

Rogers v Affinia Dumont Hotel
2017 NY Slip Op 30259(U)
February 8, 2017
Supreme Court, New York County
Docket Number: 154673/2013
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
*Justice*PART 13CORBIN ROGERS AND MICHELLE ROGERS,
Plaintiffs,INDEX NO. 154673/2013
MOTION DATE 12/21/2016
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

-against-

THE AFFINIA DUMONT HOTEL, DENIHAN HOSPITALITY
GROUP, LLC, and DENIHAN MEZZ I HOLDING COMPANY, LLC
Defendants.The following papers, numbered 1 to 7 were read on this motion for summary judgment.

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

PAPERS NUMBERED

1 - 3

Answering Affidavits — Exhibits _____

4 - 5

Replying Affidavits _____

6 - 7Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion for an Order striking the Complaint for spoliation of evidence, or otherwise precluding Plaintiffs and/or allowing for a negative inference jury charge, and for an Order granting summary judgment dismissing the Complaint, is granted to the extent stated herein.

Plaintiffs commenced this personal injury action alleging that they were bitten by bedbugs during their stay at Defendants' hotel in July of 2012. (Mot. Exh. A). Plaintiffs allege that the Defendants were negligent in: permitting Plaintiffs' hotel room to become infested with bedbugs; in failing to properly and professionally clean the premises; in permitting and allowing the bedbugs to travel about the hotel; in violating the applicable warranty of habitability, and in failing to move Plaintiffs to another hotel room. (Mot. Exhs C & D). Issue was joined, the parties proceeded with discovery, and the Note of Issue was filed on March 18, 2016.

Defendants now move (1) to strike the Complaint, or to preclude Plaintiffs from offering any evidence on the issue of liability, and/or otherwise allow for a negative inference jury charge due to the Plaintiffs' spoliation of a key piece of evidence, and (2) for summary judgment dismissing the Complaint.

Defendants contend that the Plaintiffs testified that they did not see any alleged

bugs until the thirteenth day of their hotel stay, and that they caught the bug, put it in a ziplock and put it in the freezer (Mot. Exh. I pp 32-33, & 41, J pp 34-35). That Ms. Rogers, in contradiction to Mr. Rogers testimony, also testified that when they went to the hospital to be treated for their bug bites they showed the doctor the bug, that the doctor stated it was a bedbug, but that the hospital records indicate the Plaintiffs were treated for scabies. (Mot. Exhs. J p 40, I p 43, and K). That the Defendants first became aware that the Plaintiffs had preserved the bug at their depositions, that Plaintiffs were directed at their depositions to preserve the alleged captured bedbug, and that subsequent discovery conference orders reserved Defendants' right to have the bug inspected by its expert. (Mot. Exhs. J p 43-44, L & M).

Defendants contend that they notified Plaintiffs of their intention to have their expert conduct an examination of the bug in a letter dated August 10, 2015 (Mot. Exh. N), that this Court's August 12, 2015 Status Conference Order directed Plaintiffs to respond to the August 10, 2015 letter (Mot. Exh. O), and that in a letter dated September 16, 2015 Plaintiffs' counsel notified Defendants for the first time that the bug was no longer available for inspection because it appeared to have thawed out and disintegrated. (Mot. Exh. P).

Defendants also contend that Alex Spektor, Defendants General Manager of the Hotel, testified that he was first notified of the insect bite complaints by Elizabeth Zieba- the hotel's assistant director of housekeeping- on the day Plaintiffs left the hotel, and that Ms. Zieba inspected the room, saw what appeared to be some kind of insect, and that according to standard operating procedure the room was put out of service and inspected by their professional exterminator EcoTech. (Mot. Exh. Q pp 9-11). Mr. Spektor also testified that Ecotech's standard procedure included only providing a certificate if the room was positive for bedbugs or any kind of insect, and that no certificate would be issued if the room was negative. (Id. at pp 15-16). That Ecotech also performed preventive maintenance and regular bedbug maintenance services, which included monthly inspection-and application of chemicals if tested positive for bedbugs- of 15 to 20 rooms every two weeks which resulted in every room being inspected twice a year (Id. at p 22-23). That there had been no complaints of bugs in the Plaintiff's room, nor any complaints of any bedbugs in any of the rooms on the 37th floor prior to the Plaintiff's stay (Id. at 24), and that all hotel staff received annual training for preventive measures of bedbugs and the procedures taken after receiving a report or a finding of bedbugs. (Id. at 26-27).

Defendants contend that the hotel records- which Mr. Spektor testified to confirm that an "out of order history report" would reflect a room being out of order because of possible bedbugs or other insects, that as a safety precaution any bug or bite complaints would cause the room to be put out of order pending inspection by the exterminator, and that there had been only one confirmed case of bedbugs at the hotel three months prior to the Plaintiffs' hotel stay in a room 16 floors below the Plaintiffs' room. (Mot. Exhs. E & Q p 31, 33, and 44). That the "out of order" report for

Plaintiffs' room shows that there was possible bedbugs and that the room went under heavy cleaning as a standard housekeeping procedure. (Mot. Exh. F, and Q pp 34-35). Ms. Zieba also testified that under hotel procedure a room would automatically be taken out of service following a complaint of insects, (Mot. Exh. R p 15).

Defendants argue that the discrepancies between Plaintiffs' claims that bedbugs were present in their room, the hotel's records showing the absence of any bedbug present in the room, the hospital emergency room records showing that Plaintiffs presented with "scabies" and not bedbug bites, and the spoliation of the sole piece of evidence that could determine what kind of bug it was, results in extreme prejudice to the defendants because they are now unable to refute Plaintiff's contentions. That at the very least, if the Complaint is not dismissed, the Defendants should be entitled to a negative inference jury charge, and/or the Plaintiffs should be precluded from offering any evidence that they were bitten by bedbugs because the photos and video clips they provided do not present a clear depiction of the alleged bedbugs.

Finally, Defendants argue they are entitled to summary judgment because there is no evidence that a dangerous or defective condition existed in the room, that the Defendants were on notice of or created any such condition in the room, or that this condition was the proximate cause of the Plaintiffs' injuries. That both Mr. Spektor and Ms. Zieba testified to the Defendants' maintenance and inspection procedures, that hotel records evidenced that daily housekeeping was done in each room, that Plaintiffs were transferred to a different hotel as a precautionary measure following their complaints, and that Ecotech did not issue any certificate for a bedbug or insect finding following inspection of the Plaintiffs' room. That if the Plaintiffs only found a bedbug on the thirteenth day of their stay, the Defendants cannot be charged with notice, constructive or otherwise, if daily housekeeping did not reveal any bugs, and there had been no prior complaints.

Plaintiffs oppose the motion arguing, among other things, that the destruction of the bug was not spoliation because the bug had been dead for nearly two years, and that they had taken reasonable steps to preserve it. That the freezer where the bug was held was unplugged in their move to a new residence about an hour away in September of 2013, and that upon arrival at their new residence everything in the freezer seemed ok. That it was not until after their return to California from their depositions in April of 2014 that Mrs. Rogers retrieved the bag and noticed that the alleged bedbug had completely disintegrated. Plaintiffs contend that the destruction of the bug does not prejudice the Defendants because the other evidence, such as the video taken by Plaintiffs, clearly provide proof that the insect was a bedbug. (Opp. Exh. 1).

CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order. The nature and degree of the penalty to be

imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (see CPLR § 3126; *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812, 971 N.Y.S.2d 167 [2nd Dept., 2013]). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v. City of New York*, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1st Dept. 2000]). A court may preclude a party from testifying at the time of trial or otherwise submitting evidence in support of, or in opposition to, the discovery sought. (*Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505, 928 N.Y.S.2d 536, 542 [1st Dept. 2011]; see also *Yong Soon Oh v. Hua Jin*, 124 A.D.3d 639, 1 N.Y.S.3d 307 [2nd Dept., 2015]).

New York's common-law doctrine of spoliation refers to "'willful, deliberate, or contumacious' destruction of evidence." (*Strong v. City of New York*, 112 A.D.3d 15, 973 N.Y.S.2d 152 [1st Dept. 2013], citing *Kerman v. Martin Friedman, CPA, PC*, 21 A.D.3d 997, 999, 801 N.Y.S.2d 387 [2nd Dept. 2005]). Sanctions for spoliation have also been imposed where the evidence was destroyed negligently rather than willfully. (see *Strong, Supra*). "Spoliation occurs 'when a party destroys key evidence before the other side can examine it.'" (*Kirkland v. NYC Housing Authority*, 236 A.D.2d 170, 666 N.Y.S.2d 609 [1st Dept. 1997]).

Mrs. Rogers' affidavit states that Plaintiffs discovered that the alleged bedbug had been destroyed as early as April of 2014. However, they did not notify Defendants of the destruction of the bug until September of 2015, after Defendants had preserved their right to inspect the bug in Court Discovery Conferences. Therefore, Defendants have stated a basis for precluding any testimony or evidence specifically concerning the alleged bedbug that was destroyed. However, that is the extent of the preclusion. The evidence exchanged during discovery shows that Mrs. Rogers had bite marks on her body, and the video provided by Plaintiffs taken inside the hotel room clearly depicts some sort of bug. This presents an issue of fact for the jury to determine whether the bugs depicted in the video are in fact bedbugs.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (*Klein V. City of New York*, 89 NY2d 833; *Ayotte V. Gervasio*, 81 NY2d 1062, *Alvarez v. Prospect Hospital*, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Kaufman V. Silver*, 90 NY2d 204; *Amatulli V. Delhi Constr. Corp.*, 77 NY2d 525; *Iselin & Co. V. Mann Judd Landau*, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. V. Public Service Mut. Ins. Co.*, 253 AD2d 583; *Martin V. Briggs*, 235 192).

"A landowner is under a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances...this common law duty is

tempered by a requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it....[An] owner and manager of [a] hotel owe[s] plaintiffs [a] duty of providing them with accommodations that were in a reasonably safe condition...[and where it is] plaintiffs' contention that the room was unsafe and they sustained physical injuries, [thus] to prevail on its motion for summary judgment, [defendant] has to prove, as a matter of law, that it did not breach its duty of care to plaintiffs." (Grogan v. Gamber Corp., 19 Misc.3d 798, 858 N.Y.S.2d 519 [J. Judith J. Gische, NY County Sup. Ct. March 26, 2008]).

Defendants have failed to make a prima facie showing entitling them to judgment as a matter of law. Although the Defendants provide evidence of its standard procedures regarding cleaning and inspections for bugs, it only provides its own hotel staff's testimony as to the exterminator's standard procedures. There is no affidavit or testimony provided by the exterminator confirming that such bedbug inspection and standard procedures were implemented at the time of, and following the Plaintiffs' stay, or that its inspection revealed no presence of bedbugs. This presents an issue of fact that is for the jury to consider, and which cannot be determined on a motion for summary judgment.

Accordingly, it is hereby ORDERED that Defendants' motion to strike the Complaint, to preclude Plaintiffs from offering any evidence on the issue of liability, and/or otherwise allow for a negative inference jury charge due to the Plaintiffs' spoliation of a key piece of evidence, and for summary judgment dismissing the Complaint, is granted to the extent of precluding the Plaintiffs from introducing any testimony or evidence at trial specifically concerning the alleged bedbug that was destroyed, and it is further, and it is further,

ORDERED, that the Plaintiffs are precluded from introducing any testimony or evidence at trial specifically concerning the alleged bedbug that was destroyed, and it is further,

ORDERED, that the remainder of the relief sought is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 8, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE