SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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BROOKLYN UNION GAS COMPANY,

Plaintiff,

- v -

CENTURY INDEMNITY CO and MUNICH REINSURANCE AMERICA INC,

Defendants.

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INDEX NO. 403087/2002

MOTION SEQ. NO. 032

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 032) 221, 222, 223, 224, 225, 226, 227

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

Covington & Burling LLP, Washington, D.C. (Jay T. Smith, Eric Bosset, and Michael Lechliter of counsel), and San Francisco, CA (Gretchen Hoff Varner of counsel), for plaintiff.
O'Melveny & Myers LLP, New York, NY (Jonathan Rosenberg and Leah Godesky of counsel), and Los Angeles, CA (Daniel Petrocelli and Craig P. Bloom of counsel), for defendant Century Indemnity Company.
Ford Marrin Esposito Witmeyer & Gleser, LLP, New York, NY (Michael L. Anania and John A. Mattoon of counsel), and *BatesCarey LLP*, Chicago, IL (Robert J. Bates, Jr., and Maryann C. Hayes of counsel), for defendant Munich Reinsurance America, Inc.

This decision addresses the last of 14 pretrial motions in limine filed in insurance-coverage litigation arising from the government-mandated cleanup of the Gowanus Canal.[1]

One of the insurers in this litigation, Century Indemnity Company, previously moved for spoliation sanctions due to the destruction of some executive-meeting minutes by its insured, Brooklyn Union Gas Company. This court denied Century's spoliation motion on the ground that Brooklyn Union's disposal of these documents did not flout any extant obligation to preserve them. (*See* Decision and Order entered July 17, 2018, NYSCEF No. 554, *affd. Century Indem. Co. v Brooklyn Union Gas Co.*, 170 AD3d 632 [1st Dept 2019].)

[1] The litigation among Brooklyn Union, Century, and Munich Re comprises two separate actions before this court: this action and *Century Indemnity Co. v Brooklyn Union Gas Co.*, Index No. 603405/2001. The motions in limine filed in the two actions overlap almost completely. The NYSCEF citations given in this decision correspond to the *Century Indemnity* docket, in which in which the motion to preclude is motion sequence 040.

Brooklyn Union now moves to preclude Century from introducing evidence about these lost documents or from arguing to the jury that it should hold their loss against Brooklyn Union in determining the notice and coverage questions in this litigation. The motion is granted.

DISCUSSION

Brooklyn Union argues in support of its motion that this court's prior spoliation ruling remains law of the case, foreclosing Century from introducing evidence or making arguments to the jury based on the lost documents. This court agrees.

In denying Century's spoliation motion, this court assumed that Brooklyn Union "had a reasonable expectation of litigation" as of 1993, when Brooklyn Union provided notice of a covered occurrence to Century. This court held, though, that Century did not establish "that Brooklyn Union should have been aware of the evidentiary value of the Executive Conference minutes at the time of their loss or destruction." (NYSCEF No. 554, at 5.) That is, given their character as documents "cover[ing] a wide range of topics in minimal detail," Brooklyn Union did not have reason to believe the documents "had potential evidentiary value" before Century requested them in discovery in 2001.[2] (*Id.*) In light of these documents' lack of apparent evidentiary value before 2001, Brooklyn Union had neither pre-2001 notice of the need to preserve them for future litigation, nor the corollary obligation to do so. (*See id.* at 4-5.) In affirming this court's ruling, the Appellate Division, First Department, agreed with this court's conclusion that Brooklyn Union "was not on notice at the time that the minutes . . . were lost or destroyed that the minutes may have been needed for future litigation." (*Century Indem. Co.*, 170 AD3d at 633.)

This court's prior spoliation ruling thus rested on a conclusion that Brooklyn Union's disposal of the minutes at issue did not manifest an intent by Brooklyn Union to conceal evidence that might prove harmful to it in later litigation. That conclusion bars the argument that Century now claims it should be able to make to the jury about those minutes.

That is, Century contends on this motion that it should be "fair game . . . to ask the jury to infer that the disappearance of these minutes is no mere happenstance," and that "Brooklyn Union's failure to preserve those key minutes—while it did preserve so many others—is significant." (NYSCEF No. 729 at 4, 8.) Although Century does not (quite) say so expressly, the only way to understand these contentions is that Century is implying (and wishes to imply to the jury) that Brooklyn Union committed a cover-up: That Brooklyn Union deliberately destroyed documents that it knew or believed would impair its litigating position on crucial questions relating to the timeliness of its notice to Century and whether the Century policies covered Brooklyn Union's impending remediation costs. Both this court *and* the First Department have already held, though, that Brooklyn Union lacked a pre-2001 basis to believe the lost minutes would be relevant to future litigation in the first place. Century's argument on this motion is therefore barred at a minimum by the law of the case.

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[2] This court noted that "Century has not shown that the documents were destroyed or lost since 2001." (NYSCEF No. 554 at 5.)

Century argues that a pretrial ruling denying a motion for spoliation sanctions does not necessarily preclude a party from putting forward at trial evidence and arguments about the missing evidence. (*See id.* at 8.) This argument misses the point. No material consideration has *changed* here from then to now. Century does not contend that further evidence elicited in discovery since July 2018 has undermined this court's analysis in its spoliation ruling. Nor does Century attempt to adduce any new reasons to think that this court erred then in concluding that Brooklyn Union was not obliged to have preserved the lost minutes before 2001.[3] This case thus differs from the *Martinez v Paddock Chevrolet, Inc.*, decision cited by Century, in which the Appellate Division, Fourth Department, held that the trial court properly reconsidered the issue of spoliation (and granted a request for an adverse-inference instruction) "based on further evidence developed at trial" about the prejudice suffered by the moving party. (*See* NYSCEF No. 729 at 8, citing 85 AD3d 1691, 1693 [4th Dept 2011].)

For similar reasons, there is no merit to Century's argument that this court's refusal to impose spoliation sanctions implicates different considerations from whether this court should preclude Century from making spoliation-type arguments to the jury. (*See* NYSCEF No. 729 at 7.) This court's denial of Century's spoliation motion was not based on whether Brooklyn Union was sufficiently culpable in destroying evidence it should have preserved—or Century sufficiently prejudiced by that destruction—to warrant spoliation sanctions, as in *Paddock Chevrolet*, or for that matter *Utica Mutual Insurance Co. v Berkoski Oil Co.* (58 AD3d 717, 718 [1st Dept 2009]), also cited by Century. As discussed above, this court denied Century's motion based on a conclusion that no preservation obligation existed in the first place. And *that* rationale holds true whether one is considering pretrial spoliation sanctions or what arguments may permissibly be made to the jury at trial.

Finally, Century claims that the Appellate Division has repeatedly held in the criminal context that a party may "introduce evidence at trial regarding missing evidence after spoliation sanctions are denied." (NYSCEF No. 729 at 6-7 [emphasis added].) This court is not persuaded. None of the cases cited by Century state this proposition in so many words. To the contrary, these decisions arise from trial courts denying defense requests for an adverse-inference charge—*i.e.*, rulings that would ordinarily occur at a charge conference *after* all of the trial evidence was in, not before.[4] The cited decisions are thus inapposite in the procedural context of this case.

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[3] Century's arguments for the relevance and significance of these documents largely recapitulate arguments that it made on the prior unsuccessful motion. (*Compare e.g.* NYSCEF No. 729 at 1-6, 8-9 [Century's current mem. of law], *with* NYSCEF No. 752 at 1-3, 13, 18-22 [Century's past mem. of law].)

[4] Indeed, were the sequencing the other way around, as Century suggests, it would be odd for the Appellate Division to hold that a trial court properly declined to give an adverse-inference instruction, in light of a lack of prejudice to defendant at trial from the loss of the evidence at issue. (*See e.g. People v Hester*, 122 AD3d 880, 880-881 [2d Dept 2014]; *People v Hamlin*, 39 AD3d 361, 362 [1st Dept 2007]; *People v Adams*, 300 AD2d 92, 92 [1st Dept 2002].) The absence of spoliation-based prejudice given the course of trial might affect whether the ultimate verdict should stand. But it would not affect whether a pretrial spoliation ruling was *correct*.

Accordingly, for the foregoing reasons, it is

ORDERED that Brooklyn Union's motion to preclude is granted.

HON. GERALD LEBOVITS J.S.C.

3/14/2022
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE