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2438 REALTY LLC v. VASQUEZ

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CIVIL COURT OF THE CITY OF NEW YORK
COUNT OF BRONX: Housing Part L

2438 REALTY LLC,

L & T 55914/18

Petitioner,

Present:

-against-

Hon. Norma J. Jennings

EDWIN VASQUEZ,

DECISION/ORDER

Respondent.

HON. NORMA J. JENNINGS

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion by respondent to preclude

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed

1

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

PROCEDURAL HISTORY:

This nuisance holdover proceeding was commenced to recover possession of apartment 4CC located at 2438 Prospect Avenue, Bronx, New York. Petitioner seeks possession on the ground that the respondent is engaging in nuisance conduct in violation of Sections 2524.3 and 2524.3(b) of the Rent Stabilization Code. The Notice to Terminate includes forty-three (43) incidents that allegedly took place between May 10, 2017 and June 2018, involving respondent's grandson and daughter-in-law, which disturbed the quiet enjoyment of the other tenants in the building. The Notice of Termination in this proceeding, alleges that many of the incidents were captured by the sixteen video cameras (16) located throughout the subject premises, others were witnessed by employees of the petitioner and other tenants, resulting in written complaints.

The proceeding first appeared on the court's calendar on November 1, 2018 and was adjourned several times. Respondent, who is represented by Mobilization for Justice, Inc, moved for discovery to obtain the names and addresses of the tenants who allegedly complained or witnessed the alleged incidents, none of which involved the respondent, and for petitioner to produce the videotapes that showed the alleged objectionable conduct. On July 26, 2019, this Court granted respondent's motion for discovery, ordering petitioner to comply with respondent's Production of Documents, within thirty days from the date of the decision. The Court also granted respondent's request to depose the managing agent, Lum Pelinovic, as

petitioner's counsel in his opposition to the motion for discovery, and on the record, admitted the videotapes and written complaints had been destroyed.

Respondent now moves, pursuant to CPLR §3126(2), to preclude petitioner from producing in evidence any film, photographs, videotapes or audio tapes, as well as the written complaints by tenants, of the objectionable conduct listed in the Notice of Termination, or any evidence related to such claims. Respondent also moves, pursuant to CPLR §3126(3), to strike the petition and dismiss the proceeding, as petitioner admits it cannot disclose any films, photographs, videotapes or audio tapes nor any complaints made by tenants of the objectionable conduct that form the basis of the Notice of Termination, because the videotapes and written complaints have been destroyed.

RESPONDENT'S MOTION:

Respondent argues the court has the discretion in imposing a penalty of preclusion under CPLR §3126(2) where there is a clear showing that the party has willfully failed to comply with the court-ordered discovery. Respondent argues that petitioner should be precluded under the doctrine of spoliation because it has negligently lost or intentionally destroyed key evidence in this proceeding, which it was required to preserve, and its failure to do so has prejudiced respondent, who cannot properly defend the allegations. Pursuant to the spoliation doctrine, "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. In this proceeding, respondent argues, petitioner should have anticipated that the evidence detailed in the Notice of Termination would be essential in establishing its prima facie case, and since it failed to preserve it, petitioner should be precluded. Respondent further argues that petitioner should be precluded, pursuant to the best evidence rule, since petitioner is required to produce an original, where its contents are in dispute, and sought to be proven, as the rule is intended to eliminate or reduce the spectre of deceit or perjury, inaccuracies or errors.

Respondent further argues that this Court should consider striking petitioner's pleadings and dismiss the proceeding, pursuant to CPLR 3126(3), which is warranted, as petitioner has blatantly disregarded the Court's decision and order of July 26, 2019. The proceeding should also be dismissed as the evidence that petitioner has admitted to destroying was the basis of the Notice of Termination. In addition, the destruction of the evidence is prejudicial to the respondent who cannot review the evidence before it is presented at trial, depriving him of the ability to prepare a defense.

DECISION:

Petitioner has not filed opposition to respondent's motion to preclude or to strike the petition. In opposition to respondent's motion for discovery and during oral argument on the record, petitioner's attorney admitted that the video from the cameras, as well as the written complaints made by other tenants in the subject building, were destroyed. Petitioner has not complied with this Court's order granting respondent discovery, has failed to produce any of the documents

requested by respondent, and failed to schedule a deposition for its managing agent. Petitioner has also failed to explain why it destroyed the videotapes and written complaints and has failed to make the managing agent available for a deposition. Petitioner's attorney simply stated on the record, during argument on respondent's motion to preclude that his client and the respondent have an agreement for respondent to vacate the premises upon payment of monies. An agreement, respondent's counsel was not aware of and in contravention of her client's discussions with her where he complained harassment by the petitioner.

Pursuant to CPLR §3126, "If any party, or a person refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: (1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; (2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined or from using certain witnesses; (3) an order striking out pleading or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

The nature and degree of the penalty to be imposed on a motion, pursuant to CPLR §3126, is in the discretion of the court. In making the determination of the appropriate sanctions, the court must consider the degree to which the destruction of evidence prejudiced the other party. A party seeking a sanction such as preclusion or dismissal, pursuant to CPLR section 3126, is required to demonstrate that a "litigant, intentionally, or negligently, disposed of crucial items of evidence before the adversary had an opportunity to inspect them, thus depriving the party seeking the sanction of the means of proving his claim." *Baldwin v. Gerard Avenue, LLC*, 58 AD3rd 484 (1st Dept. 2009). The court must consider the degree to which the destruction of evidence has prejudiced the other party who has the burden to prove it has suffered prejudice. *Palmenta v. Columbia University*, 266 AD2d 90 (1st Dept. 1999). When the moving party establishes prejudice, the burden shifts to the nonmoving party to establish a reasonable excuse for failure to provide discovery, with appropriate findings to be made by the court. *Corner Realty 30/7 v. Bernstein, Mgt. Corp.*, 249 AD2d (1st Dept. 1998). The extreme sanction of dismissal may also be warranted where a clear showing has been made that the non-compliance with a discovery order was willful, contumacious or due to bad faith. *Palmenta v. Columbia University*, 266 AD2d 90 (1st Dept. 1999).

This Court has the discretion to preclude petitioner from producing evidence or testimony as to the forty-three (43) incidents allegedly captured on video, witnessed by employees of the petitioner, and resulting in written complaints by tenants in the building. These complaints are the basis of the proceeding and incorporated into the Notice of Termination. In this proceeding, the petition must be stricken and the proceeding dismissed. The drastic remedy of striking a pleading is usually not warranted unless the evidence is crucial, and the spoliator's conduct reaches some high degree of culpability. *Russo v. BMW of N.A.M, LLC*, 82 AD3rd 643 (1st Dept. 2011). Striking a pleading may be justified where the spoliator deprives a party of the ability to

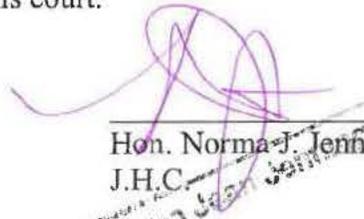
assert a claim or a defense. *Melder v. Apollo Med. Fund Mgmt., LLC*, 959 NYS2d 133 (1st Dept. 2013).

In opposition to respondent's motion for discovery, as well as on the record during oral argument, petitioner admitted that it destroyed the evidence upon which this proceeding is based. The Court noted in its July 26, 2019 decision that it was disturbed by petitioner's admission that it destroyed the tapes and written complaints in this proceeding. Petitioner had a duty to preserve this evidence which is the basis of the allegations in the Notice of Termination that respondent has engaged in objectionable conduct. The availability of this evidence would allow respondent to form a proper defense. Petitioner has not opposed respondent's current motion or explained why it destroyed the evidence or has failed to produce the managing agent to be deposed. Respondent has met its burden to show that it will be prejudiced if the evidence is allowed to be introduced, as the information is crucial to his defense, especially since none of the incidents alleged involve the respondent. Respondent should have been allowed to review the videos and discover the names of the tenants, and employees who filed complaints, and the contents of those complaints, prior to trial. In addition, petitioner, has continuously disregarded this court's order to produce the managing agent to be deposed. Petitioner has not met its burden to show a reasonable excuse for its action or that the destruction of this evidence was not intentional or willful.

Accordingly, respondent's motion, pursuant to CPLR section 3126(3), to strike the petition and dismiss the proceeding is granted and the proceeding is dismissed.

This constitutes the decision and order of this court.

Dated: December 30, 2019
Bronx, New York



Hon. Norma J. Jennings
J.H.C.
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