

Jamindar v Uniondale Union Free School Dist.

2009 NY Slip Op 33156(U)

December 11, 2009

Supreme Court, Nassau County

Docket Number: 7942/08

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

JIGAR JAMINDAR,

Plaintiff,

Index No.: 7942/08
Motion Seq. Nos.: 2-4

- against -

UNIONDALE UNION FREE SCHOOL DISTRICT,
UNIONDALE HIGH SCHOOL, IRWIN CONTRACTING,
CONOR CONSTRUCTION CONSULTANTS and
NORTHGATE ELECTRICAL,

Defendants.

UNIONDALE UNION FREE SCHOOL DISTRICT s/h/a
UNIONDALE UNION FREE SCHOOL DISTRICT,
UNIONDALE HIGH SCHOOL,

Third-Party Plaintiffs,

- against -

HERRICK'S MECHANICAL CORPORATION,

Third-Party Defendant.

The following papers have been read on this motion:

	Papers Numbered
Defendant's Notice of Motion to Quash Non-Party Subpoena	1
Plaintiff's Cross-Motion	2
Third-Party Defendant's Cross-Motion	3
Defendant's Reply Affirmation	4
Plaintiff's Reply Affirmation	5

Motion by defendant Northgate Electrical Corp. s/h/a Northgate Electrical ("Northgate") pursuant to CPLR 3106(b) for a protective order quashing the

non-party witness subpoena issued by plaintiff's attorneys seeking deposition of Bruce Jackie, R.M.G. Investigations, 104 West 27th Street, New York, New York, is denied.

Cross-motions by plaintiffs and third-party defendant Herrick's for an order striking defendant Northgate's answer based upon spoliation of the scissor lift on which plaintiff was seriously injured is denied; the Court hereby imposes the lesser sanction of a negative inference charge against Northgate at trial.

The background of this case is set forth in this Court's order dated April 2, 2009, which is incorporated herein. The scene of plaintiff's accident was a construction project in the auditorium at Uniondale High School. On August 22, 2007, plaintiff was severely injured when the extended scissor lift in which he was standing fell over. Northgate owned the scissor lift. It is disputed whether plaintiff had permission from Northgate to use the lift.

Northgate's president testified that he learned of the accident, possibly as early as the day after it happened, and he learned that plaintiff was paralyzed after the fall (Bass transcript, pp. 13-14). On September 8, 2007, a notice of claim against the municipal defendants was filed on plaintiff's behalf. Northgate notified its insurance company (Bass transcript, p.19), who retained R.M.G. Investigations. On September 11, 2007, Bruce Jackie of R.M.G. Investigations, examined and photographed the subject scissor lift, which was still located at Uniondale High School.

The subject lift was then removed from Uniondale High School and stored in one of Northgate's three warehouses. Richard Hedges, the warehouse supervisor, testified that he was not sure how long the lift was kept at the warehouse (Hedges transcript, p. 56). He testified that the batteries, some hydraulic lines and some wires were disconnected (Hedges transcript, p.50). He told the president of Northgate that the lift was not worth repairing because of its age and damage (Hedges transcript, p.60). The president admitted that he told the warehouse supervisor to "junk it," after he was told the condition of the lift, the damages, and the estimated repairs (Bass transcript, p.24). Hedges further explained that "the warehouse is always pressed for space"(Hedges transcript, p. 80).

Hedges called Central Scrap Metal to remove the lift. Oddly the date on the document provided by Central Scrap Metal for the pick-up is July 31, 2007(twenty-two days prior to the accident).

This Court, in its prior order of March 5, 2009, already directed discovery of the photographs taken on September 11, 2007, in Northgate's possession, notwithstanding the fact that the photographs were taken in contemplation of litigation. At the time of that prior order, plaintiff was unaware that the scissor lift was no longer available, and indeed the Court granted plaintiff the right to inspect the scissor lift, without opposition. Now that defendants reveal the unavailability of the scissor lift, plaintiff seeks a deposition from the investigator who took the photographs. For this reason, plaintiff served Mr. Jackie with a subpoena that is the subject of Northgate's motion.

A party seeking discovery from a nonparty witness must show special circumstances [*In re Cavallo*, ___ AD3d ___, 2009 WL 3208764 (2nd Dept. 2009); *Tannenbaum v Tenenbaum*, 8 AD3d 360 (2nd Dept. 2004)]. While Northgate is technically correct that the subpoena for the deposition of non-party investigator Bruce Jackie should indicate on its face that special circumstances exist [*Moran v McCarthy, Safrath, & Carbone, PC*, 31 AD3d 725 (2nd Dept. 2006), lv app dsmd 8 NY3d 969 (2007)], that technical defect may be corrected by service of a proper subpoena indicating the special circumstances herein at the adjourned date for the deposition set forth below. In addition Northgate is correct, and plaintiff concedes, that the venue for the deposition is improperly laid in the offices of plaintiff's attorneys. As the venue of a non-party deposition is governed by CPLR 3110(2), the Court directs amendment of the subpoena to provide for the deposition of Mr. Jackie at the Supreme Court in Manhattan, as Manhattan is the county where R.M.G. has its New York office. The deposition shall take place within 30 days of service or receipt of a copy of this order, unless otherwise agreed in writing.

A substantive showing of special circumstances is plainly presented, as the key evidence of the subject scissor lift is no longer available through the actions of the Defendant Northgate [*Dixon v City of Yonkers*, 16 AD3d 542 (2nd Dept. 2005); see *Brooklyn Floor Maintenance Co. v Providence Washington Ins. Co.*, 296 Ad2d 520 (2nd Dept. 2002)]. Consequently, the motion by defendant Northgate to quash the subpoena for the deposition of Bruce Jackie, of R.M.G.

Investigations is denied.

Northgate's president knew of plaintiff's accident and plaintiff's resulting serious injuries, possibly as early as the day it happened. Northgate contacted its insurer, who sent Mr. Jackie to investigate. Northgate refused to produce copies of Mr. Jackie's photos on the prior motion on the specific grounds that the photos were taken entirely in anticipation of litigation. After the investigation, Northgate discarded the subject scissor lift to a scrap metal business.

The Court has broad discretion in determining what sanction should be imposed for spoliation of evidence [*Jamiceli v General Motors Corp.*, 51 AD3d 635 (2nd Dept. 2008); *Denoyelles v Gallagher*, 40 Ad3d 1027 (2nd Dept. 2007); *Molinari v Smith*, 39 AD3d 607, 608 (2nd Dept. 2007); *Iannucci v Rose*, 8 AD3d 437 (2nd Dept. 2004)]. Spoliation sanctions are not limited to cases where the evidence was destroyed wilfully or in bad faith, since one party's negligent loss of evidence can be just as fatal to another party's ability to present a case or defense [*DiDomenico v C&S Aeromatik Supplies, Inc.*, 252 AD2d 41, 53(2nd Dept. 1998)]. Striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, and thus, if the moving party is still able to establish or defend a case, a less severe sanction is appropriate [*Utica Mutual Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 (2nd Dept. 2009); *Molinari*; *Iannucci*].

According to plaintiff, the "scissor lift was defective" because it "lacked several important safety features"(Kramer affirmation, par. 4). Plaintiff further asserts that "Northgate knew that the scissor lift lacked safety features that prevented its use on a sloped surface" (Kramer affirmation, par. 32). At this juncture it cannot be determined if the absence of the subject scissor lift will prevent the plaintiff from establishing his case of such an alleged defect [see *Rios v Johnson VBC*, 17 AD3d 654 (2nd Dept. 2005) and *Klein v Ford Motor Co.*, 303 AD2d 376 (2nd Dept. 2003)].

Nevertheless, the Court disapproves of the destruction of evidence by Northgate when future litigation was anticipated. Under all of the circumstances of this case, the Court hereby imposes the lesser sanction of an adverse inference charge against Northgate at trial [*Utica Mutual Ins. Co.*; *Barone v City of New York*, 52 AD3d 630 (2nd Dept. 2008); *Yechieli v Glissen Chemical Co., Inc.*, 40 AD3d 988 (2nd Dept. 2007); *Molinari*; *Mylonas v Town of Brookhaven*, 305

AD2d 561 (2nd Dept. 2003)].

In addition the Defendant Northgate shall be precluded from moving for summary judgment based on evidence derived from its retention and examination of the fork lift. Lastly, the foregoing is without prejudice to the Plaintiff's right to renew this motion for more severe sanctions after the examination of Mr. Jackie and any photographs and reports he has made, upon proof that the Plaintiff's ability to prove its claim was rendered so difficult by the destruction of the fork lift as to require the ultimate sanction requested by plaintiff, that being striking defendant's pleadings.

SO ORDERED.

Dated: December 11, 2009


A.J.S.C.

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