

**Chang v Board of Mgrs. of 325 Fifth Ave  
Condominium**

2009 NY Slip Op 31394(U)

June 19, 2009

Supreme Court, New York County

Docket Number: 111967-2007

Judge: Judith J. Gische

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

PRESENT: GISCHE  
Justice

PART 10

CHANG, JULIA

INDEX NO. 111967/07

- v -

THE BOARD OF MANAGERS OF  
325 FIFTH AVE. CONDOMINIUM, INC.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 02

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
JUN 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6/19/09

J. GISCHE  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----x  
Julia Chang,

Plaintiff (s),

**-against-**

The Board of Managers of 325 Fifth Avenue Condominium, Cooper Square Realty, Inc., and Young Taik Oh,

Defendant (s).  
-----x

**DECISION/ ORDER**  
Index No.: 111967-2007  
Seq. No.: 002

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

**Papers**

Pltf n/m (sanctions) w/ HWL affirm, exhs	Numbered	1
Def's Board and CSR opp w/LCS affirm, exhs		2
Pltf's reply w/HWL affirm		3
Transcript of OA 4/30/09		4

**FILED**  
JUN 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Julia Chang for damages arising from the theft of valuable jewelry from her apartment, Unit 26B at 325 Fifth Avenue, New York, New York, a condo unit she leases from defendant Oh, the owner ("apartment"). Oh is no longer a party to this action, but plaintiff's claims against the defendant board ("board") and condominium ("condominium") are unresolved. Plaintiff seeks the imposition of monetary sanctions against the defendants pursuant to the Uniform Rules for Trial Courts, Part 130 ("Part 130 sanctions"). Plaintiff also seeks an order compelling defendants to respond to her discovery demands. CPLR 3124. Defendants oppose the motion in its entirety.

## **Arguments presented**

Plaintiff alleges that the defendants failed to exercise reasonable care in maintaining the premises. She claims that this breach (lax security) created a dangerous environment which was hospitable to criminal activity, and therefore, the proximate cause of her damages, to wit: the theft of \$430,000 in valuable jewelry from her apartment. Plaintiff claims that defendants had actual notice of thefts in the building, but did nothing to remedy the dangerous situation.

Plaintiff served defendant with document demands dated October 17, 2007 and December 17, 2008 (respectively the "1<sup>st</sup>" and 2<sup>nd</sup>" document demands). The preliminary conference was held on January 17, 2008. At that conference, the parties agreed to certain limitations on plaintiff's 1<sup>st</sup> document demand; those limitations are part of the preliminary conference order ("preliminary conference order").

Plaintiff contends that defendants responses to her demands have been incomplete, evasive, or simply "inaccurate" because they first responded they did not have documents, but later produced some of them. Plaintiff has deposed Petra Bergstrand, the property manager for the building. Her deposition lasted two days. She has provided a sworn affidavit in opposition to this motion by plaintiff to compel discovery and for the imposition of sanctions under Part 130 of the Uniform Rules of Trial Courts ("Part 130 sanctions"). Plaintiff contends that the defendants have engaged in sanctionable conduct because defendants: 1) provided incomplete responses to her demands, 2) delayed in turning over information, documents, etc., 3) objected to her demands, and 4) spoliated evidence. She seeks the deposition of a person familiar with defendants' search for the records she has demanded because she does not believe

they have conducted a thorough search.

With this motion, plaintiff demands certain documents set forth in a document called "Schedule A." The parties disagree whether this is the first time they are being demanded, or documents already demanded, but not provided. Thus, plaintiff seeks enforcement of the 1<sup>st</sup> and 2<sup>nd</sup> document demand, as well as of her most recent demand in "Schedule A." These documents are best addressed in broad categories.

The first category of documents in dispute are those pertaining to changes or improvements in security practices or procedures at the condominium. Plaintiff claims she is entitled to this information post burglary (*i.e.* after April 26, 2007) because the parties agreed to it at the preliminary conference, and she also agreed it would only be for a limited time, although she wanted it for a greater period. The preliminary conference order provides that defendants will provide discovery as to "security related matters" and also "security practices, rules, procedures, or protocols" limited in time from January 2007 to May 2007. Also to be provided are all board minutes, related to security issues, complaints about security issues, all documents concerning "any investigation of the robberies or burglaries occurring at the condominium in or around 2007," limited to non-privileged documents. Defendants object to these demands. They argue that there has been no change in their procedures or practices, and any changes to the "security system" or replacement of locks on the units is not discoverable or admissible in a negligence case. Item 5 in Schedule A demands the following:

"all documents constituting any or concerning any evaluation, assessment or inspection of the condominium's security system, including without limitation, documents located at the condominium, on the Condominium's computer systems, in the condominium's

"building files" maintained at Cooper Square, on Cooper Square's internal database, or other systems called "Cooper Square Connect," the "share drive" and email files, folders and archives."

The second category of documents or demands pertains to condominium documents, like minutes, complaints, notices, and internal emails. Plaintiff contends that Ms. Bergstrand "admitted" that the condominium was the primary custodian of all documents for the condominium, like minutes, and that she never threw out any notes she made about complaints by tenants. Thus, defendants argue that the defendants' failure to produce such documents is false, based upon Ms. Bergstrand's testimony, and that the documents may, in fact, exist on the defendants' electronic database, or a shared drive. Thus, item 2, 3 and 4 of Schedule A seeks all documents concerning board minutes, the occurrence in Unit 26B, and copies of emails to or from Ms. Bergstrand related to burglaries at the condominium, including documents maintained on the defendants' servers, databases, etc.

Plaintiff contends the defendants have destroyed, or spoliated evidence, despite their demand that defendants preserve it. For this claim plaintiff relies upon a letter her attorney sent to Ms. Bergstrand. In that letter dated "April 29/30, 2007," sent by email and fax, plaintiff's attorney asked the property manager to "preserve any and information that may be relevant to our investigation," such as surveillance tapes. Defendants deny they have any surveillance tapes for the day of the alleged incident. Ms. Bergstrand testified that she could not recall receiving that letter, and could not find it in her files. The defendants have also provided a formal response dated May 9, 2008, stating that they "are not in possession of any video surveillance taken on the date of

the subject occurrence . . . Defendants reserve the right to supplement this response should additional information become available." Plaintiff contends that it is evidence that the defendants spoliated evidence, warranting the imposition of sanctions.

Defendants admit they hired a private investigator (John Decker) after the occurrence in Unit 26B, but before this action was commenced by the plaintiff. Ms. Bergstrand testified that Decker "probably" prepared a written report, although she could not specifically remember it. She believes he made some recommendations about how security at the building could be improved (i.e. changing locks, etc.), and also also evaluated plaintiff's claim, that her apartment had been burglarized. According to Ms. Bergstrand, defendants doubted plaintiff's account of the burglary apparently because she did not report the occurrence to her insurance company or have receipts for the jewelry allegedly stolen.

Item 6 requests a copy of Decker's report (and other investigatory reports) as well as all of the defendants' information about such investigation (s), whether in written or electronic form. In a previous stipulation between the parties (June 19, 2008), they agreed (and the court "so-ordered" that), "[defendant]<sup>1</sup> to identify John Decker and his relationship to the subject occurrence." In the preliminary conference order, defendants reserved their right to a site inspection, and they agreed to respond to item 4 in the 1<sup>st</sup> demand for documents which was for "all documents concerning any investigation of the robberies or burglaries accruing at the condominium in or around early 2007," with the following limitation: "limited to non-privileged documents." Defendants contend that

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<sup>1</sup>The stipulation actually says "π" (plaintiff). Evidently, this is a scrivener's error.

Decker's report is privileged and even if not privilege, not discoverable because it pertains to post-occurrence remediation steps taken by them.

### **Discussion**

The court first addresses plaintiff's motion for sanctions because it is the least complicated branch of her motion. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from "frivolous conduct" as defined in Part 130. Conduct is frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

Plaintiff has not made an initial showing that defendants engaged in frivolous conduct, within the meaning of the court rules. Contrary to plaintiff's claims, defendants have not ignored her document demands. They have responded and then supplemented their responses. Compliance conferences have been meaningful, resulting in discovery orders that further clarified and/or defined categories of information that the parties have agreed to provide and accept. Plaintiff's frustration with the pace of discovery does not justify the imposition of sanctions. Such relief is denied.

Turning to the dispute about whether evidence has been spoliated by the defendants, the court observes that plaintiff's allegation rests entirely on her assumption

that her request for the preservation of evidence was disregarded because Ms. Bergstrand cannot remember plaintiff's April 29/30, 2007 letter. Plaintiff's suggestion that defendants may have destroyed the surveillance tapes is based on speculation. Scansarole v. Madison Square Garden, L.P., 33 A.D.3d 517 (1<sup>st</sup> Dept 2006). There is no evidence that surveillance tapes existed for April 23, 2007 or that they were destroyed. Ms. Bergstrand's deposition testimony is that the condominium's video surveillance equipment may not have been entirely installed as per the offering plan and "very likely that the system was not complete at the time." This is also what plaintiff factually alleges in her complaint (paragraphs 19, 20, 21). Although spoliation of evidence may result in sanctions where crucial items of evidence involved in an accident are disposed of before the adversarial party has had an opportunity to examine them, plaintiff has not met her burden of putting forth facts tending to show that such an extreme sanction is warranted in this case. Kirkland v. New York City Housing Authority et al., 236 AD2d 170 (1<sup>st</sup> Dept. 1997); Squitieri v. City of New York, 248 AD2d 201 (1<sup>st</sup> Dept. 1998); Marro v. St. Vincent's Hospital et al., 294 AD2d 341 (2<sup>nd</sup> Dept 2002). Therefore, plaintiff's motion, for the imposition of sanctions for the spoliation of evidence is denied.

It is plaintiff's contention that the ongoing supplementation of defendants' discovery demands is proof they have more information or documents, but are withholding them. Plaintiff is "incredulous" that defendants are missing certain documents, particularly since Ms. Bergstrand testified the condominium is in charge of keeping most of them on behalf of the board. These arguments, however, seek a determination by the court that the witness has not testified credibly. Deposition

testimony is, however, sworn testimony and it is up to the trier of fact to decide issues of credibility. Therefore, the court (for purposes of this motion) accepts the testimony at face value. Defendants make no claim that Ms. Bergstrand does not have knowledge of the facts, or that there is someone more knowledgeable within their companies. Rather, defendants seek the production of someone else who will explain what steps Ms. Bergstrand took to locate the information and documents demanded by. Essentially, what they are seeking is corroboration that what Ms. Bergstrand testified she did she really did. Their motion, to have defendants produce someone else for that reason is denied. Defendants have, therefore, provided responses to plaintiff's demands for board minutes, complaints by other tenants, and reports of property loss.

Plaintiff has previously requested a copy of Decker's report and the defendants agreed they would provide any investigative reports they have, provided they are non-privileged. Defendants also agreed they would "identify John Decker and his relationship to the subject occurrence." The preliminary order directs that defendants provide discovery as to "security related matters" and also "security practices, rules, procedures, or protocols" limited in time from January 2007 to May 2007."

CPLR § 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Begin Collier Publ. Co., 21 N.Y.2d 403, 406, (1968). The scope of disclosure provided is "generous, broad, and is to be construed liberally . . ."  
Allen v. Crowell-Begin Collier Publ. Co., supra. Since defendants claim that the report is

privileged, they have the burden of establishing the immunity of that information from discovery. Volpicelli v. Westchester, 102 AD2d 853 (2<sup>nd</sup> Dept 1984).

Here, defendants contend the report was prepared in anticipation of litigation. Trial-preparation materials encompassed by CPLR § 3101(d)(2) are only conditionally immune from discovery, and that immunity can be overcome by "showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3101 (d) (2).

Decker's report apparently has two components: it may have materials prepared in anticipation of litigation, but also information about the security system at or about the time of the burglaries. While evidence of post-occurrence repairs may not be admissible at trial, such material may, nonetheless, be discoverable. Francklin v. New York Elevator, Co., 38 AD 2d 329 (1<sup>st</sup> Dept 2007).

The court has not been provided with sufficient information to decide whether the Decker report has to be disclosed. Therefore, the court will require that defendants provide a copy of the report to the court for an in camera inspection. The report shall be delivered to the Clerk in Part 10 at 60 Centre Street, Room 232 together with a copy of this decision and order, **no later than July 8, 2009**. The court reserves decision solely on that branch of plaintiff's motion.

Plaintiff's request for any electronic documents contained in defendants' internal databases is made for the first time in this motion (i.e. Schedule A). Ms. Bergstrand states in her sworn affidavit that she has search the email server and not located the April 29/30, 2007 letter. She has sates that has been unable to locate any board

minutes, reports, or other correspondence, except those that were already provided. Plaintiff argues that her affidavit is non-responsive because she had not stated she checked the server for the documents.

Leaving aside the issue that plaintiff is seeking to enforce demands made for the first time in her motion to compel, whether Ms. Bergstrand checked computerized files, a drawer or a shopping bag for the documents demanded does not matter. What matters is that the witness has testified under oath, and again stated in a sworn affidavit that she has checked for the documents demanded and not found them. Plaintiff's dissatisfaction with that result is not a legal basis to order defendant to check in a particular place for the documents demanded. This branch of plaintiff's motion to compel is denied.

### Conclusion

Plaintiff's motion to compel is granted only to the extent that defendants shall deliver a copy of the Decker report to the Clerk in Part 10 at 60 Centre Street, Room 232 together with a copy of this decision and order, **no later than July 8, 2009**. The court reserves decision solely on that branch of plaintiff's motion. In all other respects plaintiff's motion to compel and for sanctions is denied.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 19, 2009

So Ordered:

  
Hon. Judith J. Gische, J.S.C.

