| **Szabo v House of Yes Inc.** |
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| 2021 NY Slip Op 32157(U) |
| November 5, 2021 |
| Supreme Court, Kings County |
| Docket Number: Index No. 502992/2018 |
| Judge: Lillian Wan |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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LEVANTE SZABO,

Plaintiff,

– against –

HOUSE OF YES INC., DISTRICT LLC, NEW WORLD GROUP, LLC, and ABC CORP.,

Defendants.

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HOUSE OF YES INC., DISTRICT LLC and NEW WORLD GROUP, LLC,

Third-Party Plaintiffs,

– against –

ALPHA 1 SECURITY GROUP INC. and DAVID BAREN,

Third-Party Defendants.

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Index No.: 502992/2018
Motion Date: 11/03/2021
Motion Seq.: 03

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number 56-76 were read on this motion to strike the defendants' answer.

In this action to recover damages for personal injuries, the plaintiff moves: 1) for an order striking the Answer of defendants House of Yes Inc. and District LLC pursuant to CPLR § 3126 due to their spoliation of evidence; or, in the alternative, 2) for an adverse inference charge to be given at trial against defendants House of Yes Inc. and District LLC; and 3) to sever the third-party action pursuant to CPLR §§ 603 and 1010. For the reasons set forth below, the motion is granted to the extent that an adverse inference shall be given at trial.

The plaintiff alleges that he was injured at a nightclub located at 2 Wyckoff Ave, Brooklyn, NY 11237 on December 9, 2017, when a heavy metal column fell and struck the plaintiff on his head, causing him to fall. Defendant New World Group was the owner of the premises, and defendants House of Yes Inc. and District LLC were the tenants and operators of the nightclub space inside the building.

In support of its motion, the plaintiff submits, inter alia, the pleadings, copies of discovery demands and responses, and the deposition transcripts of the plaintiff and of Justin Ahiyon, a partner and general manager of House of Yes Inc. and partner of District LLC. The

plaintiff states that on December 20, 2017, 11 days after the accident, plaintiff's counsel sent a letter to House of Yes Inc. and District LLC demanding that they preserve any video evidence pertaining to the subject incident. *See* NYSCEF Doc. No. 58. The letter states as follows:

> PLEASE PRESERVE ALL VIDEO AND/OR SURVEILLANCE TAPES WHICH MIGHT HAVE RECORDED THE ACCIDENT OR ACCIDENT LOCATION. FAILURE TO DO SO WILL SUBJECT YOU TO DAMAGES FOR SPOLIATION.

Plaintiff further states that, in response to its demand for surveillance video, counsel for House of Yes Inc. and District LLC replied that they were "not aware of any items responsive to this demand at this time." *See* NYSCEF Doc. No. 67. The plaintiff also notes that Mr. Ahiyon testified that there were eight security cameras filming at the time of the incident. *See* NYSCEF Doc. No. 69. Mr. Ahiyon testified that he immediately investigated the occurrence by reviewing the videotape of the incident, and that he saw a patron named "David" climb onto the metal column just before it fell onto the plaintiff. *Id.* at pg. 53. Mr. Ahiyon further testified that he could have saved the footage and had done so in the past, but did not save the video following this incident, and that the video automatically overwrites itself every two weeks and that "two weeks has always been enough of a buffer." *Id.* at pg. 85-86. The plaintiff further asserts that although House of Yes Inc. and District LLC knew of the third-party defendants since the date of the occurrence, they waited approximately two years before initiating the third-party action.

House of Yes Inc. and District LLC oppose the motion, asserting that Mr. Ahiyon testified that he did not believe a lawsuit would result from the subject incident. House of Yes Inc. and District LLC further argue that the issue as to whether a patron was climbing the metal pillar is immaterial to the plaintiff's case, and that the only relevance to the patron being on the pillar is as to House of Yes Inc. and District LLC's case against the third-party defendants. House of Yes Inc. and District LLC contend that they are actually the ones most prejudiced by the destruction of the video. House of Yes Inc. and District LLC further contend that although the plaintiff asserts that it sent a preservation letter on December 20, 2017, the plaintiff presents no proof that the letter was mailed or that House of Yes Inc. and District LLC ever received it.

Pursuant to CPLR § 3126, if a party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, the court may make an order "striking out pleadings or parts thereof…" However, before a court invokes the drastic remedy of striking a pleading, there must be a clear showing that the failure to comply with discovery was willful and contumacious. *HSBC Bank USA, National Association v Oscar*, 161 AD3d 1055 (2d Dept 2018) (internal quotations removed); *see also Household Finance Realty Corp. of New York v Delia Cioppa*, 153 AD3d 908 (2d Dept 2017).

"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." *Eksarko v Associated Supermarket*, 155 AD3d 826, 828 (2d Dept 2017), quoting *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 (2015). The court has broad discretion as to whether a sanction should be imposed for spoliation

of evidence and how drastic the sanction should be. *Iannucci v Rose*, 8 AD3d 437 (2d Dept 2004). "It may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] ... was on notice that the evidence might be needed for future litigation.'" *Id.* at 437, quoting *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 53 (2d Dept 1998). "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." *Iannucci* at 437.

In the instant matter, the plaintiff has failed to demonstrate that defendants House of Yes Inc. and District LLC willfully destroyed the video at issue. However, the plaintiff has established that House of Yes Inc. and District LLC were at least negligent in failing to preserve the video, and as such it has demonstrated an entitlement to an adverse inference at the time of trial. *See Eksarko* at 828-829 (where the plaintiff established that defendant was under an obligation to preserve the video recording of the accident, that the video recording was negligently destroyed, and that the recording was relevant to proving its case, an appropriate sanction is to direct that an adverse inference charge be given at trial with respect to the unavailable recording). House of Yes Inc. and District LLC's argument that they were not on notice of potential litigation is unavailing and is further belied by the fact that Mr. Ahiyon investigated the incident by reviewing the videotape immediately after and noting that the plaintiff left the scene in an ambulance. *See SM v Plainedge Union Free Sch. Dist.*, 162 AD3d 814 (2d Dept 2018) (trial court properly imposed negative inference charge at trial with respect to unavailable surveillance footage where the defendant acted negligently when it only preserved 24 seconds of the footage and passively permitted the destruction of the rest).

However, the plaintiff failed to establish an entitlement to severance of the third-party action pursuant to CPLR §§ 603 and 1010. A trial court's discretion to direct severance of claims should be exercised sparingly, and "[s]everance is inappropriate where the claims against the defendant[ ] involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial." *M.V.B. Collision, Inc. v Allstate Insurance Company*, 187 AD3d 883, 883 (2d Dept 2020), quoting *New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 (2d Dept 2011). Here, the plaintiff has not demonstrated that it has been unduly prejudiced by the defendants' two-year delay in filing the third-party action, especially in light of unavoidable delays already caused by the COVID-19 pandemic and the fact that a trial date has not yet been set. In any event, the claims in both actions are sufficiently related as to justify a single trial. As such, that prong of the plaintiff's motion is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED,** that the plaintiff's motion to sanction House of Yes Inc. and District LLC for spoliation is GRANTED only to the extent that the plaintiff is entitled to an adverse inference against these defendants at trial with regard to the missing surveillance video. The motion is denied in all other respects.

This constitutes the decision and order of the Court.

DATED: November 5, 2021

Lillian Wan
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.