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

PRESENT: HON. PAUL WOOTEN Justice PART 7

ALONA KRUGLAK,

Plaintiff,

- against-

LASER COSMETICA LLC, "JANE DOE 1" and "JANE DOE 2",

Defendants.

INDEX NO. 102356/09

MOTION SEQ. NO. 002

The following papers were read on this motion by defendants for summary judgment and plaintiff's cross-motion to strike defendants' answer.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes ☐ No

This is a negligence action commenced by Alona Kruglak (plaintiff) on or about February 19, 2009 to recover damages for facial burns and injuries allegedly sustained when she received photo facial procedures at Laser Cosmetica LLC (Laser). Before the Court is a motion by the defendants for summary judgment, pursuant to CPLR 3212, dismissing the Verified Complaint. Plaintiff is in opposition to the defendants' motion and cross-moves to strike the defendants' answer and deny defendants' motion for summary judgment for their intentional and/or negligent spoliation of crucial, essential evidence and failing to produce evidence consisting of facial photographs taken by defendants' employees in connection with photo facial treatments administered to plaintiff, and on the basis of defendants' refusal to provide requested discovery. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

In February of 2007, plaintiff purchased a package of photo facial treatments at Laser. These treatments began on February 13, 2007 and the photo facials were administered at Laser's stores located on 57th Street and on 40th Street in New York, New York. Plaintiff maintains that pre-operative photographs of her face were taken as part of Laser's pre-treatment protocol on February 13, 2007, again on March 15, 2007 when her second photo facial treatment was administered, and on July 30, 2007 when her last photo facial treatment was administered. It is during the second photo facial treatment on March 15, 2007 that plaintiff maintains that she had an adverse reaction to the photo facial, namely that she sustained a severe burn to her face, and the photo facial treatments she had subsequent to that date on April 10, 2007 and July 30, 2007 were undertaken in an attempt to ameliorate these burns. Allegedly after plaintiff's continued complaints about the facial burns defendants sent her to one of their physicians, Shirley Madhere, M.D., with whom Laser had a written supervisory and consulting agreement. Dr. Madhere treated plaintiff at defendants' expense (*see* Notice of Cross-Motion, exhibit K). Dr. Madhere had plaintiff execute a release and waiver of liability (*id.* at exhibit K-1).

Defendants maintain that photo facials involve the emission of Intense Pulsed Light (IPL) from a special machine directed at the skin, and in some cases the light pulses are able to reduce uneven skin pigmentation. According to Laser's treatment notes, at plaintiff's first photo facial on February 13, 2007, the machine was set at 14-15 jules/cm (a measure of energy) in one pass (pulse) (Notice of Motion, exhibit D, p. 1). The first treatment apparently produced little change in plaintiff's skin condition and no adverse skin reactions were reported on the treatment notes, only slight "erythema (redness or flushness of the skin) was noted" (*id.*). According to Laser's treatment notes, at plaintiff's second treatment on March 15, 2007 the machine's settings were raised by the Laser technician to 17 joules/cm in one pass, and slight

erythema was again noted (*id.* at p 2). The treatment notes for March 15, 2007 do not note any other skin reactions. It is shortly after leaving Laser's office after this treatment that plaintiff contacted Laser about redness on her face, and immediately returned to the Laser office after seeing her face in a mirror in a drugstore (Notice of Motion, Plaintiff Examination Before Trial [EBT], exhibit B, p.11-12). Subsequently, defendants claim that plaintiff returned to Laser for a "Genesis" treatment on April 10, 2007, and then on July 30, 2007 she had her third photo facial treatment (Defendants' Affirmation in Support, ¶ 14). The treatment notes for the Genesis treatment on April 10, 2007 state that plaintiff had slight erythema, and moderate erythema following the July 30, 2007 photo facial treatment where the machine was set at 13-16 joules/cm in one pass (Notice of Motion, exhibit D, p. 3, 4). Defendants point out that Laser's treatment notes for July 30, 2007 indicate that plaintiff complained of some discomfort but refused ice and said she was in a rush (*id.* at p. 4).

Defendants argue that plaintiff has not stated why she chose to undergo photo facial treatment, nor has she produced any photographs of the condition of her skin prior to undergoing treatment. Based upon the medical opinion of Dr. Joshua Fink and statement of Dr. Sergey Voskresensky (*see* Notice of Motion exhibits A and G), and because reducing dyspigmentation is one of the express purposes of photo facial treatment, defendant proffers that plaintiff had areas of dyspigmentation on her face before starting the treatments. Defendants further proffer that if plaintiff did not start with dyspigmentation, there would have been no reason for her to undergo photo facials. Dr. Madhere states in her treatment notes of plaintiff that she has "Fitzpatrick skin type II/III" and the range of recommended settings by the manufacturer of the photo facial machine for the face of a person of this skin type is between 14 and 20 joules/cm in one pass (*id.* at exhibit E and F). As such, the setting of 17 joules/cm in one pass used by Laser in plaintiff's March 15, 2007 treatment was within the correct range for plaintiff's skin type (*id.* at exhibits D and F). Although plaintiff contacted Laser and complained

of redness shortly after the March treatment, she did not follow up or seek medical, hospital or emergency room treatment. Subsequently, plaintiff returned for the Genesis treatment and her last photo facial treatment in July of 2007, where she complained of some discomfort but refused ice. In August of 2007, plaintiff was sent to see Dr. Madhere about lingering hyperpigmentation and she also saw Dr. Sergey Voskresenskiy about her pigmentation. Dr. Voskresenskiy informed plaintiff she has melasma, a skin condition which could not be further corrected by photo facials or other noninvasive medical procedures (*id.* at exhibit G).

Defendants move for summary judgment on five separate grounds, each of which defendants proffer is sufficient on its own to warrant dismissal of the case: (1) plaintiff has failed to show that she suffered an actual adverse skin reaction let alone a burn from any of the photo facial treatments rendered to her by Laser in 2007; (2) plaintiff's skin condition reflecting melasma[1] and dyspigmentation is not causally related to the photo facial treatments, and expert medical opinion is that her skin condition was preexisting and/or that it came about from events or circumstances having nothing to do with the photo facial treatments; (3) plaintiff is unable to identify any act, conduct, procedure, protocol, deviation from procedure or omission reflecting any wrongdoing, error, breach of duty or negligence committed by Laser or its technicians during the course of her photo facial treatments; (4) plaintiff has failed to set forth a reliable and consistent date as to when the alleged adverse skin reaction or burn supposedly took place; (5) plaintiff duly executed an informed consent form from Laser acknowledging that various skin reactions and risks may result from the various procedures being administered. In support of their motion, defendants point to the medical conclusions put forth by Dr. Joshua Fink as reflected in his IME report, plaintiff's own examination before trial (EBT) testimony and the

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[1] As defined by defendants, melasma is "a skin condition characterized by dyspigmentation over various parts of [ones] body" (Affirmation of Defendants' Counsel in Opposition to Plaintiff's Cross-Motion at ¶ 5).

statements in Laser's contemporaneous treatment notes (Notice of Motion, exhibits A, B and D). Additionally, defendants proffer that plaintiff will be unable to dispute these opinions and conclusions in her opposition as she has not put forth any medical opinion or report by an expert which raises any inference on the part of the defendants or which disputes Dr. Fink's opinions and conclusions.

Plaintiff is in opposition to the defendants' motion and cross-moves for an order striking the defendants' answer and denying defendants' motion for summary judgment for their intentional and/or negligent spoilation of crucial, essential evidence and failing to produce evidence consisting of facial photographs taken by defendants' employees in connection with photo facial treatments administered to plaintiff, and on the basis of defendants' refusal to provide requested discovery. Specifically, plaintiff points to Laser's treatment notes wherein it is indicated that photographs of plaintiff's face were taken before the first treatment as part of pre-treatment protocol on February 13, 2007 (*see* Notice of Cross-Motion, exhibit B), prior to the photo facial treatment on March 15, 2007 (*id.* at exhibit F), as well as on July 30, 2007 at plaintiff's last treatment (*id.* at exhibit G). It is during the second photo facial treatment on March 15, 2007 that plaintiff maintains that she had an adverse reaction to the photo facial, namely that she sustained a severe burn to her face. Plaintiff avers that, as admitted in the EBT of the former president of Laser, Ryan Bloch, that Laser's own protocol is to take pre-operative photographs prior to the initial treatment for future reference (Notice of Cross-Motion, exhibit E, p. 91-92). Bloch also testified that Laser's client files are kept indefinitely, yet he was unable to testify as to whether photographs were kept with the respective client's files and whether the photographs were kept indefinitely (*id.* at p. 73, 74).

STANDARD

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues

of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Sanctions pursuant to CPLR 3126

"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 AD3d 555, 555-556 [2d Dept 2005], quoting *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]), "thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice" (*Kirschen*, 16 AD3d at 556). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude that party from offering evidence as to the destroyed product" (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998] [internal citation and quotation omitted], *but see Hall v Elrac, Inc.*, 79 AD3d 427, 428 [1st Dept 2010] ["Absent proof that the destruction of the vehicle was willful, contumacious or in bad faith, the court properly declined to impose the drastic sanction of striking defendant's answer and, instead, deferred the issue of the appropriate sanction for spoliation of evidence to trial"]). "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" (*Kirkland*, 236 AD2d at 173).

DISCUSSION

Plaintiff's Cross-Motion to Strike pursuant to CPLR 3126

The Supreme Court is empowered with "broad discretion in determining the appropriate sanction for spoliation of evidence" (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2d Dept 2009]; *Hillman v Sinha*, 77 AD3d 887, 888 [2d Dept 2010]; *Ortega v City of New York*, 9 NY3d 69, 76 [2007]). Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under

CPLR 3126" (*Samaroo v Bogopa Serv. Corp.*,106 AD3d 713, 713 [2d Dept 2013], quoting *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009]; *see Utica Mut. Ins. Co.*, 58 AD3d at 718 [When a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading"]). The Supreme Court has broad discretion, and "may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation" (*Samaroo*, 106 AD3d at 714, quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [2d Dept 1998]).

"The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo*, 106 AD3d at 714). However, Courts must exercise prudence because "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct [and, thus, the courts] must consider the prejudice that resulted from the spoliation to determine where such drastic relief is necessary as a matter of fundamental fairness" (*Utica Mut. Ins. Co.*, 58 AD3d at 718, quoting *Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]). As such, the "party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to defend [the] action'" (*Utica Mut. Ins. Co.*, 58 AD3d at 718, quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2d Dept 2005]; *Holland*, 64 AD3d at 629 ["striking a pleading as a sanction for spoliation is appropriate only where the missing evidence deprives the moving party of the ability to establish his or her claim or defense"]). A less severe sanction may be appropriate

where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case (*see Iannucci*, 8 AD3d 437 at 438).

The Court concludes that under the circumstances striking the defendants' answer is too severe a penalty. In opposition to plaintiff's motion Laser does not dispute that photos of plaintiff's face appear to have been taken at three photo facial sessions and that such photos appear to have been discarded (Affirmation of Defendants' Counsel in Opposition to Plaintiff's Cross-Motion at ¶ 8). However, Laser avers that it cannot be shown that it acted with the intent to despoil or was negligent in its preservation of the photographs as it was first served with process in this action on March 12, 2009, over two years after the first photos were taken. Further, Laser contends that there was no reason for it to believe that there were any problems with the photo facial treatments, since plaintiff continued to come to Laser to receive further treatments in April and July of 2007. Additionally, Laser states that the pre-treatment photos are retained from a given session only until the next session as a reference point to show the extent of any skin change in the interval between the two sessions, and thereafter the photograph would be discarded as it would serve no further purpose (*id.* at ¶ 12). Laser also maintains that plaintiff has not been prejudiced as defendants' photographs were not unique, exclusive or the only evidence of plaintiff's pre-treatment appearance.

It is plaintiff's burden on this motion to demonstrate that defendants' failure to preserve the photographs compromises her ability to prosecute this action. As early as October 25, 2010, plaintiff issued a Combined Demand for the disclosure by defendants of the photographs of her at the treatments, yet these photographs were never produced. Additionally, in support of her motion plaintiff points to the EBT testimony of Bloch who testified that Laser's client files are kept indefinitely, yet he was unable to say whether in its normal course of business Laser kept client photographs with the respective client's files, and if the photographs were kept

indefinitely (*id.* at p. 73, 74). In their discovery responses defendants state that there are no pre-or-post photographs of plaintiff in their possession, custody or control which depict plaintiff's injuries or otherwise of plaintiff (*see* Notice of Cross-Motion, exhibit M), however this is contrary to the treatment notes created by Laser's technicians during plaintiff's visits for treatments. Plaintiff proffers that these photographs are crucial and material, inasmuch as they would demonstrate plaintiff's condition before she started photo facial treatments, and tend to disprove as alleged now by defendants that she had pre-existing melasma. Even though plaintiff cannot show that the photographs were lost or destroyed after the commencement of the instant action in 2009, plaintiff states that the loss or destruction of the photographs have deprived her from being able to prove her claims.

The Court does not agree that the only photographs that would show plaintiff's skin condition before her photo facial treatment were held by Laser. Any photograph of plaintiffs skin prior to March of 2007 could be used in proving her claims. Further, the Court finds that plaintiff failed to prove that the destruction or loss of the photographs was willful, contumacious or in bad faith, thus the Court will not impose the drastic sanction of striking defendants' answer (*see Hall*, 79 AD3d at 428). Accordingly, plaintiff's motion to strike the defendants' answer for spoliation must be denied. The Court has considered plaintiff's other contentions and finds them to be unavailing.

Defendants' Motion for Summary Judgment

In support of their motion, defendants point to the medical conclusions put forth by Dr. Joshua Fink as reflected in his IME report, plaintiff's own EBT testimony and the statements in Laser's contemporaneous treatment notes which state that plaintiff had preexisting melasma and because of this she elected to undergo the photo facial treatments (*see* Notice of Motion, exhibits A, B and D). Defendants proffer that disclosure in this matter is complete and thus far plaintiff has failed to exchange any expert disclosure whatsoever. Furthermore, Laser points to

the attached photo facial protocol which indicates the appropriate treatment levels for different skin types (*id.* at exhibit F). Based on Dr. Madhere's treatment notes, plaintiff has "Fitzpatrick skin type II/III," and as such the setting of 17 joules/cm in one pass used by Laser in plaintiff's March 15, 2007 treatment was within the correct range for plaintiff's skin type, as well as the other two photo facial treatments (*id.* at exhibits D and F). The Court finds that defendants have met their prima facie burden of establishing their entitlement to summary judgment.

In opposition, plaintiff does not submit any expert testimony that rebuts this finding by Dr. Madhere that she is of Fitzpatrick skin type II/III. Plaintiff also does not submit any expert medical testimony to rebut Dr. Voskresenskiy's diagnosis of melasma, or that suggests that the settings of the photo facial machine were outside the normal settings or that the machine was used improperly by Laser's employees. In opposition, plaintiff submits a copy of her EBT transcript and her Verified Bill Particulars. Plaintiff maintains that defendant does not submit an affidavit from any of the photo facial operators who administered the treatments to plaintiff which raise any material factual issues inconsistent with plaintiff's testimony. However, plaintiff has not put any submissions before the Court from an expert or otherwise which demonstrates that the photo facial operators administered her treatments in a negligent manner. As such, the Court finds that plaintiff has failed to raise triable issues of fact in opposition. Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion seeking summary judgment and dismissal of the complaint is granted and the complaint is dismissed in its entirety with costs and disbursements to the defendants upon submission of an appropriate bill of costs; and it is further,

ORDERED that plaintiff's cross-motion seeking to strike defendants answer, pursuant to CPLR 3126 is denied; it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the decision and order of the Court.

Dated: 2-24-14 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE