[* 1]

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

PRESENT: Scarpulla Justice

PART 19

Index Number : 111116/2007
VERIZON NEW YORK
vs.
ELQ INDUSTRIES
SEQUENCE NUMBER : 001
STRIKE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying decision.

Dated: 1/2/13

SALIANN SCARPULLA J.S.C.

SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19
---------- X
VERIZON NEW YORK, INC.,

Plaintiff,

- against-

Index No.:111116/07
Submission Date:10/17/12

ELQ INDUSTRIES, INC.,

DECISION AND ORDER

Defendant.
---------- X

For Plaintiff:
Pillinger Miller Tarallo, LLP
570 Taxter Road, Suite 275
Elmsford, NY 10523

For Defendant:
Rubin, Fiorella & Friedman LLP
292 Madison Avenue, 11th Floor
New York, NY 10017

Papers considered in review of this motion to strike complaint:

Amended Notice of Motion 1
Amended Aff in Support 2
Aff in Opp 3
Reply Aff 4
Sur-Reply 5
Sur-Reply 6

HON. SALIANN SCARPULLA, J.:

In this action by plaintiff Verizon New York Inc. ("Verizon") to recover $239,402.10 in property damage, defendant ELQ Industries, Inc. ("ELQ or defendant") moves pursuant to CPLR 3126 for an order striking the complaint and dismissing the action for Verizon's failure to comply with orders of this court and for spoliation of evidence, or in the alternative, for an order pursuant to CPLR 3126 precluding Verizon

from giving evidence at trial as to matters of which discovery has been sought and not provided.

Verizon commenced this action by filing and service of a summons and verified complaint dated August 9, 2007, seeking to recover for alleged damage to its telecommunication cables and conduits which it alleged were damaged by defendants on or about October 12, 2005. In its verified Bill of Particulars, served October 27, 2008, Verizon alleged that ELQ pierced Verizon's cables and conduits in three different locations, which exposed the cables to 6-10 inches of rain.

On March 22, 2011, the same day Verizon appeared for a deposition by witness Julio Figueroa ("Figueroa"), ELQ served a notice for discovery and inspection of the "telecommunication cables, equipment, conduits, pole and facilities . . . used by plaintiff in furnishing telephone and other communications services of which plaintiff alleges were damaged by Defendant on or about October 12, 2005." Verizon responded to that demand on April 11, 2011 with an objection that it was overbroad.

On May 10, 2011, the parties appeared before this court for a compliance conference. As a result, a So-Ordered Stipulation was entered which states "Plaintiff agrees to produce the cables, conduits and other property which was damaged in this matter withing 30 days, or if they are no longer available to provide an affidavit to that effect from an employee with knowledge thereof by June 10, 2011." ELQ states that it did not receive anything in response to this order.

On July 5, 2011, the parties again appeared for a discovery conference. The resulting So-Ordered Stipulation provides: "Plaintiff shall comply with prior order dated 5/10/11 ordering that plaintiff produce the cables, conduits or other property which was damaged in this matter within 30 days, or provide an affidavit by someone with knowledge to that effect by 7/31/11." To date, Verizon has not produced either the alleged damaged items for inspection, or an affidavit by someone with knowledge regarding the damaged items.

ELQ now moves for an order striking Verizon's complaint and dismissing the action for Verizon's failure to comply with the May 10, 2011 and July 5, 2011 orders, and also for spoliation of crucial evidence. In the alternative, ELQ seeks to preclude Verizon from giving evidence at trial in this matter regarding the discovery which has been sought and not provided. ELQ asserts that Verizon's failure to produce the damaged property, or an affidavit explaining its unavailability, prejudiced ELQ's ability to defend itself in this matter. ELQ has not been able to have an expert examine the physical evidence and cannot make its own assessment as to whether the cables were damaged from piercing as alleged by Verizon. ELQ also asserts that as Verizon's witness Steven Calvani ("Calvani") testified at his examination before trial that the damaged cables date to 1901, it is possible they were already in a damaged state and needed to be replaced for other reasons. Without the ability to inspect the cables, ELQ argues that it cannot substantiate this defense.

In opposition to the motion, Verizon counters only the spoliation argument, and offers no explanation for its failure to comply with ELQ's discovery request or the May 10, 2011 and July 5, 2011 orders. While not specifically stating the status of the allegedly damaged property, Verizon does not claim that the property has been preserved, and seems to conceded that it has not, arguing that instead of barring Verizon from recovering against ELQ, Verizon "requests that this Court grant relief that is more appropriate . . . with respect to matters involving spoilation [sic] of evidence." Verizon asserts that because of ELQ's delay in requesting production of the allegedly damaged property, Verizon was not on notice to preserve it for future litigation, and therefore the remedy of dismissal is inappropriate. Verizon further argues that ELQ's delay in requesting production demonstrates that the evidence is not actually crucial to ELQ's defense of this action.

Discussion

"The law strongly prefers that matters be decided on the merits. Accordingly, the drastic sanction of striking a pleading is inappropriate without a clear showing that the failure to comply with disclosure obligations was willful, contumacious, or the result of bad faith." *Gibbs v. St. Barnabas Hosp.*, 61A.D.3d 599 (1st Dep't 2009) (citations omitted).

Verizon has utterly failed to comply with ELQ's reasonable discovery request, or either of the two discovery conference Court Orders. Verizon has not put forth – in

opposition to this motion or at any other time – any explanation or excuse for failing to comply with the repeated requests for it to produce the damaged cables and conduits, or for its failure in the alternative to produce an affidavit of a person with knowledge to explain why they cannot be produced for inspection. Accordingly, "the willful and contumacious character of the plaintiff['s] failure to respond to discovery could be inferred from [its] refusal to comply with the defendant['s] discovery request for over [one and a half years] as well as the inadequate explanation offered to excuse their failure to comply." *Frost Line Refrigeration, Inc. v. Frunzi*, 18 A.D.3d 701, 702 (2d Dep't 2005). "Plaintiff's year-long pattern of non-compliance with the court's repeated compliance conference orders gave rise to an inference of willful and contumacious conduct." *Goldstein v. CIBC World markets Corp.*, 30 A.D.3d 217 (1st Dep't 2006). *See also Byam v. City of New York*, 68 A.D. 3d 798, 801 (2d Dep't 2009) ("Here, the [plaintiff's] willful and contumacious conduct can be inferred from [its] repeated failures, over an extended period of time, to comply with the discovery orders, together with the inadequate, inconsistent and usupported excuses for those failures to disclose.")

Moreover, it is unclear how Verizon expects to proceed on its claims for damages without producing the allegedly damaged cables and conduits. There is nothing in the record before me to support a claim that the cables and conduits were damaged by ELQ. Neither Figueroa or Calvani testified at their depositions that they personally viewed the alleged damaged cables and conduits and saw that they had been pierced and then further

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damaged by 6-10 inches of rain water, as Verizon claims in its verified bill of particulars. In fact, Verizon's counsel stated at Calvani's deposition that he was never in the field or at the location of the alleged damage, but there only to discuss billing and amounts of damages.

Figueroa testified that he was in the field in the general area where the damage is alleged to take place, but did not testify that he inspected the cables himself. He stated that he concluded that the cables and conduits were damaged by ELQ because of "the explanation I had from being out there, just the type of hole it was" in the cable. Figueroa did not state who gave him that explanation, nor does Verizon proffer any affidavits or further explanation of how it concluded that ELQ caused the damage to its property.

And now ELQ is deprived of the opportunity to inspect the cables and conduits, and allow its expert to put forth its own explanation. As ELQ noted, these cables were originally placed in 1901, making it wholly possible that they may have been previously damaged, or in need of replacement due to normal wear and tear or other damage suffered over the years. Therefore, even if Verizon's actions were not deemed willful and contumacious, the failure to preserve the alleged damaged property which forms the basis of this lawsuit constitutes spoliation.

> Spoliation is the destruction of evidence. Although originally defined as intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. . . . 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. . . . [D]ismissal [may] be a viable remedy for loss of a key piece of evidence that thereby precludes inspection.

Kirkland v. New York City Hous. Auth., 236 A.D.2d 170, 173 (1st Dep't 1997). "Necessary to this burden is a showing of prejudice." *Baldwin v. Gerard Avenue, LLC*, 58 A.D.3d 484, 485 (1st Dep't 2009).

Verizon's assertion that it should not be sanctioned for the destruction of evidence because ELQ waited too long to put it on notice to preserve it is unavailing. Verizon is the plaintiff in this action, and is seeking to recover damages for alleged property damage. The property which it claims was damaged is therefore vital to its prosecution of its claims, as well as to ELQ's defenses. Plaintiff, by initiating this action, was on notice that the allegedly damaged property was integral to this action and it should therefore have been preserved. Verizon did not need to wait for a request for the cables and conduits from ELQ to know that they should be preserved, or at the very least properly documented. From the record on this motion, it is clear that there are no photos of the allegedly damaged property, and Verizon has again offered no excuse, reasonable or otherwise, for its failure to preserve the property.

"When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation . . . . Spoliation sanctions . . . are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense." *Squitieri v. City of New*

York, 248 A.D.2d 201, 202-203 (1st Dep't 1998). Dismissing a pleading is an appropriate sanction whether the party's spoliation was intentional or negligent. *See The Standard Fire Ins. Co. v. Federal Pacific Electric* Co., 14 A.D.3d 213 (1st Dep't 2004); *Kirkland*, 236 A.D.2d 170. Here, there is no showing that Verizon's destruction of the alleged damaged property was intentional, but as Verizon is seeking to recover damages for the alleged damaged property, its destruction before ELQ could inspect it was negligent.

Moreover, Verizon "should have recognized the 'elevated priority of preserving the evidence.' In the absence of any indication in the record that [Verizon] had taken any steps to assure preservation of the evidence, dismissal [is] warranted." *The Standard Fire Ins. Co.*, 14 A.D.3d at 219 (quoting *Kirkland*, 236 A.D.2d at 176).

Accordingly, Verizon's complaint is stricken and the action against ELQ dismissed.

In accordance with the foregoing, it is

ORDERED that defendant ELQ Industries, Inc.'s motion for an order striking plaintiff Verizon New York Inc.'s complaint and dismissing the action for Verizon's failure to comply with orders of this court and for spoliation of evidence is granted, and the Clerk of the Court is directed to enter a judgment dismissing the complaint.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
January 2, 2013

ENTER:

Saliann Scarpulla, J.S.C.