

Agius v Gray Line Corp.
2019 NY Slip Op 32513(U)
August 22, 2019
Supreme Court, New York County
Docket Number: 156167/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

JENNIFER AGIUS and ALEXANDER AGIUS,
Plaintiffs,
INDEX NO. 156167/2017
MOTION DATE 05/01/2019
MOTION SEQ. NO. 001

- v -

GRAY LINE CORPORATION, A/K/A GRAY LINE
WORLDWIDE, GRAY LINE NEW YORK TOURS, INC.,
COACH USA, INC, CITYSIGHTS LLC,
TWIN AMERICA LLC,
GRAY LINE NEW YORK SIGHTSEEING,

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to STRIKE PLEADINGS

Woods Lonergan PLLC (Annie E. Causey and James F. Woods of counsel), for plaintiffs.
Wilson Elser Moskowitz Edelman & Dicker LLP (Craig T. Ellman of counsel), for defendants.

Gerald Lebovits, J.:

Plaintiffs, Jennifer Agius and her husband Alexander Agius, sued defendants
(collectively, Gray Line) for injuries suffered by Jennifer Agius when she slipped and fell on a
Gray Line bus. Plaintiffs now move to strike defendants' answer for alleged spoliation of
evidence, or alternatively to deem certain key factual issues in the case resolved against
defendants in light of this alleged spoliation.

Background

According to the allegations of the complaint, on August 10, 2016, Jennifer Agius was a
passenger on a double-decker tour bus owned and operated by Gray Line. As Agius descended
stairs from the upper level of the bus, she slipped and fell on a non-treaded surface at the
staircase landing. She sustained sufficiently serious injuries in the fall that Gray Line called an
ambulance to the scene, and ultimately needed hospitalization and surgery.

On August 31, 2016, plaintiffs' counsel sent Gray Line a letter (referred to by both
parties as the litigation hold notice) seeking the preservation of 12 categories of evidence. Those
categories included "[a]ll existing daily, weekly, monthly and yearly incident, repair and/or
inspection reports relating to the source of the client's accident if the source has been identified"
as well as "[t]he entire personnel file of all employees working on the day of the Accident." (See

NYSCEF No. 27.) The notice did not, however, seek the preservation of any part of the bus itself. (*See id.*)

Almost seven months later, on March 28, 2017, Gray Line sold to Cousins Metal Industries, Inc. (Cousins) the bus on which Agius fell. Cousins converted the bus to scrap metal shortly after the completion of the sale. (*See* NYSCEF No. 29.)

Plaintiffs filed their complaint three months later, seeking damages for Agius's personal injuries and her husband's loss of consortium. (*See* NYSCEF No. 1.) Plaintiffs sent a demand to Gray Line for an inspection of the bus on February 12, 2018. (*See* NYSCEF No. 23.) Gray Line responded on September 24, 2018, stating that it was no longer in possession of the bus because it had been sold to Cousins in March 2018. (*See* NYSCEF No. 24.)

Plaintiffs now move for discovery sanctions under CPLR 3126 on the theory that Gray Line's failure to preserve the bus constitutes spoliation of evidence. Plaintiffs' motion is denied.

Discussion

As an initial matter, this court must apply the "common-law doctrine of spoliation, rather than CPLR 3126," because the statute "pertains to 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 AD3d 15, 21 [1st Dept 2015].)

Under this common-law doctrine, courts "possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence." (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015].) A party seeking such relief must show (i) that the party against whom relief is sought had control over the evidence, (ii) that the party with control over the evidence had an obligation to preserve it at the time of its destruction, (iii) that the evidence was destroyed with a culpable state of mind,¹ and (iv) that the destroyed evidence was relevant to the moving party's claim or defense. (*See Pegasus Aviation*, 26 NY3d at 546.)

In this case, it is undisputed that Gray Line had control over the evidence at issue—*i.e.*, the bus—at the relevant time. This court concludes, however, that Gray Line did not have an obligation to preserve the bus when it sold the bus to Cousins to be turned into scrap metal. Spoliation relief therefore is not warranted here.²

Plaintiffs argue that the circumstances of Agius's fall put Gray Line on notice that it had an obligation to preserve the bus for potential future litigation. As plaintiff notes, the First Department has held that a defendant is placed on notice of a reasonable probability of future litigation concerning certain evidence—and thus the defendant's obligation to preserve that

¹ A party seeking spoliation sanctions may satisfy the "culpable state of mind" requirement by establishing that the destruction of evidence was only negligent, rather than willful. (*See Strong*, 112 AD3d at 21.)

² Given its conclusion on this point, this court need not and does not address the remaining aspects of the spoliation analysis.

evidence—where, as here, an individual sustains injuries in an accident (such as a fall) for which an ambulance is called.³

This court concludes, though, that under the particular facts of this case, Gray Line did not have such an obligation to preserve at the time it sold the bus to Cousins in March 2017.

Agius slipped and fell on Gray Line’s bus on August 10, 2016. On August 31, 2016, plaintiffs’ counsel sent Gray Line an express and detailed litigation-hold notice, which requested that Gray Line preserve 12 distinct types of documentary, photographic, and video evidence. (See NYSCEF No. 27.) The notice did not, however, request preservation of any *physical* evidence related to the circumstances of the accident, such as the mat inside the bus on which Agius alleges she slipped. And the notice certainly did not request preservation of the bus itself. (See *id.*) Nor did plaintiffs amend or supplement this notice—or otherwise suggest that they needed Gray Line to preserve the bus—in the seven months between service of the hold notice and Gray Line’s March 2017 sale of the bus to Cousins.⁴

Given plaintiffs’ careful itemization of the nature of the evidence that needed to be preserved, Gray Line could reasonably conclude that its preservation obligation was limited to those categories of evidence that plaintiff specified. This court declines to penalize Gray Line for failing to preserve an entirely different category of evidence that plaintiff never mentioned.⁵ (See *Jackson v Whitson’s Food Corp.*, 130 AD3d 461, 463 [1st Dept 2015]; *Duluc v AC & L Food Corp.*, 119 AD3d 450, 452 [1st Dept 2014]. *Accord Sarris v Fairway Grp. Plainview, LLC*, 169 AD3d 734, 736 [2d Dept 2019].)

This court’s conclusion is bolstered by the sheer scope of the preservation obligation that plaintiffs contend that Gray Line *impliedly* assumed—i.e., retaining a two-decker tour bus in unchanged condition for at least 18 months, if not longer. (See *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 483-484 [2004] [declining to find that a party spoliated evidence by destroying a damaged vehicle where plaintiff did not “request [preservation] in writing or volunteer[] to cover the costs associated with preservation”].) That obligation is quite different from—and much more burdensome than—retaining digital videocamera footage, or emails, or a small physical item such as a pair of roller skates (see *Kelley v Empire Roller Skating Rink, Inc.*, 34 AD3d 533 [2d Dept 2006] [in personal-injury action, declining to impose spoliation sanctions for failure to preserve roller-skates worn by plaintiff at the time of the accident].) This court

³ (See *Macias v Asal Realty LLC*, Index No. 306584/2010, 2015 NY Slip Op 32684(U), at *6-*7 [Sup Ct, Bronx County Oct. 29, 2015], *aff’d* 148 AD3d 622 [1st Dept 2017]; *Maiorano v JPMorgan Chase & Co.*, Index No. 304752/2011, 2013 NY Slip Op 33787(U), at *3 [Sup Ct, Bronx County July 9, 2013], *aff’d* 124 AD3d 536 [1st Dept 2015].)

⁴ Indeed, the record reflects that plaintiffs made their first request to inspect the bus only in February 2018, 18 months after Agius fell. (See NYSCEF No. 23.)

⁵ Though plaintiffs suggest that Gray Line had malign motives in selling the bus to Cousins in March 2017, they fail to provide any evidence that Gray Line acted “with the intention of frustrating discovery,” rather than in the ordinary course of business. (*Estate of Smalley v Harley-Davidson Motor Co.*, 170 AD3d 1549, 1550 [4th Dept 2019].)

declines to find that Gray Line was subject to this substantial preservation requirement where plaintiff's extensive litigation-hold notice did not mention the bus or its components at all.

Accordingly, it is

ORDERED that plaintiffs' motion for spoliation sanctions against Gray Line is denied.

8/22/2019

DATE



GERALD LEOVITS, 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