

**Dorman v Luva of NY, LLC**

2024 NY Slip Op 30352(U)

January 28, 2024

Supreme Court, Kings County

Docket Number: Index No. 520154/2020

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of January 2024

HONORABLE FRANCOIS A. RIVERA

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JONATHAN DORMAN and  
MERRILL STUBBS DORMAN,

Plaintiff,

- against -

LUVA OF NY, LLC; WALDEK DEC, ANDREW  
PASEK, BEN HERZOG ARCHITECT, P.C., and  
BEN HERZOG,

Defendants.

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Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion filed on March 28, 2023, under motion sequence numbers three, by plaintiffs Jonathan Dorman and Merrill Stubbs Dorman (collectively, the plaintiffs or the movants) for an order pursuant to CPLR § 3126: (1) striking the answer of the defendants Luva of NY, LLC, Waldek Dec and Andrew Pasek (collectively, the Luva defendants) and entering judgment against the Luva defendants in favor of plaintiffs for failure to comply with discovery demands and court orders, and for spoliation of material evidence; and (2) pursuant to CPLR § 3126 or, alternatively, 22 N.Y.C.R.R. § 130-1.1, awarding plaintiffs costs and expenses, including reasonable attorneys' fees, incurred in connection with this motion.

- Notice of motion
- Memorandum of law in support
- Affirmation of good faith
- Affirmation in support
- Exhibits A-M

**DECISION & ORDER**

Index No.: 520154/2020

Recitation in accordance with CPLR 2219 of the papers considered on the notice of cross motion filed on May 16, 2023, under motion sequence numbers four, by the Luva defendants (hereinafter the cross movants) for an order pursuant to 22 N.Y.C.R.R. § 130-1.1, awarding the Luva defendants costs and sanctions against the plaintiff and their counsel for making the instant motion.

- Notice of cross motion
- Affirmation in in opposition to plaintiffs' motion and in support of the cross motion
- Memorandum of law in opposition to plaintiffs' motion and in support of the cross motion
  - Exhibits 1-13
- Reply memorandum of law by the plaintiffs
- Reply affirmation by plaintiff
  - Exhibits A-B
- Reply affirmation by Luva defendants
- Reply memorandum by Luva defendants

## **BACKGROUND**

On October 19, 2020, plaintiff commenced the instant action for damages for personal injury by their attorneys, Goetz Fitzpatrick LLP, by filing a summons and complaint with the Kings County Clerk's office (KCCO). The complaint was signed by Sabrina M. Galli, Esq. and Joshua G. Oberman, Esq. from the office of Goetz Fitzpatrick LLP.

On December 21, 2020, defendants Ben Herzog Architect, P.C., and Ben Herzog interposed and filed a verified answer with the KCCO.

On January 11, 2021, defendants Ben Herzog Architect, P.C., and Ben Herzog interposed and filed an amended verified answer with cross claims, counterclaims, and third-party claims with the KCCO.

On January 25, 2021, the Luva defendants interposed and filed a verified answer with counterclaim and cross claims against Ben Herzog Architect P.C. and Ben Herzog.

## LAW AND APPLICATION

The movants seek sanctions against the cross movants for alleged disclosure violations. The movants explain the document they were seeking and the difficulties they encountered getting the cross movants to respond to their discovery demands. It is noted, however, that the movants are not now, nor have they previously, moved for an order pursuant to CPLR 3214 compelling the cross movants' compliance with those discovery demand. Rather they seek the draconian remedy of an order striking of the cross movants' answer as well as sanctions pursuant to either CPLR § 3126 or 22 N.Y.C.R.R. § 130-1.1. In support of the motion the movants annexed thirteen exhibits labeled A through M. It is noted that of the thirteen exhibits annexed, there documentary submission did not include a Court order directing disclosure of any kind by the cross movants. Under these circumstances, the movants do not and cannot meet their burden of demonstrating that the cross movants' alleged disclosure failures were the result of willful and contumacious conduct.

Under CPLR 3126, if a court finds that a party destroyed evidence that ought to have been disclosed ..., the court may make such orders with regard to the failure or refusal as are just (*Ortega v. City of New York*, 9 N.Y.3d 69, 76 [2007], quoting CPLR 3126). New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an

adverse inference instruction at the trial of the action (*Ortega v. City of New York*, 9 N.Y.3d at 76). Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party (*Ortega v. City of New York*, 9 N.Y.3d at 76).

The movants have also contended in conclusory fashion that the cross movants intentional destroyed some of the items which the movants were requesting. A party that seeks sanctions for spoliation of evidence 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. Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 at 547–548 [2015]).

The movants contends that their attorney at the time, Robert S. Dowd, Jr. sent a letter (hereinafter the subject letter) to Michael Goldstein, who they believed was counsel for the Luva defendants. The letter was dated February 5, 2020, and indicated that it was sent by email. February 5, 2020, is at least seven months prior to the date the instant action was commenced. The letter advised of possible litigation between the plaintiffs

and the Luva defendants pertaining to a gut renovation project for real property located at 428 6th Street, Brooklyn New York. It further advised to take all necessary steps to preserve all tangible things that have any connection or relevance to the renovation project.

A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence (*Oppenheimer v. City of New York*, 193 A.D.3d 957, 958 [2<sup>nd</sup> Dept 2021]). However, in the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices (*Sanders v. 210 N. 12th St., LLC*, 171 A.D.3d 966, 968 [2<sup>nd</sup> Dept 2019]).

When the movants became aware that the cross movants were claiming a loss of the requested disclosure document because of an alleged computer crash, they contended that sanction due to spoliation of evidence was appropriate. The affirmation in support of the motion was by Nader Mobargha, Esq., the movants' current counsel. There was no sworn statement by Robert S. Dowd attesting to the emailing of the subject letter. Moreover, the movants' evidentiary submission did not establish that the individual to whom they purportedly sent the e-mailed was the counsel to the cross movants at the time. Thus, the factual predicate for the request for sanction due to spoliation is therefore lacking. The movants' motion is denied in its entirety.

The Luva defendants cross moved for an order pursuant to 22 N.Y.C.R.R. § 130-1.1, awarding the Luva defendants costs and sanctions against the plaintiff and their counsel for making the instant motion.

22 NYCRR 130–1.1 states:

(A) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expense reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130–1.3 of this Subpart.

For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

The plaintiffs' filing of the motion was not frivolous within the intendment of 22 NYCRR 130–1.1. The cross motion is denied.

## **CONCLUSION**

The branch of the motion by plaintiffs Jonathan Dorman and Merrill Stubbs Dorman for an order pursuant to CPLR § 3126 striking the answer of Luva of NY, LLC, Waldek Dec and Andrew Pasek is denied.

The branch of the motion by plaintiffs Jonathan Dorman and Merrill Stubbs Dorman for an order entering judgment against defendants Luva of NY, LLC, Waldek Dec and Andrew Pasek for failure to comply with discovery demands and court orders, and for spoliation of material evidence is denied.

The branch of the motion by plaintiffs Jonathan Dorman and Merrill Stubbs Dorman for an order pursuant to CPLR § 3126 or, alternatively, 22 N.Y.C.R.R. § 130-1.1, awarding plaintiffs costs and expenses, including reasonable attorneys' fees, incurred in connection with the motion is denied.

The cross motion by defendants Luva of NY, LLC, Waldek Dec and Andrew Pasek for an order pursuant to 22 N.Y.C.R.R. § 130-1.1 granting them an award for costs and sanctions against the plaintiff and their counsel is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.