

Nestenberg v Standard Intl. Mgt., LLC

2021 NY Slip Op 30628(U)

March 3, 2021

Supreme Court, New York County

Docket Number: 157227/2015

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS PART 11

Justice

-----X

CARL H.R. NESTENBORG,

Plaintiff,

- against -

INDEX NO. 157227/2015
MOTION DATE 09/15/2020
MOTION SEQ. NO. 004

STANDARD INTERNATIONAL MANAGEMENT, LLC, ANDRE
BALAZS PROPERTIES, ABG STANDARD OPERATOR, LLC and
AB GREEN GANSEVOORT, LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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STANDARD INTERNATIONAL MANAGEMENT, LLC, ABG
STANDARD OPERATOR, LLC i/s/h/a ANDRE BALAZS
PROPERTIES, ABG STANDARD OPERATOR, LLC and AB GREEN
GANSEVOORT, LLC,

Third-Party
Index No. 595006/2016

Third-Party Plaintiffs,

-against-

PAVARINI McGOVERN, LLC,

Third-Party Defendant.

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PAVARINI McGOVERN, LLC,

Second Third-Party Plaintiff,

-against-

J.E.S. PLUMBING & HEATING CORP.,

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 113, 119, 124, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for SJ and Cross-Motion to Strike the Answer.

Based upon the foregoing documents and applicable law, Defendants/Third-Party Plaintiffs' motion for summary judgment is denied and Plaintiff's cross-motion to strike Defendants/Third-Party Plaintiffs' Answer is denied.

Plaintiff Carl H.R. Nestenborg ("Plaintiff") brought this action against Defendants/Third-Party Plaintiffs Standard International Management, LLC, Andre Balazs Properties, ABG Standard Operator, LLC, and AB Green Gansevoort, LLC (collectively "Defendants"), who were the alleged owners of a hotel, for personal injuries he sustained when the hotel bathroom sink that he leaned against detached from the wall, collapsed and broke.

Defendants now move for summary judgment dismissal of Plaintiff's complaint and any cross-claims against them. Plaintiff opposes the motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Based on the admissible evidence submitted, Defendants failed to meet their initial burden of demonstrating their entitlement to summary judgment dismissal of Plaintiff's complaint as a matter of law and Plaintiff raised material issues of fact in dispute to be determined by the trier of fact, including, but not necessarily limited to, whether the accident occurred by Plaintiff leaning back against the sink or sitting on the sink; whether a defective and dangerous condition existed; whether Defendants had actual or constructive notice of the alleged defective condition; and whether Defendants breached a duty owed to Plaintiff by failing to properly install, inspect and/or maintain the bathroom sink and its wall mounts in the hotel room.

As such, the court denies Defendants' motion for summary judgment seeking to dismiss Plaintiff's complaint and any cross-claims against them.

Plaintiff cross-moves to strike Defendants' Answer pursuant to CPLR 3126 and/or based on spoliation of key evidence and seeks judgment against Defendants for Defendants' destruction of the sink and its attachments. Defendants oppose Plaintiff's cross-motion.

On a motion for sanctions based on the spoliation of evidence, the movant must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the evidence was destroyed with a culpable state of mind, which could include negligence; and, (3) 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 (*see VOOM HD Holdings v Echostar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012]). The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions (*id.*).

In deciding whether to impose sanctions, courts look at the extent that the spoliation of evidence may prejudice a party, and if a particular sanction is necessary as a matter of elementary fairness (*see Duluc v AC & L Food Corp.*, 119 AD3d 450 [1st Dept 2014]). The burden is on the party requesting sanctions to make the requisite showing (*id.*).

Plaintiff alleges in substance that he was severely and irreparably prejudiced by the Defendant's destruction of the sink because Plaintiff is unable to have it inspected and tested by an expert. Defendants concede that the broken sink and debris were immediately discarded on an emergency basis after Plaintiff's accident because they posed a grave danger to other patrons of the hotel who used that room. Defendants also argue that Plaintiff failed to demonstrate that Plaintiff needs the broken sink to prove his case, which is based on Defendants alleged failure to maintain the sink. Defendants also argue that Plaintiff failed to demonstrate that he was prejudiced by the allegedly destroyed evidence, other than in counsel's affidavit, because the sink was the identical make of sinks in other rooms at the hotel and Plaintiff could examine and test those sinks or an identical one obtained from the manufacturer.

The record demonstrates that Defendants discarded the sink prior to receiving a request from Plaintiff's prior counsel for Defendants to maintain the sink in anticipation of litigation. There is no showing that Defendants' destruction of the broken sink and attachments was intentional or willful in an effort to destroy evidence needed for litigation. Therefore, if Defendant's destruction was negligent, Plaintiff must demonstrate that the discarded broken sink and attachments were relevant to its claims. Plaintiff failed to do so. Plaintiff's claims are rooted in allegations that Defendants failed to install, inspect, and maintain the hotel sink and not in allegations that there was a problem with the actual sink. As such, Plaintiff failed to show that the destroyed evidence is relevant to his negligence claims such that the trier of fact could find that the evidence would support his claims. Additionally, the court finds that striking Defendants' Answer is a drastic remedy and based on the nature of Defendants' alleged culpability and the alleged prejudice to Plaintiff, such sanction is not warranted.

Therefore, the court denies Plaintiff's cross-motion to strike Defendants' Answer.

As such, it is hereby

ORDERED that Defendants/Third-Party Plaintiffs Standard International Management, LLC, Andre Balazs Properties, ABG Standard Operator, LLC and AB Green Gansevoort, LLC's, motion for summary judgment to dismiss Plaintiff Carl H.R. Nestenborg's complaint is denied with prejudice and without costs; and it is further

ORDERED that Plaintiff Carl H.R. Nestenborg's cross-motion to strike the answer of Defendants/Third-Party Plaintiffs Standard International Management, LLC, Andre Balazs Properties, ABG Standard Operator, LLC and AB Green Gansevoort, LLC, for spoliation of key physical evidence is denied.

3/3/2021

DATE

Erika M. Edwards
ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE