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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 100620/2007
SHIELDS, JAMES
vs
FIRST AVENUE BUILDERS LLC
Sequence Number : 008
STRIKE ANSWER

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

The following papers, numbered 1 to ____, were read on this motion/to/for cross motion spoliation sanctions.

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + ~~not~~ order.

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

FILED
OCT 24 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 11, 2013

_____, 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
NEW YORK COUNTY, PART 11

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JAMES SHIELDS and EILEEN CAVANAGH,

Index No.: 100620/07

Plaintiffs,

-against-

FIRST AVENUE BUILDERS LLC, HOUSING PARTNERSHIP DEVELOPMENT CORPORATION, FSLM ASSOCIATES LLC and WORTHINGTON SpA.,

Defendants.

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WORTHINGTON SpA.,

Index No.: 590608/08

Third-Party Plaintiff,

-against-

MC & O MASONRY, INC.,

Third-Party Defendant.

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JOAN A. MADDEN, J.:

In this action arising out of a work place accident, defendant/third-party plaintiff Worthington S.p.A. ("Worthington") moves for an order against third-party defendant, MC & O Masonry ("MC & O") for sanctions based on spoliation of evidence including (a) striking the answer of MC &O (b) dismissing MC &O's counterclaims against Worthington, (c) granting summary judgment on Worthington's third-party claims against MC&O, and (d) granting other sanctions. Defendants First Avenue Builders LLC ("First Avenue"), Housing Partnership Development Corporation ("Housing") and FSML Associates LLC ("FSML") (hereinafter "the First Avenue defendants") cross move for an order (a) striking the answer of MC &O (b) dismissing any cross claims or counterclaims asserted by MC &O, (c) granting summary

judgment on their claims for contractual and common law indemnification. Plaintiffs support the motion and cross motion for spoliation sanctions. MC & O opposes the motion and cross motion.

BACKGROUND

In this action, plaintiffs seek damages for personal injuries sustained by plaintiff James Shields ("Shields") on October 10, 2006, at construction project located at 40 West 116th Street, New York, NY, when he was cleaning a concrete pump. The concrete pump was manufactured and designed by non-party Reinert Manufacturing Company ("Reinert"), which is no longer in business. Plaintiffs allege Worthington is liable as Reinert's successor. The concrete pump was purchased by MC& O as a used piece of equipment and no manufacturer's information or instruction manuals were provided with the pump.

Housing was the owner of the project; First Avenue was the general contractor; and FSLM was the site developer. At the time of the accident, Shields was working as a "mechanic and laborer" for the masonry company, MC&O. On May 9, 2008, the pump was provided to plaintiff for inspection. After Worthington commenced the third party action against MC& O, it sent a letter dated September 19, 2008, notifying MC& O to preserve that concrete pump and not to make any alterations to it. The parties inspected the pump on April 21, 2009 before depositions. After Shields' deposition, plaintiffs supplemented their Bill of Particulars to add allegations that:

> defendants were negligent in manufacturing and providing a machine with a defectively fabricated swing pipe interior; in allowing and permitting the design and fabrication of the swing arm pipe to have a groove to become an area of retention for cement that had to be cleaned manually in a blind spot at or near a pinch or contact point.

Worthington sought, and the court issued an order, providing for a second inspection of the pump in 2011, which was to focus on the swing-pipe (also known as the S-tube, the swing tube or pipe) and its component parts and attachments.

According to Worthington, before Shields' deposition, plaintiffs had not made allegations about the swing-pipe or specifically, that the hydraulics malfunctioned on the accident date. Despite the issuance of court orders on April 14, 2011 and on July 14, 2011, directing an inspection of the pump, the inspection did not take place. At a compliance conference held on October 20, 2011, the court directed that the inspection occur between November 16, 2011 and December 15, 2011, or that MC&O provide an affidavit that the pump was no longer in its possession and what happened to it. On or about December 11, 2011, MC&O's counsel sent a letter stating that it disposed of the pump. MC&O subsequently produced an affidavit from its employee Eamonn McDonnell ("McDonnell") dated January 3, 2012, stating that the parties were arranging the inspection of the pump when MC&O "inexplicitly disposed of it" and that MC&O has no records or information concerning how the machine was disposed of.

In support of its motion, Worthington submits the affidavits of an expert who performed the April 21, 2009 inspection who states, *inter alia*, that "not having an opportunity to conduct the inspection of the S-tube and its component parts, severely hinders my ability to assess and analyze plaintiffs' design defect claims." Worthington also submits the affidavit of a professional engineer, who states that '[n]ot being able to inspect the concrete pump severely hinders my ability to offer opinions about a number of defenses available to Worthington [and that] [t]here are potential causes of the accident that I cannot explore and the loss of the machine inhibited my ability to address plaintiffs' design defect claims."

The First Avenue defendants cross move for spoliation sanctions based on the

destruction of the pump including striking MC&O's answer, and dismissing any cross claims or counterclaims asserted by MC&O and for summary judgment on its cross claims against MC&O for contractual and common law indemnification. The First Avenue defendants argue that sanctions are appropriate in light of MC&O's destruction of the pump and adopts Worthington's arguments and maintains that as a matter of judicial fairness if the court grants sanctions as requested by Worthington it should grant the same sanctions in favor of the First Avenue defendants. The First Avenue defendants submit no evidentiary support for the cross motion, and fail to explain how they would be prejudiced by the failure to re-inspect the pump. Plaintiffs also seek spoliation sanctions based on the arguments in the Worthington motion.

MC&O argues that the motion is untimely as it was made on August 30, 2012, which is one day beyond the 120 days after the note of issue on May 1, 2012 was filed as per the compliance conference order dated April 26, 2012. Alternatively, MC&O argues that a drastic sanction of striking its answer is not warranted as before the pump was discarded, two inspections occurred.[1] In addition, MC&O asserts that plaintiffs' initial Bill of Particulars served before either inspection was performed put defendants on notice of the alleged defective condition as it alleged "a claim for dangerous and defective machinery is made in that the pump engaged during the cleaning process" and that plaintiffs' negligence allegations included, *inter alia*, that "the pipe becoming loose, swinging and striking the claimant is evidence that the machine was not in good repair and proper working order; in allowing and permitting the concrete pump pipe to be unsecured and swing loose; in allowing and permitting the pipe to move...." Thus, MC&O argues that plaintiffs knew, and the defendants were on notice, that the

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[1]MC&O incorrectly asserts that the first inspection took place on July 6, 2008, when it occurred on May 9, 2008.

swing pipe was implicated prior to the two inspections.

In reply, both Worthington and the First Avenue defendants argue, *inter alia*, that the motion and cross are for discovery sanctions and are not subject to the 120 day time limit. In addition, Worthington argues that insofar as its motion seeks summary judgment, he has a reasonable excuse for the one-day delay based on a good faith error in calculating that time period. As for the First Avenue defendants, they assert that MC&O offers no excuse for failing to preserve the pump despite the existence of three court orders requiring it to do so and therefore it should be sanctioned.

After the motion and cross motion were submitted, but before oral argument, by decision and order dated January 14, 2013, this court granted Worthington's motion for renewal of its motion for summary judgment and, upon renewal, granted summary judgment dismissing the claims, cross claims and counterclaims against Worthington on the ground that it could not be held liable as a successor of non-party Reinert. Accordingly, Worthington's motion is moot.

In addition, by decision and order date April 22, 2013, the court granted the motion for summary judgment by the First Avenue defendants to the extent of dismissing plaintiffs' claims under Labor Law sections 240 and 200. However, the court found that there were triable issues of fact as to whether the alleged violation of third and last sentences of 23 NYCRR 23.9.2(a), which respectively require the replacement or repair of an unsafe condition in power-operated equipment, in this case the concrete pump, and the servicing of such equipment while the equipment is at rest, provides a basis for liability under Labor Law section 241(6) .

Discussion

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." Kirkland v New York City Housing Authority, 236 AD2d 170, 175 (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." Ortega v. City of New York, 9 NY3d 69, 76 (2007). Thus, under CPLR 3126, "if the 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.'" Id. This provision gives New York courts "broad discretion to provide proportional 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 the cost to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at trial of the action." Id. (citations omitted). In addition, "where appropriate a court can impose the ultimate sanction of dismissing the action or striking the responsive pleadings, therefore rendering a judgment on default against the offending party." Id. (citations omitted).

However, the severe sanction of dismissing the action or striking responsive pleadings is not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of its destruction. See Balaskonis v. HRH Constr. Corp., 1 AD3d 120 (1st Dept 2003); Riley v. ISS Intern. Service System, Inc., 304 AD2d 637 (2d Dept 2003). At the same time, when the destroyed evidence is not shown to be crucial, the lesser sanctions in the form of an adverse inference instruction, a missing document charge or a preclusion order have been found to be a proper exercise of the court's discretion. See Metropolitan New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc., 1 AD3d 168 (1st Dept 2003); Melendez v. City of New York, 2 AD3d 170 (1st Dept 2003); Foncette v. LA Express, 295 AD2d 471, 472

(2d Dept 2002).

Under this standard, the court finds that MC&O should be sanctioned for its destruction and unexplained disposal of the pump despite the existence of court orders requiring its further inspection[2]. Notably, while the parties had an opportunity to inspect the pump before its disposal, the record shows that MC&O was on notice that it was to retain the pump throughout the litigation, and the parties were entitled to re-inspect the pump in light of the evolution of the cause of the pump's malfunction during discovery. Next, contrary to MC&O's apparent position, its submission of an affidavit stating that it no longer was in possession of the pump does not constitute compliance with court orders requiring it to permit a further inspection of the pump

However, while the parties had a right to a further inspection of the pump, and MC&O's unexplained failure to preserve the pump appears to be, at best, grossly negligent, in the absence of any substantiated assertions of prejudice on the part of plaintiffs or the First Avenue defendants resulting from their inability to perform such further inspection, the court finds that it would not be appropriate to strike MC&O's answer based on its conduct. Foncette v. LA Express, 295 AD2d at 472. Instead, the appropriate sanction is a negative inference charge to be given at the time of trial in accordance with PJI 1:77 to the extent of charging the inference which may be drawn. See generally Ortega v. City of New York, 9 NY3d at 76; Hulett ex rel. Hulett v. Niagara Mohawk Power Corp., 1 AD3d 999 (4th Dept 2003)(trial court did not abuse its discretion in determining that the proper sanctions for railroad defendants' spoliation of evidence by failing to preserve, *inter alia*, dispatcher records and audio tapes was the giving of a missing evidence charge to the jury and precluding the use of audible portions of the audio tapes at trial).

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[2]To the extent the cross motion seeks sanctions based on the failure to preserve the pump, it is not governed by the time limits for motions for summary judgment.

Finally, even assuming *arguendo* that it were timely, the First Avenue defendants' request for summary judgment on its cross claims for common law and contractual indemnification against MC&O is not warranted in light of the court's denial of their cross motion to request to strike MC&O's answer, and the absence of any other basis for granting such relief.

Accordingly, it is

ORDERED that the motion by defendant/third-party plaintiff Worthington S.p.A is denied as moot; and it is further

ORDERED that the cross motion by defendants First Avenue Builders LLC, Housing Partnership Development Corporation, and FSML Associates LLC is granted to the extent that a missing evidence charge will be given at the time of trial in connection with the disposal of the concrete pump; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 11, room 351, 60 Centre Street, on November 21, 2013 at 2:30 pm.

DATED: October , 2013

J.S.C.