[* 1]

SHORT FORM ORDER

COPY

INDEX No. 03-27516

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10/25/07 (008)
11-29-07 (009)
ADJ. DATE 12-20-07
Mot. Seq. # 008 - MOTD # 009 - MOTD

----------X
JOSEPH JENNOSA :
Plaintiff, :
:
- against - :
:
VERMEER MANUFACTURING COMPANY, :
ADVANTAGE RENTAL CENTER and :
NICHOLAS GOVERNALE, :
Defendants. :
----------X
NICHOLAS GOVERNALE, :
:
Third-Party Plaintiff, :
:
- against - :
:
DUNNE IN THE SUN, INC., :
:
Third-Party Defendant. :
----------X
VERMEER MANUFACTURING COMPANY, :
:
Fourth Third-Party Plaintiff, :
:
- against - :
:
DUNNE IN THE SUN, INC., :
:
Fourth Third-Party Defendant. :
----------X

PAZER & EPSTEIN, P.C.
Attorneys for Plaintiff
20 Vesey Street, Suite 700
New York, New York 10007

CERUSSI & SPRING
Attys for Deft/4th Pty Pltf Vermeer Manufacturing
One North Lexington Avenue
White Plains, New York 10601

CATALANO, GALLARDO & PETROPOULOS
Attorneys for Defendant Advantage Rental Center
100 Jericho Quadrangle, Suite 214
Jericho, New York 11753

RICHARD T. LAU & ASSOCIATES
Attorneys for Defendant Nicholas Governale
P.O. Box 9040
Jericho, New York 11753-9040

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY & PENDER, P.C.
Attys for 3rd Pty Deft/4th 3rd Pty Deft Dunne in the Sun, Inc.
154 Terry Road, P.O. Box 883
Smithtown, New York 11787

Upon the following papers numbered 1 to 10 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers 4 - 6 ; Answering Affidavits and supporting papers 7 - 8 ; Replying Affidavits and supporting papers 9 - 10 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#008) by defendant Governale for summary judgment dismissing the claims interposed against him in this action by the plaintiff is granted only to the extent that the plaintiff's claims for recovery of damages under Labor Law §§ 240(1) and 241(6) are dismissed; and it is further

ORDERED that the plaintiff's cross-motion (#009) for dismissal of the defendant Governale's answer pursuant to CPLR 3126 and denial of said defendant's motion pursuant to CPLR 3212(f) is granted only to the extent that the defendant is precluded from offering any evidence at the trial of this action as to the outside condition of his premises in 2003 and the plaintiff is awarded the benefit of an adverse inference charge against defendant Governale at the trial of this action.

The plaintiff commenced this action to recover damages for the personal injuries he sustained on April 19, 2003, while working for third-party defendant, Dunne in the Sun, Inc., in the yard of the defendant Governale's residential premises. Prior thereto, the defendant Governale retained third-party defendant, Dunne in the Sun, Inc. (hereinafter Dunne), to perform landscape services on the residential lot of defendant Governale. In connection therewith, Dunne retained a subcontractor who removed thirteen oak trees from the said lot. On the date of the accident, the plaintiff, his boss, Hector Rodriguez, and several co-workers were assigned the task of removing the stumps left on the subject premises by the subcontractor who previously removed the oak trees.

At the time of his accident, the plaintiff was operating a stump cutter machine manufactured by defendant, Vermeer Manufacturing Company, which the plaintiff and a co-worker had rented from defendant, Advantage Rental Center. With the rented machine engaged, the plaintiff began to grind a stump. While grinding the stump, the machine unearthed a piece of underground hose which became wrapped around the cutting wheel. The plaintiff shut the machine off and took a ten minute break. Upon his return, the plaintiff removed the hose that had tangled around the cutting wheel. The plaintiff re-started the stump cutter and resumed grinding the stump he had been working on previously when it unearthed a second piece of hose. Plaintiff testified that he lowered the idle of the stump cutter, disengaged and raised the cutting wheel but did not shut down its engine. As the plaintiff grabbed this second piece of hose in an effort to remove it, his hand contacted the cutting wheel which, apparently, was still turning. As a result of such contact, the plaintiff's suffered a traumatic crush injury to his right hand which resulted in the amputation of his right wrist and hand.

By his complaint and bill of particulars the plaintiff charges defendant Governale with liability for the occurrence of his accident under theories of common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). By the instant motion-in-chief, defendant Governale moves for summary judgment dismissing all of said claims. The motion is predicated upon the following grounds: 1) that defendant Governale was without notice of the defective condition of the premises about which the plaintiff complains, namely, the existence of underground hosing which allegedly caused the plaintiff's accident and resulting injuries; and 2) that none of the plaintiff's claims for recovery under Labor Law §§ 200; 240(1) and 241(6) are actionable.

In support of his claims regarding the absence of notice, defendant Governale principally relies upon his own deposition testimony wherein he stated that he purchased the subject premises in

November of 2002, which were improved with a dwelling, a twenty by forty foot backyard pool and a shed. Defendant Governale further testified that there was no underground sprinkler system that he was aware of and that he had undertaken no pool renovation projects or landscaping activities prior to the plaintiff's accident on April 19, 2003, except for the tree, brush and stump removal activity which defendant Dunne had agreed to perform. With respect to his claims for summary judgment dismissing the plaintiff's Labor Law claims, the moving defendant again relies on his own deposition testimony. He also relies upon the deposition testimony of the plaintiff and of defendant Dunne's principal, Hector Rodriguez, who contracted with the plaintiff for the performance of the work, rented the stump cutter and assigned the tasks which the employees were engaged in on the date of the accident. As in the case of defendant Governale, Hector Rodriguez was not present on the premises at the time the plaintiff's accident occurred.

The plaintiff cross-moves for dismissal of the defendant Governale's answer on the grounds that said defendant's destruction and/or failure to preserve photographs taken by him immediately following the plaintiff's accident which depicted the condition of the premises at and around the place where the plaintiff's accident occurred and of the stump cutter shortly after the plaintiff's accident warrants a dismissal of the moving defendant's answer pursuant to CPLR 3126. The plaintiff further asserts that these circumstances also warrant a denial of defendant Governale's motion for summary judgment pursuant to CPLR 3212(f).

In support of his cross-motion, the plaintiff attaches copies of defendant Governale's March 19, 2004 written response to the plaintiff's demands for documents and Governale's June 21, 2004 written response to the stipulated and so-ordered discovery exchange schedule set forth in the Preliminary Conference order. Therein, defendant Governale asserted that he was not in possession of any photographs of the scene. However, plaintiff points to the subsequent and wholly contradictory deposition testimony given by defendant Governale on August 10, 2006, wherein said defendant unequivocally stated that he had taken photographs of the accident scene and the stump cutting machine just after the plaintiff's accident and prior to the removal of said machine by employees of defendant Dunne. Further questioning revealed that the photos had not been developed. When asked why the photos had not been developed, defendant Governale responded as follows:

> "I am a bit of a closet photographer. I take a lot of pictures. When I moved into the house I had literally near forty to sixty undeveloped rolls of film. They are very expensive to develop, as well, during that time my son was involved in several soccer tournaments that I took a lot of pictures of and hence, there is a collection of still thirty to forty rolls of film that have not gotten developed" (see, pages 88-91 of the transcript of defendant's August 10, 2006 deposition attached as Exhibit L of defendant's moving papers).

After Governale stated that he did not know on which of the thirty to forty undeveloped rolls of film the subject pictures were located, the plaintiff's counsel called for the preservation of all undeveloped rolls of film in the possession of defendant Governale by their delivery to his attorney. Upon further

questioning, Mr. Governale confirmed that as of August 10, 2006, the date of his deposition, he still had the undeveloped film of the photographs he took of the accident scene on the date thereof (*see*, pages 93-94 of the transcript of defendant's August 10, 2006 deposition; Exhibit L of defendant's moving papers). Within days of the deposition of the moving defendant, plaintiff's counsel followed up his call for the production of the subject film or photographs by a written demand. Having received no response, plaintiff's counsel issued on November 19, 2006, a second written demand for the production of the undeveloped film or developed photos of the accident scene and stump cutter. On December 19, 2006, defendant Governale's counsel responded by stating " .... after a diligent search, defendant is unable to locate photographs".

The plaintiff received no further response to his demands for production of either the undeveloped film or the photos developed therefrom. In October of 2007, defendant Governale interposed the instant motion for summary judgment. The motion was not preceded by the parties' certification of this action as trial ready nor by the issuance of a compliance/certification order by this court. Consequently, no note of issue and statement readiness was filed prior to the interposition of this motion. Plaintiff claims that these circumstances and those outlined above warrant the granting of his cross-motion to dismiss the answer served and filed by defendant Governale and/or the denial of his motion-in-chief pursuant to CPLR 3126 and CPLR 3212(f), respectively. Since those portions of the plaintiff's cross- motion wherein he seeks dismissal of defendant Governale's answer purportedly raises a complete defense in bar sounding in spoliation to the defendant's motion-in-chief, the court will first consider the plaintiff s cross-motion.

Where a party to litigation has destroyed evidence that should have been disclosed, CPLR 3126 empowers court before whom such litigation is pending to make such orders with regard to the failure or refusal to disclose as are just (***Ortega v City of New York***, 9 NY3d 69, 2007 WL 2988760 [Court of Appeals, 10/16/07]). Appropriate sanctions which the court may impose include: 1) the drastic sanction of dismissing the pleadings served by the offending party which subjects said party to the entry of an accelerated judgment pursuant to CPLR 3212 or 3215 in favor of any adverse party aggrieved by the destruction and failure to disclose; 2) issuance of an order of preclusion prohibiting the spoliator from adducing proof in his or her favor at the trial of the action; 3) the assessment of costs relative to replacing the lost evidence; and 4) directing that an adverse inference charge be employed at trial (*see*, ***Ortega v City of New York***, *ibid* @ p.776, and the cases cited therein). That the most drastic sanction of dismissal is available under CPLR 3126 in those cases where a party negligently loses key evidence, even in the absence of willful or contumacious conduct, is clear (*see*, ***Ortega v City of New York***, *ibid* @ p.777, and the cases cited therein). The sanction of dismissal has also been imposed where a party had the opportunity to safeguard key evidence and negligently failed to do so (***Amaris v Sharp Electronic Corp.***, 304 AD2d 457, 758 NYS2d 637 [2003], *lv. denied* 1 NY3d 507, 808 NE2d 859 [2004]). In such cases, however, if the negligent loss or negligent failure to safeguard irreplaceable evidence does not deprive adverse parties of the means of establishing their claims or defenses, imposition of one of the less drastic sanctions is the appropriate judicial response (***E.W. Howell Co. Inc., v S.A.F. La Sala Corp.,*** 36 AD3d 653, 828 NYS2d 212 [2007]).

Here, the cross-moving papers established that on August 10, 2006, defendant Governale testified, unequivocally, that he was in possession of the undeveloped film containing the photographs

he took of the accident scene and the stump cutter shortly after the occurrence of plainitff's accident. The cross-moving papers further established that immediately following such testimony and in the presence of defendant Governale and all others present at defendant's deposition, the plaintiff's attorney called for the preservation and production of said film and/or photographs. Notwithstanding such testimony and some four months thereafter, defendant Governale's counsel advised that no photographs had been discovered. Now, the defendant Governale avers that immediately after his deposition, he searched his home and found twenty-one undeveloped rolls of film. Said film was developed but it contained no pictures of the accident site. Since there is no undeveloped film nor any photographs in the possession of defendant Governale, none are available for dissemination to the other parties to this action (*see*, December 3, 2007 affidavit of defendant Governale submitted in opposition to the plaintiff's cross-motion).

Upon the foregoing undisputed facts, the court finds that defendant Governale, at the very least, negligently failed to safeguard the film having had the opportunity to do so and/or negligently lost the film and the photographs recorded thereon after receiving due notice of its character as key evidence of the condition of his premises. The court further finds that because such evidence contained matter from which the jury might infer that defendant Governale had notice of a dangerous condition on his premises due to the existence of the hose piping buried at or below the surface of his yard which may have caused or contributed to the occurrence of the plaintiff's accident, said evidence is sufficiently crucial to warrant the imposition of sanctions for its spoliation pursuant to CPLR 3126 (***Dorsa v National Amusemnets, Inc***, 6 AD3d 652, 776 NYS2d 583 [2004]).

Claims for recovery of damages attributable to dangerous or unsafe conditions on real property, whether governed by principles of common law negligence or by §200 of the Labor Law, are dependent upon a shewing that the defendant created or had notice of the complained of condition of the premises that purportedly caused or contributed to the occurrence of an accident (*see*, ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Payne v 100 Motor Parkway Associates, LLC.,*** 45 AD3d 550, 846 NYS2d 211 [2007]). As pleaded here, the plaintiff's claims include allegations that defendant Governale had actual and/or constructive notice of the condition of his premises prior to plaintiff's accident. However, notice of a dangerous or defective condition on real property is not an element of a claim for recovery under §§ 240(1) or 241(6) of the Labor Law. Defendant Governale's negligent loss of the film at issue is thus not a defense in bar to said defendant's demands for summary judgment dismissing the plaintiff's 240(1) and 241(6) Labor Law claims, both of which have been sufficiently demonstrated to be without merit (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Rizzuto v L.A. Wenger Contracting Co. Inc.***, 91 NY2d 343, 670 NYS2d 816 [1998]). Since the plaintiff failed to contest the merits of defendant Governale's motion for summary judgment dismissing his claims for recovery under §240(1) and §241(6) of the Labor Law, and made no showing that facts essential to state opposition are unavailable due to incomplete discovery, (*see*, ***Fobbs v Rahimzada***, 39 AD3d 811, 834 NYS2d 329 [2007]), summary judgment dismissing said claims is awarded to the moving defendant.

With respect to the plaintiffs remaining claims against defendant Governale, which sound in common law negligence by landowners and breaches of the duties imposed upon landowners to provide and maintain a safe workplace under §200 of the Labor Law, defendant Governale's motion for summary judgment is denied. The evidence spoliated by said defendant's negligent loss or failure to

preserve was material and relevant to the notice element of such claims. Moreover, the proof adduced by defendant Governale failed to establish, *prima facie*, his entitlement to summary judgment with respect to such claims (*see*, ***Alvarez v Prospect Hospital***, 68 NY2d 320 508 NYS2d 923 [1986]).

However, dismissal of the moving defendant's answer, as demanded by the plaintiff, is inappropriate. Although the issue of the defendant's actual or constructive notice of the dangerous and/or defective condition of the subject premises is an element of plaintiff's claims for recovery under common law negligence theories and under §200 of the Labor Law, it cannot be said that the plaintiff was deprived of the means of establishing these claims (***E.W. Howell Co. Inc., v S.A.F. La Sala Corp.,*** *supra*; ***De Los Santos v Planco,*** 21 AAD3d 397, 799 NYS2d 776 [2005]). Under these circumstance, the court finds that the remedy of preclusion such as the one employed by the court in ***Dorsa v National Amusemnets, Inc.***, (*supra)* is appropriate. Accordingly, defendant Governale is hereby precluded from offering any evidence at the trial of this action as to the outdoor condition of his premises in 2003. The court further awards the plaintiff the benefit of an adverse inference charge against defendant Governale at the trial of this action.

Dated: January 31, 2008

J.S.C.

___FINAL DISPOSITION _X__NON-FINAL DISPOSITION