

**Weber v Baccarat, Inc.**

2011 NY Slip Op 32736(U)

October 13, 2011

Supreme Court, New York County

Docket Number: 120164/2002

Judge: Saliann Scarpulla

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: \_\_\_\_\_

PART 19

Justice

Index Number : 120164/2002

**WEBER, ARTHUR**

VS.

**BACCARAT**

SEQUENCE NUMBER : 013

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

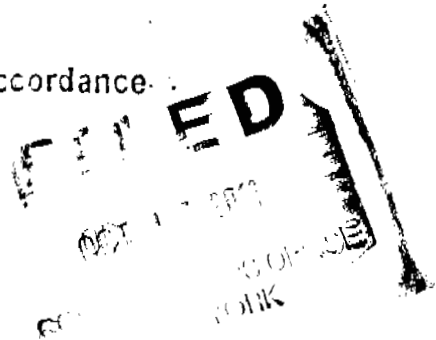
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

~~motion and cross-motion~~ are decided in accordance with accompanying memorandum decision.



Dated: 10/13/11

Saliann Scarpulla  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

-----X  
ARTHUR WEBER and MARGARET WEBER,

Plaintiffs,

-against-

Index No. 120164/02

BACCARAT, INC., BACCARAT REAL ESTATE, INC.,  
625 MADISON AVENUE ASSOCIATES, IDI  
CONSTRUCTION COMPANY, INC., RELATED  
MANAGEMENT CORP. and KING FREEZE  
MECHANICAL CORP.,

**DECISION AND ORDER**

Defendants.

-----X  
KING FREEZE MECHANICAL CORP.,

Third-Party Plaintiff,

-against-

Index No. 591098/03

COOL WIND VENTILATION CORP.,

Third-Party Defendant.

-----X  
KING FREEZE MECHANICAL CORP.,

Second Third-Party Plaintiff,

-against-

Index No. 590416/10

YORK LADDER INC., WERNER LADDER INC.  
and WERNER CO.,

Second Third-Party Defendants.

-----X

-----X  
BACCARAT, INC. and BACCARAT REAL ESTATE, INC.,

Third Third-Party Plaintiffs,

-against-

Index No. 590785/10

YORK LADDER INC., WERNER LADDER, INC. and  
WERNER CO.,

Third Third-Party Defendants.

-----X

For Plaintiffs:  
Sheindlin & Sullivan, LLP  
350 Broadway, 10<sup>th</sup> Floor  
New York, New York 10013

For Defendants Baccarat, Inc. and Baccarat Real Estate:  
Wilson, Elser, Moskowitz, Edelman & Dicker  
3 Gannett Drive  
White Plains, New York 10604

For Defendants 625 Madison Avenue Assocs. and  
Related Management Corp.:  
Callan, Koster, Brady & Brennan, LLP  
One Whitehall Street, 10<sup>th</sup> Floor  
New York, New York 10004

For Defendant/Third-Party Plaintiff King Freeze  
Mechanical Corp.:  
Goldberg Segalla, LLP  
11 Martine Avenue, Suite, 740  
White Plains, New York 10606

For Third-Party Defendants York Ladder Inc., Werner  
Ladder Inc. and Werner Co.:  
Lewis Brisbois Bisgaard & Smith LLP  
77 Water Street, Suite 2100  
New York, New York 10005

-----  
**HON. SALIANN SCARPULLA, J.:**

Third-party defendant York Ladder Inc. (“York Ladder”) moves, pursuant to  
CPLR 3212, for summary judgment dismissing the second and third third-party actions  
against it.

Plaintiffs Arthur Weber and Margaret Weber bring this action to recover for  
injuries sustained by Arthur Weber (“Weber” or “plaintiff”) when he fell from an A-

frame ladder during the course of his employment at a construction site located at 625 Madison Avenue, New York, New York (the "Premises").

The accident occurred on December 23, 2000. Weber was a sheet metal worker employed by Cool Wind Ventilation Corp. ("Cool Wind"), which had been hired to provide a heating, ventilation and air conditioning ("HVAC") system at the Premises. At the time of his accident, Weber was helping to hold and install lineal duct piping on the ceiling of one of the rooms of the Premises. Weber alleged that after he fell off the ladder, he noticed that a rivet, which connected the top of the ladder to its legs had come off and had caused him to fall. Weber commenced this action on September 15, 2002.

Third-party plaintiffs, King Freeze Mechanical Corp. ("King Freeze"), Baccarat, Inc. and Baccarat Real Estate, Inc. (collectively "Baccarat") assert that York Ladder supplied the ladder which caused Weber's accident and that the ladder, which was manufactured by third-party defendant Werner Co. ("Werner"), was defective.

York Ladder now moves to dismiss the action as against it on three grounds. First, it asserts that King Freeze and Baccarat cannot establish a "chain of custody" of the ladder at issue. Second, York Ladder contends that Weber's description of the ladder was significantly different from the Werner ladder York Ladder sold to Cool Wind. Finally, York Ladder contends that the action should be dismissed because the purported defective ladder is missing. Moreover, York Ladder argues that because both King Freeze and

Baccarat knew, by 2004, that they needed to inspect the ladder, but did not, they should be precluded from maintaining their actions against York Ladder and Werner.

In support of its chain of custody argument, York Ladder submits, among other things, deposition testimony of Weber. Weber testified that he could not recall the manufacturer of the ladder. He did, however, remember that he was using a fiberglass Cool Wind eight-foot, A-frame ladder. Weber also testified that after the accident he placed the ladder to the side next to a wall near plumbing material.

In addition, Weber testified that the ladder was an orange, fiberglass, eight-foot ladder with a plastic top cap that was attached to the legs by rivets, not a nut and bolt. Plaintiff's accident allegedly occurred when a "rivet" popped out of the plastic top cap.

Wade Takahata ("Takahata") was working with Weber at the job site at the time of the accident. At his deposition, Takahata testified that he was working on a ladder approximately 10 feet from Weber, and that after the accident, he immediately got down off his ladder to check on Weber. Takahata stated that he then inspected the ladder Weber was using and found that a bolt was missing at the top of the ladder. At his deposition, he described the ladder as a seven or eight-foot, A-frame fiberglass ladder, with the name "Cool Wind" on it. Takahata stated that he then folded the ladder and put it on the side so that no one else would get hurt.

Christopher Koonge ("Koonge") was employed by Cool Wind in its receiving and shipping department at the time of the accident. At his deposition, Koonge testified that

the procedure to be followed when there was an accident was that the ladder would be taped with duct tape and marked "Do not use." The ladder would also be chained.

Koonge testified that after Weber's accident, the dispatcher requested that the ladder be picked up and brought back to the shop with the Cool Wind truck. Koonge testified that he inspected the ladder on the same day that it was brought back from the job site, and stated that he observed that one of the bolts was missing on the ladder on the very top end on the A-frame of the plate. Koonge further testified that he wrote "Arthur Weber" in magic marker on the side of the ladder and on the duct tape that had been placed on the ladder in the field, which read "Do Not Use."

David Sullivan ("Sullivan"), the president of Cool Wind, stated, in an affidavit dated January 2007, that the ladder involved in Weber's accident was immediately brought back to Cool Wind's office and that he had inspected the ladder and observed that one of its two bolts had fallen out. In deposition testimony, Sullivan testified that due to problems Cool Wind was having with its stock of wooden ladders, Cool Wind replaced every ladder they had and bought a complete set of new ladders from York Ladder prior to Weber's accident.

In addition, Sullivan wrote a letter to Ken Buettner, the president of York Ladder ("Buettner") on January 24, 2001, approximately one month after Weber's accident. In this letter Sullivan stated:

As you know we purchased Warner fiberglass ladders from you to replace Cool Wind's entire ladder inventory. On 1/22/01 one of our employees was working on one of these ladders. The ladder failed and the employee was injured. Today I inspected that ladder and found that a bolt attaching one of the ladder legs to the top platform had fallen out. This bolt has no locking mechanism to prevent this from happening. I confirm that the other ladders purchased from you have the same defect. These ladders must be replaced or repaired immediately so that this failure can no longer occur.

Please contact me right away to discuss the resolution.

Buettner also testified that, although Werner manufactured an eight-foot, orange, fiberglass ladder, the Werner model 7400 series identified in the photographs is unique in that its top cap is metal and is attached to the upper portion of the legs by a nut and bolt system – not a rivet. Buettner added that the metal top cap is consistent with the 7400 design top cap and is a hallmark of their extra-duty 7400 ladder.

York Ladder argues that the photographs exchanged by the parties show Green Bull ladders stored in the same Cool Wind ladder repository, along with the Werner ladder purportedly involved in the accident. The Green Bull ladders are the same orange color as the Werner ladders in the photos. However, just like the ladder involved in the accident, as described by Weber, the Green Bull ladders have a plastic top cap that is held to its legs by rivets.

York Ladder also submits the deposition testimony of Linda Jennings (“Jennings”), a manager at Cool Wind. At her deposition in 2004, Jennings testified that



she inspected the ladder being stored at Cool Wind's manufacturing shop. The ladder she inspected had allegedly been locked and chained in the shop since the accident. Counsel for Baccarat and King Freeze were present at Jennings' deposition. On the record, the attorney for King Freeze acknowledged that an inspection of the purported defective ladder stored at Cool Wind needed to be performed. There is nothing in the record to suggest that it was inspected. Moreover, on March 5, 2009, Jennings attested that the ladder she inspected in 2004 was no longer in Cool Wind's possession.

### Discussion

On a motion for summary judgment, the burden is upon the movant to make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1985). "This drastic remedy should not be granted where there is any doubt as to the existence of such issues." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). Summary judgment is a rare event in negligence cases. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974).

Here, York Ladder has not met its burden that it is entitled to judgment as a matter of law, as it fails to show that there are no issues of fact. York Ladder maintains that the ladder involved in the accident, as described by Weber, is a different ladder than the one maintained and inspected by Cool Wind. Based on the evidence, there is an issue of fact as to whether the ladder brought back to Cool Wind's shop was, in fact the same ladder

that allegedly caused Weber's accident. York Ladder argues that the ladder which Weber places to the side after his accident "has never been seen again," and that a different ladder was returned by Koonge to Cool Wind for inspection. However, there is also evidence that *all* ladders used by Cool Wind at the time of the accident were supplied by York Ladder and that they were manufactured by Werner. Moreover, there is deposition testimony establishing Cool Wind's standard procedure after an accident for identifying and removing the ladder from the scene and bringing it back to its shop for inspection. There is therefore a question of fact regarding the "chain of custody" of the ladder.

York Ladder next argues that Weber's description of the ladder which caused his accident does not identify a Werner product sold by York Ladder. But here again, York Ladder fails to establish the absence of material issues of fact. Weber testified that at the time of his accident he was using a fiberglass Cool Wind eight foot, A-frame ladder. He further testified that the ladder had "Cool Wind Vent" painted on the side in black letters, and that the top cap was plastic and that the legs were held on by rivets. York Ladder points out that the Werner ladders it supplied had a metal top cap and were attached to the legs by a nut and bolt, as opposed to a rivet.

However, the deposition testimony of Takahata indicates that, upon inspection of the ladder immediately after the accident, he found that a bolt was missing at the top of the ladder. Takahata further testified that he looked for the bolt on the floor but could not find it. Moreover, there is also testimony that Weber was using a Cool Wind ladder and

that Cool Wind only stocked ladders supplied by York Ladder. This therefore presents material issues for the trier of fact.

Finally, York Ladder contends that the action should be dismissed because the opposing parties lost key evidence and have prejudiced York Ladder in determining whether or not a defect existed in any Werner ladder. The ladder which allegedly caused Weber's accident has been lost. The subject ladder was stored at Cool Wind's facility for a number of years, but may have been lost when Cool Wind moved its business in 2008.

Spoliation is the destruction of evidence. 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.'" *Ortega v. City of New York*, 9 N.Y.3d 69, 76 (2007). As a result,

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

*Ortega*, 9 N.Y.3d at 76 (citations omitted).

"A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them.'" *Kirschen v Marino*, 16 A.D.3d 555, 555-556 (2d Dept 2005) (quoting

*Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, -173 (1<sup>st</sup> Dept 1997). Discovery sanctions have also been employed against a litigant who had an opportunity to safeguard evidence but failed to do so. *See e.g. Amaris v Sharp Elecs. Corp.*, 304 A.D.2d 457 (1<sup>st</sup> Dept 2003), *lv denied* 1 N.Y.3d 507 (2004).

However, “[w]here a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate.” *Shay v. Mozer, Inc.*, 80 A.D.3d 687, 688 (2d Dept 2011), quoting *Cordero v. Mirecle Cab Corp.*, 51 A.D.3d 707, 709 (2d Dept 2008); *see also O’Reilly v. Yavorskiy*, 300 A.D.2d 456 (2d Dept 2002); *McLaughlin v. Brouillet*, 289 A.D.2d 461 (2d Dept 2001).

Here, neither Baccarat nor King Freeze was involved in the misplacement of the ladder and they are at the same disadvantage regarding its disappearance as York Ladder. In addition, as to York Ladder’s contention that Baccarat and King Freeze knew that they had to inspect the ladder, the deposition testimony of both Sullivan and Buettner indicates that shortly after Buettner was informed of the malfunction of the ladder, he went to Cool Wind’s facility and was shown the ladder. Buettner testified that he did not ask to inspect the ladder at that time.

In his deposition testimony, Sullivan stated that Buettner came to look at the ladder, which was located at Cool Wind’s shop. Sullivan testified that at that time

Buettner told him that if Cool Wind “found any other defective ladders that [Buettner] would replace them.”

Given Buettner’s opportunity to inspect the subject ladder and the absence of any culpability regarding the spoliation of this piece of evidence on the part of King Freeze and/or Baccarat, that part of the motion seeking to dismiss based upon spoliation is denied.

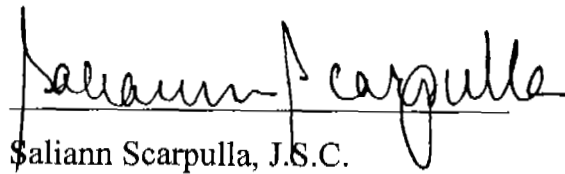
In accordance with the foregoing, it is

ORDERED that the motion by York Ladder Inc. for summary judgment dismissing the second third-party action by King Freeze Mechanical Corp.’s and the third third party action by Baccarat, Inc. and Baccarat Real Estate as against it is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 13, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**  
OCT 17 2011  
COUNTY CLERK'S OFFICE  
NEW YORK