

Black v Medical Chem. Corp.
2020 NY Slip Op 31761(U)
June 5, 2020
Supreme Court, Kings County
Docket Number: 524774/2018
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of June, 2020.

P R E S E N T:

HON. KATHY J. KING,

Justice.

----- X

Jason Black,

Plaintiff,

- against -

Medical Chemical Corp., EK Industries Inc. & Henry Schein Inc.

Defendants.

----- X

The following papers number 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-2, 3-4, 5-6
7
8, 9

Upon the foregoing papers, defendant Henry Schein (“Schein”) moves to dismiss plaintiff’s complaint with prejudice, pursuant to CPLR 3211(a)(7) on the ground of spoliation of evidence (Mot. Seq. No.1). Defendants EK Industries (“EK”) and Medical Chemical Corp. (“MCC”)¹ (“collectively defendants”), respectively, cross move to dismiss plaintiff’s complaint

¹ MCC joins, adopts and incorporates by reference all factual allegations, arguments, exhibits and Memorandum of Law made by defendant Henry Schein, Inc. EK’s arguments in support of its cross motion, essentially mirrors the arguments of MCC and Schein.

with prejudice, pursuant to CPLR 3211(a)(7) (Mot. Seq. No. 2 and Mot. Seq. No. 3). Plaintiff Jason Black submits opposition to the motion and respective cross motions.

Plaintiff commenced the within action against defendants alleging personal injuries arising from exposure to fumes and liquids of a chemical known as Formalin. The underlying incident took place on July 25, 2017 when plaintiff was working as a driver for the United Parcel Service. On the date of the incident, plaintiff was delivering a package containing jars or containers of Formalin to 318 Warren Street, Brooklyn, NY, which is a veterinary clinic owned and operated by VERG. Upon plaintiff's arrival to VERG, he discovered that the package was leaking and damp. Plaintiff alleges that the liquid leaked out of the package causing burning and irritation to his eyes and skin. After delivering the package to VERG personnel, he notified his supervisor of the incident, who arrived at the scene and took pictures. Plaintiff contends that by the time his supervisor arrived, VERG personnel put the leaking package in a black plastic bag to be disposed of. On September 29, 2017, plaintiff's counsel served a claim letter on defendants, and on October 11, 2017, upon request by defendants, plaintiff's counsel provided photographs of the Formalin jar, cardboard packaging, the UPS shipping label affixed to the cardboard packaging, and the Material Safety Data Sheet for the Formalin chemical. Plaintiff did not respond to defendants' subsequent demand for the preservation and maintenance of evidence, specifically the Formalin jars and cardboard shipping box.

Defendants claim that plaintiff spoiled key evidence and argue that if the within motion and cross motions to dismiss are not granted, they will be prejudiced in preparing their defense. Defendants further contend that after taking the photographs, plaintiff had a duty to preserve the physical evidence that was photographed in anticipation of litigation. In opposition, plaintiff

argues spoliation sanctions would be inappropriate since, upon delivery to VERG, plaintiff relinquished control of the package in question.

Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence (*see* CPLR 3126; *see Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 713-714 [2d Dept 2013]. The case law is well settled that the determination of the appropriate sanction for spoliation is within the broad discretion of the court (*see Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *see Denoyelles v Gallagher*, 40 AD3d 1027 [2d Dept 2007]). “The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and ‘fatally compromised its ability to’” prove its claim or defense (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2d Dept 2009], quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2d Dept 2005]).

Here, defendants argue that the Court should be guided by the holding in *Horace Mann Ins. Co. v E.T. Appliances*, 290 AD2d 418 [2d Dept 2002]. In *Mann*, despite a directive in a preliminary order, and repeated requests by defense counsel, plaintiffs disposed of a stove which was a critical piece of evidence in the case. The Appellate Division, in reversing the Supreme Court, granted defendant’s motion to dismiss the complaint, based on spoliation, noting that plaintiffs’ expert had an opportunity to inspect the stove putting plaintiff on notice that it might be needed for future litigation. However, unlike *Mann*, prior to commencement of the within action, plaintiff put defendants on notice that neither plaintiff’s firm nor plaintiff had possession of the Formalin jars, shipping box, or shipping label. Significantly, the Court notes that after plaintiff took photographs, VERG took custody, control and possession of the package containing the Formalin, therefore, the duty to preserve did not attach (*see Neve v City of New York*, 117 AD3d

1006 [2d Dept 2014]). Since the disposal of the package was outside the control of plaintiff's counsel, the Court finds that defendants have failed to make a showing of willful or contumacious conduct on behalf of plaintiff.

Additionally, the Court finds that defendants would not be prejudiced by the unavailability of the physical evidence in question. Photographs of the packaging and container, including the shipping label, were taken by plaintiff's supervisor, contemporaneous with the incident, and are available for examination by defendants. Further, defendants will have the opportunity to depose plaintiff. Given the facts in the case at bar, the Court finds that the imposition of sanctions for spoliation are not warranted.

Based on the foregoing, the motion and cross motions are denied in their entirety.

This constitutes the decision/order of the Court.

ENTER,



HON. KATHY J. KING
J.S.C.