



Agius v Gray Line Corp.

2019 NY Slip Op 32513(U) (2019) | Cited 0 times | New York Supreme Court | August 22, 2019

SUPREME COURT OF STATE OF COUNTY

HON. LEBOVITS

JENNIFER AGIUS AGIUS,

LINE CORPORATION, LINE WORLDWIDE, LINE YORK TOURS, INC., COACH USA, INC,
CITYSIGHTS TWIN AMERICA LINE YORK SIGHTSEEING, IAS MOTION

INDEX NO. MOTION 05/01/2019 MOTION SEQ. NO. 001

DECISION ORDER ON MOTION

following NYSCEF 001) 20, 30, STRIKE PLEADINGS

LLP

Plaintiffs,

Plaintiffs

10, 2016,

She sufficiently fall ultimately

On 2016,

"[a]ll identified" "[t]he Accident." FILED: NEW YORK COUNTY CLERK 08/27/2019 04:00 PM
INDEX NO. 156167/2017 NYSCEF DOC. NO. 50 RECEIVED NYSCEF: 08/27/2019

1 of 4 THE NEW YORK NEW YORK

PRESENT: GERALD Justice -----X



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and ALEXANDER Plaintiffs, - v - GRAY A/K/A GRAY GRAY NEW LLC, LLC, GRAY NEW
Defendants. -----X PART 7EFM

156167/2017 DATE

+

The e-filed documents, listed by document number (Motion 19, 21, 22, 23, 24,25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39,40,41, 42, 43,44,45, 46,47 were read on this motion to Woods Lonergan PLLC (Annie E. Causey and James F. Woods of counsel), for plaintiffs. Wilson Elser Moskowitz Edelman & Dicker (Craig T. Ellman of counsel), for defendants.

Gerald Lebovits, J.:

Jennifer Agius and her husband Alexander Agius, sued defendants (collectively, Gray Line) for injuries suffered by Jennifer Agius when she slipped and fell on a Gray Line bus. now move to strike defendants' answer for alleged spoliation of evidence, or alternatively to deem certain key factual issues in the case resolved against defendants in light of this alleged spoliation.

Background

According to the allegations of the complaint, on August Jennifer Agius was a passenger on a double-decker tour bus owned and operated by Gray Line. As Agius descended stairs from the upper level of the bus, she slipped and fell on a non-treaded surface at the staircase landing. sustained serious injuries in the that Gray Line called an ambulance to the scene, and needed hospitalization and surgery.

August 31, plaintiffs' counsel sent Gray Line a letter (referred to by both parties as the litigation hold notice) seeking the preservation of 12 categories of evidence. Those categories included existing daily, weekly, monthly and yearly incident, repair and/or inspection reports relating to the source of the client's accident if the source has been as well as entire personnel file of all employees working on the day of the (See [* 1] NYSCEF

2017,

NYSCEF

NYSCEF 2018. NYSCEF 2018, 2018. NYSCEF

"common-law 3126," "pertains here." 2015].)



Agius v Gray Line Corp.

2019 NY Slip Op 32513(U) (2019) | Cited 0 times | New York Supreme Court | August 22, 2019

Under "possess evidence." SA., [2015].)

"culpable mind" FILED: NEW YORK COUNTY CLERK 08/27/2019 04:00 PM INDEX NO. 156167/2017 NYSCEF DOC. NO. 50 RECEIVED NYSCEF: 08/27/2019

2 of 4 No. 27.) The notice did not, however, seek the preservation of any part of the bus itself. (See id.)

Almost seven months later, on March 28, Gray Line sold to Cousins Metal Industries, Inc. (Cousins) the bus on which Agius fell. Cousins converted the bus to scrap metal shortly after the completion of the sale. (See No. 29.)

Plaintiffs filed their complaint three months later, seeking damages for Agius's personal injuries and her husband's loss of consortium. (See No. 1.) Plaintiffs sent a demand to Gray Line for an inspection of the bus on February 12, (See No. 23.) Gray Line responded on September 24, stating that it was no longer in possession of the bus because it had been sold to Cousins in March (See No. 24.)

Plaintiffs now move for discovery sanctions under CPLR 3126 on the theory that Gray Line's failure to preserve the bus constitutes spoliation of evidence. Plaintiffs' motion is denied.

Discussion

As an initial matter, this court must apply the doctrine of spoliation, rather than CPLR because the statute to refusal to comply with a discovery order or a willful failure to disclose, neither of which is applicable (*Strong v City of New York*, 112 AD3d 15, 21 [1st Dept

this common-law doctrine, courts broad discretion to provide proportionate relief to a party deprived of lost or destroyed (*Pegasus Aviation I, Inc. v Varig Logistica* 26 NY3d 543, 551 A party seeking such relief must show (i) that the party against whom relief is sought had control over the evidence, (ii) that the party with control over the evidence had an obligation to preserve it at the time of its destruction, (iii) that the evidence was destroyed with a culpable state of mind, 1 and (iv) that the destroyed evidence was relevant to the moving party's claim or defense. (See *Pegasus Aviation*, 26 NY3d at 546.)

In this case, it is undisputed that Gray Line had control over the evidence at issue—i.e., the bus—at the relevant time. This court concludes, however, that Gray Line did not have an obligation to preserve the bus when it sold the bus to Cousins to be turned into scrap metal. Spoliation relief therefore is not warranted here. 2

Plaintiffs argue that the circumstances of Agius's fall put Gray Line on notice that it had an obligation to preserve the bus for potential future litigation. As plaintiff notes, the First Department has held that a defendant is placed on notice of a reasonable probability of future litigation



Agius v Gray Line Corp.

2019 NY Slip Op 32513(U) (2019) | Cited 0 times | New York Supreme Court | August 22, 2019

concerning certain evidence-and thus the defendant's obligation to preserve that

1 A party seeking spoliation sanctions may satisfy the state of requirement by establishing that the destruction of evidence was only negligent, rather than willful. (See Strong, 112 AD3d at 21.) 2 Given its conclusion on this point, this court need not and does not address the remaining aspects of the spoliation analysis. [* 2] 2017.

10, 2016. On 2016,

(See

(See

2017

(See 130 2015]; 450, 2014]. Sarris Plainview,

(See [2004] "request preservation").)

Skating 2006]

(See 306584/2010, 2015 Slip Op 32684(U), [Sup Oct. 2015], 2017]; JPMorgan 304752/2011, 2013 Slip Op 33787(U), [Sup 2013], 2015].)

2018, (See

2017, "with discovery," Smalley 170 1550 2019].) FILED: NEW YORK COUNTY CLERK 08/27/2019 04:00 PM INDEX NO. 156167/2017 NYSCEF DOC. NO. 50 RECEIVED NYSCEF: 08/27/2019

3 of 4 evidence-where, as here, an individual sustains injuries in an accident (such as a fall) for which an ambulance is called. 3

This court concludes, though, that under the particular facts of this case, Gray Line did not have such an obligation to preserve at the time it sold the bus to Cousins in March

Agius slipped and fell on Gray Line's bus on August August 31, plaintiffs' counsel sent Gray Line an express and detailed litigation-hold notice, which requested that Gray Line preserve 12 distinct types of documentary, photographic, and video evidence. NYSCEF No. 27.) The notice did not, however, request preservation of any physical evidence related to the circumstances of the accident, such as the mat inside the bus on which Agius alleges she slipped. And the notice certainly did not request preservation of the bus itself. id.) Nor did plaintiffs amend or supplement this notice-or otherwise



Agius v Gray Line Corp.

2019 NY Slip Op 32513(U) (2019) | Cited 0 times | New York Supreme Court | August 22, 2019

suggest that they needed Gray Line to preserve the bus-in the seven months between service of the hold notice and Gray Line's March sale of the bus to Cousins. 4

Given plaintiffs' careful itemization of the nature of the evidence that needed to be preserved, Gray Line could reasonably conclude that its preservation obligation was limited to those categories of evidence that plaintiff specified. This court declines to penalize Gray Line for failing to preserve an entirely different category of evidence that plaintiff never mentioned. 5 Jackson v Whitson 's Food Corp., AD3d 461, 463 [1st Dept Duluc v AC & L Food Corp., 119 AD3d 452 [1st Dept Accord v Fairway Grp. LLC, 169 AD3d 734, 736 [2d Dept 2019].)

This court's conclusion is bolstered by the sheer scope of the preservation obligation that plaintiffs contend that Gray Line impliedly assumed-i.e., retaining a two-decker tour bus in unchanged condition for at least 18 months, if not longer. MetLife Auto & Home v Joe Basil Chevrolet, Inc., 1NY3d478, 483-484 [declining to find that a party spoliated evidence by destroying a damaged vehicle where plaintiff did not [preservation] in writing or volunteer[] to cover the costs associated with That obligation is quite different from-and much more burdensome than-retaining digital videocamera footage, or emails, or a small physical item such as a pair of roller skates (see Kelley v Empire Roller Rink, Inc., 34 AD3d 533 [2d Dept [in personal-injury action, declining to impose spoliation sanctions for failure to preserve roller-skates worn by plaintiff at the time of the accident].) This court

3 Macias v Asal Realty LLC, Index No. NY at *6-*7 Ct, Bronx County 29, aff'd 148 AD3d 622 [1st Dept Maiorano v Chase & Co., Index No. NY at *3 Ct, Bronx County July 9, aff'd 124 AD3d 536 [1st Dept 4 Indeed, the record reflects that plaintiffs made their first request to inspect the bus only in February 18 months after Agius fell. NYSCEF No. 23.) 5 Though plaintiffs suggest that Gray Line had malign motives in selling the bus to Cousins in March they fail to provide any evidence that Gray Line acted the intention of frustrating rather than in the ordinary course of business. (Estate of v Harley-Davidson Motor Co., AD3d 1549, [4th Dept

3 [* 3] CHECK ONE:

APPLICATION: CHECK IF APPROPRIATE: CASE DISPOSED 0 DENIED SETILE ORDER INCLUDES TRANSFER/REASSIGN LEBOVITS, NON-FINAL DISPOSITION IN SUBMIT ORDER FIDUCIARY APPOINTMENT OTHER FILED: NEW YORK COUNTY CLERK 08/27/2019 04:00 PM INDEX NO. 156167/2017 NYSCEF DOC. NO. 50 RECEIVED NYSCEF: 08/27/2019

4 of 4 declines to find that Gray Line was subject to this substantial preservation requirement where plaintiff's extensive litigation-hold notice did not mention the bus or its components at all.

Accordingly, it is

ORDERED that plaintiffs' motion for spoliation sanctions against Gray Line is denied.



Agius v Gray Line Corp.

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8/22/2019 DATE

GRANTED GERALD J.S.C.

GRANTED PART D

D REFERENCE [* 4]

