Steen v Taylor Garbage Servs., Inc.
2017 NY Slip Op 31301(U)
June 14, 2017
Supreme Court, Tioga County
Docket Number: 46142
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 21st day of April, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

ROGER STEEN,

Plaintiff,

vs.

TAYLOR GARBAGE SERVICES, INC., ROBERT TAYLOR, II, SHANNON L. TAYLOR, JW HARTMAN LLC, and M & T BANK,

Defendants.

DECISION AND ORDER

Index No. 46142
RJI No. 2016-0096-C

APPEARANCES:

Counsel for Plaintiff:	COUGHLIN & GERHART LLP By: Robert R. Jones, Esq. PO Box 2039 Binghamton, NY 13902-2039
Counsel for Defendant JW HARTMAN LLC:	Alfred Paniccia Jr., Esq. 53 Chenango St. Centre Plaza Suite 400 Binghamton, NY 13901
Counsel for Defendants ROBERT TAYLOR, II, SHANNON L. TAYLOR:	Michael Garzo, Esq. 89 Court Street, 3rd Floor Binghamton, NY 13901
Counsel for Defendant M & T BANK:	Demario Carswell, Esq. M & T Bank Corporation 1 M & T Plaza Buffalo, NY 14203

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon JW Hartman, LLC's ("Hartman's") motion against Robert Taylor, II and Shannon L. Taylor (collectively "Taylors") seeking sanctions for alleged spoliation of evidence pursuant to CPLR §3126, and seeking to compel responses to other discovery demands pursuant to CPLR §3124.

The parties' dispute arises in the context of claims brought by Plaintiff Roger Steen for, among other things, foreclosure on a mechanic's lien filed by Steen regarding construction of a log home for the Taylors at 88 Thornhollow Road, Town of Tioga, Tioga County, New York. Hartman was named as a nominal defendant, as it also filed a mechanics lien on the subject property for work it performed. Hartman filed a Verified Answer with Cross Claims against the Taylors on February 1, 2016 for alleged non-payment for design and construction management work on the project. Hartman seeks foreclosure on its mechanic's lien and also submits claims for breach of contract and/or quasi contract and *quantum meruit*. Taylors served a Verified Answer to Cross Claims.

Hartman alleges that Taylors retained Hartman to provide various services, including design work, construction management, coordination with the log home manufacturer and various contractors, and other services related to the construction of the home. Hartman alleges that it was to be paid ten percent of the overall cost for construction in return for its services. Hartman alleges that it should have been paid $160,000 representing ten percent of the $1,600,000 project but was paid $84,050. The Taylors entered general denials of the cross claims and allege full payment.

Hartman's motion for sanctions pursuant to CPLR §3126 arises from its June 7, 2016 demand for all correspondence regarding the Thornhollow Road project including communications by electronic means. Initially, Taylors' denied having any correspondence related to the project. However, subsequently at a August 25, 2016 deposition, Robert Taylor admitted that he communicated with Hartman by text and email and still had access to those electronic

documents. Hartman demanded the electronic documents. Hartman again demanded the electronic documents on September 3, 2016. Counsel for Taylors responded on September 22, 2016 that they were unable to print the text messages, but would allow inspection of the phone at his office. On September 23, 2016, Counsel for Hartman responded suggesting several options for the retrieval of the text messages. Counsel for Hartman again sent a letters demanding the text messages on November 2, 2016, November 30, 2016, December 15, 2016, and January 5, 2017.

In the November of 2016, Robert Taylor's cell phone was turned over to the New York State Attorney General's Office regarding an unrelated matter pending in that office. The Attorney General's Office had his phone for two weeks presumably securing data therefrom. During this time, Robert Taylor obtained a new phone to continue his business activities. Robert Taylor picked up his cell phone from the Attorney General's Office and went directly to a recycling facility owned by his family business. He alleges that the phone unknowingly fell from his pocket and he inadvertently ran over it with a forklift. He then discarded the damaged phone. In a letter dated January 5, 2017, counsel for the Taylors confirmed the destruction of Robert Taylor's phone.

With regard to Hartman's Motion to Compel responses to demands for documentation regarding amounts paid to contractors and others related to the project, Hartman's counsel made numerous requests for additional documentation in the aforementioned letters in late 2016. Counsel demanded, among other things, copies of invoices, check ledgers and cancelled checks for both Robert and Shannon Taylor. Robert Taylor, in his affidavit, concedes that authorizations for bank records was not provided until recently. The current status of the remaining demands is unclear.

Spoliation

"On a motion for spoliation sanctions involving the destruction of electronic evidence, the party

seeking sanctions must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' and (3) the destroyed evidence was 'relevant' to the moving party's claim or defense. A 'culpable state of mind,' for purposes of a spoliation inference, includes ordinary negligence." *Ahroner v. Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 (1st Dept. 2010), *citing Zubulake v. UBS Warburg LLC*, 220 FRD 212, 220 (SDNY 2003).

In the present matter, Taylors do not dispute that they had an obligation to preserve the electronic evidence. There were numerous demands for the text messages and various discussions as to how to provide them. As of at least June 7, 2016, the Taylors were made aware of this obligation in light of Hartman's demand. When the records were destroyed in November of 2016, the Taylors had been under the obligation to preserve the electronic evidence for at least five months.

A 'culpable state of mind', although suggesting intentional conduct, can also be found where a party is grossly negligent or merely negligent in preserving evidence.[1] *See Ahroner at 482*. In this matter, Robert Taylor was aware of the electronic evidence sought from his cell phone. Various methods of retrieving the information were discussed over approximately five months. Robert Taylor resisted turning his phone over to Hartman's counsel arguing that he needed it for business purposes. However, when the Attorney General's Office demanded his phone and retained it for two weeks, he got a replacement phone. In fact, with replacement phone in hand, there is no reason provided as to why the phone was not secured and/or turned over to Hartman's counsel upon its return. There is no evidence that Robert Taylor intentionally destroyed the phone or that he was grossly negligent. The Court concludes that Robert Taylor was negligent in not securing and safeguarding his cell phone with knowledge that electronic evidence in this matter was sought. This negligence was further evidenced by his failure to preserve the phone

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[1]The distinction between intentional destruction or gross negligence and negligence has bearing on the determination of relevancy. Intentional or grossly negligent spoliation gives rise to a presumption of relevance. *See Pegasus, infra at 547.* The determination of intentional destruction and gross negligence will also bear on the nature and extent of the sanction imposed.

after it was damaged. By discarding the phone, Robert Taylor eliminated any possibility that the data could be forensically recovered.

The Court also concludes that the electronic evidence sought by Hartman is relevant. Hartman alleges that there was no written contract between Hartman and the Taylors, and that the only documentary evidence of their agreement was contained in electronic messages exchanged between the parties. The Taylors have failed to offer even an allegation that the phone did not contain evidence of their agreement with Hartman. The Court concludes that the phone contained relevant evidence regarding the nature and extent of the parties agreement.

Having determined that the Taylors were negligent in failing to preserve the electronic evidence on Robert Taylor's cell phone, the Court must determine the appropriate sanction. "[T]rial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence." *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d 543, 551 (2015); *see Weiss v. Bellevue Maternity Hosp.*, 121 AD3d 1480, 1481 (3rd Dept. 2014); *Merrill v. Elmira Hgts. Cent. School Dist.*, 77 AD3d 1165, 1166 (3rd Dept. 2010). "Sanctions for spoliation—including the dismissal of a pleading—may be imposed when a litigant intentionally or negligently disposes of critical items of evidence before an opposing party has an opportunity to inspect them." *Markel Ins. Co. v. Bottini Fuel*, 116 AD3d 1143, 1143 (3rd Dept. 2004), *see* CPLR §3126 (3); *Cummings v. Central Tractor Farm & Country*, 281 AD2d 792, 793 (3rd Dept. 2001), *lv dismissed* 96 NY2d 896 (2001); *Hartford Fire Ins. Co. v. Regenerative Bldg. Constr.*, 271 AD2d 862, 863 (3rd Dept. 2000). However, "Courts should consider the prejudice caused by the spoliation 'in determining what type of sanction, if any, is warranted as a matter of fundamental fairness.'" *Merrill* at 1167, *citing Scarano v. Bribitzer*, 56 AD3d 750, 751 (2nd Dept. 2008). "[A] less severe sanction is appropriate where the absence of the missing evidence does not deprive the moving party of the ability to establish his or her case." *Gotto v. Eusebe-Carter*, 69 AD3d 566, 567-568 (2nd Dept. 2010).

It cannot be said that Hartman has been deprived of the ability to establish its case. The nature and extent of the agreement can be proven either through testimony of its principal, or any other witness to the transaction. Additionally, Hartman provides no explanation as to why the records were not preserved by it.[2] However, the Court recognizes that the absence of the electronic data may result in a difficult credibility determination for the finder of fact with the potential for conflicting accounts from the parties. Further, Hartman alleges that the messages will prove that he was contracted to provide all design and project management. Since messages evidencing the scope of Hartman's work may have been with contractors and suppliers, they may not have included Hartman. Moreover, even if Hartman has copies of the electronic communications, disputes may arise regarding their authenticity. For these reasons, the Court does find that Hartman has been prejudiced due to the Taylors' failure to preserve the electronic evidence in their possession. The Court finds that a sanction of a negative inference charge at trial regarding electronic evidence that may have been contained on Robert Taylor's cell phone is warranted. CPLR §3126.

Motion to Compel Discovery

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR §3124. In such cases, the Court may, among other things, preclude the noncompliant party from asserting defenses, offering proof on specific issues or resolve all issues of fact in favor of the moving party. *See* CPLR §3126. However, in the first instance, where there is limited evidence of a willful noncompliance with discovery, a conditional order directing compliance is warranted. *See e.g. Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, 84 ad3D 1543 (3rd Dept. 2011); *Harris v. City of New York*, 211 AD2d 663 (2nd Dept. 1995)

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[2]Presumably, Hartman's electronic devices would also contain copies if the electronic communications with the Taylors.

In the present matter, Hartman initially served discovery demands on the Taylors on or about June 7, 2016. Hartman's counsel followed up with good faith attempts to secure compliance with the demands for various documents including invoices, cancelled checks and bank statements. The Taylors now allege that documents and/or authorizations to obtain the documents have been provided.

In light of the foregoing, the Court directs the Hartman to provide the Taylors with a specific list of outstanding discovery demands within 20 days of the entry of this decision. The Taylors shall comply with such demands within 20 days of receipt of the updated demands. If Hartman deems the discovery response incomplete, the Court will entertain a motion for sanctions.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 14, 2017
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion, and the originals are being returned to the moving party, to be filed in the County Clerk's office, along with the original signed Decision and Order:

1) Notice of Motion from JW Hartman LLC, dated March 10, 2017, with Affirmation of Alfred J. Paniccia, Jr., Esq, sworn to March 10, 2017, with Exhibits 1 through 16, and Memorandum of Law dated March 10, 2017;

2) Taylors' opposition to the motion, consisting of: Reply Affidavit of Michael A. Garzo, Jr., Esq., sworn to April 14, 2017, Affidavit of Leslie T. Hyman, dated April 12, 2017, Affidavit of Robert Taylor, II, dated April 12, 2017, Affidavit of Alexandria Perris-Sick, dated April 12, 2017, Affidavit of Tammy Peyton-Kreb, dated April 14, 2017, and attached Exhibits, and Memorandum of Law dated April 14, 2017, and

3) Reply Affirmation in Support of the Motion of JW Hartman LLC, from Alfred J. Paniccia, Jr., sworn to April 19, 2017, with Exhibit.