

**Melnicker v Weythe**

2010 NY Slip Op 30870(U)

April 10, 2010

Supreme Court, New York County

Docket Number: 601690/07

Judge: Louis B. York

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

PRESENT: \_\_\_\_\_

PART 2

*Justice*

Melnicker and Melnecker

INDEX NO. 601690/07

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

- v -

Weythe

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the accompanying order*

**FILED**  
APR 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/10/10

Pluy  
**LOUIS B. YORK** s.c.  
**JSC**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST

MOTION/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 2

-----x  
LAWRENCE MELNICKER and EILEEN MELNICKER,

Plaintiffs,

Index No. 601690/07

-against-

ARTHUR WEYTHE,

Defendant

**FILED**

APR 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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**Louis B. York, J.:**

This action arises from a fire that occurred on September 29, 2006 at plaintiffs' apartment located at 219 East 11th Street, New York, New York. At the time of the fire, plaintiffs leased the premises on a month-to-month basis from defendant.

Plaintiffs' insurance company, non-party Chubb & Son Insurance Company (Chubb), did not cover all of plaintiffs' property losses from the fire. Plaintiffs commenced the instant action asserting that defendant is responsible for the remainder of the recovery.

The parties dispute the cause of the fire. Plaintiffs allege that defendant was negligent in the upkeep of certain electrical components in the apartment. Specifically, plaintiffs now contend that the fire may have been caused by a malfunctioning wall switch in the foyer and a malfunctioning circuit breaker. Defendant asserts that the fire was caused by heat generated from an

electrical cord wiring failure created as a result of wear and tear by plaintiffs.

In an order dated November 23, 2009, this court denied plaintiffs' motion to quash three subpoenas which had been served by defendants on Chubb. The first subpoena sought information, files and production of an extension cord from Ed Pecknic, Chubb's Cause and Origin Investigator. The second subpoena sought the Chubb insurance file resulting from the fire. The final subpoena sought any and all files and records maintained by Chubb's in-house counsel with respect to plaintiffs.

Defendant now moves for an order enforcing the subpoenas. Plaintiffs cross-move for leave to reargue/renew their motion, which asked the court to quash the subpoenas or to issue a protective order.

#### **Reargument/Renewal**

CPLR 2221 (d) (2) provides that a motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. See *Matter of Hill v New York City Tr. Auth.*, 68 AD3d 866 (2d Dept 2009). Here, plaintiffs have not demonstrated that the court overlooked or misapprehended any matters in determining the

[\* 4]

underlying motion. Therefore, the cross motion for leave to reargue is denied.

CPLR 2221 (e) (2) provides that a motion for leave to renew must "be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." See *Emigrant Mtge. Co. v Turk*, \_\_\_ AD3d \_\_\_, 895 NYS2d 726 (2d Dept 2010). Here, plaintiffs have not offered any new facts or demonstrated a change in the law which would change the decision on the underlying motion. Therefore, the cross motion for leave to renew is denied.

In light of the denial of the cross motions for leave to reargue or to renew, defendant's motion to enforce the subpoenas is granted. Chubb shall comply with any outstanding items set forth in the subpoenas within two weeks of service on it of a copy of this order with notice of entry. This includes delivery to defendant of the extension cord which is alleged by it to be the cause of the fire.

#### **Spoliation of Evidence**

Plaintiffs have also cross-moved for an order sanctioning defendant for spoliation of evidence. Plaintiffs assert that on

[\* 5]

May 22, 2007, defendant sold the premises and the new owner renovated it, resulting in the destruction of a foyer light fixture, a foyer switch and certain circuit breakers. Plaintiffs contend that defendant had a duty to preserve those items, based on a report from the Fire Marshal, dated October 4, 2006. The report stated that the cause of the fire was "[p]robably heat from a faulty electrical fixture."

"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." *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 (1st Dept 1997); see *Ortega v City of New York*, 9 NY3d 69 (2007); *Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213 (1<sup>st</sup> Dept 2004). Here, plaintiffs have not demonstrated that sanctions are warranted.

Initially, plaintiffs contend that the alleged spoliation occurred during litigation, in that the building was sold while the instant action was pending. However, plaintiffs concede that the building was sold one day after plaintiffs purchased the index number and one month before defendant was served with the summons and complaint. Therefore, this is not a significant factor in demonstrating that defendant had an obligation to preserve the

[\* 6]  
evidence at issue.

More significantly, it is undisputed that plaintiffs had a period of over seven months after the fire marshal's report in which plaintiffs had the opportunity to inspect the apartment and, in particular, the items which defendant allegedly destroyed. In fact, it is undisputed that plaintiffs did have experts go into the apartment to inspect it during that period. Therefore, plaintiffs have not demonstrated that defendant's sale of the building deprived plaintiffs of the opportunity to inspect or preserve crucial items of evidence. See *General Sec. Ins. Co. v Nir*, 50 AD3d 489 [1<sup>st</sup> Dept 2008]. As such, the motion for sanctions based on spoliation of evidence is denied.

#### **Stay of Discovery**

CPLR 3103 (b) provides that "[s]ervice of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute." CPLR 3103 (c) provides that if disclosure has been "improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed."

Plaintiffs contend that defendant violated that stay by

[\*7]

acquiring discovery from Chubb during the time that the motion to quash the subpoenas and for a protective order was sub judice. Defendant does not address this allegation in its motion papers.

Plaintiffs have submitted evidence demonstrating that defendant sought and obtained certain discovery from Chubb which was the subject of the subpoenas at issue, including documents and photographs, during the period of time in which such discovery was stayed under CPLR 3103 (b). However, plaintiffs have not demonstrated that a substantial right has been prejudiced. The discovery at issue was subject to the subpoenas and would have eventually been discoverable by defendant, given this court's order denying plaintiffs' motion for a protective order.

Plaintiffs specifically contend that they were prejudiced because defendant deposed Mr. Pecknic, Chubb's Cause and Origin Investigator on April 28, 2009, without the presence of plaintiffs' counsel. Plaintiffs contend that the deposition should have been stayed because they served their motion for a protective order on that same date. However, it is undisputed that plaintiffs were aware that the deposition was scheduled for that date and could have attended and objected to the deposition taking place. Moreover, plaintiffs have not demonstrated that they completed service of the motion before the deposition took place. See CPLR

2103(b) (5).

Accordingly, it is

ORDERED that plaintiffs' motion for leave to reargue this court's decision dated November 23, 2009, is denied; and it is further

ORDERED that plaintiffs' motion for leave to renew this court's decision dated November 23, 2009, is denied; and it is further

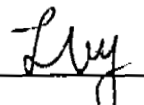
ORDERED that plaintiffs' motion for sanctions in connection with spoliation of evidence is denied; and it is further

ORDERED that plaintiffs' motion for sanctions in connection with defendant's violation of CPLR 3103 (b) is denied; and it is further

ORDERED that defendant's motion to enforce certain non party subpoenas is granted.

DATED: 4/10/10

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE