

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

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

FREDINE DIETZ, Individually and as Personal
Representative for the Estate of ARTHUR D. DIETZ,

Plaintiffs,

- v -

A.C. & S, INC., et al.,

Defendants.

INDEX NO. 105736/99

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-I

Answering Affidavits — Exhibits A-H

Replying Affidavits

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that Defendant Fulton Boiler Works, Inc.'s ("Fulton"), order to show cause must be denied. "[W]here a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate [citations omitted] . . ." *Cordero v Mirecle Cap Corp.*, 51 AD3d 707, 709 (2nd Dept 2008). Here, plaintiffs' counsel turned over about 50 pages of medical records and a number of pathology slides garnered from a prior Florida action which Fulton acknowledges receiving. Although the New York action commenced in 1999, this "action did not become part of a trial group until approximately six years later when the February 2007 FIFO Cluster was published . . ." (Horner Opp Aff at ¶ 11). During the ensuing seven year time lapse and indisputably unbeknownst to plaintiffs' counsel, one non-party hospital had destroyed diagnostic imaging films and reports pursuant to its 7 year retention policy and another facility's records were lost due to hurricane damage to its building housing such records. These unfortunate reversals evidently occurred when this action was procedurally dormant without either side actively litigating this matter and affect both parties equally. Stated differently, "[u]nder such circumstances, the plaintiffs who also were prejudiced, cannot be held liable for such a loss . . ." *Fotiou v Goodman*, 74 AD3d 1140, 1141 (2nd Dept 2010). Moreover, Fulton has not shown inter alia how the loss of certain chest x-rays, CT scans, etc., renders it totally incapable of effectively asserting a CPLR Article 16 defense based on other evidence in its possession.

This court further directs all parties to appear on October 4, 2010 at 9:30 a.m. at the 4th Floor Jury Assembly Room at 60 Centre Street, New York, New York for jury selection and the ensuing trial forthwith.

Dated: August 12, 2010

Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE