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

PRESENT: JUDITH J. GISCHE PART 10

HON. JUDITH J. GISCHE Justice
J.S.C.

Pace University

INDEX NO. 602247/2005

MOTION DATE

-v-

MOTION SEQ. NO. 005

McQuay New York LLC

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

SC 6/7/2012 @ 9:30 am
590459/11 & only
590813/11

Dated: 2/21/12

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

---x

Pace University,

Plaintiff,

-against-

McQuay New York, LLC and
McQuay Service, LLC,

Defendants.

---x

McQuay New York, LLC,

Third-party Plaintiff,

-against-

McDonnell & Miller,

Third-party Defendant.

---x

ITT McDonnell & Miller
Division of ITT Corporation,

Fourth-party Plaintiff,

-against-

McQuay International,

Fourth-party Defendant.

---x

DECISION/ ORDER
Index No.: 602247/05
Seq. No.: 005

Present:
Hon. Judith J. Gische, JSC

T.P.
Index # 590459/11

T.P.
Index # 590813/11

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Notice of Motion, DMA affd., exhibits	1
FR affd	2
RSF affirm., exhibits	3
DMA Reply affirm	4

Upon the foregoing papers the decision and order of the court is as follows:

Third-party defendant/ Fourth-party plaintiff ("ITT McDonnell") moves pursuant to CPLR § 3126 for dismissal of the third-party complaint, with prejudice, on the basis of spoliation of evidence. Alternatively, it seeks to sever the third-party and fourth-party action for the case in chief. The motion is opposed by defendant/third-party Plaintiff McQuay New York, LLC ("McQuay NY"). Issue has been joined and the motion was brought shortly before the Note of Issue was filed in the underlying action. The motion is, therefore, properly before the court and will be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Plaintiff, Pace University ("Pace") sued McQuay NY for property damages resulting from the alleged failure of a chilled water pump on one of its its refrigeration and air conditioning unit. Pace alleged that the paddle mechanism on the control flow switch was damaged and evidence was adduced during discovery that the chilled water pump failure was caused by the malfunction of the control flow switch. Pace sued McQuay NY based upon beach of a service agreement and also for negligence in failing to service the system. ITT McDonnell was identified during discovery as that manufacturer of the control flow switch. McQuay NY then commenced the third party action for indemnification and/or contribution claiming that the chilled water pump failed due to a manufacturing issue and not a maintenance issue.

During discovery ITT McDonnell asked for the production of the allegedly defective control switch for inspection and possible testing. The requests were made both to McQuay NY and also to Pace. Each have separately denied having possession of the control flow switch and, to date, the switch has not been located. ITT McDonnell claims that it requested schematics of the chiller and control flow switch, but they were

not provided because there are none. ITT McDonnell admits that it was provided with a photograph, but it is of poor quality and, therefore, according to ITT McDonnell, of no use in determining the functionality of the control flow switch. ITT McDonnell provides the affidavit of Florin Rosca, the Manager of Engineering for the "Flow Control Center of Excellence for ITT Corporation." Rosca opines that based on the limited information available, he cannot evaluate the functionality of the control flow switch. ITT McDonnell argues that because a key piece of evidence (the control flow switch) has been spoliated, ITT McDonnell cannot prepare its defenses, and the third-party complaint should be dismissed.

In opposition, McQuay NY claims that following the malfunction, Pace asked McQuay to perform repairs and the repairs entailed taking the Chiller apart. Peter Eck, the McQuay mechanic who oversaw maintenance at Pace, would routinely check the LED lights in the chillers to determine whether the control flow switch was operational and would note this on his inspection sheets. The inspection sheets and all service reports have been provided to ITT McDonnell. ITT McDonnell has also been provided with prior deposition testimony, including that of Mr. Eck, who testified that: on April 3, 2001 (before the accident) he observed that the control flow switch was stuck in the middle position and that he had to spray the switch to loosen it; on May 3, 2001 the chiller was making banging noises and that on June 4, 2001 the flow switch was not operational. McQauy New York also points out that it did not control the day to day operation of the location of the chiller.

Discussion

Spoliation occurs when a litigant disposes of crucial items of evidence involved in an accident before an adversary has an opportunity to inspect them. Kirkland v. New York City Housing Authority, 236 AD2d 170 (1st dept. 1997). The destruction may be either intentional or negligent. Kirkland, supra. Spoliation can be improper even if there is no litigation pending, but where litigation is reasonably anticipated. See. Ortega v. City of New York, 9 NY3d 69 (2007). Once spoliation is found to have occurred, it is within the court's discretion to fashion a remedy. Miller v. Weyerhaeuser Company, 3 AD3d 627 (3rd dept. 2004).

It is the burden of the party seeking sanctions to prove their entitlement to them. The courts possess broad discretion to provide proportionate relief to the party deprived of the of the lost evidence. Ortega v. City of New York, *supra*. This may include striking a pleading, precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to develop replacement evidence or employing an adverse inference instruction at the trial of this action. Ortega v. City of New York, *supra*. The remedy should, however, be tailored to the spoliation and its effect on the case. Minaya v. Duane Reade, 66 AD3d 402 (1st dept. 2009). Although sanctions may be imposed even for negligent spoliation, striking a pleading is usually not warranted unless the evidence is crucial and the spoliators conduct evinces some higher degree of culpability. Russo v. BMW of North America, 82 AD3d 643 (1st dept. 2011).

For the reasons that follow the court denies the motion for summary judgment dismissing the complaint on the issue of spoliation, but without prejudice to ITT McDonnell seeking such other remedies as, within the discretion of the trial judge, may

be appropriate.

There is no question but that the object of the dispute in the third party action is unavailable for inspection or testing. The control flow switch is certainly a key piece of evidence and its absence certainly makes it more difficult to defend against the claims. In this case however, although McQuay NY had access, post accident, to the flow switch, it did not have day to day access. There is no indication that it was McQuay NY's actions that resulted in the spoliation of the evidence. There is no evidence when the spoliation even occurred. There is no evidence of the higher degree of culpability that would invoke the most severe spoliation sanction of striking a pleading. Since striking the pleading is the only sanction requested by ITT McDonnell at this time, the motion is denied. In making this decision, however, the court is expressly not deciding whether a lesser form of sanction, might be warranted, which is left to the discretion of the Justice ultimately assigned to preside over the trial of this case.

ITT McDonnell's alternate request, to sever the third and fourth party actions, is granted. While the later commenced actions involve a common set of facts as the underlying action, the third and fourth party actions were not commenced until almost six years after the underlying action was initially brought. McQuay NY's arguments that it could ot have brought the claim any sooner are not persuasive. The underlying inspection documents which according to McQuay NY, identify defects in the control flow switch, were their own records. In any event, any further delay in the resolution of the underlying seven year old case is inappropriate. ITT McDonnell claims that it still needs to complete additional discovery in the third and fourth party actions. The underlying a action, however, is ready for trial. Balancing these considerations, the

court finds that the first party action brought by Pace should proceed to trial at this time. The third and fourth party actions are, however, severed. The each of the plaintiffs in those actions shall contact the office of trial support for instructions on how to proceed. Discovery in the third and fourth party actions should be completed on or before May 31, 2012. A status conference on the severed actions is scheduled for **June 7, 2012 at 9:30 a.m.** The Note of Issue in the third and fourth-party actions is due on **June 8, 2012.**

CONCLUSION

In according with this decision, it is hereby:

ORDERED that third party defendant/fourth party plaintiff, ITT McDonnell & Miller, a Division of ITT Corporation's, motion for summary judgment dismissing the third-party complaint on the basis of spoliation of evidence is denied , and it is further

ORDERED that third party defendant/fourth party plaintiff, ITT McDonnell & Miller, a Division of ITT Corporation's, motion to sever and separately continue the third-party complaint and the fourth-party complaint is granted; and it is further

ORDERED that the 3rd party plaintiff and the 4th party plaintiff shall each contact the office of trial support for instructions on how to proceed; and it is further

ORDERED that the end date for discovery in the third-party action and the fourth-party action is May 31, 2012; a status conferences in the third-party action and the fourth-party action is set for June 7, 2012 at 9:30 a.m. and the notes of issue in the third-party action and the fourth-party action is set for June 8, 2012 , and it is further

ORDERED that within 30 days hereof the plaintiff is to file this decision and order

with the clerk in Part 40 who shall place the first party action (index # 602247/05) on the calendar as ready for trial, and it is further

ORDERED that any requested relief not otherwise granted herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
February 21, 2012

SO ORDERED:

J.G. J.S.C.

FILED

FEB 22 2012

NEW YORK
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