

Velesaca v Metropolitan Transp. Auth.

2020 NY Slip Op 34152(U)

December 8, 2020

Supreme Court, New York County

Docket Number: 106644/2011

Judge: Suzanne J. Adams

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART IAS MOTION 21

Justice

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JULIO VELESACA, THERESA VELESACA

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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INDEX NO. 106644/2011
MOTION DATE N/A
MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, it is ordered that plaintiff's motion is granted to the extent that at the time of trial in this action, there will be a missing documents/spoliation charge against defendants, and defendants will not be permitted to put forth any evidence or arguments pertaining to any and all data that would have been contained in certain event recorder units, as described hereinafter, and which were not provided during discovery. The remainder of plaintiffs' motion is denied.

This matter arises out of an incident that occurred on January 28, 2011, at the Lexington Avenue/77th Street subway station in Manhattan. Plaintiff Julio Velesaca fell to the tracks of the southbound #6 subway and was run over by a train, losing both his legs above the knee. The train at issue was comprised of two five-car units; each unit was equipped with two event recorder units, for a total of four event recorder units on the train. (Affidavit of Barbara Grieco, Exhibit D to the moving papers, ¶¶ 6, 7) The event recorder units contain information regarding

the train's speed, brake functionality, emergency brake application, distanced travelled between braking and stopping, and other pertinent information. (See Exhibit E to the moving papers) Defendants' internal procedures require that in instances of serious customer injuries, data from the event recorder units must be downloaded by the appropriate maintenance shop, which then transmits the digital data to the Office of Emergency Response (part of the Rail Control Center). The Rail Control Center then forwards the data to the Car Equipment Engineering and Technical Support department, which then sends the information to the Torts Division of defendants' Law Department. (Feil Memo, Exhibit F, and Affidavit of Steven C. Tu, Exhibit G, to the moving papers; Affirmation in Opposition, ¶¶ 19, 20) In the course of discovery, plaintiffs sought to obtain from defendants the data downloaded from the four event recorder units on the subject train. However, the only data that was produced to plaintiffs was a four-page document that reflects a six-minute period of recorded data from one of the four event recorder units on the subject train. (Exhibit E to the moving papers) Defendants admit that, contrary to their own protocols, the digital information from the event recorder units at issue was never transmitted from the maintenance shop to the appropriate departments and was thereafter lost, but for the four-page document provided to plaintiffs. (Tu Affidavit, Exhibit G, and Affidavit of George Herrera, Exhibit I, to the moving papers; Affirmation in Opposition, ¶¶ 5, 42- 44)

Plaintiffs now move pursuant to CPLR § 3126 to strike defendants' answer because of defendants' alleged spoliation of evidence or to preclude defendants from offering any evidence of downloadable electronic data contained in the event recorder units on the date of the incident, including, but not limited to, the train's movement, speed, brake application times, brake cylinder pressure and the times when the train went into emergency brake application. Plaintiffs maintain that the alleged spoliation was willful, and that the absence of the evidence sought by

plaintiffs prejudices and compromises their ability to prove their claims in this action. Defendants oppose the motion, stating that the failure to obtain the digital information (other than the four pages of data that was produced to plaintiffs) was not intentional, and that plaintiffs are not compromised in proving their case because the alleged spoliated evidence is not the sole means to do so. Defendants cite other discovery exchanged in the action, and note that data from event recorder units could not in any event establish significant issues, such as where on the subway platform plaintiff Julio Velesaca was located when he fell to the tracks. (Affirmation in Opposition, ¶ 91) Defendants also note that similar cases involving an individual being struck by a subway train have been tried where the train in question was an older model that did not have event recorder units. (Affirmation in Opposition, ¶ 93)

Where there has been spoliation of evidence, a court has broad discretion to determine the appropriate sanction, and those outlined in CPLR § 3126 have been used as a guideline. *Ortega v. City of New York*, 9 N.Y.3d 69 (2007); *Neve v. City of New York*, 117 A.D.3d 1006 (2d Dep't 2014). "The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party." *Samaroo v. Bogopa Service Corp.*, 106 A.D.3d 713, 714 (2d Dep't 2013); *Neve*, 117 A.D.3d at 1008. The party seeking sanctions has the burden of proving that the spoliation was intentional or negligent, and that it fatally comprised the party's ability to prove its claim or defense. *Id.* at 1008 (citing *Utica Mutual Insurance Co. v. Berkoski Oil Co.*, 58 A.D.3d 717 (2d Dep't 2009)). When a party negligently or intentionally disposes of key evidence and deprives the non-responsible party from proving its claim or defense, the spoliator may be subject to having its pleadings stricken. *Utica Mutual*, 58 A.D.3d at 718. However, as the striking of a pleading is a

drastic sanction, in the absence of willful behavior, or where the non-responsible party is still able to establish or defend a case, the sanction may be less severe. *Id.* at 718; *see also, Klein v. Ford Motor Co.*, 303 A.D.2d 376, 377 (2d Dep't 2003) ("Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate"). Sanctions under the statute include "an order prohibiting the disobedient party from supporting or opposing designated claims or defenses." CPLR § 3126(2).

The evidence before the court does not establish that defendants acted willfully in failing to obtain and preserve the now-missing digital information from the event recorder units. Contrary to defendants' position, however, they were under an obligation to preserve the electronic evidence at issue even before litigation commenced. Both the nature of injuries alleged, and defendants' own protocols regarding incidents such as this one, should have led defendants to reasonably anticipate a lawsuit. *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 48 (1st Dep't 2012); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted to the extent that at the time of trial, there will be a missing documents/spoliation charge against defendants, and defendants will not be permitted to offer any evidence of downloadable electronic data contained in the event recorder units on the date of the incident, including, but not limited to, the train's movement, speed, brake application times, brake cylinder pressure and the times when the train went into emergency brake application, other than what has already been produced by defendants in disclosure; and it is further

ORDERED that the remainder of plaintiffs' motion is denied.

This constitutes the decision and order of the court.



12/8/2020
DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE