Lewis v City of New York
2025 NY Slip Op 33151(U)
August 21, 2025
Supreme Court, New York County
Docket Number: Index No. 154086/2019
Judge: Carol Sharpe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL SHARPE — *Justice*

PART 52M

INDEX NO. 154086/2019

MOTION DATE 12/12/2024

MOTION SEQ. NO. 003

---X

LASHETTE LEWIS,

Plaintiff,

- v -

THE CITY OF NEW YORK, 8-12 WEST 14TH ASSOCIATES LLC

Defendant.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 89, 90, 91, 92, 93, 94

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff moved to strike defendants' answers pursuant to CPLR § 3126 on the grounds of intentional destruction and spoliation of evidence or, in the alternative, preclude defendants from contesting liability and notice at the time of trial, and for sanctions, including an adverse inference charge at trial and/or a preclusion order, at the time of trial (Motion Sequence No. 3). Defendants 8-12 West 14th Associates LLC ("8-12 West") and The City of New York ("The City") filed written opposition to this motion and plaintiff filed a reply. The motion is granted in part and denied in part.

Defendant 8-12 West (Motion Seq. 4) and The City (Motion Seq. 5) each filed a motion to vacate plaintiff's Note of Issue, pursuant to 22 NYCRR § 202.21(e), on the grounds that critical discovery has not been completed and requested an extension of time to file a motion for summary judgment to 60 days following completion of plaintiff's last physical exam. The City sought to compel plaintiff to attend an independent medical examination ("IME"). Plaintiff filed written opposition.

Plaintiff commenced this personal injury action by filing a summons and complaint on April 19, 2019, alleging that on June 7, 2018, she slipped and fell on a puddle of water in the third floor Women's staff restroom while working as a security guard in the building located at 8-12 West 14th Street, New York County. Issue was joined upon the filing of Answers by defendants 8-12 West on May 20, 2019, and The City on July 9, 2019. Plaintiff filed Note of Issue and Certificate of Readiness on December 11, 2024.

Plaintiff contends that she served preservation notices on each defendant, as the records are critical to the issue of notice of the defective condition, yet the defendants destroyed the records. The records that are the subject of the motion are The City's custodians' records, which were destroyed after it vacated the premises, and 8-12 West's maintenance and renovation records, which cannot be found. In support of the motion, plaintiff submitted, among other things, the August 14, 2024 Order granting leave to file the instant motion; a Request to Preserve Evidence letter from plaintiff to 8-12 West dated July 30, 2018; Notice of Claim with preservation language served on The City on August 1, 2018; plaintiff's Deficiency Letter to defendants; the examination before trial ("EBT") transcript of Micheal Arroyo, the Custodial Supervisor employed by Human Resource Administration ("HRA"); and the EBT transcript of Diana Marrone, who served as Secretary and Treasurer of 8-12 West and Senior Vice-President and Director of Property Management at Philips International Holding Corporation.

The notice of claim, dated July 27, 2018, identified the location and cause of plaintiff's fall as being a wet, slippery or defective condition at 8-12 West 14th Street, New York, New York, "more specifically, the Women's Staff Restroom located on the 3rd Floor, at or near the first stall". (NYSCEF Doc. #64). The preservation language at the end of the Notice of Claim stated: "*As you are now formally put on notice of this claim, please search for and preserve all evidence pertaining*

to the above referenced accident/incident at the above referenced location; including but not limited to any and all videos, accident/incident reports, witness statements, and/or any documentation regarding the investigation of said incident."

The parties entered into a discovery schedule pursuant to the CSO dated September 14, 2022, in which The City agreed to provide any maintenance and repair records for the defective condition (NYSCEF Doc. #37). On August 9, 2023, following Mr. Arroyo's EBT, plaintiff demanded the custodian log; the bathroom cleaning log; and the work order folder (NYSCEF Doc. #73). During Mr. Arroyo's EBT, plaintiff was told by the attorney for The City that it no longer had the custodial records or the maintenance records for the building as The City had ended its tenancy in the building.

In opposition to this motion, The City submitted, among other things, plaintiff's incident report; an incident report by Juan Helly, Jr.; and a note from plaintiff's doctor, Dr. Aubrey Raimondi of The Institute for Family Health at 17th Street. The City contends that there has been no willful or contumacious conduct that would warrant the striking of its answer as the notice of claim and the complaint did not notify it of a defective toilet; it complied with the discovery obligations by producing the incident reports; it notified plaintiff that no custodial records were located; and it produced Mr. Arroyo, who was deposed by plaintiff. Additionally, The City contends that they were not the only entity that could have performed work in the restroom, and that the building owner, 8-12 West, hired a contractor and was contractually obligated to repair plumbing systems located within the walls of the building, and to unclog plumbing fixtures, pursuant to the terms of their lease.

Michael Arroyo testified at his deposition on June 23, 2023, that in July 2018, he was assigned to the location as a part of the custodian crew. He was in the custodian's office when

plaintiff reported to him that she fell. He immediately went to the bathroom with his mop and bucket and observed that there were only droplets of water in the area where users would reach for the paper towel after washing their hands. He testified that when repairs were to be done, he would put in a work order and a HRA trade person would make the repairs. He had no recollection of plaintiff reporting that she fell as a result of water from the toilet on the floor, nor did he observe any water from the toilet. He was shown a picture of a toilet covered by a black bag, but he did not have any knowledge about it.

In opposition to the motion, 8-12 West submitted, among other things, the Lease and certain amendments and exhibits thereto, including the First Amendment to the Lease between 8-12 West and The City; the Scope of Work for Lease Renewal Landlord Base Building Scope of Work, and Tenant Scope of Work; the Landlord's Base Building Scope of Work done by HRA and Construction Cost. In addition to opposing plaintiff's motion on the ground that it was untimely, 8-12 West opposed the motion on the grounds that the records were not intentionally destroyed, but that The City and 8-12 West entered into the lease agreement in November 2005, so it is reasonable that they would not have the records of the renovations completed thirteen years before plaintiff had her accident on June 7, 2018.

Diana Marrone testified at her EBT that 8-12 West owned the six-story office building that was leased by The City, and pursuant to the lease and its amendments, The City was responsible for certain maintenance obligations, including the plumbing in the bathrooms. She testified that if 8-12 West sent a plumber for repairs, The City would be invoiced for the cost of the repair. The lease ended when The City moved out. She did not know what happened to the files that were maintained during the period of the lease. Ms. Marrone also submitted an affidavit in which she stated that she made a diligent inquiry to locate the records requested. She testified that none of

the items were found, and that some of the requested items, if they were ever in the possession of 8-12 West, would have or could have been discarded long before plaintiff's incident. The affidavit did not state the type of search that was conducted for the records.

CPLR §3126 provides in pertinent parts that where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article," the court may issue an order deeming the issue resolved in the moving party's favor, precluding the disobedient party from producing evidence, or striking the pleading.

"The law is settled that an action should, if at all possible, be resolved on the merits and that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the nondisclosure was willful, contumacious or due to bad faith [internal citation omitted] (*Remuneration Planning & Servs. Corp. v Berg & Brown, Inc.*, 151 AD2d 268, 269, 542 NYS2d 182 [1st Dept 1989]; *McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324, 624 NYS2d 158 [1st Dept 1995]; *Youwanes v Steinbrech*, 193 AD3d 492, 493, 146 NYS3d 253 [1st Dept 2021]("Even if the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits.")). Striking the answer can be denied where the party disclosed the records it possesses and submit an affidavit explaining the search of the missing records (*see*, *Patterson v Beth Abraham Nursing Home*, 214 AD3d 437, 437, 183 NYS3d 306 [1st Dept 2023]("the court providently exercised its discretion in denying the request to strike defendant's answer because defendant had satisfied its obligation to provide all relevant documents within its possession and control and an affidavit concerning its search for responsive

documents.")). Under the circumstances of this case, this Court does not find that striking the answers is the appropriate remedy.

"When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation or, at the very least, preclude that party from offering evidence as to the destroyed product [internal citation omitted]." (*Squitieri v City of N.Y.*, 248 AD2d 201, 203, 669 NYS2d 589 [1st Dept 1998]). Spoliation sanctions may be applied to the negligent loss of evidence in addition to those destroyed willfully or in bad faith. (*Id.*; *Gilliam v Uni Holdings, LLC*, 201 A.D.3d 83, 86, 159 N.Y.S.3d 401 [1st Dept. 2021])("New York spoliation cases encompass both the willful and negligent destruction of evidence"). "Over time, the courts have developed a set of criteria for determining whether evidence has been spoliated. Thus, a party seeking sanctions for spoliation "must establish that the non-moving 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." (*Id.*; *see also*, *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45, 939 NYS2d 321 [1st Dept 2012]). A "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence" (*Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SDNY 2003]; *see also VOOM HD Holdings LLC,* 93 AD3d at 45). However, "striking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability [internal citation omitted]" (*Rossi v Doka USA, Ltd.*, 181 AD3d 523, 525-526, 121 NYS3d 41 [1st Dept 2020]).

When a non-spoliating party is seeking dismissal of the action or striking the pleading in the case of ordinary negligence, it is that party's burden to establish that the missing evidence was its "sole means" of defending the claim, its defense was otherwise "fatally compromised" by the

spoliation, or it had become "prejudicially bereft" of being able to defend (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609-610, 36 NYS3d 2 [1st Dept 2016]). "However, the sanction must reflect "an appropriate balancing under the circumstances," (*Voom HD Holdings LLC*, 93 AD3d at 47)" (*Id.* at 609).

Here, there is no evidence that either of the defendants engaged in willful or bad faith destruction of the records or that the defendants engaged in gross negligence in not maintaining the records. The notice of claim failed to notify The City that a toilet was involved in the claim. The sanction as to The City is preclusion from offering any logbook entries about the toilet in the first stall in the 3rd floor women's restroom. The City may defend the claim by the introduction of the testimony of Mr. Arroyo and his observations of the condition of the bathroom on the day of the accident, and the reports that were disclosed to plaintiff. The trial court will decide whether an adverse charge should be given to the jury based on the evidence adduced during the trial.

Likewise, this Court finds that the preservation letter to 8-12 West from plaintiff dated July 30, 2018, did not give notice of the claim or the request for renovation or maintenance records. Plaintiff did not establish that the records maintained by 8-12 West were the sole means of prosecuting her case. The appropriate sanction is that 8-12 West is precluded from offering evidence as to the condition of the toilet in the 3rd Floor Women's restroom. 8-12 West may present a witness to testify as to its role at the location and that it no longer has possession of the records. The trial court will decide whether an adverse charge should be given based on the evidence adduced during the trial.

Accordingly, it is hereby

ORDERED, that the branch of the motion seeking to strike the defendants' answers is denied; it is further

ORDERED, that the branch of the motion seeking to preclude the defendants from contesting liability is denied; it is further

ORDERED, that defendants' witnesses may testify about the 3rd floor women's restroom based on their personal knowledge; it is further

ORDERED, that the branch of the motion seeking to preclude the defendants from offering evidence of any facts contained in the missing reports is granted, except facts that are based on the witnesses' personal knowledge; it is further

ORDERED, that the branch of the motion seeking to preclude defendants from contesting the issue of notice is granted; and it is further

ORDERED, that the branch of the motion seeking an adverse charge is reserved for the trial judge to determine based on the evidence adduced at trial.

This constitutes the Decision and Order of the Court.

ENTER:

August 21, 2025
DATE

HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:	☐ CASE DISPOSED		X NON-FINAL DISPOSITION			
	☐ GRANTED	☐ DENIED	X GRANTED IN PART		☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	