

Travers Jewelers Corp. v 650 Fifth Avenue Corp.

2007 NY Slip Op 34189(U)

December 18, 2007

Supreme Court, New York County

Docket Number: 0107475/2005

Judge: Walter Tolub

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: TOLUB
Justice

PART 18

Index Number : 107475/2005

TRAVERS JEWELERS

vs

650 FIFTH AVENUE

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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Upon the foregoing papers, it is ordered that this motion *is denied & withdrawn*
with the accompanying memorial opinion.

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

FILED
DEC 19 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: 12/13/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----x
TRAVERS JEWELERS CORP.,

Plaintiff,

Index No. 107475/05
Mtn Seq. 002

-against-

650 FIFTH AVENUE CORPORATION and LIZ
CLAIBORNE, INC., d/b/a MEXX FIFTH AVENUE

Defendants.

-----x
650 FIFTH AVENUE CORPORATION and LIZ
CLAIBORNE, INC., d/b/a MEXX FIFTH AVENUE

Third-Party Plaintiff,

-against-

B.P. AIR CONDITIONING CORP.,

Third-Party Defendant.

-----x

WALTER B. TOLUB, J.:

This is an action to recovery monetary damages for property allegedly damaged as a result of two separate water damage incidents that occurred on plaintiff's premises. By this motion, defendant Liz Claiborne, Inc., d/b/a Mexx Fifth Avenue ("Liz Claiborne") moves, pursuant to CPLR 3126, for dismissal of plaintiff's complaint on the grounds of spoliation of evidence. Alternatively, defendant Liz Claiborne seeks an order precluding plaintiff from offering any evidence as to all items destroyed during the course of the litigation. Third-Party defendant B.P.

Air Conditioning Corp. ("B.P. Air") cross-moves for similar relief. Defendant 650 Fifth Avenue Corporation ("650 Fifth Avenue") cross-moves for dismissal of the complaint on the grounds of spoliation, and additionally moves for summary judgment on the cross-claims advanced by them against defendant Liz Claiborne for contractual and common law indemnification. Defendant 650 Fifth Avenue also seeks summary judgment on the issue of liability and for dismissal of all of the claims advanced against them.

Litigation History

Plaintiff operates a fine art/jewelry store located at 650 Fifth Avenue in Manhattan ("the premises"). Defendant 650 Fifth Avenue is the owner and landlord of the building where plaintiff's store is located. Defendant Liz Claiborne is the tenant of the space adjacent to plaintiff's store.

Plaintiff claims that on January 26, 2003 and again on January 11, 2004, plaintiff's store sustained water damage when an overhead pipe began to leak. Plaintiff claims that the 2003 incident caused property damage in the amount of \$46,224.29, and the 2004 incident caused an additional \$54,062.43 in property damage. This action was commenced in May, 2005 and in August, 2005, plaintiff amended its complaint. In January, 2006, defendant Liz Claiborne commenced a third-party action against B.P. Air Conditioning Corp. ("B.P. Air"), the entity hired by

defendant Liz Claiborne to repair the overhead pipe which caused the property damage in plaintiff's store.

Plaintiff's Claimed Damages

In support of their damage claims, plaintiff produced an itemized list of claimed damages, which was compiled by the late Wendell (Bill) Dickerson, the manager of plaintiff's store. Mr. Dickerson was also a friend of plaintiff's president and sole shareholder, Sam Kassin. The damaged items, the most valuable of which were inventoried as carved ivory pieces, were never produced for inspection. At some point during the pendency of this action, plaintiff moved the damaged items from the premises to a store in New Jersey owned by Mr. Dickerson (Transcript of Mr. Kassin, Exhibit D, p. 50-52 at 12, 55-57). Mr. Kassin testified that Mr. Dickerson allowed plaintiff to store the damaged merchandise there (Id. at 56). Mr. Kassin knew that the merchandise involved in this litigation was at Mr. Dickerson's New Jersey store and had been there since at least August, 2005 (Id. at 117, 143-144). Mr. Kassin also testified that the landlord of the New Jersey store confiscated the contents of Mr. Dickerson's store in the Spring of 2006 in response to a failure to pay rent, after which, Mr. Kassin made no effort to retrieve the items (Id. at 56-57, 71-72, 117-118, 130-134). Mr. Dickerson was not deposed and has since died. Mr. Kassin has no knowledge as to whether there are records reflecting the purchase

of the damaged items (Id. at 50-52) or whether the damaged items were replaced (Id. at 54-55). All that was presented to defendants were a few invoices, and a few appraisals made for plaintiff's company. Defendants have had no opportunity to inspect and independently value the items which were damaged.

Discussion

It is well established in this State that when critical items of evidence are willfully or negligently disposed of before an opposing party has an opportunity to review and inspect them, elementary fairness may require dismissal of the complaint (see, Abulhasan v. Uniroyal-Goodrich Tire Company, 14 AD3d 900 [3rd Dept 2005]; Neal v. Easton Aluminum, Inc., 15 AD3d 459 [2nd Dept 2005]; Ortega v. City of New York, 9 NY3d 69 [2007]).

Plaintiff commenced this action seeking damages for items its claims were in its store when it was flooded in 2003 and 2004 (see, Amended Complaint, Notice of Motion Exhibit B). Among the items on its inventory list were art pieces which require individual appraisal for proper valuation. The notion that plaintiff had no obligation to preserve the items lost because no other party requested them, is therefore at best, misguided, and plaintiff should have taken proper steps to safeguard the evidence necessary to maintain its claims.

Contrary to plaintiff's opposition papers, the items which were claimed to have been damaged and which are no longer in

plaintiff's possession, are key items of evidence which are crucial to the defense of this action, i.e., the determination of plaintiff's actual losses. These items were available for inspection when plaintiff commenced this litigation in 2005. Plaintiff however, never made them available for inspection. The items remained in Mr. Dickerson's store in New Jersey, where plaintiff had stored them, until they were confiscated in the Spring of 2006, at which time plaintiff made no effort to retrieve them. Under the facts and circumstances of this case, photographs of the art pieces, partial invoices, and appraisals prepared for plaintiff's store, are no substitute for inspection and evaluation of the items by the defendants' own experts (see, Neal, 15 AD3d 459; Lindquist v. Pillsbury Company, 1 AD3d 410 [2nd Dept 2003]; New York City Transit Authority v. Consolidated Edison Co. Of New York, Inc., 40 AD3d 273 [1st 2007]).

Accordingly, plaintiff's complaint must be, and is, dismissed.

The court has considered the balance of the cross-motion advanced by defendant 650 Fifth Avenue which asserts entitlement to summary judgment on the cross claims advanced against defendant Liz Claiborne for contractual and common law indemnification. Inasmuch as this court has dismissed plaintiff's complaint, there are no damages to speak of. As such, the balance of the cross motion is denied.

Accordingly, it is

ORDERED that the motion advanced by defendant Liz Claiborne, Inc., d/b/a Mexx Fifth Avenue ("Liz Claiborne") for dismissal of plaintiff's complaint on the grounds of spoliation of evidence is granted; and it is further

ORDERED that the cross-motion advanced by third-Party defendant B.P. Air Conditioning Corp., which sought dismissal of plaintiff's complaint on the grounds of spoliation of evidence is granted; and it is further

ORDERED that the portion of the cross-motion advanced by defendant 650 Fifth Avenue Corporation dismissal of the complaint on the grounds of spoliation, is granted; and the remainder of the cross-motion is denied; and it is further


ORDERED that the complaint is dismissed with costs and disbursements to the aforementioned defendant and third-party defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/18/07

FILED
DEC 19 2007
NEW YORK
COUNTY CLERK'S OFFICE



HON. WALTER B. TOLUB, J.S.C.