

<b>Moiseyeva v New York City Hous. Auth.</b>
2020 NY Slip Op 30905(U)
March 16, 2020
Supreme Court, Kings County
Docket Number: 502006/2013
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16<sup>th</sup> day of March 2020.

P R E S E N T:

HON. LARA J. GENOVESI,  
J.S.C.

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VIRA MOISEYEVA,

Index No.: 502006/2013

Plaintiff,

DECISION & ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY AND  
THE CITY OF NEW YORK

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Memoranda Annexed _____	_____ 56 – 73 _____
Opposing Affidavits (Affirmations) _____	_____ 89 - 105 _____
Reply Affidavits (Affirmations) _____	_____ 107 _____
<u>Other Papers: Sup. Ct. Decision, App.Div.Decision</u> _____	_____ 111, 115 _____

***Introduction***

Defendant, New York City Housing Authority (NYCHA), moved by notice of motion, sequence number five, pursuant to CPLR §§ 3212 and 3126 granting summary judgment and dismissing plaintiff's complaint and all-cross claims against it, and such

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other relief as the court deems just and proper. Plaintiff, Vira Moiseyeva, opposed this application.

On December 16, 2016, the branch of defendant's motion seeking summary judgment was granted by this Court. In a short form order, dated same, this Court held that since plaintiff could not identify what caused her to trip and fall without resorting to speculation, defendant NYCHA was entitled to summary judgment (*see* NYSCEF Doc. # 111).<sup>1</sup>

Plaintiff appealed this Court's decision on December 23, 2016. On September 25, 2019, the Appellate Division, Second Department, reversed, holding that "NYCHA failed to establish, *prima facie*, that the plaintiff could not identify the cause of her fall . . . . Contrary to NYCHA's contentions, the alleged failure of the plaintiff and Galina to identify the exact location of the plaintiff's alleged fall on a photograph shown at their depositions and hearings pursuant to General Municipal Law § 50-h, which photograph was taken the day after the alleged accident occurred and after NYCHA had allegedly covered the subject part of the sidewalk with plywood, did not establish, *prima facie*, that the plaintiff is unable to identify the cause of her fall" (*Moiseyeva v. New York City Hous. Auth.*, 175 A.D.3d 1527, 109 N.Y.S.3d 370 [2 Dept., 2019]).

The Appellate Division, Second Department, further remitted the matter to this Court "for a determination on the merits of that branch of NYCHA's motion which was pursuant to CPLR § 3126 to dismiss the complaint insofar as asserted against it" (*id.*).

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<sup>1</sup> This Court notes that defendant the City of New York's cross-motion for summary judgment was granted on December 16, 2016 (*see* NYSCEF Doc. # 110).

The parties now appear on that branch of motion sequence five, to dismiss the complaint and all cross claims pursuant to CPLR § 3126; specifically, the notice to produce a disc of photographs and a supplemental bill specifying the location of plaintiff's fall.

### *Background*

Plaintiff commenced this personal injury action when she allegedly tripped and fell on a sidewalk/walkway outside of a NYCHA building on August 23, 2012.

Plaintiff resided at the NYCHA apartment building with her daughter Galina and grandson Yaroslav. Plaintiff testified that she fell on the path that leads to the building (*see* NYSCEF Doc. # 62, Plaintiff 50-H Transcript at 34). A person that plaintiff does not know took photographs of the defect on the day she fell. When she returned home from the hospital, the sidewalk defect was already repaired. At her examination before trial (EBT), plaintiff marked a photograph of a large piece of wood and said that she fell on "this plate" (NYSCEF Doc. # 65, Motion, Exhibit G). She testified that she did not know the exact place. On the errata sheet she specified that she did not fall on the wood, but rather, that the plywood was covering the defect and she did not understand the translator.

At her 50-h hearing, plaintiff states that she fell on something like a piece of wood or a raised edge, or some stones. She admitted that she did not see what caused her to trip. Three photographs were marked at plaintiff's 50-H hearing. Plaintiff provided two photographs which he identified as having been marked at plaintiff's 50-H (*see* Opposition, Exhibit 4 & Exhibit 6). One photograph, marked as 4/18/13, Exhibit C depicts the area covered by a piece of plywood (*see id.* at Exhibit 6). The second

photograph, which has no indication that it was marked as an exhibit, depicts a cracked sidewalk (*see id.* at Exhibit 4). It is unclear from the testimony who took these photographs.

Galina, plaintiff's daughter, testified at an EBT on January 14, 2015 (*see* NYSCEF Doc # 66, Motion, Exhibit H).<sup>2</sup> She testified that she was looking ahead at the time of the accident, but that she knows her mother tripped on a crack or gap in the pathway. Galina testified that her mother walked on the right side of the path when she fell, but Galina marked the center of the path as the defect which caused her mother's fall. Galina testified that on the day of the accident, she took two photographs of the location where her mother fell (*see id.* at 103). During her deposition, counsel requested that Galina e-mail the two photographs which were on her cellular phone to counsel. Galina immediately complied and e-mailed them (*see id.* at 106). She further testified that her lawyers came and took photographs the day after the accident. Galina reported the incident to the NYCHA office.

At approximately 6:00 a.m., on the morning after the accident, Galina saw the defect while she was leaving to go to work. Upon returning home, the pathway was covered by a piece of plywood (*see* NYSCEF Doc. # 67-68, Motion, Exhibits H1, H2). Her son, Yaroslav, informed her that NYCHA "urgently" began repairing the pathway at

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<sup>2</sup> This Court notes that defendant annexed excerpts of plaintiff's 50-h hearing, as well as Galina, Yaroslav and non-party Wendy Feliciano's EBT transcripts to their moving papers. However, plaintiff annexed full transcripts in opposition. This Court further notes that plaintiff's copy of the 50-h hearing transcript only includes even numbered pages. Neither party provided all photographs marked at each deposition or hearing.

9:00 a.m. the day after the accident (*see* EBT at 109). Galina marked photographs at her deposition, that she believes her lawyer took the day after the accident. These photographs depict the “wooden plank” or piece of plywood that was purportedly placed by NYCHA the day after the accident. The photographs depict an interior pathway within the NYCHA property, not an exterior sidewalk. Galina testified that the path leads up to the main entrance to the premises (*see id.* at 75). Galina further testified that neighbors took photographs of the location on the day of the accident, which actually show the defect. These photographs were given to her son on a compact disc and forwarded to her mother’s attorney.

Yaroslav testified at an EBT on January 14, 2015 (*see* NYSCEF Doc # 69, Motion, Exhibit I; NYSCEF Doc. # 100, Opposition, Exhibit 10). He testified that NYCHA began to repair the pathway the day after the accident and a wooden board was installed over the area (*see id.* at 40). Yaroslav further testified that a neighbor took photographs with a digital camera after the accident. She put the photographs on a disc and Yaroslav picked up the disc from the neighbor. He testified that he made copies of the photographs and gave everything to plaintiff’s attorney’s office. Yaroslav testified that there are three pathways from the main entrance of the building to the sidewalk. He was shown a google maps photograph of the front of the building, and marked the location where plaintiff fell. He marked the pathway to the left of the main entrance door and testified that he believes she fell near the third bench from the entrance (*see id.* at 25; *see* NYSCEF Doc. # 101, Exhibit 11, Photograph).

Wanda Feliciano testified at an EBT on January 13, 2015 (*see*, NYSCEF Doc. # 102, Opposition Exhibit 12). She was outside of the premises when the accident occurred, but she did not see how it happened (*see id.* at 46). She went over and helped plaintiff get up. She visits the premises daily and testified that the building has a front and a rear entrance. There are three pathways that lead to the front door of the building (*id.* at 20). She marked a photograph of the location of the accident which shows that plaintiff fell (*see* NYSCEF Doc. # 103, Opposition, Exhibit 13). She testified that plaintiff fell on the walkway to the left of the front door of the premises (*see* EBT at p 52-53).

### *Discovery*

The day after Galina and Yaroslav's EBTs, defendants sent a notice to produce the disc of photographs dated January 15, 2015. A response to the notice to produce was requested on: (1) March 17, 2015 in a compliance conference order; (2) July 7, 2015 in a compliance conference order; (3) January 6, 2016 cross-motion (sequence number two) to compel discovery; (4) in the January 13, 2016 order requiring production within 20 days; and (5) April 4, 2016 motion (sequence number three) to vacate the note of issue and compel discovery. Plaintiff responded to the notice to produce on April 7, 2016, stating that "plaintiff is not in possession of the CD containing the photograph of the defect upon which plaintiff fell on 08/23/2012" (NYSCEF Doc # 44). Thereafter, plaintiff opposed motion sequence three, arguing that all discovery has now been provided, rendering the motion moot (*see* NYSCEF Doc. # 45). Defendant asserts herein

that plaintiff annexed one of the photographs taken by Galina in opposition to that motion (see NYSCEF Doc. # 57, Motion at ¶ 31).

In the demand for a bill of particulars, defendant asked for “the location of the occurrence alleged in the Complaint including distances from identifiable points of reference, with sufficient detail to permit accurate identification” (NYSCEF Doc. # 47). In the verified bill of particulars, plaintiff stated that “the occurrence took place on the sidewalk and/or walkway leading to the entrance of the premises” (NYSCEF Doc. # 33 at ¶ 2). Defendant requested a supplemental bill of particulars clarifying the location of the accident on the following occasions: (1) July 2, 2014 preliminary conference order; (2) March 17, 2015 compliance conference order; (3) July 7, 2015 compliance conference order; (4) January 6, 2016 cross-motion to compel discovery; (5) January 13, 2016 order directing service within 20 days; and (6) April 4, 2016 motion to vacate the note of issue and compel discovery. Plaintiff served the supplemental bill of particulars on April 15, 2016, which stated “Plaintiff was caused to trip and fall due to a broken, defective, cracked, uneven, irregular, unlevel, dangerous and/or hazardous segment of sidewalk/walkway on the date of the accident” (NYSCEF Doc. # 45, Exhibit B at ¶ 4). Thereafter, plaintiff opposed motion sequence three to vacate the note of issue and to compel, arguing that discovery is now complete, rendering the motion moot.

This action was commenced by filing the summons and complaint on April 20, 2013. Issue was joined by service of NYCHA’s answer on or about May 21, 2013. Plaintiff filed the note of issue with a certificate of readiness for trial on March 16, 2016. There is no reservation of rights as to any outstanding discovery.

The Appellate Division, Second Department decision was issued on September 25, 2019. This Court notes that after this matter was remanded to this Court for decision on that branch of the motion to dismiss the complaint pursuant to CPLR § 3126, plaintiff exchanged correspondence with a supplemental response to defendant's combined demands dated December 10, 2019 that includes the disc of photographs and color copy prints. The attorney's affirmation attached thereto provides "[u]pon a further search of our firm's computer back-up database conducted on December 10, 2019; the attached photographs were located relating to the above-captioned matter" (*see* NYSCEF Doc. # 118).

In a letter dated January 8, 2020, defendant provided this Court with a copy of plaintiff's supplemental response to defendant's combined demands. In this correspondence, defendant set forth arguments related to the motion, requesting that this Court to reject the photographs. Plaintiff responded by letter dated January 13, 2020. This Court notes that neither party requested the opportunity to supplement the moving papers.

### *Discussion*

#### *CPLR § 3126 Penalties for refusal to comply with order or to disclose*

Defendant argues that "plaintiff's obstructive failure to provide critical evidence has resulted in spoliation of evidence warranting dismissal of the complaint" (NYSCEF Doc. # 81, Memorandum of Law in Support at 9).

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126"

(*Holland v. W.M. Realty Mgt., Inc.*, 64 A.D.3d 627, 629, 883 N.Y.S.2d 555). “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 N.Y.3d 543, 547, 26 N.Y.S.3d 218, 46 N.E.3d 601 [internal quotation marks omitted]; see *Cannella v. Spector*, 167 A.D.3d 840, 841, 88 N.Y.S.3d 349). “ ‘Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness’ ” (*Jennings v. Orange Regional Med. Ctr.*, 102 A.D.3d 654, 655–656, 958 N.Y.S.2d 168, quoting *Iannucci v. Rose*, 8 A.D.3d 437, 438, 778 N.Y.S.2d 525). “[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case” (*Denoyelles v. Gallagher*, 40 A.D.3d 1027, 1027, 834 N.Y.S.2d 868).

(*N.H.R. v. Deer Park Union Free Sch. Dist.*, -- A.D.3d --, 2020 N.Y. Slip Op. 01099 [2 Dept., 2020]).

Defendant further argues that plaintiff acted willfully and contumaciously in their repeated failure to provide the requested discovery. “A court may dismiss an action if a party refuses to obey an order directing disclosure or willfully fails to disclose information (see CPLR 3126[3]). Although courts should resolve actions on the merits when possible, “a court may strike [a pleading] upon a clear showing that [a party’s] failure to comply with a disclosure order was the result of willful and contumacious conduct” (*Marino v. Armogan*, -- A.D.3d --, 113 N.Y.S.3d 613, [2 Dept., 2020], quoting

*Corex-SPA v. Janel Group of N.Y., Inc.*, 156 A.D.3d 599, 66 N.Y.S.3d 509 [2 Dept., 2017]).

“Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court” “Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed”

“ [B]efore a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” “A court can infer that a party is acting willfully and contumaciously through the party's repeated failure to respond to demands or to comply with discovery orders”

(*Vays v. Luntz*, -- A.D.3d --, 113 N.Y.S.3d 556 [2 Dept., 2020])<sup>3</sup>.

Here, defendant contends that plaintiff acted willfully and contumaciously with respect to two items: a supplemental bill of particulars and the disc of photographs. With respect to the former, the demand for a bill of particulars sought “the location of the occurrence alleged in the Complaint including distances from identifiable points of reference, with sufficient detail to permit accurate identification” (NYSCEF Doc. # 47). The bill of particulars stated that plaintiff fell on the “sidewalk and/or walkway leading to the entrance of the premises” (NYSCEF Doc. # 61 at ¶ 2). The supplemental bill of particulars provided that “[p]laintiff was caused to trip and fall due to a broken, defective,

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<sup>3</sup> In *Vays v. Luntz*, on November 29, 2016, defendant first requested discovery. A letter and a conversation followed. On April 12, 2017, plaintiff first responded. Thereafter, the court granted defendant's motion to the extent that plaintiff was precluded from offering at trial or in support of a dispositive motion, any evidence not produced in the subject responses.

cracked, uneven, irregular, unlevel, dangerous and/or hazardous segment of sidewalk/walkway on the date of the accident” (NYSCEF Doc. # 45, Exhibit B at ¶ 4).

Although, there were four court orders and two motions prior to plaintiff providing a supplemental bill of particulars, it is clear from all of the EBT testimony and the photographs marked at all of the EBTs, that the defective condition was located in the interior walkway to the left of the main entrance to the premises, near approximately the third bench from the door. Defendant would not have had the opportunity to examine the defect in person since NYCHA immediately repaired the alleged defect the very next day. Accordingly, defendants were not prejudiced by plaintiff’s response to the demand for a supplemental bill of particulars.

With respect to the photographs, defendant argued in its 2016 motion that,

“NYCHA has obviously been prejudiced by plaintiff’s failure to turn over the CD of photographs. Plaintiff’s daughter and Grandson both claim that the photographs were taken of the accident location immediately after the accident. As the condition of the sidewalk has changed in the interim, the loss of the CD has caused irreparable harm to NYCHA’s defense, and the Complaint and cross-claims should be dismissed”

(NYSCEF Doc. # 81, Memorandum of Law in Support at 14).

Presently, there are two issues before this Court. First, is the question of whether defendants can be prejudiced when Galina took who photographs of the defect prior to the repair, which were exchanged at Galina’s EBT. Defendant concedes that this is the photograph annexed as Exhibit 3 to plaintiff’s opposition (*see* Affirmation in Reply at ¶ 25). However, defendant is correct that this photograph provides no identifying

landmarks and as far as this Court can tell from the testimony provided herein, is unauthenticated.

The second issue relates to the disc of photographs taken by the neighbor. It is clear that plaintiff's failure to timely provide the photographs was willful and contumacious. The disc of photographs was the subject of three court orders and two motions to compel, prior to plaintiff's April 7, 2016 response. At that time, plaintiff stated that the disc of photographs was not in their possession. However, in 2019, upon "further search" of the firm's backup database, the photographs were located. Plaintiff's initial delay alone in responding to defendant's notice to produce was willful and contumacious.

This Court would be remiss if it were to ignore plaintiff's behavior. "The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 942 N.E.2d 277 [2010]). However, striking a pleading is a drastic sanction and the court must consider the prejudice to defendant. Presently, defendants have the photographs, as they were finally recovered and exchanged in 2019. Based on the record before this Court, it is unclear how NYCHA is "irreparably harmed". It is unclear how NYCHA is prejudiced by the delay in receipt of the photographs, since the

sidewalk defect was repaired by NYCHA the day after the accident. This Court is wary to impose an alternative sanction that may also serve to hinder defendant in their defense of this action. Accordingly, based on the record before this Court, defendant's motion to strike plaintiff's answer is denied.

**Conclusion**

That branch of defendant's motion pursuant to CPLR § 3126 to strike plaintiff's complaint and all cross claims is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi  
J.S.C.

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