SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ARIADNA NAVARRO

Plaintiffs,

-against-

DECISION & ORDER
Index No. 030736/2017
Motion # 2 - MG and MD
DC - N
Adj: 4/5/19

BETIS, INC D/B/A GODFATHER'S PIZZA,

Defendants.

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Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1- 3 read on this motion by Plaintiff for an Order pursuant to *Civil Practice Law and Rules* § 3126 (1) striking the Defendant's answer based on the grounds of spoilation of certain evidence, specifically the barstool(s) which caused the Plaintiff's injuries; or in the alternative, (2) directing that a negative inference charge be given against Defendant at the time of trial if this action with respect to the condition of the barstool from which Plaintiff fell, (3) deeming the Defendant to have waived an independent medical examination of the Plaintiff and (4) for such other and further relief as the Court may deem just and proper:

PAPERS	**NUMBER**
Notice of Motion (Motion #2)/Affirmation of Kevin S. Johnson, Esq./ Exhibits (A-F)	1
Affirmation of Fredric Paul Gallin, Esq. in Opposition/Exhibits (1-3)	2
Reply Affirmation of Kevin S. Johnson, Esq.	3

The instant action arises out of an accident that occurred on January 31, 2016[1] at the Defendant's restaurant, Godfather's Pizza, located at 220 N. Main Street, Spring Valley, New York 10977. According to Plaintiff she was a lawful visitor at the aforementioned restaurant and was at the restaurant with a group of friends at an after hours party sponsored and held by Defendant. The Plaintiff states that at the end of the evening she was leaving her seat at a high-top table when she fell "violently" to the ground because of a defect in the foot rest. Plaintiff contends that she placed her foot on the foot rest of the "stool" to dismount when it gave way. As a result of the aforementioned fall the Plaintiff submits that she suffered a fractured clavicle which required surgery.

Plaintiff's counsel states that on March 29, 2016 a letter was sent regular mail and certified mail to the Defendant at the address of the business, Godfather's Pizza, which requested that the Defendant preserve recordings of the scene of the accident and "the instrumentalities involved in said accident." Further, Plaintiff's letter asserts that the failure of Defendant to comply with preservation letter could "constitute spoilation."

The action was commenced on February 14, 2017 with the service of the Summons and Complaint; Defendant was served through the Secretary of State on February 23, 2017; issue was joined as to Defendant by service of an Answer on April 11, 2017. On October 6, 2017 the Plaintiff served a Verified Bill of Particulars and Combined Demands and a response to the demands of the Defendant. Within the Plaintiff's Combined Demands the Plaintiff contends that they sought photographs, video-tapes, audio tapes or other films and recordings of the "instrumentalities involved" in the accident. According to Plaintiff, Defendant served a response to Plaintiff's Combined Demands on October 20, 2017 and asserted that there was no defective condition and no pictures of an alleged defect. The Plaintiff states that within the aforementioned response th Defendant included photographs of the "alleged bar stools in question."

The Plaintiff submits that she testified at an examination before trial (hereinafter EBT) in which she stated that she was seated in the back of the restaurant at "high-top tables" with adjacent "bar stools" near the restroom. According to Plaintiff, she put her weight on the footrest

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[1] The Court notes that the Plaintiff has incorrectly stated the accident occurred January 31, 2014.

as she was getting up and when it broke and she fell. At the EBT the Plaintiff was shown photographs of bar stools from the restaurant, which the Plaintiff denied were similar to the "bar stools" from which she fell. The Plaintiff testified that the stool she was sitting on had a back.

According to Plaintiff, Defendant's representative appeared for his EBT and testified that there were eight (8) bar stools which the Plaintiff described and that they were kept at the four high top tables. Defendant's representative testified that those stools were high, made of metal, had a back, did not turn and had footrests. Further, when the Defendant's representative was shown the photographs of the "bar stools' turned over by Defendant to Plaintiff he testified that the picture did not represent the "bar stools" referenced by the Plaintiff. Additionally, Defendant's representative testified that Defendant restaurant was closed some time in 2017 and the "bar stools" described by the Plaintiff were left in the closed restaurant and he was unaware of their location. As a result of Defendant's aforementioned EBT, Plaintiff served on Defendant Post EBT Demands for Discovery and Inspection which demanded the company from which the Defendant purchased the bar stools and evidence of receipts of the brand, manufacturing, wholesaler and retailer of the Defendant's bar stools. The Plaintiff states that Defendant did not provide a response and a good faith letter was sent to Defendant on June 20, 2018.

The Plaintiff states that on August 7, 2018 an email was sent to Defendant's counsel regarding the demands. According to Plaintiff, Defendant stated that they had no further information regarding the chairs and that the chairs were bought in Chinatown (NYC) at a store that is no longer in business and the name of which the Plaintiff did not recall. At a court conference on September 25, 2018 the Plaintiff was given leave to file and serve a motion for spoilation. The Plaintiff states that on September 26, 2018 they received from Defendant further responses to the Plaintiff's EBT Demands regarding tax withholdings and identifying three (3) employees.

Plaintiff claims that despite knowing the nature of the claims made by Plaintiff, the Defendant failed to preserve the "appropriate set of bar stools." The Plaintiff questions the fact that the Defendant kept the "bar stools" that there are photographs of, but for "an unstated reason" the Defendant left the rest of the stools at the restaurant when he closed the Defendant restaurant. Additionally, the Plaintiff contends that the Plaintiff has failed to provide an explanation as to why one set of chairs was kept, but the other stools were discarded. The

Plaintiff also states that no explanation has been provided indicating why one type of "barstool" was photographed and the other type was not. As a result, Plaintiff contends that the Defendant purposefully failed to include all the evidence sought by Plaintiff despite knowing that all the photographs were essential to the Plaintiff's case. According to Plaintiff, the conduct described above alone is a basis for the Court to strike Defendant's Answer.

Plaintiff's second argument in support of striking Defendant's Answer is that the fact that the "bar stools" are unavailable has resulted in a fatal compromise to the Plaintiff's ability to prosecute the instant action. According to the Plaintiff, the "barstool" that is the subject of the accident is "central factual evidence" in the instant case. Specifically, Plaintiff contends that she cannot be expected to prosecute the instant case without at least a photograph of the "instrumentality of the injuries." Further, Plaintiff states that the Defendant should not be able to benefit from their improper actions and resulting in a further prejudice to the Plaintiff. Therefore, the Plaintiff argues that the Defendant should be subject to sanctions. In the alternative to striking the Defendant's Answer, the Plaintiff seeks an order granting an adverse inference charge at trial regarding the Defendant's failure to preserve the "barstool in question."

The Plaintiff also seeks an order declaring that Defendant has waived its right to an Independent Medical Examination (hereinafter IME) since the Defendant has failed to demand an IME on several occasions. Specifically, the Plaintiff contends that in light of the Court's prior Court orders and the Defendant's failure to designate a doctor to examine the Plaintiff, the right to have the Plaintiff examined in an IME has been waived by Defendant. Plaintiff asserts that at the preliminary conference the undersigned ordered that the IME be completed by May 31, 2018 with the report exchanged by July 31, 2018. Plaintiff notes that at a conference on September 25, 2018 Defendant's counsel initially waived the IME, and the relief sought by Plaintiff now is only for a Court Order evidencing that waiver so that the Defendant si precluded from demanding an examination on the eve of trial.

In opposition, Defendant first opposes the Plaintiff's application for an order demonstrating that Defendant waived an IME in the instant action. Defendant's counsel admits that in Court before the undersigned on September 25, 2018 that based upon the "state of the current medicals" the Defendant will not conduct an IME. However, Defendant submits that if the Plaintiff produces new medical records or makes new claims that they intend on reserving

their right to have the Plaintiff appear for an IME. Defendant contends that the Plaintiff is not entitled to an order forever barring the Defendant's right to an IME, especially in a circumstance in which the Plaintiff changes her claims upon which she proceeds in the instant action or she produces new evidence.

As to the Plaintiff's application to strike the Defendant's Answer due to spoilation of evidence, the Defendant's make several arguments. The first argument is tantamount to law office failure, as they contend that upon checking through their file a second set of photographs were located which demonstrate "bar stools" with backs that were used at the high-top tables which are the subject of the instant action. Defendant's counsel "falls on the sword" indicating that he was confused thinking the instant action involved " bar stools" and therefore he provided the photographs of round top stools that were placed around the bar at the subject restaurant. According to Defendant's counsel he was "surprised" when he heard the testimony at Plaintiff's deposition in which she stated the photograph of the "bar stools" shown to the Plaintiff were the wrong "stools." Defendant's counsel continues stating his understanding of "bar stools" are stools that are used around a bar with no back and not straight back chairs. As a result, the Defendant has now handed over the photographs of the high backed chairs.

Based upon the handing over of the aforementioned photographs of the high back chairs, the Defendant asserts there is no spoilation of evidence issue before the Court. The Defendant also argues that a broken chair is not "key evidence" necessary to Plaintiff's case, since the Plaintiff failed to provide an appropriate identifying description of this "key evidence" from the outset of the instant action (i.e. in the Complaint). As to the relief sought of a negative inference, the Defendant argues that the Plaintiff has not established that the "broken chair" which was allegedly spoilated is relevant to the instant case. Defendant also argues that the broken chair is not "key evidence" as the Defendant asserts that there was never any broken chairs in his possession and he never disposed of any broken chairs when he closed the restaurant in 2017.

Plaintiff also contends that the Defendant testified in his EBT that he was at the restaurant on the evening of the accident, that he had no knowledge of the accident and only found out about the Plaintiff's accident when he received a letter of representation two (2) months after the subject accident. Defendant further testified at his EBT that the first time he saw the Plaintiff

was at her EBT in May 2018 and that he was never made aware that she was injured on the accident date. As such, the Defendant argues that as a result of the lack of knowledge of the incident there was no evidence to preserve. Defendant continues asserting that he had no broken chair which he disposed of and therefore he cannot be held to have spoilated something that never existed. Additionally, Defendant notes the letter he received and gave to his attorney from Plaintiff on March 2016 does not seek a specific instrumentality which caused the Plaintiff's injury to be preserved. The aforementioned letter was turned over by Defendant to his insurance company on April 3, 2016 and the notes from their contact with the Plaintiff's counsel indicates that the Plaintiff was seeking to preserve a "bar stool." As a result, Defendant argues that the limited information provided by Plaintiff created a difficulty for Defendant's counsel in determining what "instrumentalities" needed to be preserved.

In support of Defendant's argument that the Plaintiff's demands were imprecise and failed to provide sufficient information to the Defendant to ensure preservation, the Defendant notes that Plaintiff's Complaint filed in 2017 only identified the instrumentality of the accident as a "stool," with no other identifying information. In fact, Defendant contends that it was not until the Plaintiff's EBT in May 2018 that he became aware of the type of "stool" that the Plaintiff alleged she was seated upon. Additionally, Defendant submits that the Plaintiff did not exchange any photographs of the broken chair from which she fell, which would have assisted Defendant in identifying the item that Plaintiff wanted preserved. As to the remedy of striking the Defendant's pleading, the Defendant notes that striking of a pleading is an extreme remedy only employed when there is a clear showing of willful and contumacious conduct. The Defendant contends that he has not disregarded discovery orders in the instant action and in fact have been cooperative in discovery.

The Supreme Court is empowered with "broad discretion in determining the appropriate sanction for spoilation of evidence." [*De Los Santos v. Polanco*, 21 AD3d 397 (2d Dept 2005); *Dennis v. City of New York*, 18 AD3d 599, 600 (2d Dept 2005); *Barahona v. Trustees of Columbia Univ. of City of N.Y.*, 16 AD3d 445, 446 (2d Dept 2005); *Iamiali v. General Motors, Corp.*, 51 AD3d 635 (2d Dept 2008); *Allstate Ins. Co. v. Kearns*, 309 AD2d 776 (2d Dept 2003)]. The party requesting sanctions for spoilation has the burden of demonstrating that a party intentionally or negligently disposed of critical evidence. [*Kirschen v. Manno*, 16 AD3d

555, 555-556 (2d Dept 2005)]. The movant must also show the disposal of the evidence "fatally compromised its ability to defend [the] action." [*Lawson v. Aspen Ford, Inc.*, 15 AD3d 628, 629 (2d Dept 2005)].

"When a party negligently loses or intentionally destroys key evidence thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." [*Denoyelles v. Gallagher*, 40 AD3d 1027 (2d Dept 2007)]. Striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct. In determining whether to strike a pleading the courts must "consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." [*Iannucci v. Rose*, 8 AD3d 437, 438 (2d Dept 2004); *Favish v. Tepler*, 294 AD2d 396 (2d Dept 2002)]. In a circumstance where the moving party can still establish ir defend their case then a less severe sanction is more appropriate. [*De Los Santos v. Polanco*, 21 AD3d at 398; *Ifraimov v. Phoenix Indus. Gas*, 4 AD3d 332 (2d Dept 2004); *Mylonas v. Town of Brookhaven*, 305 AD2d 561 (2d Dept 2003); *Chiu Ping Chung v. Caravan Coach Co.*, 285 AD2d 621 (2d Dept 2001); *Klein v. Ford Motor Co.*, 303 AD2d 376 (2d Dept 2003)].

Here, Plaintiffs failed to demonstrate the Defendant's failure to preserve the alleged "broken bar stool" was done in bad faith or that the loss of those chairs rendered Plaintiffs unable to prove her claims. The Court is of the view that the most appropriate, although not the only, remedy under these circumstances is for the trial jury to receive the instruction set forth in New York Pattern Jury Instruction 1:77. The foregoing instruction will be given to the jury at the close of all trial evidence. The issues presented in this motion and it's opposition should be fully presented to the trial jury so that the jury can reach any conclusion which, under the circumstances and within the rule stated in Pattern Jury Instruction 1:77, it deems appropriate.

As to the issue of the IME, the Court recalls that the Defendant unequivocally waived their right to an IME indicating that the medical records did not necessitate same. Therefore, the Court finds that the Defendant waived the right to an IME. However, if the Plaintiff changes their theory of the action or provides medical records at a later time in the instant action which demonstrate the need for an IME, the Defendant has leave to make the appropriate application.

In arriving at this decision the Court has reviewed, evaluated and considered all of the

issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

ORDERED that the Plaintiff's Notice of Motion (Motion #2) is granted in part and denied in part consistent with the Order; and it is further

ORDERED that the Defendant has waived an IME in the instant action; and it is further

ORDERED that the Defendant has leave to file an appropriate application if the Plaintiff changes her theory of the action or produces medical records that would require the Defendant to seek an IME; and it is further

ORDERED that the parties are reminded of the Court's prior Order requiring a Note of Issue be filed by January 23, 2019, that all dispositive motions be filed by March 6, 2019 with a return date of April 5, 2019; and it is further

ORDERED that the parties are to appear for a conference on **APRIL 5, 2019 at 9:30 a.m.**

This constitutes the Decision and Order of the Court on Motion #2.

Dated: New City, New York
January 29, 2019

Hon. Thomas E. Walsh II, J.S.C.

To:

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(via e-file)

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