

**Rob Vel Trading Pty Ltd. v Thomas**

2024 NY Slip Op 30056(U)

January 2, 2024

Supreme Court, New York County

Docket Number: Index No. 654069/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART 14**

*Justice*

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ROB VEL TRADING PTY LIMITED,  
  
Plaintiff,

**INDEX NO.** 654069/2022

**MOTION DATE** 12/22/2023

**MOTION SEQ. NO.** 002

- v -

JOSEPH LEWIS THOMAS,  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, were read on this motion to/for DISCOVERY.

Plaintiff’s motion to compel defendant to produce documents and for sanctions due to the spoliation of evidence is denied. However, the Court finds that defendant may not rely upon any documents not already produced in this litigation.

**Background**

This action relates to plaintiff’s assertion that defendant Thomas refused to perform (Thomas is an R&B artist) at an event allegedly in violation of an express contractual agreement. Plaintiff maintains that Mr. Thomas was hired to perform at a birthday party at a venue in South Africa on July 16, 2022. It argues that Mr. Thomas used his manager, Mr. Isaac, to communicate his demands. These included, among many, many demands, a fee for \$75,000 to be paid upfront, first-class travel arrangements for Mr. Thomas and his thirteen-person entourage as well as specific accommodations once in South Africa.

Plaintiff alleges that it ceded to these demands and expended \$350,000 to accommodate defendants’ conditions. It claims that two days before the event, Mr. Thomas cancelled and

claimed that he had tested positive for COVID-19. Plaintiff insists that it demanded proof and Mr. Thomas refused to provide any proof. Plaintiff alleges that Mr. Thomas used this imagined illness as a way to get out of the performance.

In this motion, plaintiff contends that defendant has refused to produce relevant documents concerning Mr. Thomas' COVID diagnosis. It argues that the only proof turned over was a screenshot of a text message containing a picture of a positive COVID test. Plaintiff argues that this screenshot contains no metadata, no time stamp nor the names or phone numbers of the participants of this text message conversation. It emphasizes that at his deposition, Mr. Thomas could not confirm the origin of this screenshot or if it concerns a test in July 2022 (i.e., right before the performance).

Plaintiff observes that Mr. Thomas testified that months after he did not perform at the party, he jumped into a hot tub with his phone in his pocket and that this caused him to lose all of this text messages and photos. Plaintiff also contends that when it took the deposition of defendant's manager, Mr. Isaac, he provided no clarity about where the COVID screenshot came from either. Plaintiff also complains about Mr. Thomas' document production, including that Mr. Thomas has not produced a single email he sent or received.

Plaintiff contends that Mr. Thomas was under an obligation to preserve evidence about this dispute long before his iPhone was destroyed in the hot tub (sometime in early 2023) as the performance was scheduled for July 2022 and this lawsuit was commenced in 2022. It questions why he did not back up his phone or do anything to preserve this evidence. Plaintiff demands that Mr. Thomas' answer and his defenses should be stricken.

In opposition, Mr. Thomas emphasizes that his inadvertent loss of a cell phone is not a basis for sanctions nor to strike his answer. He admits that he no longer possesses a copy of the

original image of his COVID test because of the loss of the phone. Mr. Thomas argues that there is no evidence that his conduct was willful or in bad faith and there is no evidence of that here. He observes that the original COVID test information is not plaintiff's sole means of proving its case and so the striking of a pleading is not appropriate here.

Defendant Thomas also argues that he has produced all available evidence and that he typically communicates about a performance at a rehearsal or sound check and not necessarily in written form. He insists that he spoke with his manager over the phone about the COVID diagnosis and that is why there are no communications about it to produce to plaintiff.

In reply, plaintiff insists that Mr. Thomas has admitted he destroyed key evidence and demands that this Court strike his answer and force both Mr. Thomas and his manager (who is now a non-party) to pay monetary sanctions.

The Court did not consider the letters the parties filed after the motion was submitted.

### **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 denies the instant motion. As defendant correctly argued, there is no legitimate dispute that the evidence surrounding Mr. Thomas’ COVID test is not part of plaintiff’s prima facie case. That is, plaintiff need not prove or disprove anything relating to Mr. Thomas’ illness in order to pursue its claim for breach of contract.

Rather, it is Mr. Thomas’ burden to show that he had an illness that implicates the force majeure clause of the agreement (*see* NYSCEF Doc. No. 50, ¶ 4). And Mr. Thomas admits in his opposition that plaintiff will likely “call into question the veracity of the copied image of the COVID test to the jury or the absence of metadata.” In this Court’s view, that is the appropriate result. That defendant will have to rely upon the screenshot of the test either at trial or in a dispositive motion and plaintiff will have the chance to argue why this evidence is not compelling or persuasive. But there is no basis to strike a pleading.

Mr. Thomas testified at his deposition that he lost the data in his old phone because he went into a hot tub while the phone was in his pocket (NYSCEF Doc. No. 51 at 20). The Court finds that this is not a basis to strike his answer or defenses. Sometimes accidents happen. And, as noted above, the lack of evidence only affects a potential defense, not plaintiff’s burden on its causes of action.

The Court also denies the motion to the extent it seeks to compel the production of additional documents from Mr. Thomas. Defendant claims that he has produced all the documents in his possession; the Court cannot force him to produce documents he insists he does not possess.

## Summary

As the Court has denied the request for sanctions, the Court similarly denies the request for legal fees and to the extent that plaintiff seeks relief against Mr. Isaac (formerly a defendant who was dismissed from this action). Mr. Thomas pointed out in opposition that there is no proof that Mr. Isaac was served with this motion and, in reply, plaintiff simply contends that there can be little doubt that Mr. Isaac knows about the motion as he and Mr. Thomas are represented by the same counsel. Unfortunately, that plaintiff suspects Mr. Isaac knows about the motion is not a basis to impose sanctions. Plaintiff had an obligation to serve Mr. Isaac as if he were a non-party—that he was a former defendant is of no moment.

Moreover, the Court emphasizes that cases should be determined on their merits. The instant motion makes clear that defendant does not possess relevant metadata or communications concerning his purported COVID diagnosis because he accidentally destroyed his phone. That will obviously hinder his ability to conclusively show that he tested positive for COVID to implicate the force majeure clause. Mr. Thomas insists he can meet his burden through testimony. Whether he can or not is up to a fact finder.


The Court recognizes that plaintiff strongly believes that the destruction of the phone necessitates the imposition of sanctions. But plaintiff did not show that Mr. Thomas' actions were willful; in fact, the loss of this information may end up being more damaging to defendant than to plaintiff. *However*, to avoid any unfair surprise to plaintiff, the Court finds that defendant may not rely upon any documents not already produced (either in a dispositive motion or at trial), absent good cause shown. That is, defendant claims he doesn't have any more documents so he is not permitted to suddenly come up with additional documents at a later date, such as on the eve of trial.

Accordingly, it is hereby

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

ORDERED that defendant may not rely upon, either in a dispositive motion or at trial, any document not already produced in this litigation absent good cause shown.

As this motion was the only item listed in the last discovery order (NYSCEF Doc. No. 46), the Court ORDERS that a note of issue be filed on or before January 23, 2024.

<u>1/2/2024</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE