

Velez v Matsia Props. Corp.

2020 NY Slip Op 35644(U)

January 25, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31946/2017E

Judge: Julia I. Rodriguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

-----X
Jacqueline Velez
-against-
Matsia Properties, et al
-----X

Index No. 31946/2017E
Hon. Hon. Julia I. Rodriguez
Justice Supreme Court
E#002

The following papers numbered 1 to _____ were read on this motion (Seq. No. 02)
for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

As further set forth in Decision and Order annexed hereto:

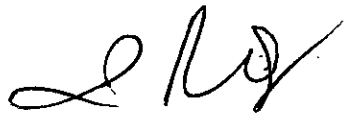
1) that branch of Plaintiff's motion seeking to strike Defendants' Answers or precluding Defendants from arguing liability due to spoliation is **denied**; and that branch of Plaintiff's motion seeking an order granting Plaintiff summary judgment on liability premised upon spoliation is also **denied**.

2) cross-motion by Defendants **Matsia Property Corp. and Langsam Property Services Corp.** seeking to vacate the Note of Issue is **granted solely to the extent** that it is

ORDERED that Plaintiff provide Defendants with an Authorization to obtain Plaintiff's cell phone records from T-Mobile, in response to Defendants' demand for same dated March 23, 2020, within 30 days after service of a copy of this Order with Notice of Entry.

The Clerk is directed to enter Judgment.

Dated: Jan. 25, 2021


Hon. Julia I. Rodriguez

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 31946/2017E**

Jacqueline Velez,
Plaintiff,

-against-

DECISION & ORDER

Matsia Properties Corp., Langsam Property Services
Corp. and Housing Options and Geriatric
Association Resources Inc.,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff’s motion to strike Defendants’ answers, pursuant to CPLR 3126, and for summary judgment as to liability, and Defendants’ Matsia Properties Corp. and Langsam Property Services’ cross-motion to vacate the note of issue and related relief.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmations & Exhibits	1
Notice of Cross-Motion, Affirmation & Exhibits	2
HOGAR Affirmation in Opposition	3
Reply Affirmation	4

After virtual conference on 1/12/2021 with attorney for Plaintiff, John Grill, for Defendant Housing Options and Geriatric Association Resources Inc., Monique Allen, and for Defendants Matsia Properties Corp. and Langsam Property Services Corp., Sara David, and upon review of the submissions of the parties, Plaintiff’s motion seeking an Order striking Defendants’ respective answers or precluding Defendants from arguing liability due to their spoliation of evidence, and for summary judgment as to liability, and the cross-motion of Defendants Matsia Properties Corp. and Langsam Property Services Corp. to strike the Note of Issue and Certificate of Readiness for Trial are resolved as follows:

Background

In the instant action, Plaintiff alleges she was injured on August 3, 2017 when she tripped and fell on a piece of chipped floor tile in her apartment in a building owned by Defendant Matsia Properties Corp. (“Matsia”) and managed by Defendant Langsam Property Services Corp. (“Langsam”). Plaintiff is not the tenant of record, but rather a subtenant of Defendant

Housing Options and Geriatric Association Resources Inc. (“HOGAR”). HOGAR assists geriatric and mentally ill individuals with housing and provides supported housing. HOGAR initially entered into a two-year lease with Matsia and Langsam for the subject apartment beginning May 1, 2015, which lease was renewed by HOGAR for an additional two years effective May 1, 2017.

I. Plaintiff’s Motion

Plaintiff moves to: (1) strike Defendants’ respective answers, pursuant to CPLR 3126, on the basis of spoliation of evidence, or preclude Defendants from arguing liability due to their spoliation of evidence; and (2) pursuant to CPLR 3212, for summary judgment as to liability.

In support of her motion, Plaintiff contends that Defendants Matsia and Langsam spoliated evidence by replacing the entire floor in Plaintiff’s apartment the day after her accident and, later on that day, Defendant HOGAR unlawfully took advantage of that spoliation by taking photos of the replaced floor in an attempt to document that the floor was free of any defects at the time of Plaintiff’s accident.

In opposition to Plaintiff’s motion, all Defendants contend that they had no notice of Plaintiff’s accident prior to the time the floors were replaced in her apartment.

In support of her contentions, Plaintiff submitted, *inter alia*, her deposition and the deposition testimony of Damon Davis, Francisco Arias and Cesar Torres, and several photos. Of note, plaintiff testified as follows: At about 2 p.m. on the date of the accident, plaintiff tripped and fell on a cracked piece of tile in the living room as she was walking from the living room to the kitchen/bathroom. The floors had been in the same condition when plaintiff first moved into the apartment and both her caseworker, Damian Davis, and the super, Francisco Arias, knew about the defective condition of the floor at that time. Plaintiff’s daughter called her shortly after the accident and plaintiff told her daughter what had happened. Plaintiff did not recall telling anyone else about her accident that day and believes that her daughter did not speak with anyone about the accident either. The following morning, August 4, 2017, at 8 a.m., a contractor arrived to fix the floors in the apartment. Plaintiff did not know why the contractor arrived to fix the floor at that time because she did not tell anyone other than her daughter about

her accident the day before. Plaintiff's arm had "blown up" that morning and she was about to call an ambulance to take her to the hospital when the contractor arrived to fix the floor; she decided to stay in the apartment while the contractor performed the work on the floor. At about 3 p.m., Plaintiff went to the hospital.

At his deposition, Francisco Arias testified as follows: Earlier in the week of the accident, Plaintiff complained about a part of the floor under the radiator and together they spoke with a contractor on the phone. Arias testified that he called the contractor, then gave the phone to Plaintiff make an appointment for the contractor for the floor to be repaired. A few days later, the contractor went to Plaintiff's apartment and replaced the floors in Plaintiff's apartment.

At his deposition, Damian Davis, Plaintiff's HOGAR case manager, testified as follows: On August 4, 2017, he made a routine phone call to Plaintiff to arrange an apartment visit. When Davis spoke with Plaintiff, she told him that she slipped on the floor coming out of the bathroom and injured her wrist. Plaintiff said that she was going to the hospital and "abruptly hung up the phone without any further conversation." Davis notified his supervisors at HOGAR of his conversation with Plaintiff. HOGAR sent a HOGAR Clinical Supervisor to Plaintiff's apartment to check on Plaintiff and the apartment; the Supervisor arrived at Plaintiff's apartment at about 4:30 p.m. on August 4, 2017, entered with a spare key kept by HOGAR as Plaintiff was not there, and inspected and took photos.

Plaintiff submitted cell phone photos taken by Plaintiff of the condition of the floor at the time of her accident as well as photos taken by HOGAR of the condition of the floor after it was repaired/replaced by the contractor.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. *Kirkland v. New York City Housing Authority*, 236 A.D.2d 170, 172, 666 N.Y.S.2d 609 (1st Dept. 1997). 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. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218, 219 (2015).

Here, based upon the deposition testimony, issues of fact exist as to when the respective Defendants were first notified of Plaintiff's accident. As such, Plaintiff has not demonstrated that spoliation sanctions are appropriate. Accordingly, that branch of Plaintiff's motion which seeks an Order striking Defendants' answers or precluding Defendants from arguing liability due to their spoliation of key evidence is **denied**. Inasmuch as that branch of plaintiff's motion which seeks summary judgment on liability is premised on the Court's finding that spoliation sanctions are appropriate, it is also **denied**.

II. The Cross-Motion of Defendants Matsia and Langsam

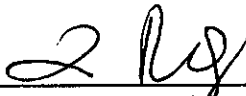
Defendants Matsia and Langsam cross-move to vacate the Note of Issue and Certificate of Readiness for Trial on the grounds that discovery is owed by Plaintiff, which bears substantially on the issue of liability. Defendants' motion is **granted solely to the extent that it is**

ORDERED that Plaintiff provide Defendants with an Authorization to obtain Plaintiff's cell phone records from T-Mobile, in response to Defendants demand for same dated March 23, 2020, within 30 days ~~from the date of this Order.~~ *after service of a copy of this Order with Notice of Entry.*

The Clerk is directed to enter Judgment.

This matter is adjourned for virtual status conference on March 11, 2021 at 12:00 p.m.

Dated: Bronx, New York
January 25, 2020



Hon. Julia I. Rodriguez, J.S.C.