

Luther v S. W. Wasserman Real Estate

2009 NY Slip Op 31646(U)

July 15, 2009

Supreme Court, New York County

Docket Number: 104517/2007

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

MICHAEL LUTHER,
Plaintiff,

Index No.: 104517/2007

Motion Date: 03/17/09

- v -

Motion Seq. No.: 001

S.W. WASSERMAN REAL ESTATE, 305 LEXINGTON
ASSOCIATES, LLC and S.W. MANAGEMENT, LLC,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 4 were read on the motion for summary judgment.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits - Exhibits	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiff's motion for discovery sanctions only to the extent that this court shall issue an order that precludes the defendants from offering any evidence at trial as to the condition of the discarded hot water mixing valve and other parts located at the boiler that controlled the temperature of the hot water circulated throughout the building. Such order also directs an adverse inference charge with respect to such discarded parts.

Plaintiff alleges that on March 25, 2006, while taking a

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

shower in his apartment, he accidentally hit the water temperature control lever in his bathroom shower that caused the water to turn hot. As a result, he fell and sustained burns to his body.

Plaintiff alleges that he complained about excessively hot water to defendants both in writing and verbally several times prior to his burn incident.

However, he never notified defendants of his accident. Nine months later, on November 15, 2006, his attorneys served a Show Cause Order for pre-action discovery on defendants, which was issued in Westchester County Supreme Court, for inspection and testing of the boiler and mixing valves in the building. Such Show Cause Order temporarily restrained defendants from repairing or altering the boiler or water heater and any related equipment. Before the hearing for a preliminary injunction, which was adjourned several times, the counsel for the parties engaged in negotiations to amend the restrictive language as winter was approaching and defendants urged that the restrictions were not feasible. Plaintiff's counsel added hand written language to the stipulation, which changes defense counsel advised he would have to discuss with his client. Defendants rejected the language and directed defense counsel to submit an Order to Show Cause modifying that language. Defense counsel submitted such Show Cause Order that allowed for the repair of the boiler or water

heater but directed that the parts be retained. Such Order was signed on December 29, 2006. Upon advising defendants of that Order, defense counsel learned from their client for the first time that their plumber had already been sent to check the boiler and water heating system and replaced and discarded some of the parts on December 8, 2006.

Plaintiff seeks to sanction the defendants and particularly seeks an order striking defendants' answer for spoliation of critical evidence that plaintiff asserts has fatally impaired his ability to establish defendants' negligence. Plaintiff argues that such sanction is warranted as defendants' failure to retain the parts was intentional. He argues that such intention is established by the testimony of the building's superintendent that the plumbing contractor was called to service the boiler because of the pending lawsuit. Plaintiff argues that notwithstanding this admission that the lawsuit motivated the service call, the superintendent never advised the plumbing contractor to retain the parts removed from the boiler in direct contravention of the Order to Show Cause.

Plaintiff submits the affidavit of a plumbing and heating expert that states that without the parts that were discarded, he will be unable to form an opinion as to the cause of the excessively hot water. He will be unable to determine why the

water temperature was not properly adjusted or what the temperature was upon discharge from the boiler.

Defendants oppose the sanctions, arguing that plaintiff is not deprived of proving his case based on his inability to inspect the equipment. They urge that only one week after the accident plaintiff measured the water temperature in his bathroom and took photographs that establish that the temperature was approximately 155 degrees. They contrast such direct evidence with the weaker evidence that would have been yielded in the inspection and testing that was not sought by plaintiff until nine months after the accident, which would not establish the condition of the equipment at the time of plaintiff's accident.

The court finds that the defendants' discard of the equipment does not leave plaintiff with no means of establishing a prima facie case against defendants. New York City Building Code Reference Standard RS-16 § P107.6(I) directs that "[w]ater temperature control valves shall be equipped with high-stop limits adjusted to a maximum hot water setting of 120 degrees Fahrenheit", which applies to units' individual bath and shower valves. Williams v Jeffmar Management Corp, 31 AD3d 344, 346 (1st Dept 2006). There have been no changes in any of the equipment in plaintiff's individual bathroom valves, so plaintiff may certainly establish that defendants breached their duty as to such valves.

In addition, plaintiff's verbal and written complaints about excessively hot water made to defendants prior to the accident constitute evidence that defendants had actual notice of the excessively hot temperature of the shower water in his apartment. Shkolnik v Longo, 2009 NY Slip Op 04887 (2d Dept 2009).

"While the striking of a pleading may be justified 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 (citations omitted), outright dismissal remains a drastic remedy and is appropriate only where less severe sanctions have been ruled out.' "

Hilfiger, USA, Inc. v Commonwealth Trucking, Inc., 300 AD2d 58 (1st Dept 2002).

Although plaintiff has not established that he is prejudicially bereft of an alternative means to present his claim, the defendants were bound by a duly entered order of the court to retain the parts that were replaced by their plumbing contractor. They were on notice of court's directive commanding the preservation of the evidence. Although the court does not find that defendants deliberately defied the advice of their attorneys, through a break down in communication, they negligently failed to direct their plumbing contractor to retain the boiler parts, which was in direct contravention of two Show Cause Orders duly signed by a judge of the Supreme Court, one of which their own lawyers presented to the court.

Since defendants' acts constitute a careless failure to retain evidence rather than the deliberate destruction of

evidence, a lesser sanction than striking their pleading is warranted. The proper sanction under these circumstances is to preclude the defendants from offering any evidence at trial as to the discarded boiler parts and to direct an adverse inference charge be issued with respect to same.

Accordingly, it is

ORDERED that plaintiff's motion to strike defendants' answer is GRANTED only to the extent that the defendants are precluded from offering any evidence at trial as to the condition of the discarded parts and the court shall issue an adverse inference charge; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference before Part Mediation-1 on September 17, 2009 at 10:30 A.M. and provide the mediator with a copy of this Order, and if this action is not settled thereat, the parties are directed to attend a pre-trial conference on November 17, 2009, at 2:30 P.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013, to set a trial date.

This is the decision and order of the court.

Dated: July 15, 2009

ENTER:

FILED
JUL 24 2009
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NEW YORK

DEBRA A. JAMES

J.S.C.