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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Claremont Preparatory School

INDEX NO. 603886/06

MOTION DATE 5/9/08

-v-

MOTION SEQ. NO. 003

Long Island Swimming Pool et al

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 ____

FILED
OCT 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 003 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 003) of third-party defendants Oaklander, Coogan & Vitto, Architects, P.C. and Whitelaw Architects to dismiss the complaint based upon spoliation of evidence is moot; and it is further

ORDERED that the cross motion of plaintiff Claremont Preparatory School, LLC to strike the answers of defendants Renosys Corporation and Long Island Swimming Pool Service, Inc. is denied; and it is further

ORDERED that counsel for defendant Oaklander Coogan & Vitto shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

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

Dated: 10/28/08

CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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CLAREMONT PREPARATORY SCHOOL, LLC,

Plaintiff,

-against-

Index No. 603886/06

LONG ISLAND SWIMMING POOL SERVICE, INC., and RENOSYS CORPORATION,

Defendants.

----------X

RENOSYS CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590146/07

OAKLANDER, COOGAN & VITTO, ARCHITECTS, P.C., COW BAY CONTRACTING, INC. and WHITELAW ARCHITECTS,

Third-Party Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

Plaintiff Claremont Preparatory School, LLC (Claremont), a private elementary school located at 41 Broad Street in Manhattan, seeks to recover monetary damages for property damage resulting from a leaking indoor swimming pool.

Third-party defendants Oaklander, Coogan, & Vitto, Architects, P.C. (OCV) and Whitelaw Architects (Whitelaw) move, pursuant to CPLR 3126, to dismiss the complaint for

spoliation of allegedly crucial evidence, the swimming pool's vinyl liner.[1] Defendant/third-party plaintiff Renosys Corporation (Renosys) moves to dismiss the complaint and all cross claims asserted against it, asserting that it is unable to defend this action due to Claremont's spoliation of this evidence. Defendant Long Island Swimming Pool, Inc. (LISP) also moves to dismiss Claremont's complaint on the same ground. Claremont cross-moves to strike the answers of Renosys and LISP.

Background

On November 7, 2006, Claremont commenced the instant action against LISP and Renosys, alleging breach of contract, negligence, strict liability, and breach of express and implied warranties, including breach of warranty of merchantibility and fitness for a particular use. Claremont alleges that LISP was hired to design and install an indoor swimming pool at the premises. LISP allegedly retained Renosys to furnish and install a vinyl liner for the pool. Claremont claims that the swimming pool, which is located in the basement of the building, leaked water to the school's kitchen and cafeteria, which are located one floor below the pool. Thereafter, Renosys commenced a third-party action against OCV, Cow Bay Contracting, Inc. and Whitelaw, seeking indemnification and contribution.

On October 3, 2006, Horizon Aquatics Systems, LLC provided a Report/Proposal to Claremont, which stated:

> "The pool is obviously leaking due to breaching of the seaming present in the liner. The water is traveling between the liner and the spun geotextile batting underlying

[1]By stipulations dated August 27, 2008, the third-party action was discontinued as against OCV and Whitelaw. On September 4, 2008, the court permitted the motion of OCV and Whitelaw to be withdrawn.

> the liner material. Because the leaks as they exit the structure do not directly correlate to the location of leaks in the lining it is almost impossible to identify the defective seaming."

(Freedman Affirm., Exh. E, at 1). The report recommended that the PVC lining system and underlying geotextile fabric be removed (*id.*).

By letter dated November 8, 2006, Claremont advised LISP and Renosys that it was granting them an opportunity to inspect the pool at issue. That letter stated that "[s]aid opportunity for inspection is limited from today through December 15, 2006. Please be advised that you will not have an opportunity to inspect said pool after December 15, 2006" (Ingber Affirms. in Opp., Exh. A.).

LISP and Renosys conducted inspections of the subject swimming pool on December 11 and 14, 2006, while the pool was full of water and while the liner was in place. Renosys hired Frank Norberto of Norberto & Sons Pools, Inc. to conduct the first inspection of the pool. According to Renosys, Norberto examined the pool through various access panels, and did not find any evidence that the pool was leaking. Renosys further claims that the second inspection was conducted by Jason Mart, who went into the pool with a scuba tank, and did not find any leak in the liner. LISP also submits an affidavit from William E. Platten, Jr., a registered professional engineer, who states that he inspected the pool on December 11th when it was full of water. Platten claims that he was unable to observe the condition of the water side of the concrete pool basin because the pool was filled with water.

By letters dated December 18 and 20, 2006, LISP and Renosys demanded to be present during the remediation work (Arcuri Affirm., Exh. E; Freedman Affirm., Exh. M). Renosys also requested that a 10 foot by 10 foot section of the liner be saved (Arcuri Affirm., Exh. E).

Subsequently, Claremont performed remediation work on the swimming pool. The owner of Claremont, Michael Koffler, testified at his deposition that, during this process, the vinyl liner was discarded (Koffler Dep., at 158). The swimming pool is now a tile pool (*id.*). Claremont first learned that there was a problem with the vinyl liner when the pool was drained in December 2006, when the repair work was being performed (*id.* at 226). A forensic analysis was conducted, which concluded that the liner was insufficient to hold water and that water seeped through to the concrete underneath the liner (*id.* at 265).

Motions for Spoliation Sanctions

Renosys contends that the complaint should be dismissed because Claremont intentionally spoliated the vinyl liner. Renosys was also precluded from being present during the remediation process. Since Claremont will use this evidence to prove its case at trial, Renosys has established severe prejudice.

LISP similarly argues that dismissal of the complaint is warranted, given that Claremont had a duty to preserve the liner and knowingly discarded it. Defendants' inspections of the subject swimming pool were inadequate and "pointless." Additionally, the photographs produced by Claremont are inadequate. Claremont produced only two photographs of the unlined pool, which were taken at a distance. Most of the remaining photographs are close-ups of pool features.

In opposing these motions, Claremont contends that it did not spoliate any evidence, because defendants inspected the swimming pool before and after the commencement of the action. And, defendants have not demonstrated that the vinyl liner is "key evidence." In any

event, Claremont possesses a piece of the liner, which is available for inspection and/or testing. Defendants did not notice an inspection pursuant to CPLR 3120 (1) (i) or move to compel the additional inspection. In addition, defendants have failed to establish severe prejudice as a result of the loss of evidence, given that Claremont possesses a portion of the liner and that Claremont did not test the liner either.

CPLR 3126 permits the court to "strik[e] out pleadings or parts thereof" when a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." The trial court has broad discretion in supervising disclosure (*Art Capital Group LLC v Rose*, 54 AD3d 276, 278 [1st Dept 2008]), and the nature and degree of the penalty to be imposed under this section is committed to the sound discretion of the trial court (*Gradaille v City of New York*, 52 AD3d 279, 283 [1st Dept 2008]).

It is well settled that spoliation sanctions may be imposed where a litigant, intentionally or negligently, disposes of crucial items of evidence (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]; *Squitieri v City of New York*, 248 AD2d 201, 202-203 [1st Dept 1998]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). "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 defense" (*Squitieri*, 248 AD2d at 203 [citation omitted]). In determining the sanction to be imposed on a spoliator, the court must examine the extent that the non-spoliating party is prejudiced by the destruction of the evidence and whether dismissal is warranted as "a matter of elementary fairness" (*Kirkland*, 236 AD2d at 175 [internal quotation marks and citation omitted]).

Dismissal of a pleading is warranted only where the loss of the evidence leaves the affected party without the means to prosecute or defend the action (*see Squitieri*, 248 AD2d at 203; *see also Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [1st Dept 2002], quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [2d Dept 1998] [court may strike a pleading where a party destroys key physical evidence such that its opponents are "'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence'"]). However, where there is independent evidence that permits a party to adequately prepare its case, a less drastic sanction is appropriate (*see e.g. Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 333-334 [2d Dept 2004] [negative inference charge for destruction of truck and propane tanks]; *Melendez v City of New York*, 2 AD3d 170, 171 [1st Dept 2003] [appropriate sanction for loss of documents, which was not fatal to plaintiff's case, was missing document charge]).

In *Kirkland* (236 AD2d 170, *supra*), a tenant's family brought a wrongful death action against two defendants, the Housing Authority and a gas stove manufacturer, claiming that the tenant fell out of the apartment window after her clothes caught on fire due to a defective gas stove. There, the Housing Authority negligently disposed of the stove, a key piece of evidence, and then brought a third-party action against the contractor that installed the stove in the tenant's apartment. The First Department held that:

> "Spoliation is the destruction of evidence. Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the non-intentional destruction of evidence . . . Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident *before the adversary has an opportunity to inspect them. We have found dismissal to be a viable remedy for loss of a 'key piece of evidence' that*

thereby precludes inspection."

(*id.* at 173 [emphasis supplied and internal citations omitted]). The Court further determined that the third-party complaint should have been dismissed by the trial court, since the contractor was deprived of its ability to present a defense (*id.* at 175-176). Indeed, the issue of whether the contractor was negligent in installing the gas connection could not be determined without an actual inspection of the connection with the stove (*id.*).

By contrast, where an adversary had an opportunity to inspect the destroyed items of evidence, spoliation sanctions are inappropriate. For instance, in *Roman v North Shore Orthopedic Assn.* (271 AD2d 669, 670 [2d Dept 2000]), where the plaintiff claimed that he was injured by an X-ray machine, the Court held that the trial court improvidently exercised its discretion in granting the third-party defendant MRL's motion to strike the third-party complaint, "[i]n light of the fact that MRL examined and repaired the machine after the accident." The same result occurred in *General Sec. Ins. Co. v Nir* (50 AD3d 489 [1st Dept 2008]). *Nir* was a subrogation action brought by a restaurant's insurer against the installer of its sprinkler system and the inspector of the system, alleging that the restaurant's fire sprinkler was defective and/or improperly inspected (*id.* at 490). Although the sprinkler was prematurely destroyed, the Court concluded that "[d]efendants' spoliation argument was properly rejected. They had an opportunity to inspect the fire-damaged premises on several occasions, and did so" (*id.*).

Here, Claremont gave Renosys and LISP opportunities to inspect the subject swimming pool. It is uncontested that Renosys and LISP conducted inspections of the pool on December 11 and 14, 2006, while the vinyl liner covered the pool and before the liner was destroyed. Therefore, this case is factually similar to *Roman* and *Nir*. Moreover, Renosys and LISP have

not established that the loss of the vinyl liner has deprived them of all means of establishing a defense. According to Renosys, the inspections showed that there was no evidence that the pool was leaking and that there was any leak in the liner. There are also photographs of the swimming pool after the vinyl liner was removed and before the pool surface was covered with tiles. Thus, LISP can use these photographs to establish that it was not negligent in installing the swimming pool. Counsel for Claremont also represents that he is in possession of a piece of vinyl liner, which may be examined and tested by defendants. Therefore, Renosys and LISP are not entitled to dismissal of the complaint.

Claremont's Cross Motion to Strike the Answers

Claremont contends that Renosys failed to comply with the court's preliminary conference order, which required that Renosys produce its expert's inspection report. According to Claremont, at a conference on December 11, 2007, Renosys informed the court that it had not yet retained an expert and thus did not have an expert report to produce to Claremont. However, in its moving papers, Renosys states that it hired Frank Norberto and bases its motion on his opinions and conclusions. Claremont further argues that LISP's answer should be stricken, because it has not yet received its expert disclosure.

In opposition to the cross motion, Renosys points out that it never "hired" an expert to inspect the pool. Norberto was merely retained "to inform [counsel as to] what to look for." LISP contends that it does not possess any such report, as it has not yet retained any experts to testify at trial.

The drastic sanction of striking a pleading is warranted only where it is shown that non-

compliance was willful, contumacious, or in bad faith (*Gradaille*, 52 AD3d at 283; *Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242, 243 [1st Dept 2008]; *DeLeon v Sonin & Genis*, 303 AD2d 291, 292 [1st Dept 2003]). Willfulness can be inferred from repeated failures to comply with discovery orders (*Howe v Jeremiah*, 51 AD3d 975 [2d Dept 2008]).

In the instant case, Claremont's cross motion must be denied. Claremont has not demonstrated that Renosys or LISP failed, either willfully or in bad faith, to comply with the court's preliminary conference order. LISP and Renosys claim that they have not yet retained experts. Claremont has also not shown a pattern of willful failure to comply with discovery demands or this court's discovery orders. Moreover, Claremont's cross motion is not supported by an affirmation of a good faith effort to resolve the dispute, as required by 22 NYCRR 202.7 (a) (2) (*see Reyes v Riverside Park Community [Stage I], Inc.*, 47 AD3d 599, 600 [1st Dept 2008]).

Sanctions Pursuant to 22 NYCRR 130-1.1 and Costs

Claremont also seeks sanctions pursuant to 22 NYCRR 130-1.1 against Renosys. Claremont contends that Renosys falsely stated that Koffler "candidly admitted that Claremont gained an unfair advantage" during the remediation process. Pursuant to this section, conduct is "frivolous" if it "asserts factual statements that are false" (22 NYCRR 130-1.1 [c] [3]). However, Claremont has failed to show that Renosys made a false statement of fact.

Finally, Claremont's request for costs in the amount of $5,000 resulting from the withdrawn spoliation motion is denied as there is no basis for same.

Conclusion

Accordingly, for the foregoing reasons, it is

ORDERED that the motion (sequence number 003) of third-party defendants Oaklander, Coogan & Vitto, Architects, P.C. and Whitelaw Architects to dismiss the complaint based upon spoliation of evidence is moot; and it is further

ORDERED that the motion (sequence number 004) of defendant/third-party plaintiff Renosys Corporation to dismiss the complaint based upon spoliation of evidence is denied; and it is further

ORDERED that the motion (sequence number 005) of defendant Long Island Swimming Pool Service, Inc. to dismiss the complaint based upon spoliation of evidence is denied; and it is further

ORDERED that the cross motion of plaintiff Claremont Preparatory School, LLC to strike the answers of defendants Renosys Corporation and Long Island Swimming Pool Service, Inc. is denied.

Dated: 10/28/08

ENTER

FILED
OCT 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Carol Robinson Edmead, J.S.C.
CAROL EDMEAD
J.S.C.