

State Farm Ins. Co. v Long Is. Power Auth.

2007 NY Slip Op 34021(U)

December 6, 2007

Supreme Court, Nassau County

Docket Number: 6882-02/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

STATE FARM INSURANCE COMPANY a/s/o
ALBERTO PENA,

TRIAL / IAS PART 32
NASSAU COUNTY

Plaintiff,

Index No. 6882/02

- against -

Motion Sequence No. 001 & 002

LONG ISLAND POWER AUTHORITY,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves for an order pursuant to CPLR 3126 striking the plaintiff's complaint for failure to produce crucial and relevant evidence for inspection by the defendant, or in the alternative striking the plaintiff's expert disclosure, precluding the plaintiff from offering expert testimony at the time of the trial, and precluding the plaintiff from offering evidence as to the cause of the incident alleged in the complaint, or in the alternative resolving the issue of the incident alleged in the complaint in favor of the defendant, and, upon such order pursuant to CPLR 3211 and 3212 dismissing the plaintiff's complaint against the defendant, and granting summary judgment to the

defendant. The plaintiff opposes the defense motion and cross moves for summary judgment pursuant to 3126, or in the alternative a further examination before trial of the defendant's witness, George Ello, or an individual with knowledge from the risk management department of the defendant. The defendant opposes the plaintiff's cross motion. The plaintiff commenced the underlying property damage subrogation action alleging a fire at the home of Alberto Pena on July 2, 2001, was solely caused by the negligence of the defendant.

The attorney for the defendant states, in a supporting affirmation dated July 3, 2007, to the defense motion, the plaintiff has deliberately delayed the production of its 3101 (d) expert response, and the plaintiff disposed of evidence from the fire scene. The attorney for the defendant provides, in detail, the defense assertion regarding discovery demands and the course of discovery in this litigation. The attorney for the defendant contends the plaintiff's evidence report reveals the plaintiff collected critical evidence from the scene of the occurrence which has not been produced.

The plaintiff's attorney states, in a supporting affirmation dated October 22, 2007, to the cross motion, and also in opposition to the defense motion, the defendant presented an incomplete factual showing in an effort to create a spoliation of evidence defense. The plaintiff's attorney argues the alleged disposal of certain physical evidence, specifically the items depicted in the plaintiff's photographs, should result in a dismissal of the plaintiff's claims. The plaintiff's attorney furnishes, in detail, the plaintiff's assertion of

factual background, in this matter, to counter the defense submission of facts. The plaintiff's attorney provides an explanation with respect to the missing items, for example burnt out wires discarded by the plaintiff's employee when performing repairs. The plaintiff's attorney asserts the plaintiff conducted a physical inspection of the loss site after the loss, and physical evidence was not intentionally discarded by the plaintiff. The plaintiff's attorney retorts, although no sanction is warranted, the Court should look for less drastic remedies which are available. The plaintiff's attorney avers the plaintiff's cross motion for summary judgment should be granted because the missing evidence places the plaintiff's legal counsel at a severe disadvantage for proving the case where the missing evidence was owned and maintained by the defendant which the plaintiff alleged caused the fire. The plaintiff's attorney maintains there was no delay in expert disclosure, and the defendant is not entitled to preclusion.

The attorney for the defendant states, in an affirmation dated October 28, 2007, in reply and in opposition, the plaintiff's cross motion papers support the defense argument that the plaintiff destroyed key evidence in this case, and the plaintiff and the plaintiff's counsel were aware of the need to preserve such evidence from the earliest moments after the incident. The attorney for the defendant contends the plaintiff's opposition to the defense motion for spoliation sanctions fails to rebut its culpability for the destruction of key evidence. The attorney for the defendant maintains the plaintiff's cross motion must be denied in its entirety for failing to preserve key evidence essential to this case, and

there is no good faith basis to grant the relief sought by the plaintiff.

The plaintiff's attorney reiterates, in a reply affirmation dated November 9, 2007, the plaintiff's assertions regarding the issue of the preservation of physical evidence involved in the ignition of the fire. The plaintiff's attorney avers fault lies with the defendant, and the defendant must produce a witness who could account for all of the defendant's activities at the subject residence after the fire.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d

235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

This Court has carefully reviewed and considered all of the parties’s submissions on the motion and cross motion. The Court finds there are triable issues of fact that must be resolved before a trier of fact. The defense request is denied to strike the plaintiff’s complaint for failure to produce crucial and relevant evidence for inspection by the defendant, or in the alternative strike the plaintiff’s expert disclosure, precluding the plaintiff from offering expert testimony at the time of the trial, and precluding the plaintiff from offering evidence as to the cause of the incident alleged in the complaint, or in the alternative resolving the issue of the incident alleged in the complaint in favor of the defendant, and, upon such order pursuant to CPLR 3211 and 3212 dismissing the plaintiff’s complaint against the defendant, and granting summary judgment to the defendant. The plaintiff’s alternative request is denied for a further examination before trial of the defendant’s witness, George Ello, or an individual with knowledge from the risk management department of the defendant. The issue of spoliation is respectfully

referred to the Trial Justice for consideration and resolution.

Accordingly, the motion and cross motion are denied in accord with this decision.

So ordered.

Dated: **December 6, 2007**

ENTER:



J. S. C.

ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

DEC 11 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**