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| <b>Bayer v Slosberg</b>                                                                                                                                                                                                                                          |
| 2014 NY Slip Op 30106(U)                                                                                                                                                                                                                                         |
| January 13, 2014                                                                                                                                                                                                                                                 |
| Sup Ct, New York County                                                                                                                                                                                                                                          |
| Docket Number: 112965/11                                                                                                                                                                                                                                         |
| Judge: Donna M. Mills                                                                                                                                                                                                                                            |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

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

PRESENT : DONNA M. MILLS

*Justice*

PART 58

PAMELA BAYER and PAMELA BAYER INTERIORS, INC.,

Plaintiffs,

-against-

MICHAEL SLOSBERG, et al.,

Defendants.

INDEX No. 112965/11

**FILED**

MOTION DATE

JAN 16 2014

MOTION SEQ. NO. 001

NEW YORK

COUNTY CLERK'S OFFICE

MOTION CAL NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits- Exhibits

2

Replying Affidavits

3

CROSS-MOTION: \_\_\_\_\_ YES ☒ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated:

1/13/14

*Donna M. Mills*  
J.S.C.

**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION



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

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**PAMELA BAYER and PAMELA BAYER  
INTERIORS, INC.,**

**Plaintiffs,**

**- against -**

**ANDREW SCHECK and ALI S. GERSH,**

**Defendants.**  
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**INDEX NO.  
112965/11**

**FILED** **DECISION/ORDER**

**JAN 16 2014**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**DONNA M. MILLS, J:**

In this breach of contract action, defendants Andrew Scheck and Ali S. Gersh seek an Order: (a) pursuant to CPLR § 3211(a)(3) granting dismissal of plaintiff Pamela Bayer Interiors, Inc.'s ("PBI") complaint in its entirety; (b) pursuant to CPLR § 3212 granting them summary judgment against plaintiff Pamela Bayer; or alternatively ( c) granting summary judgment against plaintiffs for their spoliation of evidence.

Pamela Bayer is the President and owner of PBI, a corporation duly formed in March 1996 in the State of New Jersey. PBI is a New Jersey-based interior design firm that performs its work primarily in New Jersey, but has also periodically done individual projects in several states, including New York.

Plaintiffs' complaint alleges a breach of contract and unjust enrichment arising from a construction project and renovation of defendants' apartment, located in Manhattan. In late September 2010, Plaintiff Bayer on behalf of PBI, met with defendants to view the apartment for the purpose of providing an interior design and renovation estimate and proposal. On October 7, 2010, PBI sent defendants an emailed proposal for the scope of work to be performed by PBI. Defendants accepted the agreement by submitting an initial retainer fee to PBI in the amount of \$5,000 on October 15, 2010.

On April 13, 2011, defendants entered into a contract with the contractor they selected, RTH Builders in which RTH Builders agreed to make the agreed upon

renovations of their apartment for the price of \$110,000. Subsequent to the completion of the renovations, plaintiffs claim that defendants failed to pay PBI for all of its fees and expenses. On November 15, 2011, plaintiffs filed a summons and complaint in this Court against the defendants alleging breach of contract and unjust enrichment claiming damages of \$42,346.87.

Defendants seek dismissal on the grounds that PBI has never been registered with New York State Department of State, Division of Corporations as a foreign corporation authorized to do business in the State of New York in violation of the Business Corporation Law § 1312. Plaintiffs admit that it has worked on a total of eight interior design projects in New York State over the seventeen years of its existence, but maintain that PBI was not required to register in New York, because it was not “doing business” in New York.

BCL § 1312 provides that a foreign corporation doing business in this state without authority shall not maintain any action in this state until it has been authorized to do business in this state and has paid all fees, penalties and franchise taxes for the years it did business in this state without authority.” (Barklee v Pataki, 309 A.D.2d 310, 315 [1<sup>st</sup> Dept 2003])

The record demonstrates that PBI is a foreign corporation doing business in New York without having qualified pursuant to BCL § 1312. Recent case law demonstrates that the failure to qualify is not a jurisdictional impediment. Accordingly, the more appropriate remedy is not outright dismissal of the complaint, but a conditional dismissal or a stay affording plaintiff an opportunity to cure this non-jurisdictional defect, i. e., to obtain the requisite authority.

Consequently, this Court will provide a reasonable period for PBI to comply with BCL § 1312, if so advised, in order to obtain the required authorization to bring and maintain an action in this forum ( Showcase Limousine, Inc. v. Carey, 269 A.D.2d 133,

134, 703 N.Y.S.2d 22 [1st Dept. 2000] [“[a]lthough plaintiff’s complaint is thus subject to dismissal, dismissal should have been conditioned upon plaintiff’s failure to establish within a reasonable time that it had complied with Business Corporation Law § 1312(a)”]. In the event that PBI ultimately fails to establish its compliance with BCL § 1312 within a reasonable period of time, this Court must dismiss the action.

It is undisputed that PBI has failed to provide relevant records that had been sought pertaining to its time records with respect to the defendants renovation project. Plaintiffs claim that the destruction of the records occurred inadvertently as a result of flooding in its Ohio office.

Under CPLR 3126 and New York case law, where a litigant destroys evidence, courts “possess broad discretion to provide proportionate relief to the party deprived of the lost evidence” ( Ortega v. City of New York, 9 NY3d 69, 76 [2007] ). Remedies for the spoliation of evidence include (1) dismissing the action or any part thereof; (2) deeming resolved for the purposes of the action any issues as to which the destroyed evidence is relevant; (3) precluding proof favorable to the spoliation on the issues, claims, or defenses to which the destroyed evidence is relevant; or (4) employing an adverse-inference instruction ( see id.).

While the striking of a pleading may be justified where a party destroys key physical evidence such that its opponents are “ ‘prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence’ ” ( DiDomenico v C & S Aeromatik Supplies, 252 AD2d 41, 53 [2<sup>nd</sup> Dept. 1998]), outright dismissal remains a drastic remedy and is appropriate only where less severe sanctions have been ruled out.

In the instant case, spoliation of the time records does not leave defendants prejudicially bereft of appropriate means to confront a defense with incisive evidence

( Kirkland v. New York City Hous. Auth., 236 A.D.2d 170, 174, 666 N.Y.S.2d 609 [1st Dept.1997]). Accordingly, the appropriate sanction is an adverse inference charge ( see Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d 481, 482–483, 913 N.Y.S.2d 181 [1st Dept. 2010]; Tommy Hilfiger, USA v. Commonwealth Trucking, 300 A.D.2d 58, 60, 751 N.Y.S.2d 446 [1st Dept. 2002] ).

Defendants also seek dismissal on the grounds that Pamela Bayer des not have standing to assert claims against them given that she was not a party to the contract, and did not perform any services in her individual capacity. Pamela Bayer concedes that she lacks standing in her individual capacity to remain as a party to this action, and therefore withdraws.

Accordingly it is,

ORDERED that the defendants' motion to dismiss is denied without prejudice, and it is further

ORDERED that the plaintiff is directed to establish its compliance with BCL § 1312 within sixty (60) days of service of this decision with notice of entry by the defendants, and it is further

ORDERED that the defendants may renew this motion after the expiration of the sixty (60) days to seek dismissal of this action; and it is further

ORDERED that the defendants' motion for summary judgment against Pamela Bayer is rendered moot, as plaintiff withdraws from the action; and it is further

ORDERED that the caption be amended to reflect the withdrawal of plaintiff Pamela Bayer and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the motion for summary judgment against plaintiffs for spoliation is granted to the limited extent that an adverse inference charge shall be given at the

time of trial; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 1/13/14

So Ordered



Donna M. Mills, J.S.C.

\* SC: 4/25/14  
NOI: 4/25/14

DONNA M. MILLS, J.S.C.

**FILED**

JAN 16 2014

NEW YORK  
COUNTY CLERK'S OFFICE