Cabrera v Liberty El. Co. Inc.

2019 NY Slip Op 30632(U)

March 14, 2019

Supreme Court, New York County

Docket Number: 161442/2015

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART 43**

Justice

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JEANETH CABRERA,

Plaintiff,

- v -

LIBERTY ELEVATOR CO. INC., LIBERTY ELEVATOR CORPORATION A/K/A LIBERTY ELEVATOR OF NY, MARINE ESTATES, LLC, STERLING INVESTMENT PARTNERS, FAIRWAY CHELSEA, LLC

Defendant.

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INDEX NO. 161442/2015

MOTION DATE 04/17/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

This is an action for personal injuries arising from an accident involving an elevator that is alleged to have occurred on November 10, 2014. Plaintiff seeks an order, pursuant to CPLR 3126, precluding defendant Fairway Chelsea, LLC ("Fairway") from offering evidence or testifying at the time of trial and for a negative inference at the time of trial. Defendant Liberty Elevator Corporation a/k/a Liberty Elevator of NY ("Liberty") cross-moves for an order striking defendant Fairway's answer. Fairway opposes both the motion and the cross-motion.

Plaintiff commenced an action on February 3, 2015 against the following defendants: 2328 On Twelfth, LLC, Fairway Uptown LLC, Fairway Broadway, LLC, and Fairway Group Holdings Corp. Said defendants moved to dismiss the complaint. Plaintiff withdrew the action against said defendants. On November 6, 2015, plaintiff commenced the instant action against Fairway Chelsea, LLC, et al., a separate entity operated by Fairway Group Holdings Corp.

Fairway, in discovery, exchanged an Employee Accident Form, completed by general manager Omar Johnson. The Employee Accident Form indicates that the accident was captured on video. The Employee Accident Form also contains language directing that the accident report and video, if available, be sent to Katherine Martin, Risk Management Specialist at Fairway Group Holdings, within 24 hours.

Plaintiff argues that Fairway failed to provide any video of the accident in response to discovery demands dated July 15, 2015 and May 4, 2016. Plaintiff submits the EBT of Katherine Martin, who testified that she never received a video of the accident. Martin testified about steps she took to retrieve a video from Omar Johnson. Plaintiff alleges that Martin failed to take appropriate steps to retrieve and/or confirm whether a video actually existed. In opposition, Fairway relies on the affidavit of Michael Pacewicz, Director of Risk Management and Loss Prevention at Fairway, submitted in response to a compliance order, detailing the search for -- and the nonexistence of -- surveillance footage of plaintiff's accident.

"Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence" (*Morales v City of New York*, 130 AD3d 792, 793; *see Peters v Hernandez*, 142 AD3d 980, 980; *Cioffi v S.M. Foods, Inc.*, 142 AD3d 520, 524). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and 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" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [internal quotation marks omitted]; *see Golan v North Shore-Long Is. Jewish Health Sys., Inc.*, 147 AD3d 1031, 1032). Where evidence has been intentionally or willfully

destroyed, its relevance is presumed (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d at 547). However, where evidence has been destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party's claim or defense (*see id.* at 547-548). If the moving party is still able to establish or defend a case, then a sanction less severe than striking the pleadings of the offending party is appropriate (*see Peters v Hernandez*, 142 AD3d at 980; *Morales v City of New York*, 130 AD3d at 794; *De Los Santos v Polanco*, 21 AD3d 397, 398; *lannucci v Rose,* 8 AD3d 437, 438).

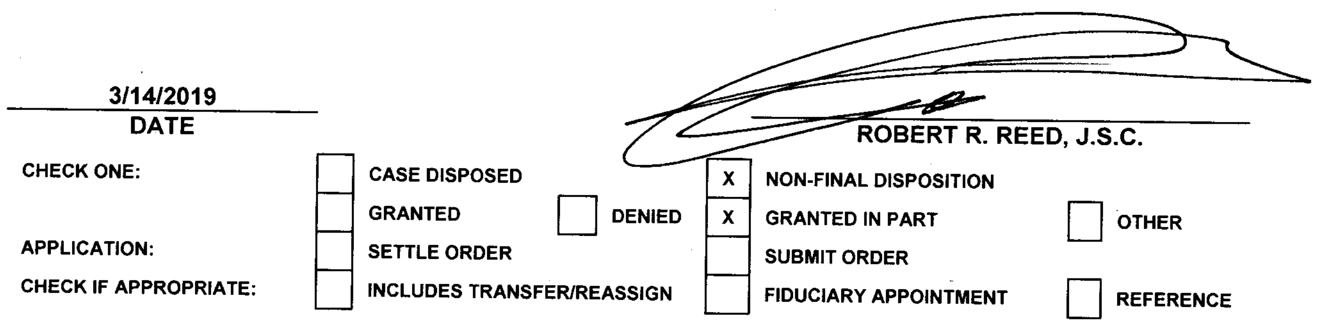
In the matter at bar, plaintiff has failed to establish that evidence was destroyed with a culpable state of mind. The record before this court indicates at best that Fairway employees failed to take contemporaneous steps to locate the video referenced in Johnson's report. To the extent that the evidence indicates that the video was negligently misplaced or destroyed, plaintiff has failed to establish that what would have been depicted on the video was relevant to plaintiff's claim. Under the circumstances of this case, the sanction should be limited to the issuance of an adverse inference charge against Fairway at the time of trial (*see Peters v Hernandez*, 142 AD3d at 981; *Giuliano v 666 Old Country Rd., LLC*, IOO AD3d at 962; *see also Mendez v La Guacatala, Inc.*, 95 AD3d at 1085-1086; *Utica Mut. Ins. co. v Berkoski Oil Co.*, 58 AD3d 717, 719). In the court's assessment, such a limited sanction is a proportionate response for the negligent misplacement or destruction of evidence that seems to have occurred here, assuming the correctness of the Employee Accident Form. As such, plaintiff's and defendant Liberty's applications for an order granting sanctions for spoliation are granted in part, but denied to the extent that such parties seek (a) to preclude Fairway from offering evidence or testifying at the time of trial or (b) to strike Fairway's answer.

Accordingly, it is hereby

ORDERED that plaintiff's motion and defendant Liberty's cross-motion are granted to the extent that this court directs the issuance of an adverse inference charge against Fairway with respect to the existence of a video at any trial of this matter; and it is further

ORDERED that, within 45 days from the entry of this order, plaintiff shall cause the action to be placed upon the trial calendar by the filing of a note of issue and certificate of readiness.

This constitutes the decision and order of the court.



3/14/2019
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	