

Baulieu v Ardsley Assoc., L.P.

2010 NY Slip Op 32272(U)

August 20, 2010

Sup Ct, NY County

Docket Number: 114779/2008

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 114779/2008
BAULIEU, RENEE
vs.
ARDSLEY ASSOCIATES
SEQUENCE NUMBER : 001
STRIKE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

In this motion to/for strike

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

PAPERS NUMBERED
<u>1, 2</u>
<u>3</u>
<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiffs to strike defendants' answer is denied in accordance with the attached memorandum decision.

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/20/10

[Signature]
J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----- x
RENEE BAULIEU and ROBERT BAULIEU,

Plaintiff,

Index No.
114779/2008

-against-

Motion Seq. No.:
001

ARDSLEY ASSOCIATES, L.P., *et al.*

Defendant.

----- x
LING-COHAN J.

Plaintiffs moves to strike defendants' answer pursuant to CPLR 2126 and the common law principles of spoliation of evidence. As detailed below, plaintiffs' motion is denied.

FILED
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COUNTY CLERK'S OFFICE

Facts

Plaintiffs commenced this case against defendant mall owner Ardsley Association L.P. (Ardsley), the managing agent for the mall defendant ISJ Management Corp. (ISJ), and Ardsley Village Square, Inc. d/b/a Sunnysdale, the tenant adjacent to the location where the accident occurred. for injuries plaintiff Rene Baulieu, allegedly sustained on November 26, 2006, when she tripped and fell after stepping off the curb of the parking lot. (Notice of Motion ¶ 3). The within motion by plaintiffs to strike defendants' answer alleges that defendants failed to properly respond to court-ordered discovery until after the three-year statute of limitations expired on November 26, 2009, preventing plaintiffs from adding M.R. Snow Plowing as a defendant. Thus, plaintiffs argue that defendants' answer should be stricken.

[3]

At the outset the court notes that plaintiffs' motion relating to discovery must be denied for the failure to provide an affirmation of good faith as required (*see* 22 NYCRR §202.7).

A Preliminary Conference was held on February 27, 2009, and an order issued requiring defendants to provide maintenance and repair records and agreements for two years prior to the date of loss. Depositions were also ordered to be completed by May 28, 2009. As a courtesy, upon request, the court gave the parties an extended period of time to complete depositions, because the parties represented that they were commencing a third-party action. On April 7, 2009, defendants responded to the order by providing invoices from Powerhouse Maintenance, Inc. (Powerhouse). Powerhouse had performed repairs at defendant Ardsley's premises prior to plaintiff Rene Baulieu's accident. As a result of defendants' responses, plaintiffs requested, at the June 26, 2009 Compliance Conference, to amend the complaint to add Powerhouse as a defendant.

On August 28, 2009, a discovery compliance conference was held, at which depositions of both plaintiffs and defendants were again ordered to be completed, but the date was extended by the court, upon request, as a courtesy, to November 19, 2009, despite the parties' failure to complete depositions in accordance with the terms of this court's preliminary conference order. Due to alleged scheduling conflicts, however, defendants were unable to produce all witnesses for deposition by the November 19, 2009 deadline, and all depositions were subsequently completed by February 18, 2010. Prior to plaintiffs consenting to defendants' request to reschedule the remaining depositions until after the November 19, 2009 deadline, attorney for defendants Ardsley

and ISJ Management confirmed that no entity, other than Powerhouse, was involved in the pothole repair/maintenance of the lot.

At the December 4, 2009 compliance conference, the court issued a 90-day notice, given the protracted period of discovery, that discovery was owed by all sides, and since the request for judicial intervention (RJI) was filed almost one year prior thereto.

On February 18, 2010, defendants turned over additional invoices to plaintiffs which indicated that another company, M.R. Snow Plowing, performed pothole repairs on defendant Ardsley's premises. Ms. Moghraby, property manager and bookkeeper for ISJ Management and Ardsley, confirmed at her February 18, 2010 deposition that M.R. Snow Plowing had performed pothole repairs on defendant Ardsley's property prior to plaintiff injury and that M.R. Snow Plowing's invoices were not previously turned over because they were filed internally in their "snow removal" file rather than the "maintenance/repair" file. (Defendants' Affirmation in Opposition at ¶ 16). Defendant maintain that their failure to disclose was inadvertent and not intentional.

Discussion

Plaintiffs allege two alternate theories in support of their motion to strike defendants' answer. First, plaintiffs allege that defendants' answer should be stricken pursuant to CPLR 3126.

Under CPLR 3126, the movant must make a clear showing that its opponent failed to comply with discovery demands in a willful, contumacious manner, or in bad faith. (*Rodriguez v. United Bronx Parents, Inc.*, 70 A13d 492, 492 [1st Dept 2010]).

Courts have discretion under CPLR 3126 to strike a pleading where a party disobeys a court order and frustrates the disclosure scheme by his or her conduct (*Frias v. Fortini*, 240 AD2d 467, 468 [2nd Dept 1997]). Courts have granted motions to strike where defendants supplied false and fraudulent information or have repeatedly failed to comply with disclosure orders. (*Santoli v. 475 Ninth Ave. Assocs., LLC*, 38 AD3d 411, 413-14 [1st Dept 2007] (motion to strike granted after defendant failed to produce documents after four court orders, including two conditional strike orders)). However, a single instance of non-compliance of one discovery order was held to be insufficient to be considered "willful, contumacious, or bad faith" conduct (*Palmenta v. Columbia Univ.*, 266 AD2d 90 (1st Dept 1999)).

Here, plaintiffs have failed to show that defendants' delayed production of documents rose to the level of conduct that is "willful, contumacious, or in bad faith" and, therefore, plaintiffs' motion to strike pursuant to CPLR 3126 is denied. Plaintiffs' reliance on *Santoli v. 475 Ninth Ave. Assocs., LLC*, (*supra*) is misplaced. In *Santoli*, the court ordered defendant to comply with the same request for discovery on four separate occasions, including two conditional strike orders. (*Santoli v. 475 Ninth Ave Assocs., LLC*, 38 AD3d at 413-14). Defendants in this case were not repeatedly ordered by the court, nor contacted by plaintiffs, to produce the subject documents. Furthermore, the initial deposition dates were delayed because of plaintiffs' request to add Powerhouse as a defendant. Depositions were further delayed *with plaintiffs' consent*. Although defendants made an affirmative misrepresentation to plaintiffs and failed to disclose the existence of M.R. Snowing Plowing, a single instance of non-compliance with one discovery order, alone, is insufficient to establish a *prima facie* case for conduct that is

willful, contumacious, or in bad faith. (*See Palmenta v. Columbia*, 266 AD2d at 91); nor is there proof that such representation was anything other than inadvertent, human error, based upon the misfiling of invoices of M.R. Snow Plowing. While the court is indeed troubled by defendants' counsel's failure to specifically address the misrepresentation in his papers, the burden is on plaintiff to show that such conduct was "willful, contumacious or in bad faith", which was not established here (*see Bassett v. Bando Sangsa Co., Ltd.*, 103 AD2d 728 [1st Dept 1984]; *Christian v. City of New York*, 269 AD2d 135 [1st Dept 2000]; *Goodman, Rackower & Agiato*, 260 AD2d 599 [2nd Dept 1999]).

Plaintiffs alternatively move to strike defendants' answer on a theory of common law spoliation. "Spoliation is the destruction of evidence [and] 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." (*Standard Fire Ins. Co. v. Federal Pacific Elec. Co.*, 14 AD3d 213, 219 [1st Dept 2004]). Plaintiffs' motion to strike on a theory of common law spoliation is denied because plaintiffs do not allege that defendants destroyed key evidence.

Plaintiffs allege only that defendants failed to turn-over evidence before the statute of limitations expired, not that defendants destroyed or failed to preserve crucial evidence. Plaintiffs fail to cite any relevant case law or statutory law to support its allegation that defendants' production of the M.R. Snow Plowing invoice after the statute of limitations had run is "the functional equivalent to Plaintiff as if it had been destroyed." (Plaintiff's Notice of Motion at ¶ 29). Therefore, plaintiffs have failed to

establish that defendants' answer should be stricken based upon the common law principles of spoliation. Thus, the motion is denied.

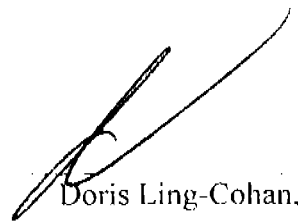
Accordingly, it is

ORDERED that plaintiffs' motion to strike defendants' answer is denied in its entirety; and it is further

ORDERED that plaintiffs' request for sanctions and attorneys' fees against Defendants is denied; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiffs with notice of entry.

Dated: August 20, 2010



Doris Ling-Cohan, JSC

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FILED
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