

**Manhattan Inst., Inc. v Crown Plumbing Inc.**

2024 NY Slip Op 30224(U)

January 10, 2024

Supreme Court, New York County

Docket Number: Index No. 651147/2021

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X

MANHATTAN INSTITUTE, INC.,
Plaintiff,

- v -

CROWN PLUMBING INC.,
Defendant.

-----X

CROWN PLUMBING INC.,
Plaintiff,

-against-

GFP REAL ESTATE, LLC, THE RELIABLE AUTOMATIC
SPRINKLER CO. INC., ABC CORPORATIONS 1-10, JOHN
DOES 1-10
Defendant.

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INDEX NO. 651147/2021
MOTION DATE 10/31/2023
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595715/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55

were read on this motion to/for HEARING

In this action, Manhattan Institute, Inc. (plaintiff), a licensed private school, seeks to recover for property damage and loss of business resulting from an alleged sprinkler failure on the 5th Floor of 41-45 West 34th Street, New York, New York (the subject premises). On June 20, 2020, a sprinkler head ruptured and caused flooding on the floor above the subject premises, which plaintiff leased from non-party 34th Street Commercial Properties, LLC. Plaintiff alleges that the resulting flooding was so extreme that it caused plaintiff to permanently close.

Plaintiff brings this action claiming negligence, private nuisance, and breach of contract against Defendant Crown Plumbing, Inc. (Crown Plumbing), who installed the subject sprinkler.

Crown Plumbing also brings a third-party action against Reliable Automatic Sprinkler Co. Inc. (Reliable), the manufacture of the subject sprinkler, and GFP Real Estate, LLC (GFP), the property manager for the building for, *inter alia*, indemnification and contribution.

### **I. Relevant Facts**

Through the course of discovery, GFP Real Estate hired non-party LGI Forensic Engineering, PC (LGI Forensic) to inspect the subject sprinkler head. In July 2020, Robert Berryman, an LGI Forensic employee/consultant, took the sprinkler head to coordinate an inspection. Although plaintiff did not receive any notice from LGI Forensic, Crown Plumbing participated in the inspection. Reliable did not participate in the inspection. By May 25, 2021, LGI Forensic allegedly disposed of the sprinkler head, which is the subject of the instant motion.

Upon learning of the inspection, plaintiff's counsel spoke with Steve Piertopalo, LGI Forensic's owner, who refused to produce Mr. Berryman for a deposition or to give any information regarding the inspection or disposal of the subject sprinkler head. Plaintiff then served a subpoena upon LGI Forensic to inspect its files with respect to the subject sprinkler and to depose Mr. Berryman to inquire as to his personal knowledge of the handling of the subject sprinkler head. Plaintiff has served discovery demands on Crown Plumbing, Reliable, and GFP Real Estate, including supplemental omnibus demands pertinent to the care, custody, inspection, and testing of the sprinkler head.

### **II. Arguments**

Plaintiff now brings this discovery motion seeking multiple types of relief and orders to: (1) schedule a hearing on spoliation issues in regards to the subject sprinkler head, which has been lost or destroyed; (2) enforce the subpoena against non-party LGI Forensic Engineering, compelling production of documents and testimony; (3) compel all outstanding discovery from

defendant and third-party defendants; and (4) grant plaintiff leave to file a third supplemental summons and third amended complaint pursuant to CPLR 3025 to join LGI Forensic as a necessary party.

Reliable partially opposes the motion. Reliable only opposes the portion of plaintiff's motion seeking a discovery response, asserting that it responded to plaintiff's discovery demands. Reliable also maintains that it did not attend or participate in the inspection of the subject sprinkler and that it provided to plaintiff the communications that it received concerning the inspection and subsequent request for production. Reliable takes no position on the request to enforce the subpoena, to have a spoliation hearing, or to file an amended complaint. In light of Reliable's position, at oral argument on October 31, 2023, plaintiff withdrew his motion to the extent it seeks relief from Reliable.

Crown Plumbing also partially opposes the motion to the extent plaintiff seeks to compel a discovery response, as Crown Plumbing maintains that it provided responses. Further, at oral argument, Crown Plumbing consented to supplement its disclosure regarding the sprinkler inspection because it acknowledged that it did send an expert to the inspection. Crown Plumbing has no opposition to the portion of plaintiff's motion seeking a spoliation hearing, with its counsel noting that "...it appears particularly likely that there has in fact been specific spoliation of material evidence by a subpoenaed retained engineer, which clearly does materially prejudice all the parties in the case." *See* NYSCEF doc. no. 54 at 2. Nor does Crown Plumbing oppose the portions of plaintiff's motion seeking to enforce the subpoena served upon LGI Forensic or granting plaintiff leave to file a third supplemental summons and complaint.

Lastly, GFP Real Estate partially opposes the motion. With respect to the outstanding discovery demands, GFP Real Estate represented to the Court that all of plaintiff's remaining

demands will have been complied with by the time of full submission of the motion. However, GFP Real Estate opposes the part of plaintiff's motion that seeks to amend his complaint to include LGI Forensic and to add a cause of action for spoliation. GFP Real Estate argues that plaintiff's proposed additional cause of action is futile because New York does not recognize an independent cause of action for spoliation. Instead, GFP Real Estate maintains that a party seeking a remedy for spoliation should file a motion for sanctions.

### III. Analysis

#### A. Spoliation Hearing

"Spoliation occurs when a litigant disposes of crucial items of evidence involved in an accident before an adversary has an opportunity to inspect them." *Solis v McDonald's Corp.*, 2010 N.Y. Slip Op. 32752[U] (Sup Ct, NY County 2010). "A party seeking sanctions based on spoliation of evidence must demonstrate that: (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 finally, (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 L.L.C.*, 93 AD3d 33, 45 (1st Dept 2012) (citations omitted); *see also Ahroner v Israel Discount Bank of NY*, 79 AD3d 481, 482 (1st Dept 2010). "The burden is on the party requesting sanctions to make the requisite showing." *HMS Holdings Corp. v Arendt*, 47 Misc 3d 1222(A) (Sup Ct, Albany County 2015).

Plaintiff has raised critical issues with respect to the preservation of the subject sprinkler head in this litigation. It is clear that the sprinkler head is central to the action. Further, there is no dispute that this litigation was pending at the time of the inspection, of which not all parties were made aware. To ascertain whether sanctions are appropriate, including, critically, if the records

were destroyed with a “culpable state of mind,” a spoliation hearing must be held. *See e.g. Klein ex rel. Klein v Seenauth*, 180 Misc 2d 213, 220 (Civ Ct, Queens County 1999) (holding that “the Court finds that a ‘spoliation hearing’ is warranted under the circumstances herein to not only determine when the subject bicycle was discarded, but more particularly, to ascertain whether the plaintiffs were on notice that the evidence might be needed for future litigation.”).

Therefore, a hearing is appropriate here, where the credibility of the witnesses must be evaluated to determine if plaintiff has met his burden in seeking sanctions and to determine what, if any, sanctions are appropriate. *See HMS Holdings Corp. v Arendt*, 47 Misc 3d 1222(A) (Sup Ct, Albany County 2015).

#### **B. Leave to file a Third Supplemental Summons and Third Amended Complaint**

In addition to seeking a spoliation hearing, plaintiff moves for leave to file a third supplemental summons and third amended complaint pursuant to CPLR 3025 so that it may join LGI Forensic as a necessary party and add the cause of action for spoliation, by way of Judiciary Law § 773.

“Leave to amend a pleading pursuant to CPLR 3025 (b) is freely given, and will be denied only if there is ‘prejudice or surprise resulting directly from the delay’ in moving to amend, ‘or if the proposed amendment is palpably improper or insufficient as a matter of law.’” *Carrasquillo v Wilfred Realty Corp.*, 205 AD3d 516, 517 (1st Dept 2022), quoting *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (internal quotation marks omitted). To establish it is entitled to leave to amend under CPLR 3025 (b), a movant “need not establish the merit of its proposed new allegations...but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010).

Plaintiff itself acknowledges that New York State does not recognize the independent tort of spoliation of evidence against a third party, as has occurred in this case. *See* NYSCEF doc. no. 39 at ¶ 12. However, plaintiff argues that Judiciary Law § 773<sup>1</sup> allows an action to be commenced against a third party who negligently breaches a duty to preserve evidence, even if such third party has no connection to the underlying lawsuit. In support of this proposition, plaintiff cites to *Ortega v City of New York*, 9 NY3d 69, 80 (2007). In opposition, GFP Real Estate argues that the Court of Appeals in *Ortega* made no such holding and that Judiciary Law § 773 merely authorizes fines based on contempt,

Plaintiff and GFP Real Estate agree that there is no distinct cause of action for spoliation in New York State Jurisprudence. *See Ortega v City of New York*, 9 NY3d 69, 80 (2007). However, they disagree as to whether Judiciary Law § 773 permits a cause of action against LGI Forensic for its destruction of evidence. The Court in *Ortega* held that, although there is no independent tort claim for spoliation, “[u]nder our civil contempt statutory scheme, a party who suffers a loss or injury as a result of violation of a court order can seek full compensation from the contemnor.” *Ortega*, 9 NY3d 69 at 80, citing Judiciary Law § 773. Here, plaintiff does not allege a cause of action for contempt. In fact, plaintiff does not assert that LGI Forensic violated a court order in any way or that any court order exists that directs the production of the sprinkler head. As such, GFP Real Estate misconstrues the holding in *Ortega*.

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<sup>1</sup> Judiciary Law § 773, entitled “Amount of fine,” reads:

If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

Therefore, plaintiff has failed to meet its burden to show that "...the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010). To allow plaintiff to implead LGI Forensics to assert a non-viable cause of action for spoliation against it is futile. Thus, plaintiff's motion to leave to file a third supplemental summons and third amended complaint is denied.

### **C. Enforce the Subpoena against non-party LGI Forensic Engineering**

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Pursuant to CPLR 3101 (a) (4), disclosure may be sought from a non-party "upon notice stating the circumstances or reasons such disclosure is sought or required." CPLR 3103 (a) permits "any person from whom or about whom discovery is sought," i.e., a nonparty, to move for "a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Further, "[t]he delicate balance between allowing liberal disclosure and protecting the parties from unnecessary intrusions, is left to the sound discretion of the lower courts." *Sgambelluri v Recinos*, 192 Misc 2d 777, 779 (Sup Ct, Nassau County 2002), citing *Andon ex rel. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 (2000).

Plaintiff seeks to subpoena Mr. Berryman to produce:

All records, whether electronically stored or otherwise, pertaining to, relating to or concerning, directly or indirectly, the care, custody, physical possession, testing, examination, transport, disposal and/or inspection of the sprinkler head removed from the sixth floor of the subject premises known as 41-45 West 34th street, NY, NY 10001 on or about June 20, 2020.

Plaintiff also seeks to depose Mr. Berryman because:

[U]pon his attorney's information and belief [his] firm had custody of a critical piece of physical evidence in this case; that [he has] personal knowledge of the examination, testing and/or disposal of said evidence, and that [he] otherwise [has] personal knowledge and information necessary to the prosecution of Plaintiff's case.

Although the Court has declined herein to permit plaintiff to amend its answer to include a spoliation claim against LFI Forensic, it does direct that a hearing is necessary to determine whether sanctions based on spoliation are appropriate here. Clearly, any files or records that address the handling of the subject sprinkler head and its inspection and subsequent disposal are material and necessary to the spoliation hearing. Further, Mr. Berryman's testimony with respect to his personal knowledge of the examination, testing, and disposal of the sprinkler head are critical in determinizing whether sanctions are warranted in this matter.

Neither defendant nor third party defendants articulate any reason why the Court should not direct compliance with the duly served subpoena upon Mr. Berryman, and, accordingly, the Court grants plaintiff's motion to enforce the subpoena against non-party LFI Forensic Engineering is granted.

#### **D. Compel All Outstanding Discovery**

To the extent plaintiff seeks to compel all outstanding discovery from defendants and third-party defendants, such request is denied as moot. Defendants and third-party plaintiffs represented in their opposition papers that all discovery sought by plaintiff was provided, and plaintiff has not replied to their oppositions to refute this position.

#### **IV. Conclusion**

Accordingly, the motion of plaintiff Manhattan Institute, Inc. is resolved to the following extent:

It is ORDERED that a hearing is directed to determine whether sanctions with respect to the alleged spoliation of the subject sprinkler head are warranted; and it is further

ORDERED that a pre-hearing conference shall be held on February 15, 2024 at 2:15 p.m. in Part 12; and it is further

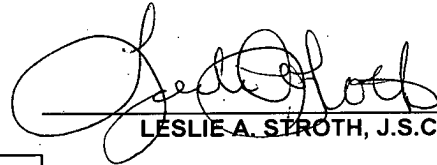
ORDERED that compliance with such subpoena is mandatory; and it is further

ORDERED that a copy of this decision and order shall be served along with the subpoena upon Robert M. Berryman, LGI Forensic Engineering.

The foregoing constitutes the decision and order of the Court.

1/10/2024

DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE