

Medina v 75-76 Third Ave. Assets II, LLC
2016 NY Slip Op 32494(U)
December 22, 2016
Supreme Court, New York County
Docket Number: 155699/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

ERICK MEDINA a/k/a GUSTAVO AVILA, Plaintiff

INDEX NO. 155699/13

MOTION DATE 11-16-2016

- v -

MOTION SEQ. NO. 002

75-76 THIRD AVENUE ASSETS II, LLC and DRYBAR HOLDINGS, LLC, Defendants,

75-76 THIRD AVENUE ASSETS II, LLC and DRYBAR HOLDINGS, LLC, Third-party Plaintiff,

- Against- CREATIVE INTERIORS PLUS, INC., Third-party Defendant.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to strike answer, preclude introduction of evidence or for negative inference due to spoliation of evidence.

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

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

cross motion YES NO X

Upon a reading of the foregoing cited papers it is ordered that this motion to strike Third-party defendant's answer or determining as a matter of law that Third-party Defendant either created the dangerous condition that caused plaintiff's fall or had constructive notice of said dangerous condition, or preclude Third-party defendant from offering evidence at trial on the condition of the premises on the date of the accident or for a negative inference, is granted to the extent of precluding Third-party Defendant Creative Interiors from arguing at trial lack of notice of the defective condition of the premises (actual or constructive), and giving a negative inference jury instruction for the spoliation of this evidence at the time of trial.

Plaintiff brings this personal injury action to recover for Personal injuries sustained when he fell through the first floor of the premises at 209 East 76th Street, New York, N.Y., while working as a laborer for Third-party Defendant Creative Interiors, during the construction of a new Drybar location. An action was commenced against the defendants and the defendants commenced a Third-party action against plaintiff's employer, Creative Interiors Plus, Inc.(Hereinafter "Creative Interiors"). Plaintiff does not have a direct cause of action against the Third-party defendant.

On July 28, 2014 plaintiff served Creative Interiors with various demands, including a Demand for discovery and inspection requesting a myriad of items (see moving papers exhibit E). Creative Interiors responded to these demands by providing copies of contracts, photographs, names of witnesses with their addresses, copies of drawings and plans, names of architect and copies of permits. As to item 5 of the demand for discovery and inspection Creative interiors responded by stating that “[it] is not in possession of any daily logs, log books or records.” (see Opposing papers Exhibits A through G).

Creative Interiors produced a witness for deposition, Faustino Vidro, on February 10, 2016. Mr. Vidro stated at his deposition (at pages 21- 36) that Creative Interiors kept a file on the project, both paper and computer. That this file contained documents related to the project such as contract drawings, administration paperwork, logs, samples, sketches, RFI’s submittals, shop drawings, photographs, minutes of project meetings (which were kept by the architect and given to Creative Interiors) and daily notes and logs documenting the work done on a particular day (these notes were taken by Chris Byk the superintendent).

Plaintiff demanded the production of the project file at the deposition and also at two court conferences (see moving papers exhibits G and H). On June 17, 2016 Creative Interiors, through its attorneys, notified the parties that it “is not in possession of daily logs, daily reports, project file, progress records, meeting minutes, photographs or any other documentation not previously provided.” Its attorneys stated that “a diligent search has been made for the hard files of the documents requested as well as the electronic file and these documents cannot be located as Creative Interiors has moved their office locations on at least (2) occasions since the plaintiff’s accident.”

Plaintiff now moves to strike the Third-party defendant’s answer, or to determine as a matter of law that it either created the dangerous condition or had constructive notice of it, or precluding it from offering any evidence about the condition of the premises on the date of the accident at the trial of this action, or for an adverse inference at the time of trial.

The Third-party defendant Creative Interiors opposes the motion, arguing that it did not willfully destroy the file; that the file was inadvertently lost during one of its at least four (4) moves since the happening of the plaintiff’s accident; that plaintiff can obtain the information contained in the file from other witnesses such as the Architect (who took notes of daily meetings) and Mr. Christopher Byk (who took notes of the daily work) and that it has already provided the plaintiff with the same information contained in the lost file (photographs, drawings, contracts, sketches, permits, etc.). Finally, it argues that plaintiff doesn’t have a direct claim against it, therefore he cannot obtain the relief he seeks, and plaintiff has not proven that the documents it seeks were ever contained in the lost project file.

“A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind and 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. If the evidence is determined to have been negligently destroyed, the party seeking

spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense.”(Pegasus Aviation I, Inc., v. Varig Logistica, S.A., 26 N.Y.3d 543, 46 N.E.3d 601, 2015 N.Y. Slip Op. 09187[2015]).

Creative Interiors had an obligation to preserve the project file because its employee had been injured on the job, it was aware that there was going to be a claim and that there was in fact a claim against it. It failed to preserve the hard copy and electronic file, despite its obligation to do so. Furthermore, the contents of the file in the nature of daily work progress logs are relevant to this action and should have been preserved. On this record it cannot be stated that Creative Interiors intentionally discarded the file, but it can be inferred that it negligently lost it, requiring that sanctions be imposed.

“The nature and severity of the sanction for spoliation depends upon a number of factors including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence and the degree of prejudice to the opposing party”(Neve v. City of New York, 117 A.d.3d 1006, 986 N.Y.S.2d 606 [2nd. Dept. 2014]).

“A trial court has broad discretion in determining the appropriate sanction for spoliation of evidence. When a party destroys key evidence, such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading,(Chan v. Cheung, 138 A.D.3d 484, 30 N.Y.S.3d 613 [1st. Dept. 2016]), but “because striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such a drastic relief is necessary as a matter of fundamental fairness. A less severe sanction is appropriate when the missing evidence does not deprive the moving party of the ability to establish his or her case or defense.” (De los Santos v. Polanco, 21 A.D. 3d 397, 799 N.Y.S. 2d 776 [2nd. Dept. 2005]).

Where a party is not deprived of its ability to prove a claim or defense because the destroyed file is not the sole source of information sought, or the sole means by which a plaintiff could establish the negligence of the defendant then a negative jury instruction at the time of trial - which is a sanction less severe than striking of a pleading or preclusion - is the appropriate sanction(Alleva v. United Parcel Service, Inc., 112 A.D.3d 543, 978 N.Y.S.2d 32 [1st. Dept. 2013];Jennings v. Orange Medical Center, 102 A.D. 3d 654, 958 N.Y.S. 2d 168 [2nd. Dept. 2013]; Neve v. City of New York, Supra). However, in this case it is not known if any other witness identified by Creative Interiors is in possession of the daily work progress notes and logs which were contained in the lost project files. Therefore, the proper sanction is to preclude Creative Interiors from arguing at trial lack of notice of the defective condition of the premises (actual or constructive) (Malouf v. Equinox Holdings, Inc., 113 A.D.3d 422 , 978 N.Y.S.2d 160 [1st. Dept. 2014]), and to give a negative inference jury instruction for the spoliation of this evidence at the time of trial.

Finally, Creative Interior's argument, that the court cannot impose sanctions against it because it is a Third-party Defendant against whom the plaintiff doesn't have a direct action, is without merit (see Millard v. Alliance Laundry Systems, LLC, 20 A.D.3d 866, 798 N.Y.S.2d 622 [4th Dept. 2005] although it was found to be an improvident exercise of discretion for the court to grant plaintiff leave to amend the

complaint to assert a direct cause of action against a third party defendant for spoliation of evidence, the court determined that if it is established that a Third-party defendant has improperly destroyed evidence, a plaintiff can have the court impose such sanctions against the Third-party Defendant as it deems appropriate).

Accordingly, it is ORDERED, that the motion for sanctions is granted , and it is further

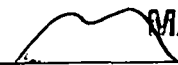
ORDERED, that sanctions are imposed against Creative Interiors for destruction of the project file in the nature of directing that a negative inference charge be given to the jury at the trial of this action, and it is further

ORDERED that Creative Interiors is precluded from arguing at trial lack of notice of the defective condition of the premises (actual or constructive), and it is further

ORDERED that the parties appear for a status conference at IAS Part 13 located at 71 Thomas Street, Room 210, New York, N.Y. on March 1, 2017 at 9:30 A.M.

ENTER:

Dated: December 22, 2016



Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE