

DePasquale v Kiop Merrick, L.P.
2024 NY Slip Op 35522(U)
March 5, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 616407/2018
Judge: Vincent J. Martorana
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Short Form Order

INDEX NO: 616407/2018

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

ANNE DEPASQUALE,

Plaintiff,

- against-

KIOP MERRICK, L.P., KIMCO REALTY
CORPORATION, BEST MARKET OF
MERRICK, INC., MAYNE CONSTRUCTION OF
LONG ISLAND, INC., CENTER
MANAGEMENT CORP., and CENTER
MORICHES CO.,

Defendants.

ORIG. RETURN DATE: 01/11/24
ADJOURNED DATE: 02/29/24
MOTION SEQ. NO.: 002 -MD

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Upon efiled documents numbered 96-110, 133-142; it is

ORDERED that Plaintiff's motion seeking an order striking the answer of Defendant Center Management Corp or granting an adverse inference charge at the time of trial, pursuant to CPLR §3126, is denied.

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Plaintiff's complaint seeks damages for personal injuries allegedly sustained when she tripped and fell on or near a sidewalk in a shopping center on April 20, 2018. An amended complaint and second amended complaint have served and filed. Issue has been joined as to all defendants and discovery is ongoing. Plaintiff now moves seeking to strike the answer of Defendant Center Management Corp. d/b/a Center Maintenance Co., s/h/a Center Management Corp. and Center Maintenance Co ("Center") pursuant to CPLR§3126, or in the alternative, directing that sanctions be imposed at the time of trial, based upon failure to provide discovery and/or spoliation of evidence.

Plaintiff alleges that she was caused to fall due to a defective sidewalk and improper pavement markings in the parking lot at issue, and that such fall resulted in a hip fracture requiring surgery. The parties disagree as to whether or not Plaintiff was in the crosswalk just prior to her fall at the curb. There are painted pavement markings at or near the area at issue, some are yellow, some are a lighter blue, and some are a darker blue. Plaintiff's counsel states that the allegations against Center include claims that the handicapped walkway was improperly marked and that "[t]he specific area in question had previously been appropriately marked in yellow paint but was subsequently painted over improperly with blue paint, with additional blue lines added..." A photograph is included showing the different colors of paint near where Plaintiff fell.

It is alleged that, on several occasions over the course of several years, Center was retained to paint pavement markings in the shopping center parking lot here at issue. Plaintiff seeks digital images of the completed painting jobs. Plaintiff claims that the photographs provided by Center in April 7, 2021 discovery responses are copies of "subpar visual quality, grainy and unable to be enlarged." Photos were provided of work that was completed on or about May 8, 2017 and June 4, 2018. There was allegedly a July 12, 2016 painting job for which no photographs were provided by Center. Plaintiff did receive some photographs of the painting performed on this date from another party, Mayne Construction of Long Island, Inc. It is asserted that Mayne had received the photographs from Center after completion of the painting job Mayne had subcontracted to it. Center's President, David Nava, testified at deposition that Center sometimes took photographs of completed work with a cell phone and that a computer search for requested materials was conducted by Liz Brazzano. Center former employee Liz Brazzano testified at her deposition on June 19, 2023, that she had conducted a search to identify invoices and photographs which were requested in discovery, and that photographs produced had been found in Center's computer system. She further stated that she did not have photos from a 2016 job in her file because "the person did not have access to them." Ms. Brazzano did not know if the image files were still maintained on Center's computer and she was not entirely clear as to what was meant by 'digital' in this context.

Center was to provide digital copies of previously exchanged photographs or an affidavit indicating that none exist, pursuant to a "so ordered" stipulation dated July 20, 2023. Center's President David Nava provided an affidavit dated August 25, 2023, stating that the only electronic files maintained by Center were three emails. Apparently the digital photo images were not found at that time. Additional copies of the originally produced images were ultimately provided by email in December 2023.

In opposition to Plaintiff's motion, Center offers transcripts of Plaintiff's two depositions and a surveillance video of the accident. One deposition was taken prior to amendment of the complaint and addition of Center to this action, one deposition was taken after. In her first deposition, after

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watching video surveillance (a copy of which has been provided to the court), Plaintiff agreed that her right toe had struck the face of the curb which had caused her to trip. The video shows only a very small portion of the painted crosswalk, but it appears that Plaintiff approached the curb while walking through the blue marked area of the pavement which abutted the yellow striped area of the pavement. One of the photographs provided shows remnants of yellow striping on the edge of the broken curb adjoining the curb cut. It appears that some yellow striping on the asphalt was painted over with blue striping at some point. The blue lines that are visible in the video appear to lead to the broken curb which is slightly sloped toward the curb cut.

Center claims that the photographs are irrelevant because Plaintiff testified that she did not look down at the crosswalk while crossing the street. Plaintiff stated that the crosswalk guided her across the street, that she was looking forward while walking, and that she used the crosswalk because she knew “there’s a handicap ramp there.” The video appears to show her walking through the blue lined area which lead to the sloped and broken curb adjacent to the curb cut, and that her foot caught on or struck the edge of the curb. Based upon Plaintiff’s argument that the pavement markings fail to comply with ANSI safety standards (which was referenced in her bill of particulars as well as her motion papers), and the argument that the allegedly improper pavement markings which should have lead her to a curb cut lead her to a curb, it cannot be said that the photographs here at issue are irrelevant.

It should be noted that any interpretations of evidence set forth in the within order are not findings of fact for the purposes of any dispositive motions nor should they be construed as law of the case with regard to the way that the accident occurred. The interpretations here are for the purpose of determining the relevance of the photographs here at issue, viewed in the context of the CPLR discovery standard.

CPLR § 3101(a) requires the “full disclosure of all information that is material and necessary to the defense or prosecution of an action.” The “material and necessary” requirement directed in CPLR § 3101(a) is to be liberally construed to require disclosure where the matter sought will assist in trial preparation by clarifying the issues and reducing any possible delay. (*Andon v. 302-304 Mott Street Associates*, 94 NY2d 740, 709 NYS2d 873 [2000]).

Center argues that the photographs were provided in May of 2021 and provided again by email on December 12, 2023. The latter photographs seem to be of better clarity. However, Plaintiff argues that they lack the metadata which would indicate when they were taken. Center further argues that it isn’t clear that what Ms. Brazzano found in her original search were digital images in their original format. Counsel argues that they may have simply been scanned photographs. Additional photo files in .heic format were provided subsequently, but Plaintiff states that these correspond to a job completed after Plaintiff’s accident. Although this isn’t explained, it is the court’s understanding that .heic is an image file indicative of a format used by Apple devices. Plaintiff states that the heic file metadata indicates that the device which took the photos was an iPhone 7. Mr. Nava also testified that the jobsite photos were taken with a cellphone; however it is unclear whether the older photos were saved in their original format on the company server. Center’s counsel argues that there is no evidence that Center intentionally or negligently destroyed evidence but offers no explanation as to how the images were originally stored.

CPLR § 3126(3) provides that upon a finding that a party has refused to obey an order for

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disclosure or has wilfully failed to disclose information which the court finds ought to have been disclosed, the court may impose discovery sanctions including preclusion of evidence or striking of a pleading (*Galarza v. 25 Hope St. Assocs., LLC*, No. 2020-00833, 2022 WL 14699222 [2d Dept 2022]). In determining that such a sanction is warranted, the Court must find that the conduct complained of has risen to a level of willfulness and contumaciousness which would justify it. (*Nationstar Mortgage, LLC v. Jackson*, 192 AD3d 813, 144 NYS3d 81 [2d Dept. 2021]; *Vancott v. Great Atlantic & Pacific Tea Co., Inc.*, 271 AD2d 438; 705 NYS2d 640 [2d Dept 2000]; *Harris v City of New York*, 211 AD2d 663, 622 NYS2d 289 [2d Dept. 1995]).

"The willful and contumacious character of a party's conduct can be inferred from either the repeated failure to respond to demands or comply with discovery orders, without demonstrating a reasonable excuse for these failures, or the failure to comply with court-ordered discovery over an extended period of time" (*Wolf v. Flowers*, 122 AD3d 728, 729, 996 NYS2d 169, 170 [2d Dept. 2014]; see also *L. K. v. City of New York* 2022 WL 16827123 [2d Dept. 2022]; *Gorbatov v. Tsirelman*, 206 AD3d 887, 889, 170 NYS3d 59 594 [2d Dept. 2022]; *Henry v. Atlantis Rehab. & Residential Healthcare Facility, LLC*, 194 AD3d 1021, 149 NYS3d 217, 219 [2d Dept. 2021]; *Friedman, Harfenist, Langer & Kraut v. Rosenthal*, 79 AD3d 798, 800, 914 NYS2d 196, 198 [2d Dept. 2010]; *Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686, 920 NYS2d 394, 395 [2d Dept. 2011]; *Stone v. Zinoukhova*, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept. 2014]). Where a party has disregarded discovery demands or orders, then participated in discovery conferences where they stipulated to provide responses, only to provide inadequate responses or none at all without an adequate excuse for their failure, such conduct may be deemed willful and contumacious (*Gorbatov v. Tsirelman*, *supra*; *Henry v. Atlantis Rehab. & Residential Healthcare Facility, LLC*, *supra*).

Under the doctrine of spoliation, a party who negligently loses or intentionally destroys key evidence may be sanctioned (*McDonnell v. Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 [2d Dept. 2018]; *Morales v. City of New York*, 130 AD3d 792, 13 NYS3d 548 [2d Dept. 2015]). "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and "fatally compromised its ability to defend [the] action" (*Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 AD3d 717, 872 NYS2d 166 [2d Dept. 2009] quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2005]; see also *Peters v. Hernandez*, 142 AD3d 980, 37 NYS3d 443 [2d Dept. 2016]; *Amos v. Southampton Hosp.*, 198 AD3d 947, 156 NYS3d 349 [2d Dept. 2021]).

"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" (*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d 543, 547, 26 NYS3d 218 [2015] (citing *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 AD3d 33, 45, 939 NYS2d 321 [1st Dept.2012], quoting *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 220 [SDNY2003]); see also *Franco v. Half Moon River Club, LLC*, *supra* (finding that the nature of Plaintiff's injuries, the investigation by defendant's employees into the cause of the accident (a spill on the floor), as well as the plaintiff's demand for insurance information within a

couple of days of the accident put defendant on notice to preserve evidence); *Gregorian v. New York Life Ins. Co.*, *supra*). “Once a party reasonably anticipates litigation, it must suspend its routine retention/destruction policy and put in place a “ ‘litigation hold’ ” to ensure the preservation of relevant evidence” (*Fadeau v. Corona Indus. Corp.*, 217 AD3d 1, 192 NYS3d 160 [2d Dept. 2023] (citing *Gregorian v. New York Life Ins. Co.*, *supra*). Evidence that is willfully or intentionally destroyed will be presumed relevant; however, where evidence is negligently destroyed, the party seeking a spoliation sanction must establish that the destroyed evidence was relevant to the party’s claim or defense (*McDonnell v. Sandaro Realty, Inc.*, *supra*; see also *Franco v. Half Moon River Club, LLC*, 214 AD3d 956, 958, 187 NYS3d 64, 67 [2d Dept. 2023]).

“The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party” (*Morales v. City of New York*, *supra* (quoting *Samaroo v. Bogopa Serv. Corp.*, 106 AD3d at 714; see also *Cioffi v. S.M. Foods, Inc.*, 142 AD3d 520, 524–26, 36 NYS3d 475, 481–82 [2d Dept. 2016]). Relief for spoliation may include preclusion of evidence, requiring payment of costs associated with replacement evidence, allowing an adverse inference charge at trial (*Gregorian v. New York Life Ins. Co.*, 211 AD3d 706, 709, 180 NYS3d 201, 205 [2d Dept. 2022]) or striking the pleading of the offending party, thereby placing them in default (*Fadeau v. Corona Indus. Corp.*, *supra*). Striking of a pleading may be warranted where destruction of evidence effectively deprives the adverse party of the ability to defend or prosecute its claim (*Foncette v. LA Express*, 295 AD2d 471, 744 NYS2d 429 [2d Dept. 2002]; *De Los Santos v. Polanco*, 21 AD3d 397, 799 NYS2d 776 [2d Dept. 2005]; *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, *supra*). However, where willful or contumacious conduct is absent and the party seeking sanctions is still able to prove its case, striking of a pleading is unwarranted and a lesser sanction should be imposed (*Francis v. Mount Vernon Bd. of Educ.*, 164 AD3d 873, 83 NYS3d 637 [2d Dept. 2018]; *McDonnell v. Sandaro Realty, Inc.*, *supra*; *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, *supra*; *25 Bay Terrace Assocs., L.P. v. Pub. Serv. Mut. Ins. Co.*, 194 AD3d 668, 148 NYS3d 484 [2d Dept. 2021]; *Francis v. Mount Vernon Bd. of Educ.*, 164 AD3d 873, 83 NYS3d 637 [2d Dept. 2018]). “[T]rial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of 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” (*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, *supra* at 551).

Here, it is not clear that Center has failed to produce evidence or has destroyed evidence that it had in its possession. Photographs were provided and there is insufficient evidence to establish that Center possessed anything additional to produce. There was no testimony that additional images had existed in .heic or other format beyond what has been provided. Plaintiff has failed in her burden to establish that Center willfully failed to disclose information that should have been disclosed. Additionally, Plaintiff has failed to establish that key evidence has been negligently or intentionally destroyed. Accordingly, Plaintiff’s motion seeking to strike Center’s answer or seeking an adverse inference charge that Center changed pavement lines from yellow to blue, is denied in its entirety.

Dated: March 5, 2024

Riverhead, New York


VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION