Gerber v 450 W. 50th LLC
2016 NY Slip Op 32386(U)
December 1, 2016
Supreme Court, New York County
Docket Number: 159307/2013
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

ANDREA GERBER,

Plaintiff,

-against-

450 W. 50TH LLC and
CROMAN REAL ESTATE INC.,

Defendants.

Index No.: 159307/2013
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for disqualification and plaintiff's cross-motion for sanctions.

Papers	**Numbered**
Defendants' Notice of Motion	1
Plaintiff's Notice of Cross-Motion	2
Defendants' Affirmation in Opposition	3
Defendants' Affirmation in Reply	4
Plaintiff's Affirmation in Reply	5

Edelman, Krasin & Jaye, PLLC, New York (Kara M. Rosen of counsel), for plaintiff.
Goldberg Segalla, LLP, New York (Michael F. Harris of counsel), for defendants.

Gerald Lebovits, J.

Defendants move to disqualify plaintiff's counsel in this personal injury action. Defendants argue that a conflict exists because plaintiff's counsel, Paul Edelman, of Edelman, Krasin & Jaye PLLC (EKJ), witnessed plaintiff's accident. Edelman, a named partner at EKJ and plaintiff's partner/common-law husband, resided with plaintiff at the time of the accident. According to defendants, Edelman is also a witness to plaintiff's physical condition and recovery after the accident. Defendants rely on the advocate-witness rule, Rule 3.7 of the New York Rules of Professional Conduct, and Disciplinary Rule 5-102(b) of the New York Lawyer's Code of Professional Responsibility, to argue that Edelman has a conflict because he was a witness to significant issues of fact in this case and it is apparent Edelman's testimony will prejudice plaintiff. Plaintiff opposes defendants' motion and cross-moves for disclosure sanctions — precluding testimony of a witness, precluding evidence, striking defendants' answer, or imposing an adverse inference charge — for defendants' failure to provide disclosure and for spoliating evidence.

I. Defendants' Motion to Disqualify Plaintiff's Counsel

Defendants' motion to disqualify plaintiff's counsel is denied. Defendants have not satisfied their burden to prove that plaintiff's counsel's testimony is necessary to defendants' case and prejudicial to plaintiff. In support of their motion, defendants rely on plaintiff's complaint and disclosure responses. Defendants have presented insufficient evidence to disqualify plaintiff's counsel.

The advocate-witness rules contained in the New York Rules of Professional Conduct guide the courts in determining whether to disqualify an attorney during litigation. (*S&S Hotel Ventures Ltd. v 777 S.H. Corp.,* 69 NY2d 437, 440 [1987].) The New York advocate witness rule, Rule 3.7 (B) (1), provides the following:

> "A lawyer may not act as an advocate before a tribunal in a matter if:
> 1. Another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client and it is apparent that the testimony may be prejudicial to the client."

The decision to disqualify counsel rests soundly in the trial court's discretion. (*Falk v Gallo*, 73 AD3d 685, 685 [2d Dept 2010].) Parties are entitled to be represented by counsel of their choice, and that right may not be abridged absent a clear showing that disqualifying counsel is warranted. (*Id.* at 686 [disqualifying plaintiff's attorney because attorney was the only person who knew about discussion regarding the oral agreement that was the subject of litigation].) The party seeking to disqualify counsel bears the burden of showing that disqualifying counsel is appropriate. (*Id.*)

To disqualify counsel, the counsel's testimony must be necessary and prejudicial to plaintiff's interests. (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013].) Testimony from counsel "'may be relevant and even highly useful but still not strictly necessary. A court's finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence.'" (*Sokolow v Lacher,* 299 AD2d 64, 74 [1st Dept 2002], quoting *S & S Hotel Ventures Ltd.,* 69 NY2d at 446.) An attorney who has relevant knowledge or is "involved in the transaction at issue does not make that attorney's testimony necessary." (*Talvy v Am. Red Cross*, 205 AD2d 143, 152 [1st Dept 1994].)

Disqualifying an attorney during litigation presents the risk of providing a strategic advantage to the party seeking to disqualify the attorney. (*Ullmann-Schneider*, 110 AD3d at 470.) Because a strategic advantage during litigation is possible for a moving party, the movant "must meet a heavy burden of showing that disqualification is warranted." (*Id.*) Untimeliness or undue delay in moving to disqualify counsel may support a finding that a motion to disqualify is in bad faith. (*E.g. Lucci v Lucci*, 150 AD2d 650, 652 [2d Dept 1989] [finding that defendant's motion to disqualify plaintiff's law firm two years after the action began supports a finding that defendants made the motion in bad faith to delay proceedings].) Delaying in moving to disqualify counsel "belies any genuine claim . . . [of] prejudice[] . . . or that the motion was

anything but an afterthought or dilatory tactic." (*Eisenstadt v Eisenstadt*, 282 AD2d 570, 570 [2d Dept 2001], citing *Schonwit v Schonwit*, 194 AD2d 780, 781 [2d Dept 1993].)

As the moving party, defendants have not met their burden of demonstrating that Edelman's trial testimony is necessary and prejudicial to plaintiff's interests. Edelman's testimony might be relevant and useful. Edelman was walking with plaintiff at the time of the accident, witnessed the accident, and resided with plaintiff throughout plaintiff's recovery. (Defendants' Notice of Motion, Exhibit D, at ¶14.) But testimony at trial regarding the accident, condition of the sidewalk, and plaintiff's physical condition can be provided by plaintiff herself as well as from her doctors. (Plaintiff's Affirmation in Opposition at ¶ 20.) Edelman does not have exclusive knowledge of the significant issues of fact involved in plaintiff's action. (*See Falk*, 73 AD3d at 686.) Plaintiff's counsel states that Edelman has not been involved in the litigation of plaintiff's case and will not be trial counsel on the matter. (Plaintiff's Affirmation in Opposition at ¶ 22.) Since the start of plaintiff's personal injury action, Lawrence P. Krasin, a partner in plaintiff's firm, has been handling the litigation. (*Id.*) Plaintiff's counsel states that plaintiff has no intention to call Edelman as a witness. (Plaintiff's Affirmation in Opposition at ¶ 18.)

Defendants offer no evidence to show that Edelman's testimony is necessary to defendants' case. (Plaintiff's Affirmation in Opposition at ¶ 18.) Defendants state that they intend to call Edelman as a non-party witness. (Defendant's Affirmation in Reply at ¶ 8.) But plaintiff has not been served with any disclosure responses naming Edelman as a witness, nor has plaintiff been served with a non-party witness subpoena naming Edelman as a witness. (Plaintiff's Affirmation in Opposition at ¶ 18.) Without any supporting evidence from defendants, it is unclear whether Edelman's testimony is necessary.

Defendants have also offered no evidence to show that Edelman's testimony will prejudice plaintiff. Defendants' argument that Edelman will be called as a necessary witness and prejudice plaintiff is speculative.

Defendants' motion to disqualify counsel during the litigation stage, moreover, offers defendants a possible advantageous tactic. Defendants claim to have learned about the relationship between plaintiff and Edelman during plaintiff's examination before trial (EBT) on February 13, 2015. (Defendant's Affirmation in Reply at ¶ 7.) But defendants did not move to disqualify plaintiff's counsel until April 4, 2016. (Defendants' Notice of Motion.) Moving to disqualify counsel more than a year after learning of the conflict carries the risk that defendants might gain a strategic advantage.

The court is troubled by the fact that plaintiff has never named Edelman as a witness to the accident — and he was a witness — in response to defendants' disclosure requests from 2014. But defendants' delay — from plaintiff's EBT on February 13, 2015, until defendants' current motion filed on April 4, 2016 — in moving to disqualify counsel belies any claim of prejudice and indicates that defendants' motion is an "afterthought or dilatory tactic." (*See Eisenstadt*, 282 AD2d at 570.)

Defendants' motion to disqualify plaintiff's counsel is denied. Defendants have

not satisfied their burden to prove that plaintiff's counsel's testimony is necessary to defendants' case or that it will prejudice plaintiff.

II. Plaintiff's Cross-Motion for Sanctions

Plaintiff argues that defendants failed to respond to their disclosure requests for repair and maintenance records, among other things, in plaintiff's Notice for Discovery and Inspection dated December 30, 2013, and that plaintiff has not provided an affidavit confirming that excess insurance coverage exists. Plaintiff also urges this court to impose sanctions on defendants for spoliating evidence, namely, video surveillance from outside defendants' premises. In opposition, defendants argue that after learning of the conflict issue at plaintiff's EBT, efforts to resolve the issue had been unsuccessful and have lead to various adjournments of defendants' EBTs. Defendants also argue that the video camera that is the subject of the spoliation sanction does not exist.

Plaintiff's cross-motion is denied in part and granted in part, as explained below.

A. Defendants' Failure to Respond to Disclosure

According to CPLR 3126 (3), "[i]f any party refuses to obey an order for disclosure or willfully fails to disclose information . . . , the court may make such orders with regard to the failure or refusal as are just, among them: . . . . an order striking out pleadings or parts thereof . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." (*CDR Creances S.A.S. v Cohen,* 23 NY3d 307, 317-318 [2014].) The harsh sanction of striking an answer is appropriate with a clear showing that defendants' failure to comply with disclosure was contumacious or in bad faith. (*Gradaille v City of New York*, 52 AD3d 279, 283 [1st Dept 2008].)

A plaintiff is entitled to reasonable disclosure to learn facts related to the controversy to prepare for trial, sharpen the issues, and reduce delay. (*Francklin v New York El. Co., Inc.*, 38 AD3d 329, 329 [1st Dept 2007] [holding that records of post-accident repairs are discoverable as long as the records are not introduced at trial]; *Petty v Riverbay Corp.*, 92 AD2d 525, 526 [1st Dept 1982] [finding that plaintiff is entitled to reasonable disclosure to ascertain facts bearing on the controversy to assist plaintiff in preparing for trial by sharpening the issues and reducing delay].)

Plaintiff argues that defendants have improperly objected to plaintiff's demand for repair and maintenance records of defendants' premises as stated in plaintiff's Notices for Discovery and Inspection dated December 30, 2013, and March 4, 2014. (Plaintiff's Affirmation in Opposition to Motion, at ¶ 36.) According to plaintiff, defendants have not given plaintiff an affidavit confirming that defendants' insurance policy contains no excess or umbrella policies. (*Id.* at ¶ 37.) Plaintiff also argues that defendants have ignored the court's orders in producing a witness for an EBT. (Plaintiff's Affirmation in Opposition at ¶ 38.)

Defendants contend that they have not willfully refused to appear for the EBTs. (Defendants' Affirmation in Opposition to Cross-Motion.) Defendants argue that Hon. Paul

Wooten was advised of the facts and circumstances of the conflict issue in this case and that this issue led to various compliance-conference adjournments. (*Id.*)

Plaintiff injured herself on defendants' premises and is entitled to reasonable disclosure, including any repair, insurance, and maintenance records for the premises where her injury occurred. Defendants' withholding of the information is unjustified.

Defendants have disobeyed three court orders. A preliminary conference was held on April 23, 2014, in which the court directed defendants to be deposed on or before July 10, 2014. (Plaintiff's Affirmation in Opposition at ¶ 29; Plaintiff's Notice of Cross-Motion, Exhibit C.) The court also ordered defendants to respond to plaintiff's disclosure demands by May 23, 2014. (*Id.*) On February 25, 2015, a compliance conference was held at which the court directed that defendants' EBT be held on March 13, 2015, and for defendants to respond to plaintiff's disclosure demands by March 25, 2015. (Plaintiff's Affirmation in Opposition at ¶ 31; Plaintiff's Notice of Cross-Motion, Exhibit D.) Defendants then requested an adjournment for the EBT scheduled on March 13, 2015. (*Id.* at ¶ 32.) Another compliance conference was held on July 29, 2015, that resulted in the court's directing that defendants' EBT be held on September 30, 2015. (*Id.* at ¶ 34.)

To date, defendants have not been deposed. And defendants have not fully responded to plaintiff's disclosure demands.

Defendants' behavior, however, is not deliberate or contumacious. The harsh sanction of striking defendants' answer is not warranted. Defendants did not respond to plaintiff's disclosure demands because of the conflict issue that arose. But this court has now resolved the conflict issue. The court will give defendants one last opportunity to comply with disclosure. Defendants must submit to an EBT by January 30, 2017. Defendants must respond to plaintiff's demand for the repair and maintenance records of defendants' premises as stated in plaintiff's Notices for Discovery and Inspection dated, December 30, 2013 and March 4, 2014, and provide plaintiff with an affidavit confirming that no excess insurance exists, by January 9, 2017.

Plaintiff's cross-motion is granted only to the extent that defendants must comply with the above deadlines. Defendants' failure to comply will result in the court striking defendants' answer.

B. Sanctions for Spoliating Evidence

That aspect of plaintiff's cross-motion for spoliation sanctions is denied without prejudice. Plaintiff may renew its motion once disclosure is complete.

Spoliation is the destruction of evidence. Sanctions are appropriate when evidence has been disposed of before the opposing party had opportunity to inspect it. (*Kirkland v NYCHA*, 236 AD2d 170, 173 [1st Dept 1997].) A party seeking sanctions for spoliating evidence "must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of

fact could find that the evidence would support that claim or defense." (*Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012].) The alleged spoliator's "willfulness or bad faith [are] not . . . necessary predicates" for the court to impose spoliation sanctions. (*Sage Realty Corp. v Proskauer Rose,* 275 AD2d 11, 16 [1st Dept 2000].) If a tape is erased negligently, the court may impose sanctions if the alleged spoliator was on notice that the material might be needed for future litigation. (*Strong v City of New York,* 112 AD3d 15, 22 [1st Dept 2013].) Striking a party's pleading is an extreme sanction appropriate only when missing evidence deprives the moving party of the ability to establish its case. (*Squitieri v City of New York,* 248 AD2d 201, 202 [1st Dept 1998].)

Plaintiff states that she observed video surveillance cameras at the location of the accident. (Plaintiff's Affidavit at ¶ 4.) Annabelle Santiago, defendants' senior property manager, states that no surveillance video or camera exists. Therefore, any claim for spoliation must be denied in its entirety. (Defendants' Affirmation in Opposition to Plaintiff's Cross-Motion ¶ 10; Affidavit of Annabelle Santiago at ¶ 4.) Although plaintiff states in her affidavit that she observed a camera, it would be premature for this court to issue a spoliation sanction until disclosure is complete. No evidence suggests that defendants had control over a camera on the premises and destroyed it. Given the conflicting information between the parties, the court cannot determine whether plaintiff was mistaken when she observed a video surveillance camera or whether defendants are correct and no video surveillance camera exists.

Plaintiff's cross-motion for spoliation sanctions is denied without prejudice. Plaintiff may renew its motion after disclosure is complete.

ORDERED that defendants' motion to disqualify plaintiff's counsel is denied; and it is further

ORDERED that plaintiff's cross-motion is granted in part and denied in part: That aspect of plaintiff's cross-motion for spoliation sanctions is denied without prejudice; but plaintiff's cross-motion is granted to the extent that defendants must submit to an EBT by January 30, 2017. Defendants must respond to plaintiff's Notice for Discovery and Inspection, dated December 30, 2013, requests number one through twenty-one, and provide plaintiff with an affidavit confirming no excess insurance exists by January 9, 2017. Defendants' failure to comply with this order will result in the court striking defendants' answer; and it is further

ORDERED that the compliance conference scheduled for December 7, 2016, is adjourned to February 1, 2017, at 10:00 a.m. in Part 7, room 583, at 111 Centre Street.

Dated: December 1, 2016

J.S.C.
HON. GERALD LEBOVITS J.S.C.