

213 W. 23rd St. LLC v Crunch Holdings LLC

2023 NY Slip Op 34421(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 652882/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

213 WEST 23RD STREET LLC,

Plaintiff,

- v -

CRUNCH HOLDINGS LLC, CRUNCH WEST 23RD STREET, LLC

Defendants.

-----X

INDEX NO. 652882/2022

MOTION DATE 12/13/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 87, 130, 131, 132

were read on this motion to/for SANCTIONS.

Defendants’ motion to strike the complaint based on plaintiff’s spoliation of discovery is decided as described below.

Background

This action arises from a breach of contract claim by plaintiff (the landlord) against defendants (the guarantor and tenant) who operated a gym at the premises. Plaintiff and defendants entered into a lease agreement in 2013 for a fifteen-year period. The lease included a Good Guy Guaranty clause recognizing Crunch Holdings, LLC (“Crunch Holdings”) as the guarantor, and that if the tenant, Crunch West 23rd Street, LLC (“Crunch West”) wanted to surrender the lease, it would need to give advance notice subject to written consent by the landlord.

On January 25, 2021, Crunch West gave notice of its intent to surrender the premises on January 26, 2022. The landlord claims it did not consent in writing. On December 8, 2021,

Crunch West sent a second follow-up notice of its intent to surrender on January 26, 2021, and again the landlord asserts it did not agree in writing. The defendants vacated the premises on January 26, 2022. On February 8, 2022, plaintiff visited the premises and allegedly found it was in disarray and had extensive damage including graffiti on mirrors, broken mirrors, holes in the wall, destroyed tiles, garbage, and missing gym equipment that was supplied prior to defendants' occupancy of the premises.

In this motion, defendants contend that the complaint should be stricken as a sanction for plaintiff's destruction of evidence. They insist that plaintiff has admitted that it has destroyed hundreds of relevant emails. Defendants contend that they complied with the lease through the surrender date. They observe that the two key issues relating to the surrender involve the condition of the premises when it was surrendered and plaintiff's conduct before and after that date.

Specifically, defendants contend that after they returned the premises to plaintiff, someone accessed the space and caused at least some of the damage for which plaintiff now blames defendants. They also argue that they have asserted a counterclaim against plaintiff for the breach of quiet enjoyment because plaintiff let someone access the premises to wander around and store equipment and tools even before defendants surrendered. Defendants maintain that this is also a partial explanation for the allegedly poor condition of the premises after the surrender date.

Defendants point out that they demanded documents involving potential purchasers or tenants of the property after the surrender date based on the notion that these communications might involve discussions about the condition of the premises. They observe that plaintiff maintained throughout this litigation that it had produced all responsive documents before

eventually admitting at a meet and confer on August 29, 2023 that some number of documents were destroyed. A follow up email on September 6, 2023 from counsel for plaintiff revealed that after IT personnel looked into the issue, it was discovered that deleted emails could not be recovered (NYSCEF Doc. No. 82).

In opposition, plaintiff contends that the spoliation issue is a red herring because the evidence is not material. It argues that the condition of the premises months after the surrender is immaterial. Plaintiff asserts that depositions were taken of key people (including two gym employees and plaintiff's principal) who could opine on the condition of the gym. It argues that it did not intentionally destroy documents and that the obligation to preserve documents cannot be triggered every time a tenant fails to pay rent.

Plaintiff argues that striking the complaint would be a severe sanction not appropriate under these circumstances and that it has not gained an unfair advantage. It emphasizes that defendants simply abandoned the premises and did not properly effectuate a surrender because plaintiff never agreed to the surrender in writing.

Defendants argue in reply that the real dispute here is whether the guarantor complied with its good guy guaranty when the premises were surrendered. They maintain that a key element of this issue concerns whether or not the premises were in broom clean condition. Defendants insist they have photos and witness testimony showing that they satisfied this condition but acknowledge that plaintiff argues that the premises were in bad shape. Therefore, defendants argue that communications that claim the premises were allegedly destroyed would certainly be relevant for this issue. Defendants argue that at least 600 documents were destroyed based on records it obtained from third-party David Barton. They maintain that these are all documents that plaintiff should have produced.

Defendants also point out that plaintiff was involved in another litigation concerning the sale of the property but only produced 22 documents from this litigation and a privilege log that identified only three documents.

Discussion

The “Supreme Court has broad discretion to determine a sanction for the spoliation of evidence. In order to obtain sanctions for spoliation, a party must establish that the nonmoving party had an obligation to preserve the item in question, that the item was destroyed with a ‘culpable state of mind,’ and that the destroyed item was relevant to the party's claim or defense.

“A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence. Even when a party is entitled to sanctions for spoliation, striking a pleading is a drastic sanction in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court should consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness. Where the moving party has not been deprived of the ability to establish its case or defense, a less severe sanction is appropriate” (*Harry Winston, Inc. v Eclipse Jewelry, Corp.*, 215 AD3d 421, 422, 187 NYS3d 202 [1st Dept 2023]).

The Court grants the motion but only to the extent that defendants are entitled to an adverse inference as described below. There is no dispute here that plaintiff destroyed documents. Defendants demonstrated that they produced many more documents between them and plaintiff’s principal than what plaintiff produced (*see* NYSCEF Doc. No. 76 n1 [observing that defendants’ document production yielded 699 documents with the relevant email domain

name for plaintiff while plaintiff only produced 72 documents]). Clearly, these productions should be nearly identical as they involve communications between the parties.

And plaintiff's principal, Mr. Marks, admits that he destroyed documents. He insisted that plaintiff has no other documents "because Plaintiff did not retain every communication between Plaintiff and Defendant during the parties' multi-year working relationship" (NYSCEF Doc. No. 131, ¶ 5). Mr. Marks complains that he is flooded with hundreds of emails a day and so he deletes emails (*id.* ¶ 5).

Unfortunately, this explanation is wholly unsatisfactory. Plaintiff is a sophisticated landlord that is seeking to recover over \$1 million from defendants. A vague assertion that its principal gets too many emails and so he deletes them is not sufficient. The fact is that, here, there were many, many red flags that should have alerted Mr. Marks to retain emails with defendants.

First, defendants sent an email to Mr. Marks on January 25, 2021 informing him that they intended to vacate the premises on January 26, 2021 and blamed plaintiff for not negotiating in good faith about rent reductions (NYSCEF Doc. No. 4). Next, defendants sent another message on December 8, 2021 telling Mr. Marks that they intended to follow through on their surrender in January 2022 (NYSCEF Doc. No. 5). Moreover, Mr. Marks sent an email on February 8, 2022 to representatives from defendants in which he claimed that the premises were not left in "Broome [sic] clean" condition (NYSCEF Doc. No. 6).

Any landlord in New York City knows that these events give reasonable notice that it is time to retain emails (and not delete them) because a dispute and possible litigation are probable. And Mr. Marks' affidavit does not detail a coherent retention policy that could justify the deletion of emails. He did not offer criteria for when he deletes emails or how he determines

which emails to delete and which to save. Instead, he appears to argue that he deletes emails because he gets too many. That does not justify haphazardly deleting emails and demonstrates negligence in retaining these documents.

The Court observes that these deleted emails are clearly relevant. Obviously, a key issue here is whether the premises were left in broom clean condition (the Court recognizes that plaintiff offers other issues with the surrender, including the fact that it allegedly did not agree to it in writing). Plaintiff cannot delete emails from that key time period and then argue that they are irrelevant or a red herring.

It may be that those emails would not shed any light about who was responsible for the conditions plaintiff complains about, but the Court cannot make that assumption. For instance, an email could have supported defendants' contention that someone else (possibly an unauthorized visitor) got access to the premises and destroyed it. And the issue of the premises' condition relates both to the good guy guaranty (and the related surrender) as well as plaintiff's demand to recover the costs it incurred to repair and clean the premises.

However, the Court finds that striking the complaint is too severe of a sanction as plaintiff has produced some documents and defendants have had the chance to depose key witnesses. Therefore, the Court will impose an adverse inference that the deleted emails would not have supported plaintiff's position that defendants were responsible for the alleged damage to the premises (*c.f. VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 939 NYS2d 321 [1st Dept 2012] [affirming the imposition of an adverse inference where a party did not suspend its routine retention/destruction policy after reasonably anticipating litigation]).


Summary

The Court observes that plaintiff argues that defendants had a chance to talk with relevant witnesses and that defendants did not make any complaints about spoliation until recently. But, according to defendants and this record, the issue of deleted documents was only discovered recently and the affidavit from Mr. Marks shows that he routinely and haphazardly deleted some undetermined number of documents because he gets too many emails. Plus, depositions are especially productive when a witness can be questioned about documents.

Plaintiff is correct that it need not retain every email with every tenant. But it cannot continue to delete emails when it reasonably should expect that there is going to be a dispute and a probable litigation with a commercial tenant and guarantor. And, critically, plaintiff did not detail a retention policy that could justify deleting these emails. That compels the conclusion that these deletions were unfair to defendants, who have a right to explore what plaintiff said about the condition of the premises before, during, and after the surrender. To the extent plaintiff claims this whole issue is a red herring because it never consented to the surrender in writing, that issue is itself premature and does not compel the Court to deny the instant motion.

Accordingly, it is hereby

ORDERED that defendants’ motion is granted only to the extent that it is entitled to an adverse inference that the deleted emails would not have supported plaintiff’s position that defendants did damage to the premises.

<p><u>12/14/2023</u> DATE</p>			 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> DENIED	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		