Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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ROBIN ANGOTTI,

Plaintiff,

-against-

PETRO HOME SERVICES, PETRO INC. and PETROLEUM HEAT AND POWER COMPANY,

Defendants.

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Index No.: 703126/2019
Mot. Date: 12/8/20
Mot. Seq. 4

The following papers were read on this motion by defendants for an order: pursuant to CPLR 3126, dismissing the plaintiff's Complaint due to the continued failure to provide court ordered discovery; or alternatively, precluding plaintiff from presenting evidence at the trial of this matter; or alternatively vacating th Note of Issue and Certificate of Readiness and striking the action from the calendar, and extending the defendants time to file a summary judgment motion.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	EF 103-115
Answering Affidavits-Exhibits.....	EF 117-121
Replying Affidavits.....	EF 123

Upon the foregoing papers, it is ordered that the defendants' motion is denied.

The underlying action is one for property damage arising out of an incident, that occurred on October 27, 2018, at the plaintiff Robin Agnotti's premises, located at 46 Atlantic Drive, Sound Beach, New York 11789. On said date, an oil spill occurred and there is now a question of fact as to whether the spill was the result of an overfilling of plaintiff's oil tank or a leak in the subject tank. Plaintiff maintains, *inter alia*, that defendants Petro Home Services, Petro Inc. and Petroleum Heat and Power Company are strictly liable for her losses as a result of violations of the Navigation Laws of the State of New York.

Defendants move for an order, *inter alia,* dismissing the plaintiff's Complaint due to the continued failure to provide court ordered discovery, pursuant to CPLR 3126, or alternatively, *inter alia*, precluding the plaintiff from presenting evidence at the trial of this matter.

Defendants maintain that the plaintiff has not provided a satisfactory response to their Notice to Inspect and Demand for Production of Physical Evidence, in that an inspection of the subject premises, property, and oil tank has yet to occur. Defendants move for sanctions in light of same.

Via plaintiff's opposition papers, plaintiff's attorney maintains that: plaintiff hired an environmental company, Laurel Environmental Geosciences D.P.C. (Laurel) to perform remediation at the subject premises, which company removed and retained the oil tank at an undisclosed location; plaintiff immediately notified Laurel that the oil tank needed to be made available for inspection, pursuant to defendants' request and this Court's Order, dated August 12, 2020; after a thorough search, Laurel advised plaintiff's counsel that the oil tank was unable to be located; the oil tank was recycled, in June, 2019; defendants already previously inspected the oil tank shortly after the spill occurred; and defendants are now seeking a re-inspection of the tank almost two (2) years after the spill occurred.

The Court finds defendants' request for spoliation sanctions is denied. 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" (*Voom HD Holdings LLC v Echostar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012], *quoting Zubulake v UBS Warburg LLC,* 220 FRD 212, 220 [SD NY 2003]; *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [2015]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (*see Zubulake, supra* at 220). On the other hand, 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 (*see id.).*

The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised [the movant's] ability to' " prove a claim or defense (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2009], *quoting Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2005]; *Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085 [2d Dept 2012]).

The Court finds that the defendants' insistence on the oil tank now being provided is not subject to spoliation sanctions because the defendants' greatly delayed their request for production of the subject tank. The record reflects that the defendants' request to inspect the tank did not come until the defendants filed their Notice to Inspect, in June, 2020, which was one (1) year and eight (8) months from the time of the oil spill and eight (8) months after the spill had already been remediated and the oil tank removed from the property.

Furthermore, spoliation sanctions are additionally unwarranted here as neither plaintiff, nor her counsel, directed the destruction of the subject tank, but rather the tank was inadvertently recycled by the remediation company, in June, 2019, after the bulk of the remediation had been completed. Defendants failed to demonstrate that the plaintiff did anything to destroy the tank (*Jenkins v Proto Prop. Servs., LLC*, 54 AD3d 726 [2008]; *see Denoyelles v Gallagher*, 40 AD3d 1027 [2007]). Plaintiff did not discover that the tank was disposed of until October 14, 2020, and prior to said date, the plaintiff had been assured by Laurel that the oil tank was being stored in their warehouse after it was removed from the plaintiff's premises. The affidavit of Scott Yanuck, principal and owner of Laurel, corroborates that his company was under the mistaken impression that the tank was being stored in accordance with its standard operating procedures, and that it communicated this mistaken belief to plaintiff's attorneys.

Moreover, the record indicates that the defendants sent a technician out to the premises, on November 3, 2018, shortly after the spill, which technician had ample time to inspect both the tank and the premises, and who temporarily patched the tank.

Under all the circumstances, the defendants have not shown either the bad faith or prejudice necessary for imposition of the drastic sanctions which they seek.

In light of the above, the branch of the motion to dismiss plaintiff's Complaint is denied. "[T]he drastic remedy of striking [a Complaint] is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Jenkins v Proto Prop. Servs., LLC*, 54 AD3d 726, 726-727 [2008] [internal quotation marks omitted]; *see Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007]).

Finally, the Court holds that discovery is complete at this point.

Any applications not specifically addressed are denied. As such, the motion is denied in its entirety.

Accordingly, it is

ORDERED that the defendants motion for an order, *inter alia,* dismissing the plaintiff's Complaint due to the continued failure to provide court ordered discovery, pursuant to CPLR 3126, or alternatively, *inter alia*, precluding the plaintiff from presenting evidence at the trial of this matter, is denied in its entirety, as discussed above, with the Court holding that all discovery is complete at this point.

The foregoing constitutes the decision and order of the Court.

Dated: December 21, 2020

FILED

12/24/2020
11:55 AM

COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.