

Shapiro v City of New York

2023 NY Slip Op 33646(U)

October 18, 2023

Supreme Court, New York County

Docket Number: Index No. 153761/2017

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **05RCP**

Justice

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LINDA S SHAPIRO,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF CORRECTION,

Defendants.

-----X

INDEX NO. 153761/2017

MOTION DATE 01/17/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 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, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to STRIKE PLEADINGS.

Plaintiff alleges that on May 10, 2016, she went to the Manhattan bail office of defendant New York City Department of Correction (“DOC”), located at 125 White Street, with \$30,000.00 in cash to post bail for her son. As a result of DOC employees’ delay in processing the documentation to accept plaintiff’s money, plaintiff was forced to wait in the bail office for seven hours. Before plaintiff could post her son’s bail, however, individuals entered 125 White Street, tasered plaintiff, and stole her purse containing her son’s bail money. As DOC personnel failed to help plaintiff, she was forced to “stagger” to the street and collapsed on the street corner of White and Baxter Streets, where a passing Assistant District Attorney called the police and an ambulance. Plaintiff alleges that, as a result of the foregoing, she has suffered severe physical and emotional injuries.

Plaintiff now moves, pursuant to CPLR §3126, to strike defendants' answer based on defendants': (1) spoliation of video footage of the seven hours plaintiff spent in the bail office at 125 White Street and (2) failure to adequately respond to plaintiff's document demands. For the reasons set forth below, plaintiff's motion is denied.

DISCUSSION

A party seeking sanctions for spoliation “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 such that the trier of fact could find that the evidence would support that claim or defense” (Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 547-48 [2015] [internal citations and quotations omitted]). Here, plaintiff has failed to establish that defendants had an obligation to preserve surveillance video of the bail office at the time of its destruction let alone that such destruction was performed with a culpable state of mind. To the contrary, defendants' submissions establish that the DVR hard drive containing the surveillance video of the bail office was, as a matter of course, overwritten every two weeks (See NYSCEF Doc. No. 147 [Sacco Affirm.]) and, therefore, the video of the subject incident was overwritten on or about May 24, 2016. Plaintiff's demand that defendants preserve this video was sent on July 25, 2016, two months beyond that two-week window. Plaintiff's argument that the federal consent decree in Nunez v City of New York et al, 11-cv-5845 (SDNY) required preservation beyond this two-week window is unavailing—that consent decree sets forth policies and procedures for the preservation of video surveillance recording the use of force against inmates within DOC facilities (See NYSCEF Doc. No. 148 [Nunez Consent Judgment at §IX(4)]) and is therefore inapplicable here.

Plaintiff also argues that the City’s production of a segment of the surveillance video recording the assault on plaintiff demonstrates that the City’s representations—through affidavits by DOC Officers Sacco and Vanterpool—that no such video exists constitutes willful and contumacious behavior. However, defendants have established that this limited footage exists not because it was preserved by DOC beyond the fourteen-day window but because it was obtained by the New York City Police Department (“NYPD”) a day after the incident as part of an NYPD’s investigation and remained in the NYPD Fusion Center thereafter (See NYSCEF Doc. No. 89 [Medina Aff. at ¶¶1, 3-5]). In fact, as early as October 2018, defendants informed plaintiff that surveillance video was within NYPD’s possession as part of an ongoing criminal investigation (See NYSCEF Doc. No. 130). To the extent the affidavits of Sacco and Vanterpool, sworn in January 2020, attest that their 2019 search of DOC records did not uncover the surveillance video sought (See NYSCEF Doc. Nos. 86 [Sacco Aff. at ¶3] and 87 [Vanterpool Aff. at ¶¶3-4]), this is entirely consistent with the City’s position that DOC did not preserve this footage beyond the fourteen-day window and does not indicate any willful and contumacious conduct by defendants.

Neither do defendants’ responses to plaintiff’s document demands warrant the sanction sought by plaintiff. “Actions should be resolved on their merits whenever possible, and the drastic remedy of striking a pleading or the alternative remedy of precluding evidence should not be employed without a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” (Aldo v City of New York, 210 AD3d 833, 834-35 [2d Dept 2022] [internal citations omitted]). No such showing has been made here. “Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure

to comply with court-ordered discovery over an extended period of time” (Id.) while the record demonstrates that the City has, in this case, fully responded or properly objected to plaintiff’s document demands. To the extent there are outstanding discovery issues that were not raised in connection with the instant motion, the parties are to address all such issues at the next status conference in the Differentiated Case Management Part on February 27, 2024. No further discovery motions may be filed without leave of the Court.

Finally, the Court notes that plaintiff’s deposition is currently scheduled to be held on or before February 15, 2024. At the upcoming status conference in the Differentiated Case Management Part, the parties are directed to select dates for defendants’ depositions as well as a note of issue date, and given the age of this case, none of these deadlines are to be adjourned absent prior Court order, upon good cause shown.

Accordingly, it is

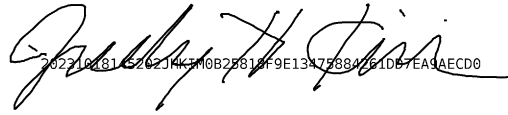
ORDERED that plaintiff’s motion is denied; and it is further

ORDERED that, within ten days from the date of this decision and order, counsel for defendants shall serve a copy of this order, with notice of entry, on plaintiff as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office 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

“Efiling” page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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10/18/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: