

<b>Moscinski v Quadrum 38, LLC</b>
2022 NY Slip Op 30802(U)
March 10, 2022
Supreme Court, New York County
Docket Number: Index No. 160030/2019
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

-----X

PAWEL MOSCINSKI,

Plaintiff,

- v -

QUADRUM 38, LLC, LEEDING BUILDERS GROUP, LLC,

Defendant.

-----X

QUADRUM 38, LLC, LEEDING BUILDERS GROUP, LLC

Plaintiff,

-against-

FORWARD MECHANICAL CORP.

Defendant.

-----X

INDEX NO. 160030/2019  
MOTION DATE 03/02/2022  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 596073/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for STRIKE PLEADINGS.

**BACKGROUND**

Plaintiff commenced this action for damages after being injured while working as a plumber and mechanic on a construction site at 351 West 38<sup>th</sup> Street, New York New York also known as the Arlo Hotel (Subject Premises). At the time of the accident QUADRUM 38, LLC was the owner of the Subject Premises and LEEDING BUILDERS GROUP, LLC (LBG), was the General Contractor for the project. FORWARD MECHANICAL CORP. was a subcontractor on the job and plaintiff's employer.

### **PENDING MOTION**

On February 9, 2022, plaintiff moved for an order pursuant to CPLR §3126 striking defendant's answer or alternatively for a preclusion order and a negative inference charge at trial due to defendant's spoliation of evidence. On March 2, 2022, the motion was fully briefed, and marked submitted and the court reserved decision.

For the reasons stated below, the motion is granted to the extent of granting an order of preclusion and a negative inference charge at trial.

### **ALLEGED FACTS**

The accident occurred on September 13, 2019, when plaintiff was working on the seventh floor of the site, hooking up heating units and installing valves. Plaintiff was pushing a cart with equipment on it when he walked by a fire extinguisher that fell on his foot and injured him.

Plaintiff alleges that the fire extinguisher was not properly secured or stored, and defendants allege that it fell because plaintiff bumped into it.

There were various methods in which fire extinguishers were kept in the building during construction. The fire extinguisher at issue was hanging on a 2 x 4, which was embedded in concrete, which was in a bucket. The bucket was standard, a little bit shorter than two feet and approximately 10 to 12 inches wide. The 2 x 4 extended approximately 5 feet out of the bucket, with the fire extinguisher secured to a v-shaped fastener and attached to the 2 x 4 with nails. The fire extinguisher secured to the two by four stand was approximately one and half to two feet in length, with its base approximately three to four feet from the ground from where it was secured on the 2 x 4 stand.

Christopher Gleckler (GC), was the Superintendent for LBG and the fire safety manager for the project. GC selected the location for the placement of the fire extinguishers and

performed monthly inspections of them during the project. GC was present on the date of the accident. After the accident GC removed all the 2 x 4 concrete bucket stands from the building, and the fire extinguisher and stand involved in the accident were removed and preserved as evidence for possible litigation by GC.

GC put the items in LBG's superintendent office shanty in the Subject Premises. After GC's deposition, plaintiff requested the items be produced for inspection and was advised by defendants that they could not be located.

### DISCUSSION

Our state trial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action (*see Ortega v. City of New York*, 9 N.Y.3d 69, 76, 845 N.Y.S.2d 773, 876 N.E.2d 1189 [2007] [citations omitted]; CPLR 3126 [if a trial court determines that a party has destroyed evidence that "ought to have been disclosed ... the court may make such orders with regard to the failure or refusal as are just"] ).

*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 551 (2015).

"Under the common-law doctrine of spoliation, 'when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading' " (*Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 655 [2013], quoting *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007]; *see Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, 1011 [2010]). " '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 AD3d at 655-656,

quoting *Iannucci v Rose*, 8 AD3d 437, 438 [2004]). “[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” (*Pennachio v Costco Wholesale Corp* 119 AD3d 662 citing *Denoyelles v Gallagher*, 40 AD3d at 1027; see *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 610 [2011]; *Gerber v Rosenfeld*, 18 AD3d 812 [2005]; *Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695, 696 [2005]).

Defendant's own witness expressly admitted that he aware of the need and importance of preserving both the fire extinguisher and fire extinguisher stand for any potential future litigation, and that all other superintendents located at the worksite were made overtly aware of the importance of preserving this evidence. Defendants had overt knowledge, and a distinct obligation, to preserve both the fire extinguisher and fire extinguisher stand and failed to do so

Defendants do not address in any way shape or form what happened to these items, why they can not be found or when they may have been disposed of. However, there is no evidence in the record to find the loss of the items was intentional or willful. Where the spoliation of evidence is inadvertent or the result of negligence, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense. *Pegasus Aviation 1, Inc v Varig Logistics Sa*, 26 N.Y.3d 543, at 547-48.

In this case, the court rejects defendants’ arguments that the condition of the stand and the fire extinguisher are not relevant to the issues to be determined in this case. Considering that these items were the “very instrumentality giving rise to plaintiff’s injuries” access to these items is important in establishing the cause of the accident and determining the culpable party (*Cummings v Central Tractor Farm & Country* 281 AD2d 792, 793).

Plaintiff's causes of action sound in negligence and labor law. Plaintiff argues persuasively that an inspection of the fire extinguisher stand was necessary so as that an expert could properly determine whether it was defective as well as the manner of its defectiveness. The subject stand is exactly the sort of instrumentality that would be examined by an expert, who would thereafter render an opinion about the specific nature of any defects, the likely duration of any condition, and how a defendant, whose obligation it would be to ensure the safety and maintenance of such devices, might notice any defects upon conducting a reasonable inspection.

However, plaintiff can still prove its case without an inspection of these items, particularly if given the negative inference charge and preclusion order sought in the pending motion. Even with the adverse inference and the order of preclusion, whether the accident occurred because plaintiff banged into the fire extinguisher with his cart, or because of the negligent manner in which it was stored or a combination of both remain questions of fact for the jury to determine.

### CONCLUSION

Based on the foregoing, the motion is granted to the extent of granting an order precluding defendants from offering any evidence as to the condition of the fire extinguisher and stand and granting plaintiff a negative inference charge at trial as to the condition of the fire extinguisher and the stand.

WHEREFORE it is hereby

ORDERED that the defendants shall be precluded from offering any evidence as to the condition of the fire extinguisher and stand at the trial; and it is further

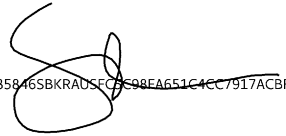
ORDERED that the plaintiff is granted a negative inference charge at trial as to the condition of the stand and the fire extinguisher; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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3/10/2022  
DATE

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SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE