

Sneed v Dever Props. LLC

2019 NY Slip Op 32983(U)

October 8, 2019

Supreme Court, New York County

Docket Number: 156919/2015

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

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JOY SNEED

Plaintiff,

- v -

DEVER PROPERTIES LLC,

Defendant.

INDEX NO. 156919/2015

MOTION DATE 01/18/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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

were read on this motion for SANCTIONS

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

Plaintiff commenced this action seeking damages for injuries allegedly sustained when she was working as a security guard at a commercial office building located at 215 Park Avenue South, New York, New York. Defendant owns the premises. Plaintiff alleges that an electromagnetic lock from the front door of the premises was caused to fall from atop of the door striking her hand and causing injuries to her hand and wrist (see NYSCEF Doc. No. 23). Plaintiff now moves for an order, pursuant to CPLR 3126, striking the answer of defendant due to spoliation of evidence and defendant's failure to respond to outstanding discovery demands. Plaintiff alleges that defendant failed to preserve video footage of the front door of the premises and post incident photographs. Defendant opposes, arguing that video footage never existed. Defendant also includes in its opposition papers what purports to be a post incident photograph.

"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 [2015]; see *Peters v Hernandez*, 142 AD3d 980, 980 [2016]; *Cioffi v S.M. Foods, Inc.*, 142 AD3d 520, 524 [2016]). “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 [2015] [internal quotation marks omitted]; see *Golan v North Shore-Long Is. Jewish Health Sys., Inc.*, 147 AD3d 1031, 1032 [2017]). 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 [2005]; *Iannucci v Rose*, 8 AD3d 437, 438 [2004]).

In support of her motion, plaintiff avers that there are surveillance cameras at the premises that would have captured the front door (see NYSCEF Doc. No. 34). Plaintiff submits the examination before trial (EBT) of Selena McKiernan, assistant property manager for SL Green Realty. Plaintiff argues that McKiernan's failure to confirm that no video existed is proof of negligence by defendant.

Defendant opposes, asserting that video footage never existed. In support of this contention, defendant relies on the incident report for this particular accident, which specifies

that no video was taken (*see* NYSSCEF Doc. No. 28). Nothing in the record supports a finding of destruction of surveillance video -- whether intentional or negligent. The court is presented with an incident reported completed 48 hours after the incident that claims there was no video footage. Plaintiff's affidavit offers mere self-serving speculation about a supposed existence of video footage.

The same incident report indicates that "photographs" of the alleged incident were taken. McKiernan testified that a photograph was taken and that she viewed the photograph. Defendant has submitted what purports to be a photograph taken of the alleged incident. On the record before this court it is not clear whether there is a single photograph or multiple photographs of the incident.

With regard to plaintiff's request for post incident photographs, defendant is directed to provide all such photographs within 20 days of the date of this decision and order. To the extent defendant claims additional photographs do not exist, defendant is directed to provide an affidavit by a person with knowledge attesting that the additional photographs requested do not exist (and whether any such additional photographs ever did exist) and detailing the efforts made to comply with the court's directive. Such person with knowledge, it should be noted, may be subject to court-ordered deposition in the future -- depending upon the adequacy of defendant's response.

Accordingly, it is

ORDERED that defendant is directed to provide the additional photographs requested in plaintiff's discovery demand within 20 days of the date of this motion, and, to the extent defendant claims additional photographs do not exist, defendant is directed to provide an affidavit by a person with knowledge attesting that additional photographs do not exist (and

whether any such additional photographs ever did exist) and to state in detail the efforts conducted to comply with the court's directive; and it is further

ORDERED that the portion of plaintiff's motion that seeks a judgment by default against defendants on the issue of liability is denied; and it is further

ORDERED that the parties shall appear for a status conference in Part 43, Room 412, 60 Centre Street, New York, New York on November 7, 2019 at 2:30 P.M.

10/8/2019
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: