

Morell v East 34th St.
2018 NY Slip Op 31907(U)
August 9, 2018
Supreme Court, New York County
Docket Number: 160209/15
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC

PART 47

Morell

-v-

East 34th St

INDEX No. 160209/15

MOTION DATE _____

MOTION SEQ. No. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____ No(s). 1

Answering Affidavits - Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

Plaintiff Kristen Morell commenced this action to recover for personal injuries she suffered on November 19, 2014, when the radiator in her apartment began spewing out steam uncontrollably, causing her to suffer burns and other injuries. In this motion, plaintiff seeks discovery sanctions against defendant East 34th Street LLC, the owner of the building, and defendant Citi-Urban Management Corp., the management company, based on their spoliation and/or failure to produce key pieces of discovery in this matter, namely, (1) the radiator valve for the subject radiator; (2) emails and texts concerning the incident; and (3) documents related to the maintenance and inspection of the boiler in the building.

This is plaintiff's third motion for sanctions. By order dated December 22, 2017, this court granted in part plaintiff's first motion, holding that defendants were precluded from offering any evidence at trial regarding the radiator valve because the superintendent, Jonathan Debono, negligently disposed of the valve the day after the incident. With respect to the emails and texts, the court authorized plaintiff to renew its motion for sanctions after conducting a deposition of Eric Borkowski, the property manager. Finally, the court ordered defendants to produce all records for the boiler for two years prior to the incident or provide a compliant affidavit of non-existence by February 15, 2018. If defendants failed to do so, the court held that plaintiff would be entitled to an adverse inference regarding these records.

After conducting Mr. Borkowski's deposition, plaintiff renewed its motion for discovery sanctions. On July 12, 2018, the parties appeared for a court conference to discuss the motion. At the conference, the court denied plaintiff's second motion without prejudice based in part on defendants' production of additional boiler records after submission of the motion. The court authorized plaintiff to make the present motion for sanctions.

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

Dated: ↓

↓
Hon. Paul A. Goetz, JSC

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
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Taken together, defendants' conduct clearly demonstrates a pattern of neglecting their discovery obligations which warrants sanctions. "However, the sanction must reflect 'an appropriate balancing under the circumstances.'" *Arbor Realty*, 140 A.D.3d at 609 (quoting *Voom HD*). Here, the sanction of striking defendants' answer is unwarranted as there are key witnesses that are available to testify and the spoliated evidence does not constitute the "sole means" by which plaintiff can prove her case. *Id.* Accordingly, an adverse inference charge is an appropriate sanction under the circumstances. In addition, defendants shall be required to pay discovery sanctions to plaintiff for the attorneys' fees and costs incurred in making the three spoliation motions in the amount of \$1,000.

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED that at the time of trial, plaintiff is entitled to an adverse inference charge regarding the radiator valve, the e-mails and texts concerning the incident, and the boiler records; and it is further

ORDERED that defendants shall reimburse plaintiff for the costs incurred in this matter in the amount of \$1,000, with payment made to plaintiff's counsel and written proof of such payment to be provided to the Clerk of Part 47 within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that timely payment is not made, the Clerk of the court, upon service of this order with notice of entry and an affirmation or affidavit of non-payment, shall enter a judgment in favor of plaintiff and against defendants in the aforesaid sum.

A status conference is set for October 18, 2018 at 9:30 AM.

Dated: 8/9/18


Hon. Paul A. Goetz, JSC

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