

Morell v East 34th St.
2018 NY Slip Op 31907(U)
August 9, 2018
Supreme Court, New York County
Docket Number: 160209/15
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC

PART 47

Morell

-v-

East 34th StINDEX No. 160209/15

MOTION DATE _____

MOTION SEQ. No. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____ No(s). 1Answering Affidavits - Exhibits _____ No(s). 2Replying Affidavits _____ No(s). 3

Plaintiff Kristen Morell commenced this action to recover for personal injuries she suffered on November 19, 2014, when the radiator in her apartment began spewing out steam uncontrollably, causing her to suffer burns and other injuries. In this motion, plaintiff seeks discovery sanctions against defendant East 34th Street LLC, the owner of the building, and defendant Citi-Urban Management Corp., the management company, based on their spoliation and/or failure to produce key pieces of discovery in this matter, namely, (1) the radiator valve for the subject radiator; (2) emails and texts concerning the incident; and (3) documents related to the maintenance and inspection of the boiler in the building.

This is plaintiff's third motion for sanctions. By order dated December 22, 2017, this court granted in part plaintiff's first motion, holding that defendants were precluded from offering any evidence at trial regarding the radiator valve because the superintendent, Jonathan Debono, negligently disposed of the valve the day after the incident. With respect to the emails and texts, the court authorized plaintiff to renew its motion for sanctions after conducting a deposition of Eric Borkowski, the property manager. Finally, the court ordered defendants to produce all records for the boiler for two years prior to the incident or provide a compliant affidavit of non-existence by February 15, 2018. If defendants failed to do so, the court held that plaintiff would be entitled to an adverse inference regarding these records.

After conducting Mr. Borkowski's deposition, plaintiff renewed its motion for discovery sanctions. On July 12, 2018, the parties appeared for a court conference to discuss the motion. At the conference, the court denied plaintiff's second motion without prejudice based in part on defendants' production of additional boiler records after submission of the motion. The court authorized plaintiff to make the present motion for sanctions.

Dated: ↓↓
Hon. Paul A. Goetz, JSC

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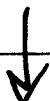
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Under the common law doctrine of spoliation, which applies to the destruction of the radiator valve, a party may be sanctioned where it negligently loses or intentionally destroys key evidence. *See Strong v. City of New York*, 112 A.D.3d 15 (1st Dep't 2013) (distinguishing rules governing spoliation sanctions for destruction of ESI and non-ESI evidence). Under that standard, spoliation sanctions are appropriate where the spoliator was "on notice that the [evidence] might be needed for future litigation" and the evidence is relevant to such litigation. *Id.* at 22. With respect to the destruction of ESI evidence, such as the emails and texts, New York courts follow the federal standard articulated in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Under this standard, "[a] party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *Voom HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 45 (1st Dep't 2012) (citing *Zubulake*). The intentional destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence. *Id.* "Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail. *Id.* Finally, CPLR 3126 authorizes sanctions based on a party's failure to comply with court-ordered discovery, including the award of attorneys' fees and costs. *Jackson v. OpenCommunications Omnimedia, LLC*, 147 A.D.3d 709 (1st Dep't 2017).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):
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 Hon. Paul A. Goetz, JSC

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In this case, defendants have repeatedly ignored their obligations to preserve and produce relevant discovery and failed to comply with this court's orders. First, defendants disposed of the radiator valve the day after the incident. Based on the nature and severity of the incident, defendants should have known that plaintiff may assert a claim against them and that the radiator valve from the broken radiator which injured plaintiff was clearly relevant to such litigation. Second, defendants never instituted a litigation hold and defendants' witnesses admitted during their depositions that they continued to delete their emails and texts on a daily basis during the pendency of this litigation, including up to the time of their depositions. Affirmation of Gregory M. Dexter dated July 19, 2018, Exh. A (Debono Tr. 32:13-35:19, 38:4-21) and Exh. B (Borkowski Tr. 44:2-46:3, 52:20-54:22, 95:12-96:16). Indeed, Jonathan Debono, defendants' key witness and the superintendent for the building where the incident occurred, testified that he had never even seen the litigation hold letter from plaintiff's counsel until his deposition. Exh. A (Debono Tr. 29:6-32:4). This constitutes gross negligence and the relevance of these documents is therefore presumed. *Voom HD*, 93 A.D.3d at 45; *see also Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, 608 (1st Dep't 2016) (plaintiff's destruction of evidence was at a minimum grossly negligent given its failure to institute a litigation hold). With respect to the boiler records, defendants repeatedly failed to fully comply with the court's orders. Although defendants did produce some documents in accordance with the court's December 22, 2017 order, such production was clearly incomplete despite defendants' representation that they did not have any additional records. Indeed, after plaintiff highlighted this deficiency in her motion papers, defendants produced additional records in June 2018. Yet defendants have still failed to produce the boiler log records they are required to maintain by law, if such records ever existed.

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Taken together, defendants' conduct clearly demonstrates a pattern of neglecting their discovery obligations which warrants sanctions. "However, the sanction must reflect 'an appropriate balancing under the circumstances.'" *Arbor Realty*, 140 A.D.3d at 609 (quoting *Voom HD*). Here, the sanction of striking defendants' answer is unwarranted as there are key witnesses that are available to testify and the spoliated evidence does not constitute the "sole means" by which plaintiff can prove her case. *Id.* Accordingly, an adverse inference charge is an appropriate sanction under the circumstances. In addition, defendants shall be required to pay discovery sanctions to plaintiff for the attorneys' fees and costs incurred in making the three spoliation motions in the amount of \$1,000.

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED that at the time of trial, plaintiff is entitled to an adverse inference charge regarding the radiator valve, the e-mails and texts concerning the incident, and the boiler records; and it is further

ORDERED that defendants shall reimburse plaintiff for the costs incurred in this matter in the amount of \$1,000, with payment made to plaintiff's counsel and written proof of such payment to be provided to the Clerk of Part 47 within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that timely payment is not made, the Clerk of the court, upon service of this order with notice of entry and an affirmation or affidavit of non-payment, shall enter a judgment in favor of plaintiff and against defendants in the aforesaid sum.

A status conference is set for October 18, 2018 at 9:30 AM.Dated: 8/9/18
Hon. Paul A. Goetz, JSC

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