

Lewis v City of New York

2012 NY Slip Op 32838(U)

November 9, 2012

Sup Ct, New York County

Docket Number: 107478/06

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

RODOLFO G. SCHIFFRINO, J.S.C.

PRESENT: _____
Justice

PART 62

Index Number : 107478/2006
LEWIS, DARLENE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 11
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed hereto decision*

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

FILED

NOV 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

GEORGE
GEOFFREY D. WRIGHT
AJSC

Dated: 11/9/12

_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----x
DARLENE LEWIS,

Plaintiff,

Index No.107478/06

-against-

DECISION

THE CITY OF NEW YORK and DUPONT
ASSOCIATES, INC.,

Defendants.

Present:

Hon. Gcoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion/Order for summary judgment.

PAPERS

NUMBERED

FILED

Notice of Motion and Affidavits Annexed.....
Order to Show Cause and Affidavits Annexed
Answering Affidavits.....
Replying Affidavits.....
Exhibits.....
Other.....cross-motion.....

_____1_____

_____2_____

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Dupont Associates, Inc. (Dupont) moves, pursuant to CPLR 3126: (1) to dismiss the complaint based on plaintiff's wilful and contumacious failure to provide discovery; (2) to compel plaintiff to provide all outstanding discovery; and (3) to award Dupont sanctions based on spoliation of evidence.

BACKGROUND

Plaintiff commenced this action by filing a summons and complaint on or about May 25, 2006, and Dupont served a verified answer and discovery demands on June 29,

2006. Motion, Exs. A & B. When no response was forthcoming, Dupont served plaintiff with a good faith letter on December 7, 2006. Motion, Ex. C.

A request for judicial intervention was filed in July of 2010 (Motion, Ex. D)¹, and a scheduling order was issued by the court on August 10, 2010, which required that a bill of particulars be provided within 60 days. Motion, Ex. F. On August 26, 2010, plaintiff provided a partial response to the scheduling order and Dupont's discovery demands. Motion, Ex. H. Dupont then served plaintiff with another good faith letter on September 9, 2010, requesting the bill of particulars, as well as a complete response to its discovery demands. Motion, Ex. I.

A preliminary conference was held on October 10, 2010, and, by so-ordered stipulation, plaintiff was ordered, among other things, to provide Dupont with a bill of particulars within 30 days and responses to Dupont's discovery demands, to the extent not already provided. Motion, Ex. J. Dupont says that plaintiff provided only a partial response to that order, and so informed plaintiff by good faith letters on November 17, 2010 and December 7, 2010, respectively. Motion, Exs. K & L.

On February 7, 2011, Dupont moved to dismiss the action as asserted against it based on plaintiff's wilful and contumacious failure to provide discovery or, in the alternative, for an order compelling immediate discovery. Motion, Ex. M. On June 22, 2011, this court issued an order based on this motion, in which plaintiff was directed to comply with Dupont's discovery demands by July 15, 2011. The order stated:

"In the event Plaintiff fails timely to comply with this Order the complaint will be deemed dismissed and Defendant shall submit an Order to the Court for signature dismissing the complaint." Motion, Ex. P.

Thereafter, plaintiff was deposed on October 18, 2011, in which she testified that she had previously been deposed at a General Municipal Law § 50-H hearing (50-H hearing), and, pursuant to that deposition, was served with a notice to produce various records and documents referred to therein, including the transcript of her 50-H hearing. Motion, Exs. Q & R. On October 20, 2011, plaintiff and Dupont entered into a so-ordered stipulation in which plaintiff agreed, among other things, to respond to Dupont's notice to produce within 30 days. Motion, Ex. S. This stipulation included various other

¹Although the request for judicial intervention stated that a bill of particulars was attached, it was not, and Dupont wrote to plaintiff indicating that the bill of particulars was missing. Motion, Ex. E.

items of discovery relating to plaintiff, Dupont and the other defendant, the City of New York (City). *Id.*

When plaintiff failed to respond to the notice to produce, Dupont sent another good faith letter to plaintiff on January 12, 2012. Motion, Ex. T.

On February 16, 2012, the parties entered into another so-ordered stipulation, which contained the same provisions as in the October 20, 2011 so-ordered stipulation. Motion, Ex. U. On May 15, 2012, Dupont received partial responses to its discovery demands. Motion, Ex. V.

Based on the foregoing, Dupont asserts that the complaint should be dismissed as asserted against it for plaintiff's wilful and contumacious failure to comply with discovery demands, and for spoliation of evidence, based on plaintiff's claim that she is unable to find the transcript of her 50-H hearing.

In opposition to the instant motion, plaintiff states that her responses to Dupont's discovery demands were addressed in the so-ordered stipulation of June 22, 2011, wherein the court found that the only outstanding items of discovery were "information about plaintiff's 9/14/2007 car accident [unrelated to the accident that is the subject of this litigation] and the HIPAA authorizations for all diagnostic testing and medical treatment related to injuries sustained on 3/29/2005." Motion, Ex. P. Further, plaintiff asserts that she served Dupont with a verified bill of particulars and all requested HIPAA authorizations in her responses to the June 22, 2011 order on July 15, 2011. Opp., Ex. A.

Although plaintiff admits that she only served a partial response to Dupont's post-deposition notice to produce, she avers that she served a further supplemental response on June 18, 2012, postdating the filing of the instant motion, wherein all of the outstanding authorizations were provided. Opp., Ex. B.

Plaintiff also argues that Dupont's request for sanctions for spoliation of evidence based on her inability to locate the transcript of her 50-H hearing is ludicrous, since there is no legal requirement that the transcript be maintained by her and it would be available from the City, Dupont's co-defendant.

Lastly, plaintiff points out that, whereas she has already been deposed, neither defendant has appeared for depositions, as ordered in the last so-ordered stipulation. Dupont has not filed a reply to plaintiff's opposition.

DISCUSSION

“The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. However, the ‘drastic remedy’ of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious. Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time [internal quotation marks and citations omitted].”

Orgel v Stewart Title Insurance Company, 91 AD3d 922, 923 (2d Dept 2012); *Tos v Jackson Heights Care Center, LLC*, 91 AD3d 943 (2d Dept 2012); *Gal-Ed v 153rd Street Associates, LLC*, 73 AD3d 438 (1st Dept 2010); *Baralan International, S.p.A. v Avant Industries, Limited*, 242 AD2d 226 (1st Dept 1997).

In the case at bar, there was only one court order that stated that sanctions would be imposed against plaintiff for non-compliance, and plaintiff has averred that all of the outstanding discovery has been provided, albeit after Dupont filed the instant motion. Since Dupont has not provided any reply to plaintiff’s opposition that dispute her assertions, the court declines to exercise its discretion to impose the severe sanction of dismissing plaintiff’s complaint as asserted against Dupont at this juncture.

Further, the court finds Dupont’s request for sanctions based on alleged spoliation of evidence to be unpersuasive.

“Spoliation is the destruction of evidence. Although originally defined as the 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. A correlating trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial ‘witness’ to what

really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them [internal citations omitted].”

Kirkland v New York City Housing Authority, 236 AD2d 170, 173 (1st Dept 1997).

“When parties involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law. 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.’ New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action [internal citations omitted].” *Ortega v City of New York*, 9 NY3d 69, 76 (2007).

The court agrees with plaintiff that she was not required to maintain the transcript of her 50-II hearing and, moreover, the transcript should be available from the City, the other participant in that hearing. Dupont has failed to provide any legal authority for its proposition that such transcripts are the type of crucial evidence meant to be the subject of sanctions for spoliation.

Therefore, based on the foregoing, the court declines to sanction plaintiff for spoliation of the transcript of her 50-H hearing.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Dupont Associates, Inc.'s motion is denied.

This constitutes the decision and order of the Court.

Dated: November 9, 2012



GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

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