

Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.

2008 NY Slip Op 33736(U)

February 25, 2008

Supreme Court, Westchester County

Docket Number: 10428/05

Judge: Kenneth W. Rudolph

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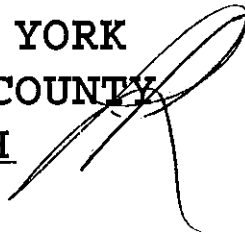
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON 2/29 2008
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION, WESTCHESTER COUNTY

Present: HON. KENNETH W. RUDOLPH
Justice.



-----X
KLEWIN BUILDING COMPANY, INC.

Plaintiff,

: Index No. 10428/05
Motion Date: 8/10/07

-against-

DECISION

FILED

HERITAGE PLUMBING & HEATING, INC. and
THE HARTFORD FIRE INSURANCE CO.,

Defendants,

:

FEB 29 2008

TIMOTHY C. IDONI
COUNTY CLERK

COUNTY OF WESTCHESTER

-----X
HARTFORD FIRE INSURANCE CO., incorrectly
sued as THE HARTFORD FIRE INSURANCE CO.,

Third-Party Plaintiff,:

-against-

NANCY BERARDIS, ANTHONY BERARDIS, JR.,
LISA BERARDIS and ANTHONY BERARDIS, SR.,

Third-Party Defendants:

-----X

The following papers numbered 1 to 46 read on this motion.

PAPERS NUMBERED

Notice of Motion/Affidavit/Exhibits 1-28/ Memorandum of Law	1-31
Affidavits in Opposition/Memorandum of Law, Plaintiff	32-36
Reply Affidavit/Exhibits A-H/Memorandum of Law, Hartford	37-46

Upon the foregoing papers, it is ORDERED that this motion by defendant, The Hartford Fire Insurance Company s/h/a The Hartford Fire Insurance Co. ("Hartford") for an order, pursuant to CPLR 3126.3., dismissing plaintiff's complaint based on the spoliation of evidence by plaintiff, namely, the discarding of the job site computers containing Klewin's electronic progress records and email, is decided as follows.

Plaintiff's Klewin Building Company, Inc. ("Klewin") complaint seeks \$348,000. in liquidated damages against a Hartford performance bond, which Hartford, as surety, executed in connection with a subcontract pursuant to which defendant, Heritage Plumbing & Heating, Inc. ("Heritage") as subcontractor, agreed to perform plumbing work on a project known as the "Woodlands Senior Housing Project" ("project") for Klewin, as contractor. Klewin contends that it sustained damages, including delay damages, as a result of Heritage's alleged discontinuance of work on and abandonment of the project on June 2, 2004. Herein, Hartford contends that the ultimate sanction of CPLR 3126.3. should be imposed in this construction case based on Klewin's admitted spoliation and willful destruction of "...computers containing Klewin's electronic progress records and email through the end of the project, as set forth in a letter to Hartford's attorney by Klewin's attorney, dated April 13, 2007. Hartford contends it has been severely prejudiced as a result of Klewin's willful destruction of electronic progress records; in particular, Hartford has been deprived of evidence pertaining to its defense as to several pivotal issues in this action.

In opposition, Klewin acknowledges that the project computers were scrapped; however, there was no spoliation, progress records and email which were contained in the computers were preserved and the information thereon was made available to Hartford in discovery. Since the making of plaintiff's motion, Klewin has made available to Hartford CD-Roms containing project schedules as well as all project documents for inspection by Hartford. Only one progress schedule, WD04, was not previously provided in hard copy to Hartford.

In particular, plaintiff's attorney avers that his letter advised Hartford only that Klewin's computers were scrapped, not that the electronic progress records and email themselves were destroyed. Hartford had not requested the CD-Roms during or subsequent to its document inspection in January, 2007. With respect to emails, Klewin's project manager, Stephen Tufaro avers that he was responsible for record keeping procedures for the project and it was his practice to print all emails, incoming and outgoing and to file the emails in the appropriate correspondence files which were made available for inspection by Hartford.

Hartford reiterates that Klewin's complaint should be dismissed based on Klewin's admitted loss of key physical evidence: email correspondence between Klewin and its surety, which has not been produced.

The determination of spoliation sanctions is within the broad discretion of the Court. See, Dennis v. City of New York, 18 AD3d 599. Under the common law doctrine of spoliation when a party negligently loses or intentionally destroys key evidence, thereby depriving the non responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. See, Baglio v. St. John's Queens Hospital, 303 AD2d 341, 342-343. While reluctant to dismiss a pleading, a drastic remedy, absent willful or contumacious conduct, courts will consider the extent of prejudice to a party and whether dismissal is necessary as a matter of fairness. See, Favish v. Templer, 294 AD2 396.

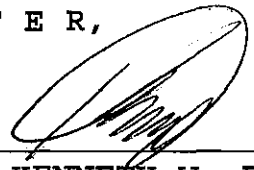
Herein, there is simply no evidence that plaintiff Klewin acted willfully, contumaciously or in bad faith or otherwise engaged in negligent or intentional spoliation with respect to providing Hartford with the progress schedule or emails. Nor has Hartford demonstrated that plaintiff's conduct has fatally prejudiced Hartford's defenses to the instant action.

In the discretion of the Court, Hartford's motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 25, 2008

E N T E R,



HON. KENNETH W. RUDOLPH
Justice of the Supreme Court

TO: TORRE, LENTZ, GAMELL, GARY & RITTMASER, LLP
Attorneys for Plaintiff
100 Jericho Quadrangle, Suite 309
Jericho, New York 11753-2702

LAMBERT & WEISS
Attorneys for Defendant/Third Party Plaintiff
The Hartford Fire Insurance Company
61 Broadway, Suite 2020
New York, New York 10006

ROBINOWITZ, COHLAN, DUBOW & DOHERTY, LLP
Attorneys for Third-Party Defendants
199 Main Street
White Plains, New York 10601