

**Lowe v Fairmont Manor Co., LLC**

2014 NY Slip Op 33358(U)

December 19, 2014

Supreme Court, New York County

Docket Number: 153214/12

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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MARK LOWE AND LISA LOWE,

Plaintiffs,

Index No.153214/12

-against-

**DECISION/ORDER**

FAIRMONT MANOR CO, LLC AND  
COOPER SQUARE REALTY INC.,

Defendants.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>      </u>

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Plaintiffs have brought the present spoliation motion for an order pursuant to CPLR § 3126 precluding the defendants at trial from denying that a burglary in plaintiffs' apartment was committed by an employee of defendants or from alleging that the burglary was committed by a permittee of the plaintiffs based on defendants' failure to turn over surveillance tapes of the lobby from the weekend the burglary occurred. In the alternative, they request that an adverse inference charge be given to the jury that the tapes, if produced, would favor the plaintiffs' version of events. For the reasons set forth below, plaintiffs' motion is granted solely to the extent of directing that an adverse inference charge be given to the jury.

The relevant facts are as follows. The plaintiffs allege that they returned from a weekend

away from New York to their apartment to discover that they had been burglarized and that jewelry had been stolen. They claim that there was no sign of forced entry and that the building keeps copies of apartment keys in a drawer at the front desk in the lobby. They further allege that there are surveillance cameras in place at the front desk in the lobby and on the upper level of the lobby facing the elevator. Immediately following the robbery, plaintiffs allege that they requested that the building superintendent preserve and make available to them the tapes from the surveillance cameras for the weekend that they were away. Plaintiffs claim that they followed up this request with several emails to the management company. Notwithstanding these requests, defendants have never turned over to plaintiffs copies of the relevant surveillance tapes. Defendants admit that plaintiffs requested the tapes, that they retrieved the tapes and that they actually viewed the tapes but state that they do not currently have the tapes and cannot locate them and that they believe they gave the tapes to the police as part of the police investigation of the burglary.

Plaintiffs now bring the instant motion seeking an order granting sanctions against defendants for spoliation of evidence based on defendants' failure to maintain a copy of the tapes. They claim that the tapes are relevant because they would show that the keys were taken by a building employee and that their housekeeper, who had keys to the apartment, did not enter the building on the weekend in question. Defendants oppose the motion on the ground that no sanction of any kind is warranted here as the disposal, if any, was not willful or intentional and the tapes would not prove whether an employee of defendants actually committed the burglary.

“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.” *Kirkland v. N.Y.C Housing Auth.*, 236 A.D.2d 170, 173 (1<sup>st</sup> Dept 1997). A party seeking sanctions based on the spoliation of evidence “must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a ‘culpable state of mind’, which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party’s claim or defense.” *Dulac v. AC & L Food Corp.*, 119 A.D.3d 450, 451 (1<sup>st</sup> Dept 2014). “In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness.” *Id.* at 451-452.

In the present case, it is undisputed that defendants were under a duty to preserve the surveillance video footage. The court also finds that the records were destroyed with a culpable state of mind as there was negligence on defendants’ part in not retaining the tapes after they had been repeatedly requested by plaintiffs and actually retrieved by defendants. The court also finds that the tapes would have some relevance to the issue of who committed the burglary but would not be dispositive on the issue. The tapes could have shown that the housekeeper did not enter the building during the weekend but would not answer the question of whether she might have given the keys to another person who entered the building. Moreover, even if the tapes showed that an employee was taking keys from the lobby, it would not necessarily establish that these were the keys for plaintiffs’ apartment or that a burglary was actually committed with the keys. Under these circumstances, in the exercise of the court’s discretion, the court finds that the most appropriate sanction in this case is directing that an adverse inference charge be given at the trial, which would allow but not require the jury to infer that relevant evidence against

