Garduno v 207-01 Jamaica Ave. Partners, LLC.
2024 NY Slip Op 35027(U)
August 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 708091/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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JOSE GARDUNO,

Plaintiff,

-against-

207-01 JAMAICA AVENUE PARTNERS, LLC., THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY and GANNETT FLEMING, INC.,

Defendants.

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Index No.:708091/2021

Motion
Date: June 3, 2024

Motion Cal. No.: 12

Motion Sequence No.: 4

The following efile papers numbered 113-131, 135-147, 149-152, 155-159, 161-162 submitted and considered on this motion by Plaintiff Jose Garduno (hereinafter "Garduno") seeking an Order enforcing this Court's conditional order of preclusion dated January 29, 2024, striking the Defendants' answer, and upon striking, setting this matter down for an inquest on the issue of damages; granting Plaintiff summary judgment on the issue of liability as to his Labor Law claims under sections 200, 240 and common law negligence based upon spoliation of the pre-construction photographs requested in item 17 of Garduno's May 4, 2023 post-EBT demand that Steve Kontarines admitted to taking and storing electronically at his deposition; and the cross-motion of Defendants seeking an Order pursuant to 22 NYCRR §130-1.1, granting Defendants costs in the form of reimbursement for actual expenses reasonably incurred in preparation of the within cross-motion and opposition, and reasonable attorney's fees incurred in connection therewith, resulting from frivolous conduct on the part of Kenneth J. Gorman, Esq., Jason B. Kessler, Esq., and the Law Offices of Jason B. Kessler, P.C., and pursuant to NYCRR §130-1.1, granting Defendants financial sanctions against Kenneth J. Gorman, Esq., Jason B. Kessler, Esq., and the Law Offices of Jason B. Kessler, P.C., for engaging in frivolous conduct.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 113-131
Cross-Motion-Affidavits-Exhibits.....	EF 135-147
Affirmation in Opposition to Cross-Motion and in Further Support of Motion- Affidavits-Exhibits.....	EF 149-152
Reply Papers.....	EF 155-159
Correspondence	EF 161, 162

This Labor Law action was commenced by Garduno to recover for personal injuries he alleged that he sustained on January 17, 2020, while in the scope of his employment at a construction site located at Q483-3K, 207-01 Jamaica Avenue, Queens Village, New York. In his amended complaint, Garduno alleged causes of action pursuant to Labor Law §§200, 240(1), and 241(6).

By Order of the undersigned dated January 29, 2024, Defendants were directed to provide certain discovery and its failure to do so would result in the striking of its answer upon final application to the Court by Garduno seeking relief. Now, Garduno states that Defendants failed to fully comply with the January 29, 2024 Order, which he views as a self-executing conditional Order of preclusion. Garduno contends that Defendants' answer should be stricken. Also, Garduno argued that Defendants destroyed pre-accident photographs which were taken and never exchanged despite discovery demands and Court Orders. According to Garduno, Defendants witness, Steve Kontarines (hereinafter "Kontarines") admitted to taking and storing electronically pre-construction photographs which had been previously requested by Garduno in his demand dated May 4, 2023. In the alternative, Garduno respectfully submits that based on Defendants' deliberate spoliation of the pre-construction photos, this Honorable Court should grant him summary judgment on the issue of liability as to his Labor Law §§200, 240(1), and common law negligence claims (*see Velasquez v. 795 Columbus*, 103 AD3d 541-2 [1st Dept. 2013] [plaintiff entitled to summary judgment on Labor Law §200 claim where general contractor had notice of the condition]). Also photographs depicting the accident scene were taken by Kontarines, were taken not exchanged as directed by the Court. In the event that Defendants argue that they have substantially complied with the Court's January 29, 2024 Order with their response dated February 28, 2024, the pre-construction photographs taken by Kontarines were not exchanged and if they had been, they would have shown the conditions of the subject premises before demolition commenced and whether the walls needed to be secured or braced before the work even began. Thus, the photographs are critical to the litigation of this case. Garduno claims that when Defendants failed to provide full and complete responses to the January 29, 2024 Order, the conditional order became absolute (*see Corex-SPA v Janel Group of New York, Inc.*, 156 AD3d 599 [2d Dept 2017].)

Defendants cross-move pursuant to 22 NYCRR §130-1.1, seeking costs in the form of reimbursement for actual expenses reasonably incurred in preparation of the cross-motion and opposition papers, along with reasonable attorney's fees incurred in connection therewith, resulting

from frivolous conduct on the part of Kenneth J. Gorman, Esq., Jason B. Kessler, Esq., and the Law Offices of Jason B. Kessler, P.C., and, pursuant to NYCRR §130-1.1, granting Defendants financial sanctions against Kenneth J. Gorman, Esq., Jason B. Kessler, Esq., and the Law Offices of Jason B. Kessler, P.C., for engaging in frivolous conduct. According to Defendants, in full compliance with the undersigned's January 29, 2024 Order, on February 28, 2024, Defendants maintained that they timely served (via NYSCEF) a Supplemental Response to Plaintiff's January 26, 2023 Post-Deposition Demands, and a Supplemental Response to Plaintiff's May 4, 2023 Post-EBT Demands, which included the sworn affirmations of two (2) representatives of Defendant, Gannett Fleming, Inc. (hereinafter, "Gannett"), the sworn affirmation of a representative of Defendant, The New York City School Construction Authority (hereinafter, "SCA"), and an approximately 1,200-page document production. Defendants claimed that Garduno's counsel has made "numerous meritless allegations, false material statements of fact and law, misrepresentations and self-serving omissions of relevant testimony and discovery, and demonstrates a clear intent to delay, inhibit, and outright prevent the resolution of this matter on the merits." Defendants claimed that Garduno's counsel was engaging in bad faith tactics, harassing and maliciously injuring defense counsel. Garduno's counsel seeks to enforce this Court's January 29, 2024 Order, which he repeatedly and erroneously refers to as a "self-executing conditional Order" however, this is not correct, since Garduno was directed to make another application under CPLR 3126 if Defendants failed to comply. Thus the prior Order was not self-executing. (*See Corex-SPA v. Janel Group of N.Y., Inc.*, 156 A.D.3d 599 [2d Dep't 2017]). As such, Garduno's counsel's repeated contentions to the contrary amount to "material factual statements that are false," and evidence a clear intent to "harass or maliciously injure" Defendants under NYCRR §130-1.1(c). As such, Plaintiff's false claims as to the nature of this Court's Order are frivolous, warranting costs and sanctions.

According to Defendants, the first purported basis asserted by Plaintiff in support of the discovery sanctions sought in his motion, is that Defendants' Supplemental Discovery Responses were deficient in that they did not include certain photographs that Kontarines testified to taking during a one-day preliminary walkthrough at the Job Site, occurring prior to the beginning of construction at said location. However, as set forth in his February 26, 2024 Affirmation submitted with Defendants' February 28, 2024 Supplemental Discovery Responses and document production, Kontarines attested that "[f]ollowing a diligent search of our records and files, including cellular phones and any other such mobile devices, we have concluded that Gannett is not in possession of any photographs or documents relative to any preliminary walkthroughs at the Job Site, other than those annexed hereto as Exhibit "'B". Also, as indicated in the sworn Affirmation of Sharon Berger, (hereinafter "Berger") Gannett's Vice President/Project Executive, Berger attested that "[f]ollowing a diligent search of our records and files, copies of all progress records, daily reports, sign-in sheets, and/or logs maintained by Gannett in connection with the Subject Project, including any such documents relative to any preliminary walkthroughs at the Job Site, dated prior to and including the date of the subject accident, are annexed hereto as Exhibit "B". Thus, both Kontarines' and Berger's Affirmations indicate that Defendants have provided a complete production of Gannett's Daily Reports, Contractor Sign-In Sheets, and Daily Signature Logs, dated up to and including the date of the subject accident. Indeed, some of the Daily Reports included in this exhibit explicitly reference walkthroughs at the Job Site during the early stages of Gannett's involvement in the project.

Therefore, as item 17 of Plaintiff's May 4, 2023 Post-EBT Demand requests "[c]opies of all logs, meeting minutes, communications, notes, progress photographs, other photographs, written communications and/or documents reflecting the project preliminary walkthroughs identified by Steve Kontarines at Defendants' deposition", the discovery exchanged by Defendants, both Kontarines' and Berger's Affirmations, taken together with Kontarines' sworn testimony as to Gannett's diligent search for and lack of possession of preliminary walkthrough photographs, comprises a full and complete response to item 17 of Plaintiff's May 4, 2023 Post-EBT Demands. 24. Notwithstanding, same, in paragraph 41 of Plaintiff's affirmation, Plaintiff blatantly misrepresents Defendants' February 28, 2024 Supplemental Response to item 17 of Plaintiff's May 4, 2023 Post-EBT Demands. Specifically, Mr. Gorman conveniently omits these facts and attempts to mischaracterize Defendants' full and complete response, showing Plaintiff's frivolous, bad faith conduct.

Further, regarding Plaintiff's demand for Kontarines' pre-construction/preliminary walkthrough photos, same was responded to and is therefore another example of Garduno's frivolous conduct. Defendants asserted that even a cursory examination of Defendants' Supplemental Discovery Responses evidences that Exhibit "A" annexed to Defendants' client Affirmations was referenced in connection with Defendants' response to Plaintiff's demands for inspection reports and documents evidencing "SCA visits" to the Job Site, as included in Plaintiff's May 4, 2023 Post-EBT Demands. The May 2, 2024 Supplemental Affirmations of Kontarines and Berger also further confirm that Defendants' February 28, 2024 Supplemental Discovery Responses comprised a full and complete response to Plaintiff's Demand for Preliminary Walkthrough Photographs. Defendants also attached a Supplemental Affirmation of Kontarines and Berger. Both Kontarines and Berger attest that Gannett continued its diligent efforts to locate discovery responsive to Garduno's demands, including the requested pre-construction/preliminary walkthrough photos, and stated that the photographs are not accessible due to a cyberattack which occurred in June 2020. Defendants' affiant attested that in the regular course of Gannett's business and as per Gannett's file retention policy, the pre-construction/preliminary walkthrough photographs were uploaded, stored, and maintained by Gannett, on a shared drive on Gannett's server. These photos were not stored or maintained in any other location, in either electronic or hard copy format, in the regular course of Gannett's business and as per Gannett's file retention policy. Berger avers that it was her understanding that Kontarines' pre-construction/preliminary walkthrough photographs were properly uploaded, stored, and maintained on Gannett's server, as per Gannett's file retention policy, however, on or about June 20, 2020, Gannett's server and systems were impacted by a completely random and unanticipated cyberattack, which affected its operations' business systems and company computers. Gannett attempted to ascertain the effects of the cyberattack and which of its systems, files, and data were affected or compromised. Gannett also proceeded with diligent data recovery efforts, even after replacing its server with a Sharepoint cloud-based system, transferring files and attempting to recover and retrieve its files and data. It was able to recover some files and data, however, it could not recover the photographs taken by Kontarines as they could not be decrypted, recovered or recycled through and were corrupted or otherwise unrecoverable. Berger further stated that Kontarines' pre-construction/preliminary walkthrough photos would not have been routinely destroyed, and other than the unanticipated, June 2020 cyberattack, there was no intentional, negligent or otherwise culpable state of mind on the part of Gannett in not being in possession of Kontarines'

preconstruction/preliminary walkthrough photos. Therefore, the Supplemental Affirmations of both Kontarines and Berger not only meet, but exceed the requirements for affidavits in cases where records requested during discovery have been completely searched for and not found, as articulated in *Jackson v. New York*, 185 A.D.2d 768 (1st Dept 1992). Thus, there is completely no basis whatsoever for the Court to assess sanctions against Defendants, pursuant to CPLR §3126, as there has been no deliberate or willful failure to provide photos that Gannett does not possess, through no fault of its own.

Garduno's counsel also asserted that the Defendants' Supplemental Discovery Responses were deficient in that they did not include certain progress/walkthrough photographs that Kontarines testified to having taken on January 17, 2020. These walkthrough photos from the date of the accident are separate and distinct from the pre-construction, preliminary walkthrough photos. Kontarines provided an affidavit, attesting that "[f]ollowing a diligent search of our records and files, including cellular phones and any other such mobile devices, we have concluded that Gannett is not in possession of any photographs or documents relative to any January 17, 2020 walkthrough at the Job Site. Annexed to Kontarines' February 26, 2024 Affirmation as Exhibit "B" is a complete production of Gannett's Daily Reports, Contractor Sign-In Sheets, and Daily Signature Logs, dated up to and including the date of the subject accident (January 17, 2020)." Therefore, the discovery included in Exhibit "B" to Kontarines' Affirmation, taken together with Kontarines' sworn testimony as to Gannett's diligent search for and lack of possession of January 17, 2020 Job Site walkthrough photographs, comprises a full and complete response to item 1 of Plaintiff's January 26, 2023 Post-Deposition Demands. In addition to the above, however, Kontarines' attests as follows, in his May 2, 2024 Supplemental Affirmation: "as a result of Gannett's continued efforts and dozens of hours of searches of its Sharepoint system and local devices for any further photographs or records relative to this matter, Gannett was able to locate all progress/walkthrough photographs which I personally took at the Job Site on January 17, 2020. Copies of these thirty-three (33) photos are annexed hereto as Exhibit "A". Defendants' February 28, 2024 Supplemental Discovery Responses evidence Defendants' full compliance with the Court's January 29, 2024 Order, through Gannett's continued good faith, diligent efforts, Gannett has located and produced the entirety of Kontarines' January 17, 2020 progress/walkthrough photos, which are annexed to his May 2, 2024 Supplemental Affirmation, as Exhibit "A".

Defendants find the third purported basis asserted by Plaintiff in support of the discovery sanctions sought in his motion, the most revealing of Plaintiff's counsel's bad faith and frivolous conduct. Beginning in paragraph 14 of his affirmation, Mr. Gorman references Kontarines' testimony, stating that on the date of the accident, January 17, 2020, Kontarines took certain post-accident photographs of the accident scene. Defendants believe Mr. Gorman proceeds at this point to engage in " subterfuge"; neither Plaintiff's January 26, 2023 Post-Deposition Demands nor Plaintiff's May 4, 2023 Post-EBT Demands contain a single demand for Kontarines' post-accident photos of the scene of the accident. Mr. Gorman attempts to claim that Kontarines' progress/walkthrough photos from January 17, 2020 were the same photos as his post-accident photos of the accident scene, from the same date. As Plaintiff's counsel is aware, Kontarines' testified that he was not personally present at the location of the subject accident on the date thereof, but rather,

arrived afterwards, and took certain photographs of the scene of the subject incident, on January 17, 2020, after the incident occurred. Kontarines stated that the progress/walkthrough photos which he took at the Job Site on January 17, 2020, are not the same photos that I took post-incident, on January 17, 2020. Defendants aver that Plaintiff has deliberately and falsely claimed that Kontarines' post-accident photos were the same photos as his progress/daily Job Site walkthrough photos, to attempt to justify a baseless allegation that Defendants' February 28, 2024 Supplemental Discovery Responses were insufficient, and therefore, that Defendants' Answer should be stricken and Plaintiff should be granted summary judgment due to Defendants' purported failure to provide photos that were not demanded in either set of Plaintiff's Post-Deposition Demands. Defendants argued that this was a mischaracterization of material facts and sworn testimony, blatantly frivolous and undertaken in bad faith, with the only possible objective being to harass, maliciously injure, and substantially prejudice Defendants.

Then, Mr. Gorman next asserts that Defendants' objections to Plaintiff's demands, on the grounds that Plaintiff mischaracterized Kontarines' testimony, is frivolous, pursuant to NYCRR §130-1.1(c). Plaintiff asserted in the moving papers that "Defendants' objection to item 17 of [P]laintiff's May 4, 2023 [P]ost-EBT discovery demand on the ground that [P]laintiff mischaracterized Steve Kontarines' testimony is a blatant falsehood, mandating the striking of their [A]nswer." Defendants find this evidence of Mr. Gorman's frivolous, harassing, and malicious conduct, but also, as Mr. Gorman's assertion is devoid of any legal basis whatsoever, he offers no legal authority in support of his contention. As testified by Kontarines in his Supplemental Affirmation (see Exhibit "A"), Plaintiff was already in possession of Kontarines' January 17, 2020 post-accident photos of the accident scene prior to and at the time of Kontarines' January 25, 2023 deposition, since these same photographs were marked Plaintiff's Exhibit "4" and shown to Kontarines during his deposition. Moreover, the very same set of photographs that were shown to Kontarines during his deposition were previously served on Plaintiff on July 12, 2022, over six months prior, as Exhibit "C" to Defendants' Response to Plaintiff's June 14, 2022 Notice for Discovery and Inspection. This discovery response from almost two (2) years ago, inclusive of the photos Plaintiff is now claiming were never provided in response to Plaintiff's Post-Deposition Demands (despite not being demanded in said demands) and a duly executed Affidavit of Service dated July 12, 2022, Defendants contend, demonstrate that Plaintiff's counsel has affirmed false statements of material fact in his submission to this Court, engaged in bad faith, misrepresentations and harassing tactics which is egregious and unconscionable. Therefore, Defendants are unquestionably entitled to the costs and sanctions sought in the within Cross-Motion.

Furthermore, Garduno's spoliation claim is meritless and frivolous, and there is no basis to grant Garduno summary judgment on the issue of liability. As Plaintiff correctly observes, [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. *(See Cantey v. City of New York*, 184 A.D.3d 618 (2d Dep't 2020), quoting *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015), see also *VOOM HD Holdings LLC v.*

EchoStar Satellite L.L.C., 93 A.D.3d 33, 45 [1st Dept 2012]). "The burden is on the party requesting sanctions to make the requisite showing."(*See Duluc v. AC &L Food Corp*., 119 A.D.3d 450, 451-52 [1st Dept 2014].) Garduno has made no such showing here. As attested, the pre-construction/preliminary walkthrough photos were corrupted and therefore unable to be recovered, due to a cyberattack affecting Gannett's server and systems, occurring in June of 2020. As noted above, Gannett was not named as a party in this action until April 20, 2023, three years later. Also, any request by Plaintiff during Kontarines' January 25, 2023 deposition, for Gannett to preserve these photos, was made over two years after the cyberattack, when these photos had already been impacted and corrupted. If the Court disagrees and finds that Gannett had an obligation to preserve the pre-construction photos almost three (3) years prior to being named in this action, it has been held that "[t]he party requesting sanctions for spoliation has the burden of demonstrating that [the defendant] intentionally or negligently disposed of critical evidence, and fatally compromised the movant's ability to prove a claim or defense." *(See Mangilit-Pradlik v. Valvoline Instant Oil Change GE 6604-White Plains*, 120 A.D.3d 774, 775 [2d Dept 2014].) Plaintiff has not and cannot meet this burden. Even if Kontarines' preliminary walkthrough photos had not been impacted in the June 2020 cyberattack, these photos would arguably be inadmissible and not discoverable, as they were pre-construction photographs, taken before any work had commenced at the Job Site. Kontarines testified at his deposition, at the time of his preliminary walkthrough (which occurred during a single day), the subject location was vacant. As such, these photos did not (and could not possibly have) depicted the area of the second floor where the subject accident occurred, at any time after work had begun at the Job Site or at the time of the accident. Further, Gannett had no obligation to preserve the pre-construction/preliminary walkthrough photos "at the time of [their] destruction." Plaintiff cannot establish that the pre-construction/preliminary walkthrough photos were even relevant to any of his claims. Kontarines' pre-construction photos did not (and could not possibly have) depicted the area of the second floor where the subject accident occurred, at any time after work had begun at the Job Site or at the time of the subject accident. Defendants argue that these photographs are completely irrelevant to Plaintiff's Labor Law/common negligence claims.

According to Defendants, the subject accident occurred while workers were removing sheetrock from a wall on the second floor of a school building, which had neither been "damaged by fire, flood, explosion, or other cause." Defendants maintain that Mr. Gorman's engaged, yet again, in subterfuge and bad faith and frivolous conduct, in an attempt to maliciously injure Defendants and mislead this Court as to the nature of the subject location and the work taking place thereat, which was yet another example of Plaintiff's frivolous, false assertion of material factual statements, thereby warranting the sanctions sought by Defendants herein. Kontarines' pre-construction photographs could not possibly have had any bearing whatsoever on "whether the walls needed to be secured or braced before the work began" as they were taken pre-construction and did not represent the condition of the Job Site after work had begun or at the time of the subject accident. As such, Defendants state that Plaintiff's contentions were "tenuous if not downright absurd." Plaintiff conducted a deposition of Kontarines on January 25, 2023, and had a full and fair opportunity to question him regarding the contents of his photos and his knowledge of any as-built conditions existing in the vacant location of the Job Site at the time of his one-day, pre-construction visit to the site.

In opposition to the cross-motion, Garduno claimed that the thirty-three (33) photographs provided by Defendant came after the date for when it should have been provided. Kontarines initially claimed in his affirmation dated February 26, 2024 that Gannett was not in possession of any photographs or documents relative to any January 17, 2020 walkthrough at the Job Site, other than those already provided. Defendants never told Garduno that they were not able to produce the photographs due to any alleged "cyberattack" that occurred nearly four years prior. Or, that Defendants were continuing the search for material after the expiration of the thirty day deadline. Defendants were required to disclose the loss of this electronic data at Kontarines' January 25, 2023 deposition or in response to his January 26, 2023 post-EBT demand requesting "all photographs taken by Kontarines during his walk through on the date of the accident", which was never properly responded to. Further, Berger did not mention this either in the February 26, 2024 affirmation. Garduno stated that the photographs sought were relevant, and Defendants cannot make unilateral decisions as to what Garduno's counsel finds is relevant based upon his own personal opinion. Garduno's expert, Mr. Schnerch was shown the photographs and opines that certain photographs show evidence of possible fire damage within the walls. Garduno alleged that the walls were deteriorated due to a prior fire and/or water damage, therefore they are relevant to this matter; this would require the bracing and shoring of any weakened walls that were not the target of the demolition. In Garduno's opinion, the undersigned's January 29, 2024 Order was a self-executing order of preclusion.

In reply, Defendants stated that they fully complied with the January 29, 2024 Order; that the Order was not self-executing; that there is no basis to grant Garduno the requested relief; that the cross-motion should be granted due to Plaintiff's counsel's frivolous conduct, and bad faith; that the requested photographs have now been exchanged and at this juncture Garduno cannot point to any outstanding discovery that has not been provided by Defendants; Mr. Schnerch's curriculum vitae/professional qualifications was not annexed to the papers, therefore he is unqualified to render an opinion; that Defendants' expert Mr. Michael Simon, P.E. rebuts Mr. Schnerch opinion in his affirmation, addressing all of Mr. Schnerch's claims. Mr. Simon opined, among other things, that based upon his search of New York City Department of Building records, no fire occurred at the subject location, and based upon his professional opinion, none of the photographs taken on January 17, 2020 by Kontarines showed fire damage. In his opinion, the photographs do not depict water damage either.

DISCUSSION

It is well settled that there is a strong public policy favoring adjudication of cases on the merits (*see generally Billingly v Blagrove*, 84 AD3d 848 [2d Dept 2011]; *Sanchez v Serje*, 17 AD3d 562 [2d Dept 2005]). To be clear, the undersigned's January 29, 2024 Order was not intended to be a self-executing conditional order of preclusion. The undersigned held that if Defendants failed to comply with the order, a final application seeking relief under CPLR 3126 had to be made. The Court in this instance chose to determine whether Defendants' responses were both timely and sufficient, and whether Defendants substantially complied with the order. The Court further finds that Defendants have, at this juncture complied with the undersigned's January 24, 2024 Order (*compare Gibbs v St.*

Barnabas Hosp., 16 NY3d 74 [2010]; *Piemonte v JSF Realty, LLC*, 140 AD3d 1145 [2d Dept 1145]).

"Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence" (*Peters v Hernandez*, 142 AD3d 980 [2d Dept 2016] citing *Morales v City of New York*, 130 AD3d 792, 793 [2d Dept 2015]; *see also* CPLR 3126; *Gregorian v New York Life Ins. Co.*, 211 AD3d 706 [2d Dept 2022]; *May v American Multi-Cinema, Inc.*, 191 AD3d 657 [2d Dept 2021]; *Gaoming You v Rahmouni*, 147 AD3d 729 [2d Dept 2017]). However, the sanction of dismissal of a pleading may be imposed in the absence of willful or contumacious conduct. (*See Bjorke v Rubenstein*, 38 AD3d 580 [2d Dept 2007].) Even routine destruction of evidence based upon the policy of a company has been held to constitute spoliation (*see Sanchez v City of New York*, 181 AD3d 522 [1st Dept 2020]). The Court finds no basis to strike Defendants' answer on the basis of spoliation of certain photographs lost due to a cyberattack occurring years prior to when Gannett was brought into this case.

Addressing next the relief sought by Defendants in their cross-motion, 22 NYCRR §130-1.1, titled "Costs; sanctions" states the following:

> (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 expenses 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. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under article 3, 7 or 8 of the Family Court Act.
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) 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.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

To be clear, the January 29, 2024 Order would not have been required had Defendants timely complied with discovery demands and Court Orders. To the extent that Plaintiff's counsel misinterpreted the January 29, 2024 Order as self-executing, the Court finds that same does not rise to sanctionable conduct under 22 NYCRR § 130.1-1. Certain photographs were not exchanged by Defendants due to a cyberattack, which Defendants' counsel should have disclosed. The Court notes that Plaintiff's counsel submitted papers which in fact contained some mischaracterizations, however, the Court finds that Plaintiff's counsel's conduct does not warrant sanctions pursuant to 22 NYCRR Part 130.

Therefore, both the motion and cross-motion are denied.

The foregoing constitutes the decision and Order of the Court.

Date: August 13, 2024

Hon. Chereé A. Buggs, JSC