

**Jamindar v Uniondale Union Free School Dist.**

2010 NY Slip Op 32233(U)

August 10, 2010

Supreme Court, Nassau County

Docket Number: 7942/08

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

TRIAL/IAS PART 32  
NASSAU COUNTY

JIGAR JAMINDAR,

Plaintiff,

- against -

Index No.: 7942/08  
Motion Seq. Nos.: 12-13  
Motion Dates: 12/28/09  
01/22/10

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 these motions:**

	Papers Numbered
Plaintiff's Notice of Motion (Seq. No. 12), Affirmation and Exhibits	1
Defendant Northgate's Affirmation in Opposition and Exhibits	2
Defendant Northgate's Further Affirmation in Opposition and Exhibits	3
Plaintiff's Affirmation in Reply and Exhibits	4
Third-Party Defendant Herrick's' Notice of Cross-Motion (Seq. No. 13), Affirmation and Exhibits	5
Defendant Northgate's Affirmation in Opposition and Exhibits	6
Third-Party Defendant Herrick's' Affirmation in Reply and Exhibit	7

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves (Motion Sequence No. 12), pursuant to CPLR § 2221(d), for an order granting renewal in accordance with the December 11, 2009 Decision of the Honorable Daniel Martin, A.J.S.C. and, upon such re-argument, for an order granting plaintiff's motion to strike the Answer of defendant Northgate based upon spoliation of key evidence. Third-party defendant Herrick's moves (Motion Sequence No. 13) for the same relief. Defendant Northgate opposes the motions.

Plaintiff and third-party defendant Herrick's contend that the testimony of non-party witness Bruce Jackey at his examination before trial conducted on February 3, 2010, along with the photographs and reports he provided, provide new additional evidence that could not have been offered on plaintiff's original cross-motion and provide the basis for renewal of the original spoliation motion.

Plaintiff and third-party defendant Herrick's submit that new evidence shows that defendant Northgate's scissor lift was not damaged as a result of the accident, that said scissor lift was not totaled as a result of the accident, that said scissor lift was operational and functional after the accident and that there was no reasonable excuse to destroy the lift. Plaintiff and third-party defendant Herrick's argue that the new facts show that defendant Northgate's intentional spoliation of the evidence warrants striking defendant Northgate's Answer. Plaintiff and third-party defendant Herrick's claim that defendant Northgate intentionally destroyed the subject scissor lift to prevent an inspection by plaintiff. Plaintiff and third-party defendant Herrick's further claim that plaintiff's ability to prove that said scissor lift was defective was undermined by defendant Northgate's destruction of same and that, by far, the best evidence would have been discovered had plaintiff been able to inspect the scissor lift.

Defendant Northgate argues that plaintiff and third-party defendant Herrick's' request for

renewal should be denied because plaintiff has not submitted dispositive additional evidence, which became available only after the first motion was made, establishing plaintiff's entitlement to the extraordinary remedy of striking defendant Northgate's Answer. Defendant Northgate additionally argues that, if the Court does grant plaintiff and third-party defendant Herrick's application for re-argument, then the Court should determine that its Answer should not be stricken and no spoliation sanctions of any type against it are warranted.

Defendant Northgate contends that notice is a threshold question in determining whether spoliation sanctions should be imposed. Defendant Northgate asserts that plaintiff's attorneys never placed defendant Northgate on notice that the scissor lift involved in the accident might be needed for future litigation. Defendant Northgate states that they were given no notice that plaintiff "would eventually conjure up a claim that a defect in its lift in any way contributed to the plaintiff's accident." Defendant Northgate states that there was nothing in the September 8, 2007 Notice of Claim that indicated plaintiff believed that the subject scissor lift was defective. The Notice of Claim did not include any reference to any "defects" in defendant Northgate's scissor lift. Accordingly, neither defendant Northgate nor its insurer were on notice (even constructive notice ) that the scissor lift was a crucial piece of evidence that must be preserved. Defendant Northgate argues that it was not until April 30, 2008 that the plaintiff first asserted that the scissor lift was defective and first alerted defendant Northgate by the filing of plaintiff's Complaint that the scissor lift had evidentiary value. Defendant Northgate states that it was several months later, in December 2008, that plaintiff for the first time specifically requested, by letter, that defendant Northgate preserve the scissor lift for inspection. Defendant Northgate asserts that the subject scissor lift was discarded in the regular course of defendant Northgate's business long before any claim that an alleged defect in the scissor lift contributed to the happening of the accident.

Defendant Northgate further claims that, “[a]ssuming for purposes of argument that plaintiff could clear the notice threshold, which he cannot, plaintiff must demonstrate that he suffered sever or substantial prejudice from not having the missing piece of evidence.”

Defendant Northgate argues that the evidentiary alternatives (the testimony of numerous witnesses, photographs and reports) demonstrate that there is no prejudice to plaintiff’s “entirely speculative claim” that the subject scissor lift was defective.

Defendant Northgate asserts that CPLR § 3126 states that the Court may order sanctions if either party willfully fails to disclose information which the Court finds ought to have been disclosed. Defendant Northgate states that, since there was no clear request to preserve the scissor lift before it was “junked,” plaintiff cannot prove the “willful” requirement set for in the statute. Plaintiff cannot demonstrate and has not demonstrated that defendant Northgate’s disposal of the scissor lift was “willful” which is a condition precedent to the imposition of sanctions.

Plaintiff replies that “[d]efense counsel’s rambling 36 page 113 paragraph affirmation winds a surreptitious path through multiple arguments some of which have absolutely no bearing upon renewal of spoliation.” Plaintiff states “[c]ounsel claims that there is ‘no additional evidence’ and therefore the application to renew should be denied. Perhaps he would prefer that Mr. Jackey didn’t testify, perhaps he would like to believe that his report did not exist and without a doubt he is not happy that Mr. Von Fricken’s admission against Northgate’s interest that the lift was operational. Unfortunately for defense counsel all of the facts do exist, all of these facts are new information and Hon. Daniel Martin’s order dated December 11<sup>th</sup>, 2009 permitted renewal for more severe sanctions.” Plaintiff claims that “Northgate and their counsel knew that litigation was imminent. They knew that the scissor lift would be crucial to the litigation. Because the scissor (*sic*) was crucial to the litigation they had it inspected. Because

they knew that there were multiple defects they had it destroyed. Their answer should be stricken.”

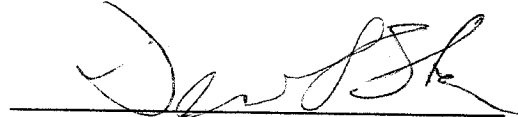
The Court finds that the motions by plaintiff and third-party defendant Herrick’s for an order granting renewal in accordance with the December 11, 2009 Decision of the Honorable Daniel Martin, A.J.S.C. are granted, and upon re-argument the relief requested by therein is denied. The Court holds, based upon the arguments, evidence and case law presented in the moving papers, that plaintiff and third-party defendant Herrick’s have not demonstrated that the extraordinary sanction of striking defendant Northgate’s Answer is warranted in the circumstances of this case. The Court finds that there was no evidence that defendant Northgate’s destruction of the scissor lift was willful and that plaintiff’s reply to the issue of whether defendant Northgate was on notice was based upon speculation and conjecture, not evidentiary facts.

Accordingly, plaintiff and third-party defendant Herrick’s motions (Motions Sequence No. 12 and 13) for an order granting plaintiff’s original motion to strike the Answer of defendant Northgate based upon spoliation of key evidence are hereby denied.

All parties shall appear for trial in Nassau County Supreme Court, Central Jury Part on September 20, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER  
A.J.S.C.

**ENTERED**

AUG 16 2010

NASSAU-COUNTY  
COUNTY CLERK'S OFFICE

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

AUG 16 2010

**ENTERED**

Dated: Mineola, New York  
August 10, 2010