Sarris v Fairway Group Plainview, LLC
2016 NY Slip Op 32999(U)
April 6, 2016
Supreme Court, Nassau County
Docket Number: 11166/2013
Judge: Julianne T. Capetola
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 6th day of April 2016

P R E S E N T:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

0

----------X

EILEEN SARRIS,

Plaintiff,

DECISION AND ORDER ON MOTION
Index No: 11166/2013
Motion Sequence: 003

- against -

FAIRWAY GROUP PLAINVIEW, LLC
KIMCO REALTY,
and MANETTO HILLS ASSOCIATES, INC.,

Defendants.

----------X

KIMCO REALTY CORPORATION
and MANETTO HILLS ASSOCIATES, INC.,

Third Party Plaintiffs,

- against -

TEAM 6 ENTERPRISES,

Third Party Defendant.

----------X

The following papers were read on these Motions:
Plaintiff's Notice of Motion and Supporting Documents
Defendant Fairway Group Plainview, LLC's Affirmation in Opposition
Plaintiff's Reply Affirmation

Plaintiff has moved for an order pursuant to CPLR §3126 striking the answer of Defendant Fairway Group Plainview LLC (hereinafter referred to as "Defendant Fairway"), or in the alternative directing that a negative inference be given against Defendant Fairway for intentional or negligent spoliation of evidence, precluding Defendant Fairway from offering certain evidence at trial, compelling Defendant Fairway to comply with all outstanding discovery demands pursuant to CPLR §3124, and granting

costs. Defendant Fairway has opposed the motion, and Plaintiff submitted reply papers. Oral argument was held and the motion was deemed submitted March 29, 2016.

The underlying action pertains to a slip and fall by Plaintiff at Defendant Fairway's store on December 24, 2012.

Plaintiff initially moved pre-action for an order compelling Defendant Fairway to produce a copy of video and/or surveillance footage capturing the accident and to restrain, stay and enjoin Defendant Fairway from re-using, taping over, or otherwise destroying the video and/or surveillance footage of the incident and for the twenty-four hour period preceding same. That motion was granted to a limited extent by The Honorable Karen V. Murphy by Order dated June 3, 2013 who stated, "Firstly, preservation of the original footage of the incident, in whatever form it exists, is paramount to the ends of justice. As directed by the order to show cause signed by this Court on March 13, 2013, ***Fairway shall continue to preserve such footage of the incident, including the 24 hours preceding same.*** Such footage 'is the best proof of whether or how an accident occurred or whether or not a crime was committed'". (emphasis added) Defendant Fairway was not, at that time, directed to turn over copies of the videos as said request was deemed premature.

Plaintiff subsequently moved to compel Defendant Fairway to respond to their demand for the video footage. That motion was granted, to an extent, by the Honorable Steven M. Jaeger by Order dated October 16, 2014 who stated, "It is undisputed that the video maintained by Fairway is material and necessary to Plaintiff's prosecution of the action. Further, CPLR §3101(i) requires full disclosure of video tapes that depict a 'party, or the officer, director, member, agent or smployee of a party'. CPLR §3101(a)(1). Plaintiff is therefore entitled to the portion of the video that depicts the happening of the accident, ***as well as portions that may depict actions of employees at Fairway related to the accident*** . . . As such, Plaintiff is entitled to the video from 10:00 p.m. on December 23, 2012 through the time of the accident However, ***Fairway is to preserve the video for the full twenty-four (24) period*** should the approximate ten (10) hour period reveal any evidence that would lead to a need for the rest of the video". (emphasis added)

CPLR §3126 states:

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court

finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party".

In the instant matter inasmuch as it is alleged that certain videotape evidence was destroyed, "it is New York's common-law doctrine of spoliation, rather than CPLR 3126, that we must consider, since CPLR 3126 covers refusal to comply with a discovery order or a willful failure to disclose, neither of which is applicable here". *Strong v. City of New York*, 112 A.D.3d 15 (1st Dept. 2013). The *Strong* Court held that "the negligent erasure of audiotapes can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was 'on notice that the [audiotapes] might be needed for future litigation' (*Standard Fire Ins. Co. v. Federal Pac. Elec. Co.*, 14 A.D.3d 213, 220, 786 N.Y.S.2d 41 [1st Dept. 2004]; *Westbroad Co. v. Pace El. Inc.*, 37 A.D.3d 300, 829 N.Y.S.2d 529 [1st Dept. 2007]; *Enstrom v. Garden Place Hotel*, 27 A.D.3d 1084, 811 N.Y.S.2d 263 [4th Dept. 2006]; *Lawrence Ins. Group, Inc. v. KPMG Peat Marwick*, 5 A.D.3d 918, 920, 773 N.Y.S.2d 164 [3d Dept. 2004]; *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 53, 682 N.Y.S.2d 452 [2d Dept. 1998])." *Id.* The instant matter pertains to videotapes which certainly must be viewed the same way.

Notably, Defendant Fairway never claims in their papers that any of the tapes in question were destroyed prior to Justice Murphy's decision wherein they were directed to preserve the videotapes. In fact, Defendant Fairway asserts that "That footage was properly preserved, and the pertinent portions disclosed as per prior Court Order". (p.6 ¶16 Aff. In Opp.) Neither Justice Murphy's nor Justice Jaeger's decisions limit the scope of the videotapes to be preserved to a single camera angle. In fact Justice Jaeger's order specifically refers to "portions that may depict actions of employees at Fairway related to

the accident" which could include all camera angles depicting the outside of the store and the parking lots. It does not stand to reason that Plaintiff would be bound by Defendant Fairway's unilateral determination as to what is considered "pertinent". Defendant Fairway is essentially asking this Court and Plaintiff to allow them to be the trier of fact.

The Appellate Division Second Department addressed a similar set of circumstances in *Murillo v. Porteus*, which involved the destruction of a table saw. 108 A.D.3d 750 (2d. Dept. 2013). The Court held as follows:

> "'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 N.Y.3d 69, 76, 845 N.Y.S.2d 773, 876 N.E.2d 1189). Even if there were two table saws at the house, [Defendant], who received a timely request from the plaintiff's counsel, 'had an opportunity to safeguard' the table saw owned by him or Hawk Shaw, "but failed to do so" (id. at 76 n. 2, 845 N.Y.S.2d 773, 876 N.E.2d 1189; *see Amaris v. Sharp Elecs. Corp.*, 304 A.D.2d 457, 758 N.Y.S.2d 637; *Thornhill v. A.B. Volvo*, 304 A.D.2d 651, 652, 757 N.Y.S.2d 598). On appeal, [Defendant] does not dispute the Supreme Court's conclusion that the order granting the plaintiff's petition for pre-action disclosure included, inter alia, "an order preserving the saw and permitting an inspection thereof." As [Defendant] failed to preserve that table saw, he significantly impaired the parties' ability to resolve the disputed issue of fact . . . However, contrary to the plaintiff's contention, a sanction in the form of striking the appellants' answer is not appropriate, since the missing evidence does not deprive the plaintiff of the ability to establish a prima facie case with respect to his causes of action (*see Molinari v. Smith*, 39 A.D.3d 607, 608, 834 N.Y.S.2d 269; *Kerman v. Martin Friedman, C.P.A., P.C.*, 21 A.D.3d 997, 999, 801 N.Y.S.2d 387). Under the circumstances of this case, the appropriate remedy is for the court to give a negative inference charge at trial against [Defendant]". *Id.*

In the instant matter, Plaintiff similarly sent a request via letter to Defendant Fairway on or about January 3, 2013 requesting the production of the videotapes. The aforementioned motion practice followed. The only claim made by Defendant Fairway regarding the deleting of the videotapes is that the tapes are recorded over every thirty (30) days. January 3, 2013 is certainly well before 30 days post-accident. As in *Strong*, which involved automatic recording-over of tapes, given that Defendant Fairway had notice that said tapes might be needed for future litigation, they are subject to spoliation

sanctions and the appropriate remedy is for a negative inference charge to be given at trial against Defendant Fairway.

Plaintiff has further moved for an order pursuant to CPLR §3124 compelling Defendant Fairway to comply with outstanding discovery demands. The post-deposition demand in question requests 3 specific items of discovery, plus 3 additional items which relate to the video footage which has already been addressed herein. The three other items are as follows:

1. Provide the names and last known addresses for all Receivers employed at the Defendant Fairway's store as of December 24, 2012;
2. Provide copies of all invoices, transfers, bills of lading, "PO's", etc., for all vendors and/or house trucks and/or Fairway Supermarket deliveries for December 24, 2012;
3. Provide the employee work schedule of all employees within the Fairway Receiving Department for the week encompassing December 24, 2012

With regard to these three items, Plaintiff concedes in their reply papers that Defendant Fairway, subsequent to the filing of the instant motion, has provided sufficient information with regard to items 1 and 3 for Plaintiff to ascertain the names of the receivers they wish to depose. Despite Plaintiff having been told otherwise previously, they have now learned that said individuals, Rommel Ortiz and Theodore Moberg are still employed by Defendant Fairway, so with regard to items 1 and 3 the instant motion is moot. Additionally, Defendant Fairway annexed to their opposition papers a full response to item 2, rendering that portion of the motion moot as well.

Finally, though Plaintiff lists costs and attorneys's fees in their list of relief sought, they make no arguments in support thereof and accordingly same must be denied.

In light of the foregoing it is hereby:

ORDERED, that the branches of Plaintiff's motion seeking various relief pursuant to CPLR §3126 is hereby granted to the extent that a ***negative inference charge*** shall be given against Defendant Fairway at the time of trial as it relates to the spoliation of the missing videotape footage, to wit, the footage from the missing additional exterior camera; and it is further

ORDERED, that the branch of Plaintiff's motion seeking relief pursuant to CPLR §3124 is hereby denied as moot; and it is further

ORDERED, that Plaintiff's request for costs and attorney's fees is hereby denied.

This constitutes the decision and order of the Court.

Dated: 4/6/16

ENTER

HON. JULIANNE T. CAPETOLA
J.S.C.