

Novak v Restaurant Depot Enters., LLC
2015 NY Slip Op 32565(U)
April 20, 2015
Supreme Court, Queens County
Docket Number: 3329/2013
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

PATRICA NOVAK, x

Plaintiff,

-against-

RESTAURANT DEPOT ENTERPRISES, LLC,
RESTAURANT DEPOT, LLC and JRD
HOLDINGS, LLC, MICHAEL GRADY,
GRADE-A-CATERING, INC. and JENJO
ENTERPRISES, INC.,

Defendants. x

Index
Number 3329 2013

Motion
Dates October 15, 2014

Motion Seq. Nos. 6 & 7

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The following papers numbered 1 to 29 read on these separate motions by plaintiff, pursuant to CPLR 3126 and the common-law doctrine of spoliation, to strike the answer of defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC based on their willful destruction of evidence; to hold defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC and/or their counsel in Contempt of Court for violating the Court Order dated May 12, 2014, allowing inspection of the subject premises within 45 days; and pursuant to 22 NYCRR 130-1.1, to award plaintiff costs and sanctions for the frivolous conduct of defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC, and by defendants Michael Grady and Jenjo Enterprises, Inc., pursuant to CPLR 3126 and the common-law doctrine of spoliation, to strike the cross claims of defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC based on their willful destruction of evidence, and on this cross motion by defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC, pursuant to 22 NYCRR 130-1.1, to award them costs and to issue sanctions for plaintiff's frivolous conduct.

Papers

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Notices of Motion - Affidavits - Exhibits	1-8
Notice of Cross Motion - Affidavits - Exhibits	9-12
Answering Affidavits - Exhibits	13-21
Reply Affidavits	22-29

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries allegedly sustained on December 19, 2013, at Restaurant Depot, a membership-only store, owned by defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC (hereinafter collectively Restaurant Depot), and located at 1335 Lakeland Avenue, Bohemia, New York. Plaintiff alleges that, while standing and browsing outside a refrigerated cold storage/freezer area (cold room) at the subject premises, she was struck by a shopping cart/U-boat being pushed by another shopper, defendant Grady, an employee of defendant Jenjo. Plaintiff and defendants Grady and Jenjo separately move to strike the answer and cross claims of defendants Restaurant Depot for spoliation arising from Restaurant Depot's May 2014 replacement of the original automatic bi-parting doors to the cold room, prior to movants' June 17, 2014 site inspection. Defendants Restaurant Depot cross-move to sanction plaintiff for frivolous motion practice.

It is well settled that when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126. (*See Biniachvilli v Yeshivat Shaare Torah, Inc.*, 120 AD3d 605 [2014]; *see also Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713 [2013]; *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627 [2009].) The determination of spoliation sanctions lies within the broad discretion of the Court. (*See Hillman v Sinha*, 77 AD3d 887 [2010]; *see also Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717 [2009]; *Dennis v City of New York*, 18 AD3d 599 [2005].) Since the striking of a pleading is a severe sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. (*See Utica Mut. Ins. Co. v Berkoski Oil Co.*, *supra*; *see also Molinari v Smith*, 39 AD3d 607 [2007]; *Iannucci v Rose*, 8 AD3d 437 [2004].) The party who is requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to establish its claim or defense. (*See Utica Mut. Ins. Co. v Berkoski Oil Co.*, *supra*.) A less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his

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or her case or defense. (See *Pennachto v Costco Wholesale Corp.*, 119 AD3d 662 [2014]; see also *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 610 [2011]; *Denoyelles v Gallagher*, 40 AD3d 1027 [2007].)

In this case, plaintiff and defendants Grady and Jenjo failed to demonstrate that the replacement of the original cold room doors by defendants Restaurant Depot was the result of intentional or negligent spoliation. (See *Huezo v Silvercrest*, 68 AD3d 820 [2009]; see also *Dennis v City of New York*, *supra*; *Goll v ABC, Inc.*, 10AD3d 672 [2004].) Moreover, plaintiff did not demonstrate that the doors were essential to her case. Plaintiff's original and amended complaints do not allege that her injuries occurred as a result of a defect in the cold room doors, but rather, as a result of plaintiff having been struck by a cart. In addition, at her examination before trial, the transcript of which is annexed to the opposition papers of defendants Restaurant Depot, plaintiff testified that prior to being slammed into by a completely stacked U-boat coming from the direction of the cold room, she, herself, had exited the cold room through the automatic sliding doors, which she described as having glass on the top and a panel on the bottom, and she had walked about ten to twelve feet down a produce aisle which began about five feet from the cold room doors, before stopping in that aisle to look at bananas on the shelf. Defendants Grady and Jenjo also failed to demonstrate that the doors were essential to their defense or cross claims. Finally, plaintiff and defendants Grady and Jenjo failed to demonstrate that they were prejudiced by the replacement of the doors by defendants Restaurant Depot. (See *Jennings v Orange Regional Med. Ctr.*, 102 AD3d 655 [2013]; see also *Gotto v Eusebe-Carter*, 69 AD3d 566 [2010]; *Denoyelles v Gallagher*, *supra*; *Dennis v City of New York*, *supra*.) There are photographs of the original cold room doors and witnesses who may testify about them. Thus, spoliation sanctions are not warranted.

Accordingly, that branch of plaintiff's motion, and the motion of defendants Grady and Jenjo to strike the answer and cross claims of defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC for spoliation are denied.

That branch of plaintiff's motion seeking to hold defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC in contempt for their alleged violation of this Court's Order dated May 12, 2014, ordering the inspection of their premises is denied.

An application to punish for contempt that does not contain the warnings required by Judiciary Law § 756 is jurisdictionally defective and should not be entertained by the court. (See *Matter of P & N Tiffany Props. v Williams*, 302 AD2d 466 [2003]; see also *Cappello v Cappello*, 274 AD2d 538 [2000]; *Matter of Dawn P.*, 180 AD2d 800 [1992].) Moreover, said inspection of the premises timely took place and the replacement of the cold room doors

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by defendants Restaurant Depot prior thereto was not a willful violation of the May 12, 2014 Order. In an affidavit submitted in opposition to plaintiff's motions, the manager of defendants Restaurant Depot, Bob Lehning, avers that the cold room doors were replaced in May of 2014, because the motor for the original automatic sliding doors was not working properly, and the inventory of produce and dairy was at risk of spoiling from the cold air escaping from that room.

That branch of plaintiff's motion seeking sanctions against defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC, and/or their attorney is denied as plaintiff failed to establish any frivolous conduct on the part of said defendants and/or their attorney within the meaning of 22 NYCRR § 130-1.1.

The cross motion of defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC, pursuant to 22 NYCRR § 130-1.1, seeking sanctions against plaintiff is denied as defendants Restaurant Depot Enterprises, LLC, Restaurant Depot, LLC and JRD Holdings, LLC failed to establish that plaintiff's making of her instant and/or earlier motions constitutes "frivolous" conduct within the meaning of 22 NYCRR § 130-1.1.

Dated: April 20, 2015



J.S.C.

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QUEENS COUNTY