SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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CHUBB NATIONAL INSURANCE COMPANY, CHUBB INDEMNITY INSURANCE COMPANY, PACIFIC EMPLOYERS INSURANCE COMPANY,

Plaintiffs,

- v -

SETH HULKOWER, LISSA PERLMAN,

Defendants.

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INDEX NO. 153771/2021

MOTION DATE 06/28/2022

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

SETH HULKOWER, LISSA PERLMAN

Plaintiffs,

-against-

AFA PROTECTIVE SYSTEMS, INC., ALLSTATE SPRINKLER CORP.

Defendants.

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Third-Party
Index No. 595773/2021

AFA PROTECTIVE SYSTEMS, INC.

Plaintiff,

-against-

GRAMERCY 222 RESIDENTS CORP.

Defendant.

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Second Third-Party
Index No. 595610/2022

The following e-filed documents, listed by NYSCEF document number (Motion 002) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 179, 180, 181, 182, 186, 187, 189

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 001) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 183, 184, 188

were read on this motion to/for STRIKE PLEADINGS

Plaintiffs, Chubb National Insurance Company a/s/o Elizabeth Wang and John Delaney, Anthony Dewell and Jennifer May Lee, and Joel Scharfstein and Deborah Prutzman, Chubb Indemnity Insurance Company a/s/o Barbara Zucker, and Pacific Employers Insurance Company a/s/o Dennis Karter (plaintiffs), commenced this action seeking recovery for alleged property damage stemming from a fire on October 27, 2018, in the apartment located at 222 Park Avenue South, New York, New York, at Unit 12E (premises). In motion sequence 001 and 002, plaintiffs and third-party defendants AFA Protective Systems, Inc (AFA) and Allstate Sprinkler Corp. (Allstate) (collectively, third-party defendants) move pursuant to CPLR 3126 striking the amended answer and third-party complaint, respectively, on spoliation grounds. In motion sequences 001 and 002, defendant/third party plaintiffs, Seth Hulkower and Lissa Perlman, the owners of the premises (the owners), now move and cross-move pursuant to CPLR 3214 to compel plaintiffs and third-party defendants to provide complete responses to all outstanding discovery. The motions and cross-motions are opposed. For the following reasons, plaintiffs' motion is granted, the third-party defendants' motion and cross-motion are denied, and the owners' cross-motions are moot.[1]

BACKGROUND

This action stems from a fire at the premises on October 27, 2018, which in turn caused the sprinkler system in the apartment to activate, resulting in water damage to the premises and other units within the building. Plaintiffs claim that the subject fire originated in the northeast corner of the kitchen premises where a toaster four-slice toaster (the toaster) was placed directly underneath wooden cabinetry.

On November 1, 2018, plaintiffs' expert, Richard F. Regenthal, P.E., inspected the premises to determine the cause and origin of the fire. According to the expert, the kitchen contained wooden cabinetry above the kitchen counter on the east wall and that there was a countertop and sink on the north wall. The expert further observed the toaster as well as a toaster oven and microwave oven located in the northeast corner of the kitchen and that the toaster was located directly underneath the bottom shelf of the cabinetry on the east wall. The expert further observed the burn pattern in the wooden shelf directly above the toaster was in the shape of the toaster. Plaintiffs claim that the toaster was the ignition point for the subject fire.

On November 5, 2018, plaintiffs notified the owners that they had a legal obligation to preserve all evidence relating to the cause of the fire. On the same day, defendant Seth Hulkower sent an email to the owners' liability carrier, AMICA Mutual Insurance Company (Amica), advising them that the owners received two letters, one from plaintiffs, and another from the building's liability carrier, notifying them that they had a legal obligation to preserve all physical evidence relating to the cause and origin of the fire, including the toaster. On the same day, Seth Hulkower also wrote an email to non-party Charles Rich wherein Hulkower acknowledged that he was required to preserve all physical evidence including the toaster.

[1] On September 29, 2022, counsel for the owners informed the Court that plaintiff and third-party defendants furnished the discovery sought in the owners' cross-motions to compel.

On November 26, 2018, NEFCO Fire Investigations (NEFCO), the fire investigation company retained on behalf of the owners by Amica, came to the premises and removed and took possession of the toaster as well as other items from the kitchen. On April 13, 2021, Amica's counsel notified plaintiffs that on May 3, 2020, NEFCO had disposed of the toaster and the other items it took from the premises on November 26, 2018. The letter did not state why NEFCO disposed of the toaster and other items or why counsel or NEFCO waited almost one year to advise plaintiffs that the items were discarded.

Plaintiffs and third-party defendants now argue that by disposing of the toaster, the owners spoliated the key piece of evidence in this case before any of the other parties' experts had an opportunity to properly examine and test such evidence. AFA also argues that in the event the amended answer is stricken, the third-party complaint should also be stricken. In opposition, the owners argue that the moving parties failed to demonstrate that the owners were in control of the toaster when the fire investigator hired by their insurer disposed of it. The owners further argue that neither NEFCO nor Amica gave the owners prior notice that the toaster would be disposed. The owners further argue that they did not have a culpable state of mind in the disposal of the toaster. Finally, the owners argue that the moving parties failed to demonstrate that the missing toaster was the sole means of prosecuting and defending their respective claims and defenses.

DISCUSSION

"A party seeking sanctions based on the spoliation of evidence 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 records were destroyed with a "culpable state of mind"; 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" *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33 [1st Dept 2012]). "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence" (*id.* at 45). "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.*). This is because "[a] party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense" (*Squitieri v City of New York*, 248 AD2d 201, 203 [1st Dept 1998]). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude that party from offering evidence as to the destroyed product" (*id.* at 202).

Here, plaintiffs' motion for an order striking the amended answer on the grounds that the owners spoliated a key piece of evidence is denied. Initially, it is clear that the owners had an obligation to preserve the toaster at the time it was destroyed or discarded. Plaintiffs also demonstrate that owners had control of the toaster. After all, the toaster was owned by the owners and located within the premises immediately prior to being removed by NEFCO.

Second, the parties do not dispute that NEFCO, the fire investigator hired by plaintiff's insurer to inspect the premises, removed the toaster from the premises and disposed of the toaster

without notice to the owners. The Court finds that while the owners may not have had a reason to suspect that NEFCO or Amica would dispose of the toaster, the owners still had a responsibility to preserve the toaster for plaintiffs' inspection. The responsibility to preserve the toaster did not pass onto Amica or NEFCO simply because the toaster was no longer in the owners' physical possession. As the Court determines that the owners were negligent in their preservation of the toaster, the Court must next determine whether the toaster was relevant to plaintiffs' claims.

The Court finds that the toaster is relevant to plaintiffs' negligence claim against the owners in that plaintiffs were denied the opportunity to have an expert inspect the toaster to determine what, if anything, was wrong with the toaster which allegedly caused the subject fire. The trier of fact could determine that the toaster would support plaintiffs' claims for negligence against the owners. As the Court finds that plaintiffs are entitled to sanctions, the Court must next determine the sanctions taking into consideration the owners conduct (*see VOOM HD Holdings LLC*, 93 AD3d at 47 [where the court determines that sanctions are appropriate, the sanction must reflect "an appropriate balancing under the circumstances"]).

The striking of a party's pleading is an appropriate remedy when the evidence spoiled is a "key piece of evidence," whose destruction precludes inspection by an adverse party (*Kirkland v New York City Housing Authority*, 236 AD2d 170, 173 [1st Dept 1997] [internal quotation marks and citations omitted]; *Strong v City of New York*, 112 AD3d 15, 21[1st Dept. 2013] [the striking of a party's pleadings "are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense"]). "When that drastic remedy is appropriate in the case of ordinary negligence, it is because the non-spoliating party carried its burden of establishing that the missing evidence was its 'sole means' of [prosecuting] the claim, its [claim] was otherwise 'fatally compromised' by the spoliation, or it had become 'prejudicially bereft' of being able to [prosecute its claim]" (*Rossi v Doka USA, Ltd.*, 181 AD3d 523, 526 [1st Dept 2020], quoting *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016]).

Here, plaintiffs demonstrate that that the toaster was a "key piece of evidence" in their claim for negligence against the owners by submitting the affidavit of their expert. According to the expert, upon a visual inspection of the premises, he observed that the wooden cabinet shelf only inches above the toaster contained a burn pattern identical to the shape of the toaster. The expert further confirmed that "[i]n order to confirm, with a reasonable degree of engineering certainty, that the [t]oaster caused the fire, it would have been necessary for me to perform various tests on the [t]oaster in the area of fire origin, in a laboratory setting, including destructive testing" (NYSCEF doc. no 73 at ¶9). The expert thereafter determined that faulty wiring was not a cause of the fire. Thus, "[t]he trier of fact could find that the evidence would support [plaintiffs'] claim" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). The owners' opposition does not specifically address the expert's affidavit or the expert's conclusions. Instead, the owners argument that plaintiffs could have commenced an action against AFA or Allstate for their alleged roles in the incident fails to address the owners own alleged role in the incident. As plaintiffs demonstrate, and the owners fail to rebut, the loss of the toaster constitutes a significant impediment to proving plaintiff claims. Accordingly, the Court finds that the appropriate remedy here is striking the owners' amended answer.

On the other hand, the cross-motions by Allstate and AFA to strike the third-party complaint are denied, as the owners' claims against the third-party defendants and their defenses are not affected by the loss of the toaster. The owners' claim against Allstate alleges, in essence, that the sprinkler system Allstate installed at the premises failed to function properly, resulting in water damage in the premises and surrounding units. The owners claim against AFA alleges that the fire alarm system installed by AFA failed to function properly, which according to the owners, delayed the emergency services response to the incident. Thus, the third-party defendants' defenses are unrelated to the fire allegedly caused by the toaster. While the third-party defendants contend that the toaster is a key piece of evidence, they fail to substantiate their argument with facts reflecting that the toaster is relevant to their defenses.

The Court further finds that AFA's argument that the Court is required to dismiss the third-party complaint as a result of striking the amended answer is without merit, as AFA fails to cite to any case law or statute in support of its position.

Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3126 is granted, and the amended answer of defendants/third-party plaintiffs, Seth Hulkower and Lissa Perlman, is stricken; and it is further

ORDERED that the cross-motions by defendants/third-party plaintiffs, Seth Hulkower and Lissa Perlman to compel are denied as moot; and it is further

ORDERED that AFA Protective Systems, Inc.'s cross-motion pursuant to CPLR 3126 to strike the third-party complaint is denied; and it is further

ORDERED that Allstate Sprinkler Corp.'s cross-motion pursuant to CPLR 3126 to strike the third-party complaint is denied; and it is further

ORDERED that the parties shall appear for a status conference on October 18, 2022 at 11:00 a.m.; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

9/29/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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