

Kekovic v 13th St. Entertainment, LLC

2011 NY Slip Op 33149(U)

December 5, 2011

Sup Ct, NY County

Docket Number: 116636/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 116636/2009
KEKOVIC, SINISA
vs.
13TH STREET ENTERTAINMENT
SEQUENCE NUMBER : 001
STRIKE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

DEC 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

motion and ~~cross-motion~~ are decided in accordance
with accompanying memorandum decision.

Dated: 12/5/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
SINISA KEKOVIC,

Plaintiff,

- against-

Index No.:116636/2009
Submission Date:8/17/11

13TH STREET ENTERTAINMENT, LLC d/b/a
KISS AND FLY NIGHTCLUB,

FILED

Defendant.

----- X
13TH STREET ENTERTAINMENT, LLC,

SEP 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Plaintiff,

- against-

Index No.:590392/2010

ALL SEASON PROTECTION SERVICES, INC.,

DECISION AND ORDER

Third- Party Defendant.

----- X

For Plaintiff:
Weiser & Associates, L.L.P.
150 East 58th Street, 27th Floor
New York, NY10155

For Defendant/Third-Party Plaintiff:
Havkins Rosenfeld Ritzert & Varriale, LLP
1065 Avenue of the Americas, Suite 800
New York, NY 10018

Papers considered in review of this motion to strike the answer:

Notice of Motion	1
Aff in Support	2
Aff in Opp	3
Reply Aff.	4

HON. SALVANN SCARPULLA, J.:

In this action to recover for personal injuries, plaintiff Sinisa Kekovic (“Kekovic”), moves pursuant to CPLR 3126 for an order striking the answer of defendant 13th Street Entertainment, LLC d/b/a Kiss & Fly Nightclub (“13th Street”) on spoliation grounds, or in the alternative granting Kekovic a negative inference against defendant at the time of trial.

This action arises from personal injuries Kekovic alleges to have suffered while a patron at the Kiss & Fly Nightclub (the “nightclub”), owned by 13th Street. Kekovic alleges that on September 20, 2009, while a patron of the nightclub, he was struck on the head and face by a bottle of vodka, causing him “severe and permanent personal injuries.” Kekovic alleges that 13th Street was negligent in its ownership and operation of the nightclub, and that its security personnel were negligent in allowing an intoxicated patron to remain on the premises while visibly intoxicated. Kekovic also alleges that alcohol was served to his alleged attacker, and that 13th Street over-served this person, whom 13th Street should have known was visibly intoxicated.

On September 22, 2009, Kekovic’s counsel sent correspondence to 13th Street, putting them on notice of the pending litigation, and to preserve the surveillance video from 10:00 pm September 19, 2009 through 4:00 am September 20, 2009.

On September, 24, 2009, Ryan Tarantino, 13th Street’s Director of Operations (“Tarantino”) sent a letter to Kekovic’s counsel, along with a DVD of the surveillance file for the time period requested.

Kekovic asserts that the DVD sent by Tarantino was not of the night of the incident. On April 19, 2011, Kekovic served on 13th Street a notice for Discovery and Inspection requesting the video surveillance for the night of the incident. 13th Street responded that they are not in possession of video of the subject premises on the night of the alleged incident. Kekovic now asserts that 13th Street willfully or negligently destroyed key evidence with knowledge that they were being sued.

In opposition, 13th Street submits the affidavit of Tarantino, who attests that he provided Kekovic with the requested DVD on September 24, 2009. In addition, 13th Street submits the transcript of Kekovic's deposition, at which Kekovic testified that after the incident at the nightclub, he reported it to the police. Kekovic further testified that the police went to the nightclub, and "were checking out security cameras to see what happened." Kekovic also testified that he was told by the police that they confiscated the video from the nightclub, and told him that the picture on the video was not clear.

Discussion

Spoliation is the destruction of evidence. "Although originally defined as intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. . . . Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. . . . [D]ismissal [may] be a viable remedy for loss of a key piece of evidence

that thereby precludes inspection.” *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dep’t 1997). “Necessary to this burden is a showing of prejudice.” *Baldwin v. Gerard Avenue, LLC*, 58 A.D.3d 484, 485 (1st Dep’t 2009).

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). “A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that ‘a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them.’” *Kirschen v. Marino*, 16 A.D.3d 555, 555-556 (2d Dept 2005) (quoting *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dept 1997)). Discovery sanctions have also been employed against a litigant who had an opportunity to safeguard evidence but failed to do so. *See e.g. Amaris v. Sharp Elecs. Corp.*, 304 A.D.2d 457 (1st Dept 2003), *lv denied* 1 N.Y.3d 507 (2004).

However, “[w]here a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate.” *Shay v. Mozer, Inc.*, 80 A.D.3d 687, 688 (2d Dept 2011), quoting *Cordero v. Mirecle Cab Corp.*, 51 A.D.3d 707, 709 (2d Dept 2008); *see also O’Reilly v. Yavorskiy*, 300 A.D.2d 456 (2d Dept 2002); *McLaughlin v. Brouillet*, 289 A.D.2d 461 (2d Dept 2001).

Accordingly, the sanction of striking the answer is too severe where, as here, Kekovic fails to establish that 13th Street intentionally or negligently disposed of the surveillance DVD. It is not disputed that 13th Street promptly responded to Kekovic's request for the surveillance video, although it appears that a DVD for the wrong night was provided.

Kekovic submits an attorney affidavit, which states that the DVD sent by Tarantino was not the DVD for the night of the incident. However, it appears that Kekovic did not promptly inspect the DVD that was sent by Tarantino on September 24, 2009, because he waited almost nineteen (19) months until April 19, 2011 to serve its Notice for Discovery and Inspection again requesting the surveillance video.

While 13th Street has raised that possibility that the police may be in possession of the surveillance video for the night of the incident, assuming the video no longer exists both sides are equally prejudiced by its absence. This, along with Kekovic's delay in seeking to retrieve the video for the correct night, Kekovic's failure to establish any culpable conduct on the part of 13th's Street, the motion to strike the answer, or in the alternative for an adverse inference is denied.

Lastly, Kekovic's argument that 13th Street should be sanctioned because it destroyed the video as part of its normal "document destruction policy," instead of securing it pursuant to a "litigation hold" is unpersuasive. It is undisputed that both 13th Street and Kekovic believed that 13th Street provided the requested video to Kekovic on September 29, 2009. It was Kekovic's obligation to review the DVD in a timely manner, and notify 13th Street of

any problems or irregularities. If in fact 13th Street did destroy the surveillance footage, it did so while under the good faith impression that it had already been provided to Kekovic. That Kekovic waited so long to notify 13th Street that the DVD produced was of the wrong night should not result in sanctions to 13th Street.

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff Sinisa Kekovic to strike the answer of defendant 13th Street Entertainment, LLC d/b/a Kiss & Fly Nightclub on spoliation grounds, or in the alternative granting Kekovic a negative inference against defendant at the time of trial is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 5, 2011

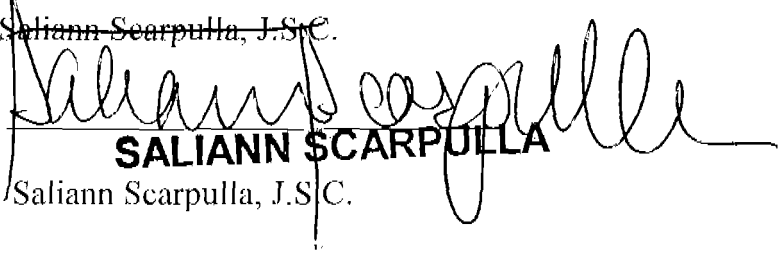
FILED

ENTER:

DEC 5 2011

NEW YORK
COUNTY CLERK'S OFFICE

~~Saliann Scarpulla, J.S.C.~~



SALIANN SCARPULLA

Saliann Scarpulla, J.S.C.