tanks was a possible source of the elevated nitrous oxide in the dental office. In 1994, plaintiff dentist contracted with the same environmental services firm to conduct additional tests. The firm removed the nitrous oxide tanks from plaintiff's office, and arranged for them to be refilled by a supplier. However, the supplier lost the allegedly defective tank.

Triweld Industries, Inc., the original supplier of the allegedly defective nitrous oxide tank, moved to dismiss the complaint on the ground that the plaintiffs failed to preserve crucial evidence. In dismissing the complaint, the Court held:

The loss of the tank was not due to any intentional act by the plaintiffs. Nevertheless, under the circumstances, the plaintiffs were properly held responsible for the negligent loss of this evidence by their expert. The plaintiffs were aware that this physical evidence was crucial and that Triweld would want to

inspect it. No act or omission by Triweld was involved in the loss of this evidence, and clearly it has been prejudiced. The plaintiffs' contention that Triweld has access to the reports of their expert and a videotape of one of the tests performed on the tank is unpersuasive, as such evidence does not provide an adequate substitute for an inspection of the valve on the tank by Triweld's own expert. Accordingly, as "a matter of elementary fairness," the complaint insofar as asserted against Triweld was properly dismissed.

Id. at 574 (citations omitted).

Likewise, in Neal v Easton Aluminum, Inc. (15 AD3d 459 [2d Dept], lv denied 5 NY3d 708 [2005]), plaintiff was injured while riding his bicycle when the fork/shock component of the bicycle broke. Approximately seven months later, an engineer photographed and inspected the bike on behalf of plaintiff. In August 2000, the engineer generated a report concluding that the fork/shock was negligently manufactured and designed. In August 2001, the plaintiff commenced an action against the manufacturer, the designer and the distributor of the fork/shock and bicycle. Pursuant to a preliminary conference order, the plaintiff was required to produce the bicycle, with the fork/shock, for inspection by the defendants. In an initial response to the preliminary conference order, plaintiff indicated that the bike was being stored and kept as evidence. In a supplemental response, however, plaintiff supplied a police report indicating that the bicycle had been reported stolen from his attorney's office in June 2000, about one year before the action was commenced.

The defendants separately moved to dismiss the complaint based on spoliation of evidence. The Court reversed the denial of the defendants' motions, finding that:

The Supreme Court should have granted the defendants' motions to dismiss based on the plaintiff's negligent loss of a key piece of evidence which is crucial to the defense of this matter. The

photographs and the report generated by the plaintiff's engineer cannot adequately substitute for an inspection and testing of the bicycle by the defendants' own experts.

Id. at 460 (citations omitted); see Cutroneo v Dryer, 12 AD3d 811 (3d Dept 2004) (dismissal of medical malpractice and products liability claims related to rod inserted into patient's back during surgery was appropriate sanction for loss of rod by plaintiff's expert, where rod was unavailable for testing by defendants' experts); Langer v Well Done, Ltd., 11 Misc 3d 1056(A) (Sup Ct, Nassau County 2006) (in action where plaintiff allegedly sustained second degree chemical burns while opening a bottle of oven cleaner, and where bottle of oven cleaner was lost, defendants entitled to dismissal of the amended complaint); see also Amaris v Sharp Electronics Corp., 304 AD2d 457 (1<sup>st</sup> Dept 2003), lv denied 1 NY3d 507 (2004) (plaintiff's complaint dismissed where plaintiff was aware that television that allegedly caused injury was crucial piece of evidence but negligently failed to take sufficient steps to assure its preservation); Lindquist v Pillsbury Co., 1 AD3d 410 (2d Dept 2003) (in action for seller against salsa for injuries plaintiff allegedly sustained when top of jar broke off, plaintiff's complaint dismissed due to her inability to produce jar during discovery); Liz v William Zinsser & Co., 253 AD2d 413 (2d Dept 1998) (claim dismissed for failure to produce can of defective spray paint).

Here, plaintiff contends that DJM negligently damaged the cooling tower. The cooling tower is thus a crucial piece of evidence to the defense of this action. As a result of plaintiff's failure to preserve a "key piece of evidence," DJM has, in essence, been denied the same opportunity which plaintiff had to inspect the cooling tower. Without access to the cooling tower, DJM will not have an opportunity to prove through expert testimony, or otherwise, that the power outage did not cause the alleged damage to the cooling tower, or present evidence that

the tower was possibly damaged due to age, failure to be properly maintained, or for some other reason which cannot be determined without proper examination of the tower. The inadvertent destruction of the cooling tower thus renders DJM bereft of appropriate means to confront plaintiff's claim of negligence with incisive evidence. In addition, DJM did nothing to contribute to the loss of the cooling tower, and its unavailability for examination and analysis is highly prejudicial. Under these circumstances, dismissal is required as "a matter of elementary fairness" (Kirkland v New York City Hous. Auth., 236 AD2d at 175).

In its affirmation in opposition to the motion, plaintiff fails to make any arguments or demonstrate any basis for denying the motion. Plaintiff does not dispute that DJM has been deprived of an opportunity to examine the cooling tower and to properly defend this action. Indeed, plaintiff states that it is "without means to demonstrate, at trial, that the electrical disruption caused the pipes within the cooling tower to burst and that the bursting of the cooling tower's pipe was a direct result of the negligence of DJM and its subcontractor Bogmar" (Stiefel Aff., ¶ 10). Plaintiff thus concedes that it is unable to prove its cause of action against DJM due to the destruction of the cooling tower.

Accordingly, DJM's motion to dismiss is granted, and all claims, cross claims and counterclaims against DJM must be dismissed.

**Bogmar's Motion to Dismiss (Motion Sequence No. 004)**

Bogmar moves for dismissal of the second third-party complaint brought by DJM, as well as all other claims, cross claims and counterclaims against it. In the second third-party complaint, DJM seeks judgment against Bogmar for its proportionate share of any judgment which may be recovered by plaintiff against DJM, as well as damages for breach of contract.

In view of the dismissal of plaintiff's claims against DJM in the main action, DJM's third-party complaint may not be maintained, as there is no predicate for a third-party action (see Interstate Adjusters, Inc. v First Fidelity Bank, N.A., 251 AD2d 232 [1<sup>st</sup> Dept 1998]) [dismissal of complaint required dismissal of third-party claims that were derivative of main action]; see also Paz v Trump Plaza Hotel and Casino, 43 AD3d 805 [1<sup>st</sup> Dept 2007] [where court granted summary judgment to hotel on guest's suit for injuries sustained when escalator stopped, summary judgment also granted to company that serviced escalators on hotel's third-party claim for indemnification and contribution in light of dismissal of guest's complaint]). For the same reason, all other claims, counterclaims and cross claims against Bogmar must be dismissed (see id.).

Accordingly, Bogmar's motion for dismissal is granted.

**Able and Matco's Motions for Summary Judgment (Motion Sequence Nos. 003 and 005)**

Although plaintiff does not allege that Able and Matco caused the underlying damage to the cooling tower, plaintiff seeks to hold Matco responsible for the entire cost of the replacement cooling tower, claiming that because Able, Matco's subcontractor, disposed of the damaged cooling tower before GNY could inspect it for coverage, GNY denied plaintiff's claim for coverage (see Complaint, ¶ 31 ["but for Matco's unauthorized action in destroying plaintiff's property, plaintiff would have had a viable claim against its insurance carrier and would have recouped from its insurance carrier the full cost of a new cooling tower"]). In the second third-party complaint, Matco seeks contribution and indemnification from Able on the theory that if Matco is held liable to plaintiff, Able should pay the balance due and owing Matco on the contract price because it was Able who incorrectly and improperly disposed of the cooling tower

(see Second Third-Party Complaint, ¶¶ 6-7, 18-20).

Essentially, plaintiff seeks indemnification and contribution from Matco on a theory of third-party spoliation of evidence/impairment of an insurance claim. Likewise, the gravamen of Matco's third-party complaint against Able for indemnification and contribution is spoliation of evidence.

However, as the New York Court of Appeals recently determined, third-party negligent spoliation of evidence "is not cognizable in this state" as an independent tort claim (Ortega v City of New York, \_\_\_ NY3d \_\_\_, 2007 WL 2988760, 2007 NY LEXIS 2715 [2007]). The Court specifically declined to recognize this cause of action because such claim, "by definition, could not be proved without resort to multiple levels of speculation" (*id.*, quoting Fletcher v Dorchester Mut. Ins. Co., 437 Mass 544, 551, 773 NE2d 420 [2002]). Thus, the Court found, "[i]n a third-party spoliation case, because the content of the lost evidence is unknown, there is no way of ascertaining to what extent the proof would have benefitted either the plaintiff or defendant in the underlying lawsuit and it is therefore impossible to identify which party, if any, was actually harmed." The Court concluded that, "[a]s a general rule, New York courts have been reluctant to embrace claims that rely on hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages," and, as such, "we join the majority of jurisdictions to consider the issue and decline to recognize spoliation of evidence as an independent tort claim" (*id.* [citation omitted]).

Accordingly, the complaint must be dismissed against Matco, and Matco's third-party action must be dismissed against Able, as well as all cross claims against these parties.

In light of this determination, plaintiff's cross motion to strike Matco's pleadings

and for summary judgment in its favor on the ground of spoliation of evidence, is denied.

Although plaintiff states that it would be “inequitable to deprive Seaport of its remedy as it is an innocent party,” the Ortega Court addressed this exact issue, and held that:

In New York, while the desire to provide an avenue to redress wrongs is certainly an important consideration underlying our tort jurisprudence, the recognition that there has been an interference with an interest worthy of protection has been the beginning, not the end of our analysis. “While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world.”

2007 WL 2988760, 2007 NY LEXIS 2715, \* 13-14, quoting Trombetta v Conklin, 82 NY2d 549, 554 (1993).

Both Matco and Able also seek summary judgment on their counterclaims. Matco alleges that, pursuant to the contract between plaintiff and Matco, plaintiff agreed to pay it \$47,200.00 (see Matco Answer, Exh A). Matco alleges that plaintiff has paid it only half of the price agreed upon – \$23,600.00 (id., ¶ 15). Matco asserts that it is currently owed \$23,600.00 pursuant to the contract, with interest from August 24, 2004, the date of the completion of work on the project (id., ¶ 16). In its first, second and third counterclaims, Matco demands judgment from plaintiff in the amount of \$23,600.00. Plaintiff does not deny in any of its papers that, under the contract, Matco is owed \$23,600.00. Accordingly, Matco’s motion for summary judgment on its first, second and third counterclaims is granted.

In its second, third and fourth counterclaims, Able seeks payment of the \$12,800.00 that Matco agreed to pay it for removal of the cooling tower, together with interest from August 21, 2004. It is undisputed that Able and Matco had an agreement for Able to remove and dispose of the cooling tower for the price of \$12,800.00 (see Dep. of David Popp, at

89:7-20 [Matco agreed to pay Able \$12,800.00 for the work that Able was to perform]; that Able removed and disposed of the cooling tower; and that Matco failed to pay Able any part of the agreed upon price (see id. at 68:14-69:4 [the entire \$12,800.00 amount remains unpaid]). Indeed, Matco admits that the only reason it has failed to pay Able is because plaintiff failed to pay Matco (see Second Third Party Complaint, ¶ 20 [seeking \$23,600.000 from Able, "less the outstanding obligation which would be payable to [Able] if [Matco] had been paid"]). Thus, Able's motion for summary judgment on its second, third and fourth counterclaims is granted.

It is appropriate for this court to determine the extent of damages owed to both Able and Matco, rather than referring this issue to a Special Referee. Where the amount in dispute is a "sum certain," there is no need for an inquest, and the court can determine the damage award (Reynolds Securities, Inc. v Underwriters Bank and Trust Co., 44 NY2d 568 [1978]; Transit Graphics Ltd. v Arco Distributing, Inc., 202 AD2d 241 [1<sup>st</sup> Dept 1994]). Stated another way, once liability has been established, and there is no dispute as to the amount due, the court can set the amount of damages (see Pikulin v Mikshakov, 258 AD2d 450 [2d Dept], lv dismissed 93 NY2d 1040 [1999]; Gaylord Bros., Inc. v RND Co., 134 AD2d 848 [4<sup>th</sup> Dept 1987]). Here, plaintiff does not deny that Matco is owed \$23,600.00, and Matco readily admits that the amount it agreed to pay Able is \$12,800.00, and that it failed to pay Able any part of that amount.

Accordingly, Matco's motion for summary judgment on its first, second and third counterclaims in the amount of \$23,600.00 is granted. Likewise, Able's motion for summary judgment on its second, third and fourth counterclaims in the amount of \$12,800.00 is also granted.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of defendant DJM Restoration Inc. to dismiss the complaint, as well as all cross claims and counterclaims against it (Motion Sequence No. 002) is granted, and the complaint, and all cross claims and counterclaims asserted against DJM Restoration Inc. are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of second third-party defendant Able Rigging Contractors, Inc. for summary judgment dismissing the second third-party complaint and all cross claims against it (Motion Sequence No. 003) is granted, and the second third-party complaint and all cross claims against Able Rigging Contractors, Inc. are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of second third-party defendant Able Rigging Contractors Inc. for summary judgment on its second, third and fourth counterclaims (Motion Sequence No. 003) is granted and the Clerk of the Court is directed to enter judgment in favor of Able Rigging Contractors Inc. and against second third-party plaintiff Matco Service Corp. in the amount of \$12,800.00, together with interest as prayed for allowable by law, until the date of entry of judgment, as calculated by the Clerk, and thereafter, at the statutory rate, together with

costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED the motion of third-party defendant Bogmar Environmental, Inc. to dismiss the third-party complaint and all cross claims and counterclaims against it (Motion Sequence No. 004) is granted, and the third-party complaint and all cross claims and counterclaims asserted against Bogmar Environmental, Inc. are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant Matco Service Corp. for summary judgment dismissing the complaint and all cross claims against it (Motion Sequence No. 005) is granted, and the complaint and all cross claims against Matco Service Corp. are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant Matco Service Corp. for summary judgment on its first, second and third counterclaims (Motion Sequence No. 005) is granted, and the Clerk of the Court is directed to enter judgment in favor of Matco Service Corp. and against plaintiff Seaport Park Condominium in the amount of \$23,600.00, together with interest as prayed for allowable by law, until the date of entry of judgment, as calculated by the Clerk, and thereafter, at the statutory rate, together with costs and disbursements to be taxed by the Clerk


upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of plaintiff Seaport Park Condominium for an order granting it summary judgment on its claims against defendant Matco Service Corp., and striking Matco Service Corp.'s answer and pleadings (Motion Sequence No. 005) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 11/12/07

ENTER:

  
WALTER B. TOLUB J.S.C.

**FILED**

NOV 26 2007

NEW YORK  
COUNTY CLERK'S OFFICE