Fox v Equinox 63rd St. Inc.
2020 NY Slip Op 30583(U)
February 20, 2020
Supreme Court, New York County
Docket Number: 158666/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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REBECCA FOX

Plaintiff

Index No. 158666/2015
DECISION AND ORDER

EQUINOX 63RD STREET INC. D/B/A EQUINOX,

Defendant. MOT SEQ 003

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this personal injury action arising from a slip-and-fall accident in a women's steam room at a fitness center owned by the defendant, Equinox 63rd Street Inc., d/b/a Equinox, the plaintiff, Rebecca Fox, moves to strike the defendant's answer or, alternatively, for other sanctions, for spoliation of evidence as the defendant renovated the subject steam room and replaced the steam unit five years after the accident but prior to any inspection by the plaintiff. The defendant opposes the motion. The plaintiff's motion is granted in part.

II. BACKGROUND

The plaintiff claims that on May 20, 2013, she sustained serious head injuries when she slipped and fell in the women's steam room at the defendant's fitness center. She commenced this

action more than two years later on August 20, 2015, alleging that she slipped and fell as a result of liquid and foreign substances on the floor of the steam room, a defective drain, and leaking water from the steam unit.

On December 2, 2015, the plaintiff served discovery demands which did not include a demand seeking to inspect the women's steam room. On July 7, 2016, the parties appeared for a preliminary conference. The plaintiff did not request to inspect the women's steam room at that time. On October 19, 2016, the plaintiff was deposed. During her deposition she authenticated and testified about the 27 photographs of the women's steam room that she had taken after her accident. In three subsequent compliance conferences on November 17, 2016, March 2, 2017, and September 7, 2017, the plaintiff also did not request to inspect the women's steam room.

On February 13, 2018, two weeks after the expiration of the Note of Issue deadline and almost three years after discovery commenced, the plaintiff sent a letter to the defendant stating that it would like to schedule an expert inspection of the steam room. On March 8, 2018, the parties appeared for a status conference. The March 8, 2018 order by this court required the plaintiff to conduct an inspection of the steam room during Equinox's non-business hours on or before June 30, 2018. The plaintiff then failed to inspect the steam room by June 30, 2018.

On or about August 6, 2018, the defendant's parent company, Equinox Holdings, Inc., through its construction department, commenced a scheduled renovation of the women's locker room, including the steam room. The senior project manager for the construction department, Oscar Barrientos, avers that he was unaware of this action when he commenced the renovation. On August 16, 2018, the parties appeared for another conference before the court. The court's August 16, 2018 order provided the plaintiff with an additional 45 days to inspect the steam room. The defendant avers that at the time of the August 16, 2018 conference, counsel for the defendant was unaware of the renovation.

The plaintiff did not attempt to schedule an inspection within the 45 days provided in the August 16, 2018 order, but rather moved to strike the defendant's answer for failure to comply with other outstanding discovery demands. On November 14, 2018 the court denied the plaintiff's motion in its entirety based upon the plaintiff's failure to fully comply with her discovery obligations. The November 14, 2018 order directed the defendant to provide the plaintiff with photos depicting the make and model of the steam unit in place at the time of the plaintiff's incident. Counsel for the defendant represents that he first learned of the steam room renovation when he went to the defendant's gym to take those photographs.

III. DISCUSSION

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (Kirkland v New York City Housing Auth., 236 AD2d 170, 173 [1st Dept. 1997]), and after being placed on notice that such evidence might be needed for future litigation. See New York City Housing Auth. v Pro Quest Security, Inc., 108 AD3d 471 (1st Dept. 2013); Sloane v Costco Wholesale Corp., 49 AD3d 522 (2nd Dept. 2008). The court has "broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation...or employing an adverse inference instruction at the trial of the action." Ortega v City of New York, 9 NY3d 69, 76 (2007); VOOM HD Holdings LLC v Echostar Satellite LLC, 93 AD3d 33 (1st Dept. 2012); Gogos v Modell's Sporting Goods, Inc., 87 AD3d 248 (1st Dept. 2011); General Security Ins. Co. v Nir, 50 AD3d 489 (1st Dept. 2008).

> "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness.

> The burden is on the party requesting sanctions to make the requisite showing."

Duluc v AC & L Food Corp., 119 AD3d 450, 451-452 (1st Dept. 2014) (some internal quotation marks omitted); see VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra; Mohammed v Command Sec. Corp., 83 AD3d 605 (1st Dept. 2011); Ahroner v Israel Discount Bank of N.Y., 79 AD3d 481 (1st Dept 2010); Standard Fire Ins. Co. v Federal Pac. Elec. Co., 14 AD3d 213 (1st Dept. 2004).

However, "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct." Iannucci v Rose, 8 AD3d 437, 438 (2nd Dept. 2004); see Melcher v Apollo Medical Fund Mgt. LLC, 105 AD3d 15 (1st Dept. 2013); Russo v BMW of North America, LLC, 82 AD3d 643 (1st Dept. 2011). Moreover, the sanction of the striking of an answer is warranted only where the alleged spoliation prevents the movant from inspecting a key piece of evidence which is crucial to the movant's case or defense (see Bach v City of New York, 33 AD3d 544 [1st Dept. 2006]; Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Inc., 221 AD2d 243 [1st Dept. 1995]; Verizon New York, Inc. v Consol. Edison, Inc., 44 Misc 3d 1206(A) [Sup Ct, NY County 2014]), or has left the movant "'prejudicially bereft' of the means of presenting their claim." Kirkland v New York City Housing Auth., supra at 174, *quoting* Hoenig, Products Liability, Impeachment Exception: Spoliation Update, NYLJ, Apr.

12, 1993, at 6, col 5; see Canaan v Costco Wholesale Membership, Inc., 49 AD3d 583 (2nd Dept. 2008). That is not the case here.

The plaintiff has not demonstrated that the defendant's failure to preserve the subject steam room and equipment constituted willful and contumacious conduct or left her "prejudicially bereft" of a means to present her claims. To the contrary, the proof submitted on this motion demonstrates that the defendant renovated the locker room and steam room and replaced the steam unit in the normal course of business as part of the renovation schedule of non-party Equinox Holdings, Inc., the parent company of the defendant. Most importantly, the defendant did not do so for more than five years after the plaintiff's accident. Clearly then, the renovation and disposal of the steam unit can not reasonably be viewed as any deliberate attempt to destroy evidence. At best, the proof may show a negligent spoliation on the part of the defendant. See Scholastic, Inc. v Pace Plumbing Corp., 129 AD3d 75 (1st Dept. 2015); Strong v City of New York, 112 AD3d 15 (1st Dept. 2013). "For the purposes of a spoliation sanction, 'a culpable state of mind ... includes ordinary negligence.'" New York City Housing Auth. v Pro Quest Security, Inc., supra at 473.

Moreover, the plaintiff herself did not seek any inspection of the steam room and unit until 2018, five years after the accident. Nor has she shown that having her expert inspect the

steam room and unit in 2018 would result in such a "key" piece of evidence and so crucial to her claim that its absence leaves her "prejudicially bereft" of a means of presenting that claim so as to warrant striking the answer. Kirkland v New York City Housing Auth., supra at 174; compare Verizon New York, Inc. v Consol. Edison, Inc., supra [plaintiff discarded telecommunications cable it claimed was damaged by stray voltage from defendants' underground equipment]. The plaintiff herself can testify as to the general condition of the steam room, the purportedly dangerous condition created by a leaking steam unit and defective drainage system, and the manner in which her accident occurred. In addition, there is other proof as to the condition of the steam room, including employee testimony. Therefore, a sanction striking the defendant's answer is not warranted.

However, a lesser sanction would be appropriate under the circumstances. The defendant was on notice of this serious accident itself from the date it occurred, and knew or should have known that the steam room and equipment, or at least information regarding or photographs of the steam room and equipment would be relevant to any litigation. Indeed, such information and evidence became the subject of discovery orders issued by this court. Thus, the defendant should have made efforts to preserve the evidence in some manner. As such, the court concludes that preclusion of certain evidence at trial is

warranted. That is, the defendant shall be precluded from offering evidence at trial to show that the steam unit and/or steam room were in good working order and/or were properly maintained on the time of the plaintiff's accident. This sanction "precludes [the defendant] from using plaintiff's lack of evidence to its own advantage" and is sufficiently "tailored to restore balance to the matter." Baldwin v Gerard Ave., LLC, 58 AD3d 484,485 (1st Dept. 2009); see Ortega v City of New York, supra.

IV. CONCLUSION

For the reasons stated herein, the plaintiff's spoliation motion is granted to the extent that the defendant is precluded from offering certain evidence at trial.

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3126 is granted to the extent that the defendant shall be precluded from offering evidence at trial to show that the steam unit and/or steam room were in good working order and/or were properly maintained at the time of the plaintiff's accident; and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: February 20, 2020 ENTER: HON. NANCY M. BANNON J.S.C.