

Garcia v Rainbow Ambulette Serv. Inc.

2020 NY Slip Op 35682(U)

November 10, 2020

Supreme Court, Bronx County

Docket Number: Index No. 30354/2018E

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

C E# 002

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

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JOSE GARCIA

Index No.: 30354/2018E

Plaintiff

-against-

Hon. BEN R. BARBATO

RAINBOW AMBULETTE SERVICE INC. and
"RICKY SHELBY" intended to be the driver

Justice Supreme Court

Defendants

-----X

SUPREME COURT OF THE STATE OF NEW
YORK COUNTY OF BRONX

-----X

RAINBOW AMBULETTE SERVICE INC.,

Third-Party Plaintiff,

-against-

NATIONAL HOME HEALTH CARE-QUEENS,
ALLEN HEALTH CARE SERVICES, INC., and
LAURA MATA GUEVARA

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The following NYSCEF docs numbered papers numbered 29 to 42 were read on this motion (NYSCEF and CASE MANAGEMENT Seq No. 2) to **STRIKE COMPLAINT** noticed on August 10, 2020 and submitted on September 16, 2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF No(s). 29-36
Answering Affidavits and Exhibits	NYSCEF No(s). 39-41
Replying Affidavit and Exhibits	NYSCEF No(s). 42

Upon the foregoing papers, third-party defendants National Home Health Care Corp., Health Acquisition Corp. d/b/a Allen Health Care Services, and Laura Mata Guervara i/s/h/a National Home Health Care – Queens, Allen Health Care Services, Inc., and Laura Mata Guevara (“third-party defendants”), move for an order pursuant to CPLR §3126, striking the plaintiff’s complaint and defendant/third-party plaintiff, Rainbow Ambulette Service Inc.’s (“Rainbow Ambulette”) third-party complaint for failure to respond to third-party defendants’ discovery demands or, in the alternative,

pursuant to CPLR §3124, compelling the plaintiff and Rainbow Ambulette to provide responses to third-party defendants' discovery demands or face preclusion. The motion is opposed.

The cause of action is for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident that occurred on September 24, 2015. Plaintiff was a passenger who, along with his aide, Laura Mata Guevara, was being transported in a Rainbow Ambulette operated by Ricky Shelby. Ricky Shelby admitted to making a sudden stop which caused the ambulette to "jerk" and propelled the plaintiff and his aide, from their seats and onto the ambulette floor.

Third-party defendants aver that on June 20, 2019, they served the plaintiff with their verified answer along with various discovery demands, including a Verified Bill of Particulars and authorizations. The plaintiff failed to respond. On January 17, 2020, third-party defendants then sent a letter to plaintiff's counsel advising that all initial discovery demands remained outstanding. On January 17, 2020, third-party defendants served a Notice for Discovery and Inspection on Rainbow Ambulette. Rainbow Ambulette failed to respond. Thereafter, on May 18, 2020, counsel for third-party defendants sent a letter to Rainbow Ambulette's counsel requesting that they respond to outstanding discovery. To date, both the plaintiff and Rainbow Ambulette have failed to respond. Third-party defendants argue that the failure of both the plaintiff and Rainbow Ambulette to respond amounts to willful and contumacious conduct and the striking of their complaints is warranted. If the court is not inclined to strike their complaints, then third-party defendants request that they be compelled to respond to their demands by a date certain or face preclusion.

Rainbow Ambulette opposes the motion and argues that there has been no willful and contumacious behavior on their part. Counsel for Rainbow Ambulette asserts that Rainbow Ambulette was sold to another company two years ago and the records requested by third-party defendants are no longer available to counsel or the former president of Rainbow Ambulette, namely Steven Kahan ("Mr. Kahan"). Mr. Kahan submits an affidavit wherein he states that he was requested to provide copies of complete maintenance and repair records and computer data related to the ambulette, in addition to Mr. Shelby's employment file, policies and procedures of Rainbow Ambulette in transporting patients, and other relevant documents. However, he sold the company to Ambulnz in 2018 and left all the paperwork at the office on Soundview Avenue in Bronx County, as required by the purchasing agreement. Mr. Kahan avers that he believes Ambulnz has since closed and he has no knowledge of the whereabouts of the contents of that office. Mr. Kahan further states that he does not have possession of or access to any of the documents requested by third-party defendants and has no independent

recollection of the matter.

Counsel for Rainbow Ambulette further avers that he has attempted to contact Ambulnz to ascertain the possibility of obtaining the requested items but Ambulnz has not been responsive. Moreover, they have no means of obtaining the requested items of discovery. However, they claim that since there has been no willful or contumacious conduct on the part of Rainbow Ambulette and they have made a good faith effort to obtain the requested documents, their answer should not be stricken.

In reply, third-party defendants argue that since plaintiff did not oppose the motion, it should be granted as against him. With respect to Rainbow Ambulette, third-party defendants assert that their answer should be stricken or they should be precluded from presenting any evidence at trial since their opposition papers show there has been spoliation of all relevant evidence. They argue that pursuant to Rainbow Ambulette's opposition papers, no documents or information relating to the claims it has chosen to bring against third-party defendants will be forthcoming. Third-party defendants further contend that they cannot "blindly" defendant against Rainbow Ambulette's allegations without any evidence. Third-party defendants also argue that the failure to preserve documents and information relating to the core of this litigation is spoliation and third-party defendants have no ability to defend themselves.

Third-party defendants further point out that the instant action by the plaintiff was commenced on September 7, 2018, and third-party defendant Laura Mata Guevara commenced separate litigation in Bronx County, arising out of the same accident, or about March 2, 2016, two years before Rainbow Ambulette was sold. The name of that case is *Laura Mata v. Rainbow Ambulette Service Inc., and Ricky Shelby*, Index No.: 0300872/2016. Therefore, Rainbow Ambulette was in active litigation for the same accident and was on notice that additional litigation could be forthcoming, long before the business was sold. However, not only did Rainbow Ambulette fail to preserve the vehicle, it failed to preserve any information or documentation relating to the claims in this action. Therefore, third-party defendants contend that the intentional and/or negligent spoliation of all relevant evidence requires that Rainbow Ambulette's third-party complaint be stricken. In the alternative, they should be precluded from presenting any evidence at trial in support of its allegations in the third-party complaint or the court should employ adverse inference instructions with regard to the destroyed evidence.

Plaintiff did not oppose the motion.

CPLR §3126, "...broadly empowers a trial court to craft a conditional order – an order 'that grants the motion and imposes [a] sanction 'unless within a specified time the resisting party submits to

the disclosure” (citation omitted). *Gibbs v. St. Barnabas Hospital*, 16 N.Y.3d 74 [2010]. Plaintiff has failed to provide any explanation for the failure to turn over the discovery requested by third-party defendants.

Accordingly, with respect to the plaintiff, third-party defendants’ motion is granted to the extent that plaintiff shall comply with all outstanding discovery requested by the defendants, within thirty (30) days of the date of this order with notice of entry. If the plaintiff fails to comply, the complaint will be stricken upon further application to this Court.

With respect to Rainbow Ambulette, they filed a third-party action against the third-party defendants but admittedly failed to preserve the vehicle and any information and/or documentation related to this accident. In *Kirkland v. New York City Housing Authority*, 236 A.D.2d 170 [1st Dept. 1997], the Appellate Division ruled that, “Although originally defined as the intentional destruction of evidence arising out of a party’s bad faith, the law concerning spoliation has been extended to the non-intentional destruction of evidence...Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in the accident before the adversary has an opportunity to inspect them...” (citations omitted). *Id. at 173*. The Court of Appeals has ruled that, “A party seeking 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...if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party’s claim or defense...”(citations omitted). *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 [2015].

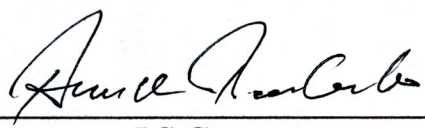
In the case at bar, Rainbow Ambulette failed to preserve any of the records, information and/or documentation related to the subject accident and the ambulette itself is also unavailable for inspection. Moreover, the president of the company has admitted that he has no recollection of the matter. Rainbow Ambulette asserts that their inability to provide the requested discovery is not willful or contumacious since the company was sold and they cannot access any records, files, documents, etc. However, there was litigation commenced at least two years before Rainbow Ambulette was sold and any evidence should have been preserved starting at least in 2016.

Accordingly, if Rainbow Ambulette is unable to obtain the documentation, information and/or records requested by third-party defendants either through the discovery that was already in its

possession with respect to the action under Index Number: 0300872/2016, or through the new owners of the company, Ambulnz, within thirty (30) days of the date of this order with notice of entry, the court will consider spoliation sanctions upon further application to the court.

This constitutes the Decision and Order of this court.

Dated: 11/10/2020

Hon. 
J.S.C.
HON. BEN. R. BARBATO, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT