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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon **PART 42**
Justice

VERIZON NEW YORK, INC.

- v -

GEORGE A. FULLER COMPANY, INC. d/b/a CAPELLI ENTERPRISES and SITEWORKS CONTRACTING CORPORATION

[And Third-Party Action]

INDEX NO. 100447/09

MOTION DATE 7-29-15

MOTION SEQ. NO. 007

The following papers were read on this motion by defendant/third-party defendant Siteworks Contracting Corp., in effect, to dismiss the complaint for spoliation of evidence (CPLR 3126) and cross-motion by third-party plaintiff George Fuller Company for the same relief.

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits	No(s).
Notice of Cross-Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law and Opposition to Motion	No(s). 3
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 4
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 5

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

In this consolidated property damage action, the plaintiff, Verizon New York, Inc. (Verizon), seeks to recover the $233,423.00 in costs it incurred repairing damage allegedly caused by the defendants, George A. Fuller Company, Inc. d/b/a Capelli Enterprises (Fuller) and Siteworks Contracting Corporation (Siteworks) to its telecommunications equipment and facilities near Hamilton Avenue in the City of White Plains on September 29, 2009. Siteworks, named as a defendant and third-party defendant, moves, in effect, to strike the complaint on the ground of spoliation of evidence, i.e. a damaged underground cable, and defendant/third-party plaintiff Fuller moves for the same relief. Verizon opposes both motions as untimely and without merit.

First, the court notes that, although the motion and cross-motion are denominated as motions for summary judgment (CPLR 3212), the common-law doctrine of spoliation is the only ground raised in both. Thus, while the motions would be untimely as being brought approximately 60 and 109 days, respectively, after this court's deadline of October 27, 2014, without good cause for the delay being

shown (see CPLR 3212[a]; Brill v City of New York, 2 NY3d 648 [2004]), they are, as stated above, essentially motions seeking a sanction for spoliation, which have no specific time limits. Indeed, the spoliation sanction of a preclusion or a negative inference charge can be requested at trial. See Ortega v City of New York, 9 NY3d 696 (2007); Scholastic, Inc. v Pace Plumbing Corp., 129 AD3d 75 1st Dept. 2015); Strong v City of New York, 112 AD3d 15 (1st Dept. 2013). In any event, the motion and cross-motion are denied on the merits.

"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" (Kirkland v New York City Housing Auth., 236 AD2d 170, 173 [1st Dept. 1997]) and after being placed on notice that such evidence might be needed for future litigation. See New York City Housing Auth.v Pro Quest Security, Inc., 108 AD3d 471 (1st Dept. 2013); Sloane v Costco Wholesale Corp., 49 AD3d 522 (2nd Dept. 2008). Furthermore, the Supreme Court has "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... or employing an adverse inference instruction at the trial of the action." Ortega v City of New York, supra at 76; see CPLR 3126; Voom HD Holdings LLC v Echostar Satellite LLC, 93 AD3d 33 (1st Dept. 2012); General Security Ins. Co. v Nir, 50 AD3d 489 (1st Dept. 2008).

However, "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct." Iannucci v Rose, 8 AD3d 437 (2nd Dept. 2004); see Melcher v Apollo Medical Fund Mgt. LLC, 105 AD3d 15 (1st Dept. 2013); Russo v BMW of North America, LLC, 82 AD3d 643 (1st Dept. 2011). Thus, the sanction of dismissal of the complaint or answer is warranted only where the alleged spoliation prevents the movant from inspecting a key piece of evidence which is crucial to the movant's case or defense (see Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Inc., 221 AD2d 243 [1st Dept. 1995]; Bach v City of New York, 33 AD3d 544 [1st Dept. 2006]) or has left the movant "'prejudicially bereft' of the means of presenting their claim." Kirkland v New York City Housing Auth., supra at 174, quoting *Hoenig, Products Liability, Impeachment Exception: Spoliation Update*, NYLJ, Apr. 12, 1993, at 6, col 5); see Canaan v Costco Wholesale Membership, Inc., 49 AD3d 583 (2nd Dept. 2008). That is not the case here.

While there is no dispute that Verizon intentionally disposed of the subject cable sometime after the incident, there is also no real dispute that a backhoe was the cause of the damage to the cable. The movants' assertions that there may be other causes are speculative. Moreover, the movants, being present at the excavation site at the time of the damage, had an opportunity to examine the cable prior to its destruction or at least to request its preservation, which they did only belatedly. No party took photographs. Contrary to the movants' further contention, the cable is not the sole piece of evidence by which they can establish a defense or defenses. Indeed, much of the proof adduced during discovery and included in the motion papers, including the property damage reports,

daily time and material work tickets, invoices and deposition testimony of the parties' witnesses, may form the basis of the defenses asserted by the movants. Nor do they argue that the same proof would not be available to them at trial to do so.

Thus, this case is distinguishable from Verizon New York, Inc. v Consol. Edison, Inc., 44 Misc 3d 1206(A) (Sup Ct, NY County 2014), where the cause of the damage to the discarded cable was in dispute, Verizon arguing that it was Con Edison steam and Con Edison arguing that it was the age and condition of the cable. Similarly, in Verizon New York, Inc. v Consol. Edison Co. of New York, Inc., 54 AD3d 599 (1st Dept. 2008), the parties disputed the cause of the damage to a cable, Verizon arguing that it was "burnout" caused by Con Edison and Con Edison arguing that it was Verizon's own negligence in allowing the cables to undergo a process known as electrolysis. In that case, the court noted that the absence of the cable "substantially hinders" (Cohen Bros. Realty v Rosenberg Elec. Contrs., 265 AD2d 242, 244 [1999] lv dism 95 NY2d 791 [2000]) Con Edison's ability to prove that the cause of the damage was electrolysis. However, since the subject cable was not discarded but remained in the ground, the Appellate Division declined to impose the drastic remedy of striking the complaint and instead imposed the cost of excavation of the cable upon the plaintiff. Similarly, where, as here, a defendant fails to establish that it was severely prejudiced by the disposal of evidence and that its ability to mount a defense is fatally compromised, sanctions such as dismissal of the complaint or claim or precluding the plaintiff from offering evidence of damages at trial are not warranted. See Ever Win, Inc. v 1-10 Indus. Assoc., 111 AD3d 884 (2nd Dept. 2013).

For these reasons, neither of the movants have demonstrated that the damaged cable was such a "key" piece of evidence and crucial to its defense, that it had no opportunity to inspect it and that its absence left it "prejudicially bereft" of a means of presenting a defense (see Kirkland v New York City Housing Auth., supra at 174) so as to warrant striking the complaint. However, while striking of the complaint is not warranted, the movants may seek an adverse inference charge at trial, a more appropriate remedy in this case. See Ortega v City of New York, supra; Scholastic, Inc. v Pace Plumbing Corp., supra; Strong v City of New York, supra.

To the extent Verizon is seeking summary judgment in its favor upon the principle of res ipsa loquitor, that relief is denied as untimely and without merit. Since, as discussed above, any summary judgment motion by Siteworks of Fuller would be untimely, the Verizon cannot invoke CPLR 3212(b) to seek reverse summary judgement. In any event, it fails to establish entitlement to that relief. "The first prerequisite for invocation of the doctrine of res ipsa loquitur, and the inference of negligence it permits, is that the injury-causing event be of a kind that ordinarily does not occur in the absence of negligence." States v Lourdes Hospital, 100 NY2d 208, 210 (2003), *rearg denied* 100 NY2d 577 (2003). The plaintiff asserting such a theory must also establish two other requisite elements - that the event was "caused by an agency or instrumentality within the exclusive control of the defendant" and was not "due to any voluntary action or contribution on the part of the plaintiff." Dermatossian v New

York City Transit Auth., 67 NY2d 219, 226 (1986); see Morejon v Rais Const. Co., 7 NY3d 203, 209 (2006). The plaintiff has failed to meet this burden.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion is denied, and it is further,

ORDERED that the cross-motion is denied.

This constitutes the Decision and Order of the court.

FILED _____, JSC

FEB 10 2016

COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 29, 2016

1. Check one: ..... ☐ **CASE DISPOSED** ■ **NON-FINAL DISPOSITION**

2. Check as appropriate: MOTION IS: ☐ **GRANTED** ■ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

CROSS-MOTION IS: ☐ **GRANTED** ■ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**