SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 22
Present: Hon. Sharon M.J. Gianelli, J.S.C.

_____X

S.J. an infant by her mother and natural guardian ROCHELLE HERRON and ROCHELLE HERRON individually,

Plaintiffs, Index No. 606416/2016

-against- Mot Seq. No. 001

CFWC AFTERCARE, INC. and CHRISTIAN FAMILY WORSHIP CENTER, INC.,

Defendants,

_____X

Papers submitted on this motion:
Plaintiffs' Notice of Motion_____X
Plaintiffs Affirmation_____X
Defendants' Affirmation in Opposition_____X

Plaintiffs' move for an order pursuant to CPLR § 3126 striking Defendants' answer for failure to provide court ordered discovery and spoliation of evidence; or, in the alternative granting Plaintiffs an adverse inference charge. Specifically, at issue is an incident report prepared by Defendants at or about the time of occurrence.

Underlying Action

This is a negligence action to recover damages for an accident that occurred on August 19, 2015 at Defendants' after school summer camp program. It is alleged that Plaintiff, an infant, was injured when another student closed the bathroom door on Plaintiff's finger while attending the program.

Plaintiffs instituted this action by filing a Summons and Verified Complaint on or about August 23, 2016.

Issue was joined when Defendants interposed a Verified Answer on or about January 5, 2017.

At this juncture, Plaintiffs state that Defendants have failed to provide an incident report related to the accident. The existence of such report is not contested, nor is the failure to produce the report contested by Defendants.

The Defendants' after school summer camp program ceased operating after the summer of 2015 (Francis EBT at p. 12-13, Plaintiff's Exhibit "E"). Defendants assert that this action was only commenced approximately a year later in August 2016. Thus, Defendants argue they were not on notice that the report in question should be preserved as no pending litigation existed that they were made aware of until approximately a year from the occurrence. Defendants argue that no willful, contumacious or bad faith occurred here (*see Ravnikar v. skyline Credit-Ride, Inc.*, 79 A.D.3d 1118 [2d Dept. 2010]).

Defendant Nathalee Francis, testified that she and Margarita Hughes, her assistant, prepared an incident report related to this occurrence (Francis EBT at p. 51). The last time she saw the report was on the date it was completed, the date of the accident. The reports are kept in the file cabinet. Ms. Francis testified that she "searched the file cabinet where all the folders were located" and could not find it (*id.* at p. 53).

Defendant Francis further provided an affidavit stating that she "directed that a search be made by CFWC Aftercare, Inc. and Christian Family Worship Center, Inc. to locate any accident and/or incident reports related to the alleged incident that gave rise to this litigation" and that no report was found (Plaintiffs' Exhibit "F").

Analysis

CPLR § 3126 provides that the court has discretion to compel discovery or dismiss a complaint for failure to abide with discovery and disclosure orders. The nature and degree of

the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court (*McArthur v. New York City Housing Authority*, 48 A.D.3d 431 [2d Dept. 2008]; citing *Kihl v. Pfeffer*, 94 N.Y.2d 118 [1999]; *Rowell v. Joyce*, 10 A.D.3d 601 [2d Dept. 2004]; *My Carpet, Inc. v. Bruce Supply Corp.*, 8 A.D. 3d 248 [2d Dept. 2004]). The dismissal of an action is an extreme sanction and should not be granted absent a showing of willful and contumacious conduct on behalf of the defaulting party (*Corner Realty 30/7, Inc. v. Bernstein Management*, 249 A.D.2d 191 [1st Dept. 1998]).

> The failure to comply with deadlines and provide good-faith responses to discovery demands impairs the efficient functioning of the courts and the adjudication of claims" (*Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 207 quoting *Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the trial court (see CPLR 3126[3]; *Kihl v. Pfeffer*, 94 NY2d 118, 122–123 [1999]; *Bernal v. Singh*, 72 AD3d 716, 717; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2010]; *Greene v. Mullen*, 70 AD3d 996 [2010]; *Dank v. Sears Holding Mgt. Corp.*, 69 AD3d 557 [2010]).

H.R. Prince, Inc. v. Elite Environmental Systems, Inc., 107 AD3d 850, 851 (2d Dept. 2013).

In this case, Defendants have complied with discovery except for the production of the incident report as indicated above (Defendants' Opposition, Exhibit "A"). Thus, Plaintiffs' application to strike Defendants' answer is denied.

Next, addressing Plaintiffs' claim that sanctions should be imposed because of spoliation of the incident report, Plaintiffs have failed to make a prima facie showing that a sanction in the form of striking Defendants' pleading or precluding Defendants from asserting defenses should be imposed upon the Defendants based upon spoliation of evidence (*see Jennings v. Orange Reg'l Med. Ctr.*, 102 A.D.3d 654 [2d Dept. 2013]).

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party of the ability to prove its claim, the responsible party may be sanctioned by the striking of its pleading" (*Gotto v. Eusebe-Carter*, 69 A.D.3d 566, 567 [2d Dept. 2010]). That is, where a party negligently or intentionally destroys essential physical evidence "such that its opponents are prejudicially bereft of appropriate means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of its pleading" (*New York Cent. Mut. Fire Ins. Co. v. Turnerson's Elec.*, 280 A.D.2d 652, 653 [2d Dept. 2001]). Even in situations where "the evidence was destroyed before the spoliator became a party, [a sanction may be justified] provided [the offender] was on notice that the evidence might be needed for future litigation" (*DiDomenico v. C & S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 53 [2d Dept. 1998]; *see also, Std. Fire Ins. Co. v. Fed. Pac. Elec. Co.*, 14 A.D.3d 213, 220 [1st Dept. 2004]). Here, this action was filed approximately one year after the incident. Furthermore, after the summer of 2015, when the accident occurred, the program no longer existed. No evidence has been presented that the report was intentionally destroyed. Thus, for these reasons, under these facts, the Court finds that Defendants were not on notice that the report would be needed for pending litigation or that willful conduct occurred as related to Defendants failure to produce the incident report.

"Where 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" (*Cordero v. Mirecle Cab Corp.*, 51 A.D.3d 707, 709 [2d Dept. 2008]; *see O'Reilly v. Yavorskiy*, 300 A.D.2d 456, 457 [2d Dept. 2002]). Similarly, where the evidence lost is not central to the case, or its destruction is not prejudicial, a sanction may not be

appropriate (*Klein v. Ford Motor Co.*, 303 A.D.2d 376 [2d Dept. 2003]; *Mylonas v. Town of Brookhaven*, 305 A.D.2d 561, 563 [2d Dept. 2003]).

"The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to defend [the] action" (*Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 AD3d 717, 718 [2d Dept. 2009]). "Generally, striking a pleading is reserved for instances of willful or contumacious conduct" (*Dean v. Usine Campagna*, 44 A.D.3d 603, 605 [2d Dept. 2007]). When a party neglectfully disposes of evidence, the Court must consider the prejudice which results from the spoliation in determining what type of sanction if any is warranted as a matter of fundamental fairness (*Dean v. Campagna*, supra; *Scarano v. Bribitzer*, 56 A.D.3d 750 [2d Dept. 2008]).

Ultimately, the determination of whether to impose sanctions for spoliation of evidence is a matter within the broad discretion of the court (*Denoyelles v. Gallagher*, 40 A.D.3d 1027 [2d Dept. 2007]). The issue as to what prejudice, if any, has occurred and whether a sanction such as an adverse inference charge is appropriate is reserved for the trial court which is in a better position to make such ruling upon conducting the trial and evaluating the evidence presented.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion seeking an order pursuant to CPLR § 3126 and under the common-law doctrine of spoilation, striking Defendants' answer or, in the alternative

precluding Defendants from offering any evidence or assert defenses in this action is **DENIED**; and it is further

ORDERED, that the branch of Plaintiffs' motion seeking an order pursuant to CPLR § 3126 and the common-law doctrine of spoilation, allowing for an adverse inference charge against Defendants shall be determined at the time of trial; and it is further

ORDERED, that the branch of Plaintiffs' motion seeking an order pursuant to CPLR § 3126 and the common-law doctrine of spoliation imposing sanctions upon the Defendants is **DENIED**, and it is further

ORDERED, that the Plaintiffs' counsel shall serve a copy of this Order with Notice of Entry upon Defendants' counsel with Proof of Service filed with the Court.

All applications not specifically addressed are denied.

This constitutes the Decision and Order of this Court.

DATED: June 1, 2018
Mineola, New York

Hon. Sharon M.J. Gianelli,
Justice of the Supreme Court

ENTERED
JUN 04 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE