

**320 W. 13th St., LLC v Wolf Shevack, Inc.**

2012 NY Slip Op 32048(U)

July 23, 2012

Supreme Court, New York County

Docket Number: 603730/07

Judge: Joan M. Kenney

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

**PRESENT:** JOAN M. KENNEY  
J.S.C. Justice

**PART** 8

Index Number : 603730/2007  
320 WEST 13TH STREET  
vs.  
WOLF SHEVACK, INC.  
SEQUENCE NUMBER : 015  
STRIKE ANSWER

**INDEX NO.** 603730/07  
**MOTION DATE** \_\_\_\_\_  
**MOTION SEQ. NO.** 015

The following papers, numbered 1 to 79, were read on this motion to Article ANNUAL  
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits and x motion | No(s) 1-56  
 Answering Affidavits — Exhibits + Memo of LAW | No(s) 57-61  
 Replying Affidavits & Reply + Memo of LAW | No(s) 62-79

Upon the foregoing papers, It is ordered that this motion is NOTE consolidated decision w/ motion sy. 016

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

**FILED**

AUG 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE

**Dated:** 7/23/12

*Joan M. Kenney* J.S.C.

**JOAN M. KENNEY**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

NOTE: CASE IS RESPONSIBLY FILED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----x  
320 WEST 13<sup>TH</sup> STREET, LLC,  
Plaintiff,

DECISION & ORDER  
Index No.: 603730/07

-against-

WOLF SHEVACK, INC., et al.,  
Defendants.

**FILED**

**AUG 03 2012**

-----x  
JOAN M. KENNEY, J.:

Motion sequence numbers 015 and 016 are consolidated for  
disposition. NEW YORK  
COUNTY CLERK'S OFFICE

In motion sequence number 015, plaintiff moves, pursuant to CPLR 3126 (3), to strike the answers of Lawrence H. Wolf, Mary Wolf, Jay Wolf, David J. Wolf, Wolf Shevack, Inc., Wolf Group Integrated Communications, Ltd., Wolf Group New York, Inc., Wolf National Yellow Pages, Inc., Wolf Group (USA), Inc., Wolf Family Holdings Limited, Amalgamated Technologies Inc. and Optio Software Inc. (collectively, the Wolf defendants) for withholding and/or destroying relevant and necessary discoverable documents and failing to comply with discovery orders or, in the alternative, pursuant to CPLR 3126 (1), holding that the issues to which these documents are relevant be deemed resolved as against the Wolf defendants. The Wolf defendants cross-move, pursuant to CPLR 3126, to dismiss the complaint or, in the alternative, to issue a conditional order of preclusion based on plaintiff's alleged violation of discovery orders. In addition, the Wolf defendants seek attorney's fees, pursuant to CPLR 3042.

In motion sequence number 016, defendants Trinad Management, LLC, Trinad Advisors GP, LLC and Atlantis Equities, Inc. (collectively, the Trinad defendants) move, pursuant to CPLR 3126, to strike plaintiff's claims as asserted against them, based on plaintiff's failure to comply with the court's compliance order of January 23, 2012.

#### **FACTUAL BACKGROUND**

The facts of this case have been previously detailed in the court's decision of December 22, 2008, and will not be reiterated herein. In brief, this action involves the enforcement of a stipulation of settlement, entered into on January 7, 2003, in connection with a claim for rent owed to plaintiff from defendants pursuant to a commercial lease. According to the complaint, no payment on the outstanding principle has been made since June 30, 2004, and plaintiff asserts five causes of action, all of which seek to void defendants' alleged transfer of assets under the Debtor Creditor Law or the CPLR.

In the present motion (motion sequence number 015), plaintiff seeks sanctions against the Wolf defendants for the alleged inadvertent destruction of financial documents from January 1, 2003 through January 31, 2005.

Plaintiff states that, by compliance conference order dated April 7, 2011, defendants were directed by the court to produce the financial documents requested by plaintiff in its document demand

[\* 4]

request of May 14, 2010. Motion, Ex. L. On April 25, 2011, counsel for the Wolf defendants served written disclosure responses, pursuant to the compliance conference order, in which counsel stated that the Wolf defendants had no idea where the relevant documents were or whether they still exist. Motion, Ex. S.

Subsequently, the matter was marked off the calendar in order for defendants to appeal the compliance conference order, but defendants abandoned the appeal and the matter was restored to the calendar on January 23, 2012. Motion, Ex. T. Thereafter, the Wolf defendants submitted supplemental responses to plaintiff's discovery demands, stating that all of the relevant financial documents had inadvertently been destroyed. Motion, Ex. U. Plaintiff asserts that the Wolf defendants have only produced limited financial documents, which they knew were already in plaintiff's possession, and that they have failed to produce any of the financial data required pursuant to the court's compliance conference order. It is noted that the individual Wolf defendants have submitted affidavits attesting that the documents were destroyed after the stipulation of settlement, but before the instant litigation was commenced, based on each person's habits regarding financial record retention.

In opposition to plaintiff's motion, and in support of their cross motion, the Wolf defendants argue that plaintiff's motion,

based on spoliation of evidence, should be denied because none of the financial records were destroyed during the pendency of the current action and because there is no evidence of misconduct with respect to the destruction of the records. Moreover, the Wolf defendants claim that a preclusion order should be issued against plaintiff, based on plaintiff's failure to comply with this court's order of January 23, 2012, ordering plaintiff to appear for deposition and to respond to defendants' bill of particulars. Cross motion, Ex. A. The court notes that this order does not warn that any sanctions may be imposed for failure to comply.

In reply to the Wolf defendants' opposition, plaintiff reiterates its arguments and points out that wilful destruction of evidence is not necessary in order to find spoliation. Further, plaintiff says that the Wolf defendants were on notice of the potential of a lawsuit from the moment that they failed to comply with the stipulation of settlement, which pre-dates the destruction of the financial records. In addition, plaintiff avers that the requested documents are not available to it from any other source.

With regard to the cross motion, plaintiff maintains that the court's order was based on the false representations of the Wolf defendants that all financial disclosure had been made, and that the Wolf defendants should not profit from their own misconduct.

In motion sequence number 016, the Trinad defendants seek to have sanctions imposed against plaintiff for plaintiff's failure to

comply with the court's compliance conference order of January 23, 2012, the same basis for the Wolf defendants' cross motion. This motion is denied, for the reasons appearing below.

#### DISCUSSION

Plaintiff's motion (motion sequence number 015) seeking to strike the Wolf defendants' answer based on their spoliation of evidence or, in the alternative, to allow a negative inference charge against them at trial is granted to the extent of allowing a negative inference charge. The Wolf defendants' cross motion is denied in its entirety.

"Spoliation is the destruction of evidence. Although originally defined as the 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. A correlating trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them [internal citations omitted]."

*Kirkland v New York Housing Authority*, 236 AD2d 170, 173 (1<sup>st</sup> Dept 1997).

"When parties involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law. 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.' New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding 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 [internal citations omitted]."

*Ortega v City of New York*, 9 NY3d 69, 76 (2007).

In the case at bar, the Wolf defendants do not dispute that they destroyed the financial records, but merely claim that such destruction was inadvertent and occurred prior to the institution of the present action. However, as noted above, the nonintentional destruction of crucial evidence does not negate a charge of spoliation (*Herera v Matlin*, 303 AD2d 198 [1<sup>st</sup> Dept 2003]), and the court agrees with plaintiff that the Wolf defendants should have realized that they might be sued when they stopped fulfilling their financial obligations under the stipulation of settlement, which occurred prior to the records' destruction. See generally *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478 (2004).

However, in the exercise of its discretion, the court concludes that the appropriate sanction in the instant case is to issue a negative inference charge rather than to strike the Wolf defendants' pleadings. *Foley v Consolidated Edison Company of New York, Inc.*, 84 AD3d 476 (1<sup>st</sup> Dept 2011); *Schantz v Fish*, 79 AD3d 481 (1<sup>st</sup> Dept 2010). A negative inference charge "provides that the jury shall determine whether there was a reasonable explanation for



the destruction of evidence and, if not, the inference to be drawn from its destruction." *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 255 (1<sup>st</sup> Dept 2011). It is more appropriate for the trier of fact to evaluate credibility and the reasonableness of the records destruction than for the court to do so based only on motion papers.

"The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. However, 'the drastic remedy' of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious. Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply or a failure to comply with court-ordered discovery over an extended period of time [internal quotation marks and citations omitted]."

*Orgel v Stewart Title Insurance Company*, 91 AD3d 922, 923 (2d Dept 2012); *Tos v Jackson Heights Care Center, LLC*, 91 AD3d 943 (2d Dept 2012); *Gal-Ed v 153rd Street Associates, LLC*, 73 Ad3d 438 (1<sup>st</sup> Dept 2010); *Baralan International, S.p.A. v Avant Industries, Limited*, 242 AD2d 226 (1<sup>st</sup> Dept 1997).

In the case at bar, there was only one court order, recently issued, with which the Wolf defendants claim plaintiff failed to comply. That order did not indicate that any sanctions would be imposed for non-compliance, and plaintiff's explanation for its non-compliance, based on the destroyed financial records, does not indicate wilful or contumacious conduct warranting sanctions.

Therefore, the Wolf defendants' cross motion is denied.

Similarly, and for the same reasons, the Trinad defendants' motion (motion sequence number 016) is similarly denied. Although the Trinad defendants state that they have provided all of the financial documents requested by plaintiff, as previously stated, the Trinad defendants' claim is based on only one court order, recently issued, that did not indicate the possibility of sanctions being imposed for non-compliance. At this juncture, the court declines to exercise its discretion to impose sanctions against plaintiff. Based on the foregoing, it is hereby

ORDERED that plaintiff's motion (motion sequence number 015) is granted to the extent of allowing a negative inference charge against Lawrence H. Wolf, Mary Wolf, Jay Wolf, David J. Wolf, Wolf Shevack, Inc., Wolf Group Integrated Communications, Ltd., Wolf Group New York, Inc., Wolf National Yellow Pages, Inc., Wolf Group (USA), Inc., Wolf Family Holdings Limited, Amalgamated Technologies Inc. and Optio Software Inc. at trial, but is otherwise denied; and it is further

ORDERED that the cross motion of Lawrence H. Wolf, Mary Wolf, Jay Wolf, David J. Wolf, Wolf Shevack, Inc., Wolf Group Integrated Communications, Ltd., Wolf Group New York, Inc., Wolf National Yellow Pages, Inc., Wolf Group (USA), Inc., Wolf Family Holdings Limited, Amalgamated Technologies Inc. and Optio Software Inc. (motion sequence number 015) is denied in its entirety; and it is

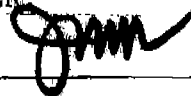
further

ORDERED that the motion of Trinad Management, LLC, Trinad Advisors GP, LLC and Atlantis Equities, Inc. (motion sequence number 016) is denied; and it is further

ORDERED that the parties are to appear for a status conference on August 23, 2012 at 9:30 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.

Dated: 7/23/12

ENTER:



Joan M. Kenney, J.S.C.

**FILED**

**AUG 03 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**