

**Kekovic v 13th St. Entertainment, LLC**

2011 NY Slip Op 33149(U)

December 5, 2011

Sup Ct, NY County

Docket Number: 116636/09

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla  
Justice

PART 19

Index Number : 116636/2009  
KEKOVIC, SINISA  
vs.  
13TH STREET ENTERTAINMENT  
SEQUENCE NUMBER : 001  
STRIKE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

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motion and ~~cross-motion~~ are decided in accordance  
with accompanying memorandum decision.

Dated: 12/5/11

Saliann Scarpulla  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
SINISA KEKOVIC,

Plaintiff,

- against-

Index No.:116636/2009  
Submission Date:8/17/11

13<sup>TH</sup> STREET ENTERTAINMENT, LLC d/b/a  
KISS AND FLY NIGHTCLUB,

FILED

Defendant.

----- X  
13<sup>TH</sup> STREET ENTERTAINMENT, LLC,

SEP 17 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party Plaintiff,

- against-

Index No.:590392/2010

ALL SEASON PROTECTION SERVICES, INC.,

**DECISION AND ORDER**

Third- Party Defendant.

----- X

For Plaintiff:  
Weiser & Associates, L.L.P.  
150 East 58<sup>th</sup> Street, 27<sup>th</sup> Floor  
New York, NY10155

For Defendant/Third-Party Plaintiff:  
Havkins Rosenfeld Ritzert & Varriale, LLP  
1065 Avenue of the Americas, Suite 800  
New York, NY 10018

Papers considered in review of this motion to strike the answer:

Notice of Motion . . . . .	1
Aff in Support . . . . .	2
Aff in Opp . . . . .	3
Reply Aff. . . . .	4

HON. SALVANN SCARPULLA, J.:

In this action to recover for personal injuries, plaintiff Sinisa Kekovic (“Kekovic”), moves pursuant to CPLR 3126 for an order striking the answer of defendant 13<sup>th</sup> Street Entertainment, LLC d/b/a Kiss & Fly Nightclub (“13<sup>th</sup> Street”) on spoliation grounds, or in the alternative granting Kekovic a negative inference against defendant at the time of trial.

This action arises from personal injuries Kekovic alleges to have suffered while a patron at the Kiss & Fly Nightclub (the “nightclub”), owned by 13<sup>th</sup> Street. Kekovic alleges that on September 20, 2009, while a patron of the nightclub, he was struck on the head and face by a bottle of vodka, causing him “severe and permanent personal injuries.” Kekovic alleges that 13<sup>th</sup> Street was negligent in its ownership and operation of the nightclub, and that its security personnel were negligent in allowing an intoxicated patron to remain on the premises while visibly intoxicated. Kekovic also alleges that alcohol was served to his alleged attacker, and that 13<sup>th</sup> Street over-served this person, whom 13<sup>th</sup> Street should have known was visibly intoxicated.

On September 22, 2009, Kekovic’s counsel sent correspondence to 13<sup>th</sup> Street, putting them on notice of the pending litigation, and to preserve the surveillance video from 10:00 pm September 19, 2009 through 4:00 am September 20, 2009.

On September, 24, 2009, Ryan Tarantino, 13<sup>th</sup> Street’s Director of Operations (“Tarantino”) sent a letter to Kekovic’s counsel, along with a DVD of the surveillance file for the time period requested.

Kekovic asserts that the DVD sent by Tarantino was not of the night of the incident. On April 19, 2011, Kekovic served on 13<sup>th</sup> Street a notice for Discovery and Inspection requesting the video surveillance for the night of the incident. 13<sup>th</sup> Street responded that they are not in possession of video of the subject premises on the night of the alleged incident. Kekovic now asserts that 13<sup>th</sup> Street willfully or negligently destroyed key evidence with knowledge that they were being sued.

In opposition, 13<sup>th</sup> Street submits the affidavit of Tarantino, who attests that he provided Kekovic with the requested DVD on September 24, 2009. In addition, 13<sup>th</sup> Street submits the transcript of Kekovic's deposition, at which Kekovic testified that after the incident at the nightclub, he reported it to the police. Kekovic further testified that the police went to the nightclub, and "were checking out security cameras to see what happened." Kekovic also testified that he was told by the police that they confiscated the video from the nightclub, and told him that the picture on the video was not clear.

### **Discussion**

Spoliation is the destruction of evidence. "Although originally defined as intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. . . . 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. . . . [D]ismissal [may] be a viable remedy for loss of a key piece of evidence

that thereby precludes inspection.” *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1<sup>st</sup> Dep’t 1997). “Necessary to this burden is a showing of prejudice.” *Baldwin v. Gerard Avenue, LLC*, 58 A.D.3d 484, 485 (1<sup>st</sup> Dep’t 2009).

Under CPLR 3126, “if a court finds that a party destroyed evidence that ‘ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just.’” *Ortega v. City of New York*, 9 N.Y.3d 69, 76 (2007). “A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that ‘a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them.’” *Kirschen v. Marino*, 16 A.D.3d 555, 555-556 (2d Dept 2005) (quoting *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1<sup>st</sup> Dept 1997)). Discovery sanctions have also been employed against a litigant who had an opportunity to safeguard evidence but failed to do so. *See e.g. Amaris v. Sharp Elecs. Corp.*, 304 A.D.2d 457 (1<sup>st</sup> Dept 2003), *lv denied* 1 N.Y.3d 507 (2004).

However, “[w]here a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate.” *Shay v. Mozer, Inc.*, 80 A.D.3d 687, 688 (2d Dept 2011), quoting *Cordero v. Mirecle Cab Corp.*, 51 A.D.3d 707, 709 (2d Dept 2008); *see also O’Reilly v. Yavorskiy*, 300 A.D.2d 456 (2d Dept 2002); *McLaughlin v. Brouillet*, 289 A.D.2d 461 (2d Dept 2001).

Accordingly, the sanction of striking the answer is too severe where, as here, Kekovic fails to establish that 13<sup>th</sup> Street intentionally or negligently disposed of the surveillance DVD. It is not disputed that 13<sup>th</sup> Street promptly responded to Kekovic's request for the surveillance video, although it appears that a DVD for the wrong night was provided.

Kekovic submits an attorney affidavit, which states that the DVD sent by Tarantino was not the DVD for the night of the incident. However, it appears that Kekovic did not promptly inspect the DVD that was sent by Tarantino on September 24, 2009, because he waited almost nineteen (19) months until April 19, 2011 to serve its Notice for Discovery and Inspection again requesting the surveillance video.

While 13<sup>th</sup> Street has raised that possibility that the police may be in possession of the surveillance video for the night of the incident, assuming the video no longer exists both sides are equally prejudiced by its absence. This, along with Kekovic's delay in seeking to retrieve the video for the correct night, Kekovic's failure to establish any culpable conduct on the part of 13<sup>th</sup>'s Street, the motion to strike the answer, or in the alternative for an adverse inference is denied.

Lastly, Kekovic's argument that 13<sup>th</sup> Street should be sanctioned because it destroyed the video as part of its normal "document destruction policy," instead of securing it pursuant to a "litigation hold" is unpersuasive. It is undisputed that both 13<sup>th</sup> Street and Kekovic believed that 13<sup>th</sup> Street provided the requested video to Kekovic on September 29, 2009. It was Kekovic's obligation to review the DVD in a timely manner, and notify 13<sup>th</sup> Street of

any problems or irregularities. If in fact 13<sup>th</sup> Street did destroy the surveillance footage, it did so while under the good faith impression that it had already been provided to Kekovic. That Kekovic waited so long to notify 13<sup>th</sup> Street that the DVD produced was of the wrong night should not result in sanctions to 13<sup>th</sup> Street.

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff Sinisa Kekovic to strike the answer of defendant 13<sup>th</sup> Street Entertainment, LLC d/b/a Kiss & Fly Nightclub on spoliation grounds, or in the alternative granting Kekovic a negative inference against defendant at the time of trial is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
December 5, 2011

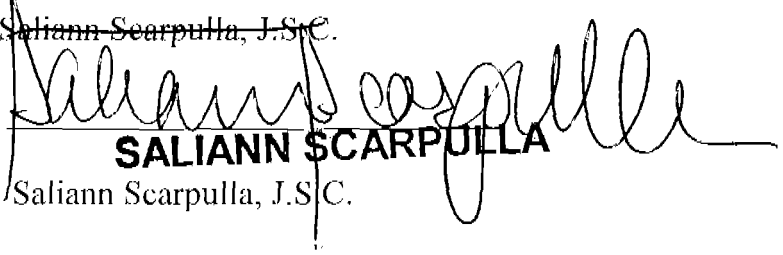
FILED

ENTER:

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Saliann Scarpulla, J.S.C.



**SALIANN SCARPULLA**

Saliann Scarpulla, J.S.C.