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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HON. PATRICIA P. SÄTTERFIELD, IA PART 19
Justice

FADA INDUSTRIES, INC.,

Index No. 12790/99

Plaintiff,

Motion Date: 4/4/01

-against-

Motion Cal. No.: 9

FALCHI BUILDING CO., L.P., ATC MANAGEMENT,
INC., and KOOLWEAR, INC.,
Defendants.

KOOLWEAR, INC.,

Third-Party Plaintiff,

-against-

GENERAL ACCIDENT INSURANCE, CO.,

Third-Party Defendant.

The following papers numbered 1 to 17 read on this motion by third-party defendant for an order, pursuant to CPLR 3211(a)(7), dismissing the third-party complaint; and on this cross motion by defendant/third party plaintiff for an order, pursuant to CPLR 3025(b), granting it leave to serve an amended complaint.

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Upon the foregoing papers, it is ordered that the motions and cross-motion are decided as follows:

This Court holds that a cause of action based upon negligent spoliation of evidence may be asserted by an insured in a third-party action against its insurer based upon the insurer's alleged loss or destruction of key evidence crucial to the insured's defense in the underlying action.

This is an action to recover for damages to property caused by a water leak on March 15, 1998. In June 1999, Fada Industries, Inc., a tenant in a building located at 31-00 47th Avenue, Long Island City, New York, commenced this action against Falchi Building Co., L.P., and ATC Management, Inc. ("co-defendants"), the owner and manager of the building, respectively, and Koolwear, Inc. ("Koolwear"), the co-tenant whose water heater allegedly was responsible for the water leak; co-defendants cross-claimed against Koolwear. Prior to the commencement of the action, Koolwear's insurer, General Accident Insurance Co. ("General Accident"), on or about April 21, 1998, during the course of its investigation of Koolwear's claim for property damage, allegedly caused the removal of the offending water heater from Koolwear's premises; the water heater subsequently was lost or destroyed while in the possession of an agent of General Accident. Koolwear thereafter, on or about October 19, 2000, commenced a third-party action against General Accident seeking recovery for the negligent loss of the water heater based upon two theories: (1) that the loss impaired its ability to defend the action brought by FADA; and (2) the loss has prevented it from impleading those entities which negligently manufacture, installed, and/or repaired the water heater. Defendant moves to dismiss the third-party complaint on the ground that it fails to state a cause of action; Koolwear cross-moves for leave to serve an amended third-party complaint.

Motion to Dismiss

General Accident moves to dismiss the third-party complaint on the ground that it fails to state a cause of action because the negligent destruction of evidence, which is the substance of Koolwear's third-party action, is not a recognized tort in the State of New York.¹ On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. Leon v. Martinez, 84 N.Y.2d 83; Santos v. City of New York, 269 A.D.2d 585; Jacobs v. Macy's East, Inc. 262 A.D.2d 607; Doria v. Masucci, 230 A.D.2d 764; Hinrichs v.

¹The irony of the instant case is an effort by an insured to assert the tort of spoliation of evidence against its insurer, which presumably has an interest in defending the insured in the action asserted against it. "The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. . . the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased (citations omitted)." Seaboard Surety Co. v. Gillette Co., 64 N.Y.2d 304, 310; Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169. The parties do not discuss this obligation to defend. Instead, the parties are vigorously litigating the issue raised in this third-party action.

Youssef, 214 A.D.2d 604. In assessing a motion under CPLR 3211(a)(7), a court properly may freely consider affidavits submitted by the plaintiff for the limited purpose of ascertaining whether they may remedy defects in the complaint or they establish conclusively that plaintiff has no cause of action. Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633. Such “affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.” Id., 40 N.Y.2d at 636. “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275. The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, supra. 84 N.Y.2d at 88. However, bare legal conclusions as well as factual claims that are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action, and are not entitled to any such consideration.” Morone v. Morone, 50 N.Y.2d 481; Mayer v. Sanders, 264 A.D.2d 827; Meyer v. Guinta, 262 A.D.2d 463. Moreover, where, the plaintiff’s submissions conclusively establish that there is no cause of action, the cause of action should be dismissed.” Rovello v. Orofino Realty Co., supra, 40 N.Y.2d at 636; Held v. Kaufman, 238 A.D.2d 546.

The issue raised on this motion presents another opportunity to examine the question of whether spoliation of evidence is an actionable tort within New York State. Two lower court decisions, Pharr v. Cortese, 147 Misc.2d 1078 and Weigl v. Quincy Specialties Co., 158 Misc.2d 753, which relies upon Pharr, are the two instances in which the spoliation of evidence theory has been rejected as a cognizable tort action by the courts of New York, notwithstanding the absence of appellate authority. The Weigl decision, especially, has been the basis for several federal court decisions that repeatedly state: “The New York courts follow the majority view and do not view spoliation of evidence as a legally cognizable tort action.” See, Black Radio Network, Inc. v. NYNEX Corp., 44 F.Supp.2d 565, 565; Tietjen v. Hamilton-Beach/ Proctor-Silex, Inc., 1998 WL 865586 at *3; Ambassador Faith Whittlesey v. Espy, 1996 WL 689402 at *1; Mondello v. Dun & Bradstreet Corp., 1996 WL 23989 at *2; Reilly v. D’Errico, 1994 WL 547671, all citing, Weigl v. Quincy Specialties Co., 158 Misc.2d 753. At issue is whether the facts of this case warrant a departure from the majority view.

It is beyond cavil that the Pharr and Weigl decisions were limited to the facts of those particular cases.² In reaching its decision, the Pharr court rejected “two cases, from other states, which have recognized a cause of action for the spoliation of evidence, namely Smith v. Superior Court for the County of L.A., 151 Cal.App.3d 491, 198 Cal.Rptr. 829 (Cal.App. 2 Dist., 1984) and Bundu v. Gurvich, 473 So.2d 1307 (Fla.App. 3 Dist.1984).” 147 Misc.2d at 1080. The court reasoned: “The reliance is misplaced. In both of those cases the spoliation of evidence made it extremely difficult or impossible for the plaintiffs to maintain or prove their causes of actions.” The

²The Pharr Court “decline[d] to recognize intentional spoliation of evidence as a separate tort when a physician allegedly falsified his records in order to avoid malpractice liability, when the plaintiff cannot show any injury, either by effectively depriving her of the prosecution of a malpractice claim or by adversely affecting her medical treatment, and when there are other appropriate measures to insure that physicians maintain accurate records, and that they do not intentionally alter them.” 147 Misc.2d at 1081.

Court, in Pharr, stated that “[u]nder the facts of this case, the court declines to accept Pharr’s invitation to create a new cause of action.” 147 Misc.2d at 1079.

Several years after Pharr, the Supreme Court, New York County, in Weigl v. Quincy Specialties Co., a worker’s compensation case, stated [158 Misc.2d at 756]:

The Courts of New York follow the majority view and do not recognize spoliation of evidence as a cognizable tort action. A review of the relevant case law in this jurisdiction has disclosed no case precedent which recognized spoliation as a cognizable tort action. Rather in Pharr v. Cortese, 147 Misc.2d 1078, 559 N.Y.S.2d 780 (Sup.Ct.N.Y.Co. 1990) the Court refused to sustain intentional spoliation of records as a viable cause of action under the factual evidence of that case.

The Weigl Court, however, acknowledged that “this jurisdiction does recognize a common law cause of action against an employer for negligently and intentionally impairing an employee’s right to sue a third-party tortfeasor, notwithstanding the employee having received Workers’ compensation benefits” [id.], and granted the plaintiff leave to serve an amended complaint to substitute the spoliation claims with those causes of action. The Pharr and Weigl decisions, thus, both intimate that, on a proper set of facts, spoliation of evidence might be recognized as a cognizable tort.

Koolwear contends that since all of the cases relied upon by General Accident are fact specific, “spoliation of evidence should be recognized as a viable cause of action upon the facts here presented.” General Accident counters that “cases upon plaintiffs’ right to bring suit based upon a defendant’s interference with their right to sue another party are limited to those instances where the plaintiff is the employee [whose] employer destroyed evidence to prevent the target defendant from bringing them in as third-party defendants.” General Accident concludes that this Court should not recognize spoliation of evidence as an independent tort, particularly since such a tort is not recognized in the majority of jurisdictions in this country. General Accident further argues that the only exception to this arguably ironclad rule is those cases that stand for the proposition that a spoliation of evidence cause of action only is sustainable when asserted by an employee against an employer, citing DiDomenico v. C & S Aeromatik Supplies, Inc., 252 A.D.2d 41.

In DiDomenico v. C & S Aeromatik Supplies, Inc., supra, the Appellate Division, Second Department, approved the striking of an answer and cross-claims based upon the employer’s spoliation of all of the physical evidence thereby impairing the plaintiff-employee’s right to sue a third-party tortfeasor, and granted summary judgment to a co-defendant because the employer also was responsible for the destruction of all the evidence by which the co-defendant might have defended itself against the plaintiff’s allegations. The Court granted the plaintiff-employee’s summary judgment motion on his common law cause of action against his employer, as well as the defendant’s summary judgment motion seeking indemnification from the employer, which is the relief sought here against General Accident. See, also, Kirkland v. New York City Housing Authority, 236 A.D.2d 170

[dismissal of third-party action appropriate where crucial evidence was negligently destroyed]; Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243 [dismissal of complaint warranted where plaintiff negligently lost key piece of evidence before defendants could examine it]; Sage Realty Corp. v. Proskauer Rose LLP, 275 A.D.2d 11 [same]; New York Central Mutual Fire Insurance Company v. Turnerson's Electric Inc., ___ A.D.2d ___ [same]. Clearly, recognition of a viable spoliation of evidence claim is not anathema to the Second Department; nor is invocation of such a claim against an employer by a stranger to the employer-employee relationship.

Courts in the State of New York indeed consistently have utilized the spoliation of evidence doctrine defensively as a remedial means of punishing the spoliator in a variety of ways by imposing sanctions. "In deciding whether to impose sanctions * * *, courts will look to the extent that the spoliation of evidence may prejudice a party and whether [a particular sanction] will be necessary as 'a matter of elementary fairness' (Hartford Fire Ins. Co. v. Regenerative Bldg. Const., 271 A.D.2d 862, 863, 706 N.Y.S.2d 236, quoting Puccia v. Farley, 261 A.D.2d 83, 85, 699 N.Y.S.2d 576, quoting Kirkland v. New York City Hous. Auth., supra, at 175, 666 N.Y.S.2d 609)." Lane v. Fisher Park Lane Co., 276 A.D.2d 136. Such remedial actions include, for example, striking the pleadings. New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec., Inc., ___ A.D.2d ___, 721 N.Y.S.2d 92 [holding that where a party destroys key physical evidence "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence,'" the spoliator may be punished by the striking of its pleading (DiDomenico v. C & S Aeromatik Supplies, 252 A.D.2d 41, 53, 682 N.Y.S.2d 452, quoting Kirkland v. New York City Hous. Auth., 236 A.D.2d 170, 174, 666 N.Y.S.2d 609)]; Squitieri v. City of New York, 248 A.D.2d 201, 202-203 ["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"]; Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243, 243, 633 N.Y.S.2d 493 [dismissing plaintiff's claim due to its "negligent loss of a key piece of evidence which defendants never had an opportunity to examine"]; see, also, Liz v. William Zinsser & Co., 253 A.D.2d 413. Courts of New York State also have imposed the sanctions of witness and issue preclusion (Yi Min Ren v. Professional Steam-Cleaning, Inc., 271 A.D.2d 602 [where a crucial item of evidence is lost, either intentionally or negligently, the party responsible should be precluded from offering evidence as to its condition]; Strelov v. Hertz Corp., 171 A.D.2d 420, 421 [defendant precluded from presenting any evidence in defense of suit based on allegedly defective rental car, except as to the parts of the car that defendant had not destroyed]).

In short, the defensive application of the common law doctrine of spoliation, at least as to dismissal or trial sanctions when key evidence is destroyed prior to examination by the opposing party, is in wide use, at least in the First and Second Department. The full dimensions of that common law doctrine is still evolving, although it is clear that remedial action is obligatory in instances in which the lost or destroyed evidence is "crucial to the determination of the key issue." Squitieri v. City of New York, supra; Kirkland v. New York City Housing Authority, supra; Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., supra; Tawedros v. St. Vincent's Hosp. of New York, ___ A.D.2d ___, 721 N.Y.S.2d 237 [refusing to apply "common-law doctrine of

spoliation of evidence” where it did not appear that plaintiff would be unable to prove his case without the items of information missing from the copy of the record that defendant provided, or that defendant had otherwise gained an unfair advantage as a result of the missing information]; compare, Liz v. William Zinsser & Co., 253 A.D.2d 413. Whether such remedial action should include the creation of a new tort cause of action is the issue squarely presented to this Court.

As “[t]he common law of tort deals with the relation between individuals by imposing on one a legal obligation for the benefit of the other and assessing damages for harm occasioned by a failure to fulfill that obligation (Prosser and Keeton, Torts § 53, at 356 [5th ed.]),” [Brown v. State, 89 N.Y.2d 172], it is fundamental to our common law system that one may seek redress for every substantial wrong. Battalla v. State, 10 N.Y.2d 237, 240. Whether to recognize a new cause of action, however, “is largely a question of policy.” Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 445 (Wachtler, J., concurring). “Critical to such a determination is whether the cause of action sought to be pleaded would be reasonably manageable within our legal system.” Id.

Decisions of courts of New York State acknowledge that the “spoliation of evidence” doctrine is predicated upon the rationale that the destruction of evidence was so damaging to a party that it could not properly defend or prosecute the action. If spoliation of evidence can be the basis of a grant of a motion for summary judgment against the spoliator, what would be the rationale of depriving a party of the right to affirmatively assert a cause of action against the spoliator based upon the party’s inability to defend an action due to the spoliator’s loss or destruction of key evidence? And, if the doctrine of spoliation of evidence is a recognized cause of action between employee and employer, why not between insured and insurer? Here, Koolwear is stripped of its ability to defend in the main action because of the conduct of General Accident, its own insurer. None of the sanctions traditionally available to a party apply in this case. Neither the striking of the answer nor a preclusion order will aid in Koolwear’s defense of the action against it based upon its water heater causing damage to plaintiff’s property. This Court is mindful that in the ten years following the rejection of spoliation of evidence as a cognizable tort in the Supreme Court, New York County, only a few jurisdictions have adopted the minority view earlier adopted in California, Alaska and Florida.³

³Those jurisdictions include the District of Columbia [Holmes v. Amerex Rent-A-Car, 336 U.S.App.D.C. 361 (“In response to the first certified question, we hold that negligent or reckless spoliation of evidence is an independent and actionable tort in the District of Columbia”)]; New Mexico [Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995) (New Mexico recognizing tort for intentional spoliation of evidence)]; Ohio [Smith v. Howard Johnson Co., 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993) (certifying answers that Ohio would recognize negligent and intentional spoliation claims)]; Washington [Ingham v. U.S., 167 F.3d 1240, 1246 (“To be actionable, the spoliation of evidence must damage the right of a party to bring an action. See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Co., 982 F.2d 363, 371 (9th Cir.1992)”)]; see, also, Swekel v. City of River Rouge, 119 F.3d 1259, 1265 [citing Smith v. Howard Johnson Company, Inc., 67 Ohio St.3d 28, stated: “Although the instant case comes from Michigan rather than Ohio, there is no suggestion that Michigan would not provide a remedy in tort for the wrong alleged here].

Nevertheless, the issue is ripe for reconsideration, particularly in cases where the wronged party has no other remedy at law.

Generally, where the party has an alternative remedy or has failed to show injury proximately resulting from spoliation, courts have been reluctant to create a tort for spoliation of evidence. Other considerations militating against the creation of the tort in other jurisdictions include the uncertainty of the existence or extent of damages; recognition of the tort interferes with a person's right to dispose of his property as he chooses; destruction of the property may be reasonable under the facts of a specific case, i.e., destroying property for safety reasons; the tort may be inconsistent with the policy favoring final judgments; a plaintiff who loses his primary suit may bring a second suit by trying to establish that some relevant piece of evidence was not preserved.⁴

⁴The Court in Larison v. City of Trenton, 180 F.R.D. 261, 264 (D.N.J. 1998), cogently outlined the status of spoliation of evidence as a cause of action in the other jurisdictions, stating:

The courts of a number of states have refused to recognize a tort for spoliation. See, *Elias v. Lancaster General Accident Hosp.*, 710 A.2d 65 (Pa.Super.1998); *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky.1997); *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 675 A.2d 829 (1996); *Henderson v. Tyrrell*, 80 Wash.App. 592, 910 P.2d 522 (Wash.App.1996); *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995); *Murphy v. Target Products*, 580 N.E.2d 687 (Ind.Ct.App.1992); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn.1990) (declined to recognize tort of spoliation of evidence in certified question but noted that instant facts were not conducive to recognition of spoliation tort); *Gardner v. Blackston*, 185 Ga.App. 754, 365 S.E.2d 545 (1988); *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (1987); *La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986); *Miller v. Montgomery County*, 64 Md.App. 202, 494 A.2d 761 (Md.App.1985); *Talmadge v. State Farm Mut. Auto. Ins. Co.* 107 F.3d 21 [Wyoming has not recognized the tort of spoliation]. In addition, other courts have declined to decide whether they would recognize a tort for spoliation of evidence, finding that the cases in which the question was presented were not conducive to such a determination. See, *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996); *Rodriguez v. Webb*, 141 N.H. 177, 680 A.2d 604 (1996); *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (W.Va.1996); *Peek v. State Auto Mutual Ins. Co.*, 661 So.2d 737 (Ala.1995); *Ely v. St. Luke's Hosp.*, 182 Wis.2d 510, 514 N.W.2d 878, (disposition only, unpublished opinion), 1994 WL 24352 (Wis.App. Feb. 1, 1994); *Panich v. Iron Wood Prod. Corp.*, 179 Mich.App. 136, 445 N.W.2d 795 (Mich.App.1989). Finally, there is a split of opinion among the lower courts of Louisiana and Texas, as to whether recognition of a spoliation tort is appropriate. See, e.g., *Bethea v. Modern Biomedical Svcs., Inc.*, 704 So.2d 1227 (La.App. 3 Cir.1997) (recognizing spoliation tort but noting

(continued...)

Other jurisdictions also have struggled with the issue of the appropriate time for bringing a spoliation of evidence claim, a legitimate concern, since principles of res judicata and collateral estoppel are implicated. Courts in some jurisdictions have ruled that such spoliation of evidence claims should be brought at the same time as the underlying claim [Smith v. Superior Court, 151 Cal.App.3d 491, 503, 198 Cal.Rptr. 829, 837 (1984) (spoliation claim should be heard together with primary claim)], while other courts require the injured party to try, and lose, the underlying claim before bringing a spoliation claim. See, Kent v. Costruzione Aeronautiche Giovanni Agusta, S.P.A., No. 90-2233, 1990 WL 139414, 1990 U.S. Dist. LEXIS 12583 (E.D.Pa. September 20, 1990) ("Not until there is a disposition with respect to the underlying civil action can it be determined whether the destruction of evidence has prejudiced plaintiff"); Fox v. Cohen, 84 Ill.App.3d 744, 40 Ill.Dec. 477, 406 N.E.2d 178 (1980) (cause of action for negligent spoliation of evidence is premature until plaintiff actually loses her medical malpractice action due to lost EKG as damages are otherwise "purely speculative and uncertain"); Federated Mut. v. Litchfield Prec. Comp., 456 N.W.2d 434 (Minn.1990) (resolution of a plaintiff's underlying claim is necessary to demonstrate cognizable injury for purposes of a spoliation action, should such a tort be recognized). While these same policy considerations guide this Court's decision, the unique facts of this case present a cogent reason for this Court to act affirmatively.

First and foremost, New York has adopted a strong public policy with respect to spoliation of evidence, particularly in those instances in which the evidence lost is "key." This was acknowledged in Kirkland v. N.Y. City Housing Authority, *supra*, in stating: "After all, the importance of the device allegedly causing the injury as a physical item of evidence is critical: 'the physical items themselves, in the precise condition they were in immediately after an accident, may be far more instructive and persuasive to a jury than oral or photographic descriptions' (Nally v. Volkswagen of America, 405 Mass. 191, 198, 539 N.E.2d 1017, 1021 [1989])." 236 A.D.2d at 175.⁵ Here, the missing water heater and General Accident's failure to preserve it will make it extremely difficult, if not impossible, for Koolwear to defend itself in the main action, which it based solely upon the offending water heater. It would be a terrible waste of judicial resources not to

⁴(...continued)

that other Louisiana courts had declined to recognize tort based on a General Accident duty to preserve evidence); Malone v. Foster, 956 S.W.2d 573 (Tex.App.-Dallas 1997) (holding Texas does not recognize intentional spoliation tort); Ortega v. Trevino, 938 S.W.2d 219 (Tex.App.-Corpus Christie 1997) (determining Texas should recognize spoliation tort).

⁵Compare, Longo v. Armor Elevator, Co., Inc., ___ A.D.2d ___, 720 N.Y.S.2d 443 [refusing to impose spoliation of evidence sanction where the missing items will not prevent a plaintiff from supporting her causes of action.]; Fairclough v. Hugo, 207 A.D.2d 707 [we agree with the IAS court that the plaintiffs have failed to establish that the alleged failure to preserve evidence would make it extremely difficult or impossible for the plaintiffs to establish their claim for malpractice].

permit this third-party action to proceed, rather than await what must be the ultimate resolution of the main action, which Koolwear seems destined to lose. Thus, prematurity is not a serious concern. Nor is Koolwear's claim speculative; the relief sought is indemnification. Plaintiff alleges in its complaint that it sustained damages in the amount of \$60,000.00, which is the amount sought to be recovered from defendants, including Koolwear, against whom the co-defendants have asserted cross-claims.

Moreover, as General Accident is Koolwear's insurer, presumably General Accident would be obligated to pay whatever damages might be imposed upon Koolwear by virtue of General Accident's defense of Koolwear in the main action, an issue that is not addressed by either party. The interesting scenario is that Koolwear arguably would be subject to the defensive application of the spoliation of evidence doctrine, solely because of General Accident's loss of the evidence, a loss that ostensibly is adverse to both third parties' interest. The facts of the instant case clearly support extending the DiDomenico v. C & S Aeromatik Supplies decision, which applies to an employer-employee relationship, to the insured-insurer relationship, and to the recognition of a negligent spoliation cause of action under circumstances such as those presented here. From a policy perspective, the obligation of the insurer to defend must carry with it the obligation to preserve key evidence relied upon by its insured to defend against property damage claims. The recognition of a negligent spoliation of evidence claim under such circumstances clearly "would be reasonably manageable within our legal system." Donohue v. Copiague Union Free School District, *supra*, 47 N.Y.2d at 445. The recognition of spoliation of evidence as an independent tort is the logical next step in the evolving recognition that there is a remedy for spoliation of evidence, as between parties to an action, separate and apart from sanctions under section 3126 of the CPLR. See, DiDomenico v. C & S Aeromatik Supplies, *supra* ["Separate and apart from CPLR 3126 sanctions is the evolving rule that a spoliator of key physical evidence is properly punished by the striking of its pleading."] It is fitting that a party should have a remedy against a nonparty, particularly when that nonparty is the party's insurer, for the nonparty's loss or destruction of key evidence.

Here, the allegations in the third-party complaint show not only that the loss or destruction of the defective water heater impacts upon Koolwear's ability to defend, but they also show that the loss or destruction impairs Koolwear's ability to implead other parties, such as the manufacturer or repairer of the water heater. It thus is the holding of this Court that, on the facts of this case, the complaint states a cause of action for negligent spoliation of evidence and states a claim for negligent impairment of the ability to sue a third-party, a concept that was recognized in DiDomenico v. C & S Aeromatik Supplies, *supra*. Accordingly, General Accident's motion to dismiss the third-party complaint is denied.

Motion to Amend

Koolwear cross-moves to amend its third-party complaint to add a third cause of action for breach of contract of bailment or conversion, in addition to a cause of action for intentional tort and negligence, all based upon the loss of "key" evidence. It is well settled that leave to amend or supplement pleadings "shall be freely given," unless the amendment sought is palpably improper or

insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment. Fahey v. County of Ontario, 44 N.Y.2d 934, 935; Adams v. Jamaica Hosp., 258 A.D.2d 604; East Patchogue Contr. Co. v. Magesty Sec. Corp., 181 A.D.2d 714; Nissenbaum v. Ferazzoli, 171 A.D.2d 654. See, McCaskey, Davies & Assocs. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755; CPLR 3025(b). It is equally well settled that the decision as to whether to grant leave is General Accidently left to the sound discretion of the trial court, and that, in exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom. "A proposed amendment that creates prejudice or surprise to the opposing party should not be permitted (citations omitted). In addition, the court must examine the underlying merit of the proposed amendment since to do otherwise would be a waste of judicial resources." Sidor v. Zuhoski, 257 A.D.2d 564. A proposed amendment which is devoid of merit should not be permitted. West Branch Realty Corp. v. Exchange, 260 A.D.2d 473, 474; Hall Signs v. Aries Striping, 236 A.D.2d 513; Nasuf Construction Corp. v. State of New York, 185 A.D.2d 304, 305; Brown v. Samalin & Bock, 155 A.D.2d 407.

The proposed amended complaint purports to set forth three causes of action. The first cause of action seeks indemnification based upon defendant's alleged breach of bailment or conversion. The second cause of action seeks indemnification based upon defendant's alleged breach of its alleged duty to preserve and secure evidence and the resulting conduct that intentionally impaired Koolwear's ability to defend claims asserted against it. The third cause of action, sounding in negligence, seeks indemnification based upon defendant's alleged conduct that negligently impaired Koolwear's ability to defend claims asserted against it. At issue is whether the proposed causes of action contained in the proposed amendment have merit.

a. Breach of Bailment or Conversion Cause of Action

Koolwear's proposed cause of action based upon breach of bailment or conversion is predicated upon the allegations that a plumber hired by General Accident removed the water heater for the purposes of inspection and testing; that the plumber agreed in writing to return the water heater to Koolwear, but failed to do so. Koolwear alleges that the failure to return the water heater constituted a breach of bailment or conversion.

The determination as to whether the relationship is one of bailor and bailee turns on whether there is a relinquishment of exclusive possession, control and dominion over the property. See, 9 N.Y.Jur.2d, Bailments and Chattel Leases, §§ 13, 14; Dubay v. Trans-America Insurance Co., 75 A.D.2d 312, 317. It "depends on the place, the conditions, and the nature of the transaction" (Osborn v. Cline, supra, at 437) and "'may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner.'" (Phelps v. People, 72 N.Y. 334, 358.)" Martin v. Briggs, 235 A.D.2d 192, 197. In other words, a "[b]ailment does not necessarily and always, though General Accidently, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates

the bailment, regardless of whether such possession is based on contract in the ordinary sense or not." Foulke v. New York Consolidated Railroad Co., 228 N.Y. 269, 275. A bailment thus "may be created by operation of law. It is the element of lawful possession, and the duty to account for the thing as the property of another, that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained. It makes no difference whether the thing be intrusted to a person by the owner or by another. Taking lawful possession without present intent to appropriate creates a bailment." Seaboard Sand & Gravel Corp. v. Moran Towing Corp., 154 F.2d 399, 402 [2d Cir. 1946]. The "failure to return the object bailed is prima facie evidence of gross negligence, requiring the bailee to come forward with an explanation." Roth v. Black Star Pub. Co. Inc., 239 A.D.2d 484, citing Voorhis v. Consolidated Rail Corp., 60 N.Y.2d 878. Here, a bailment was created when General Accident's agent lawfully removed the water heater from Koolwear's premises, with no intent to do anything more than perform an inspection.

General Accident, however, argues that as the plumber was an independent contractor, no cause of action can lie against it based upon the plumber's loss or destruction of the water heater. Koolwear counters that it is claiming that General Accident, not the plumber, breached its contract of bailment and was negligent by causing or allowing the water heater to be discarded, which apparently was done pursuant to the direction of another agent of General Accident. As the proposed amendment is neither palpably improper nor insufficient as a matter of law, that branch of the motion for leave to amend the complaint to add a cause of action based upon breach of bailment is granted. See, Fahey v. County of Ontario, *supra*; Adams v. Jamaica Hosp., *supra*; East Patchogue Contr. Co. v. Majesty Sec. Corp., *supra*.

b. Prima Facie Tort Cause of Action

Koolwear also seeks leave to amend its third-party complaint to add a cause of action for prima facie tort based upon intentional spoliation of evidence. As a preliminary matter, to state a cause of action for prima facie tort the complaint must satisfy the pleading requirements, the elements of which are the "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful." Christopher Lisa Matthew Policano, Inc. v. North Am. Precis Syndicate, 129 A.D.2d 488, 489, quoting Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332; Curiano v. Suozzi, 63 N.Y.2d 113, 117. With specific reference to the elements of a intentional negligent spoliation action, jurisdictions recognizing the tort of intentional spoliation of evidence require allegations that include: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful or destruction of evidence by the defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts. See, Vivian v. CBS, Inc., 251 N.J. Super. 113, 125-26. The proposed cause of action fails to meet the pleading requirements in a critical respect under both formulations.

Fatal to Koolwear's proposed cause of action is the absence of allegations of malevolence. To succeed on a claim for prima facie tort under New York law, a plaintiff must allege "disinterested malevolence," that is, that the defendant's sole motive was to harm the plaintiff. Curiano v. Suozzi,

63 N.Y.2d 113; see, Shapiro v. Central General Accident Hosp., Inc., 251 A.D.2d 317, leave to appeal denied 92 N.Y.2d 811[cause of action to recover damages for prima facie tort should be dismissed when complaint failed to allege that his conduct was motivated solely by malice]; see, also, International Shared Services, Inc. v. County of Nassau, 222 A.D.2d 407; Niego v. Braun, 212 A.D.2d 445; Precision Concepts, Inc. v. Bonsanti, 172 A.D.2d 737; WFB Telecommunications v. NYNEX Corp., supra. Here, the proposed amended complaint is lacking the requisite allegation that defendant, in losing or destroying the water heater, was “solely motivated by disinterested malevolence.” Griffin v. Tedaldi, 228 A.D.2d 554; see, Burns Jackson Miller Summit & Spitzer v. Lindner, supra, 59 N.Y.2d at 332; Molinoff v. Sassower, 99 A.D.2d 528, 529. See, Tietjen v. Hamilton-Beach/Proctor-Silex, Inc., 1998 WL 865586 [stating that requisite for intentional spoliation of evidence is that “act which must be motivated by ‘disinterested malevolence’”].

Hence, in the absence of alleged facts demonstrating that defendant’s actions were motivated solely by an intent to injure plaintiff, the complaint fails to state a cause of action for prima facie tort. Fallon v. McKeon, 230 A.D.2d 629; WFB Telecommunications, Inc. v. NYNEX Corp., 188 A.D.2d 257, 258-259, lv. denied 81 N.Y.2d 709. Here, there are no allegations even tending to show that the loss or destruction of the water heater was the result of actual malice or willful misconduct on the part of General Accident. Thus, it is patent that Koolwear cannot establish the essential element of either a prima facie tort or intentional spoliation of evidence, if it were cognizable. Indeed, the allegations of the complaint in fact negate this requisite element. In effect, Koolwear purports to add a cause of action “entitled ‘prima facie tort’ as a ‘catch-all’ under which it merely reiterated the allegations asserted under several of the previously-asserted causes of action (citations omitted).” Precision Concepts, Inc. v. Bonsanti, 172 A.D.2d 737. This it cannot do. Accordingly, so much as the cross-motion that seeks leave to amend the third party complaint to allege a prima facie tort predicated upon the intentional loss or destruction of evidence is denied.

c. Negligence cause of action

Koolwear further seeks leave to amend its third party complaint to add a cause of action sounding in negligence based upon the negligent spoliation of evidence. To establish a prima facie case of negligence, the plaintiff initially must establish the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff. See, Akins v. Glens Falls City School Dist., 53 N.Y.2d 325; Gordon v. Muchnick, 180 A.D.2d 715. As was stated in Akins, “a court always is required to undertake an initial evaluation of the evidence to determine whether the plaintiff has established the elements necessary to a cause of action in negligence, to wit: (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof. (See Prosser, Torts [4th ed.], § 30, p. 143.)”

The threshold question is whether General Accident owed a duty to preserve evidence to Koolwear, since absent a duty of care, there can be no breach and no liability. Koolwear alleges that “[o]nce obtaining the defective water heater and knowing full well that the loss had extended to the tenant below who was likely to make a claim for its damages, General Accident had a duty to

preserve and keep the water heater so that it would be available in its defense of the action by the other tenant.”⁶ Where, as here, the facts are undisputed and one inference may be drawn, the question of duty is for the court to determine as a matter of law. See, Pulka v. Edelman, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019; Donohue v. Copiague Union Free School Dist., 64 A.D.2d 29, 33, affd. 47 N.Y.2d 440 [where facts undisputed, duty held a question of law for the court].

It is well-established that no duty to preserve arises unless the party possessing the evidence has notice of its relevance. See, Danna v. New York Telephone Co., 752 F.Supp. 594, 616 n. 9 (S.D.N.Y.1990). Where a party is on notice that litigation is likely to be commenced, the obligation to preserve evidence may even arise prior to the filing of a complaint. Turner v. Hudson Transit Lines, 142 F.R.D. 68, 73 (S.D.N.Y. 1991). That such a duty to preserve exists with respect to “key” evidence was indirectly acknowledged by the Second Department in State Farm Insurance Company v. Amana Refrigeration, Inc., ___ A.D.2d ___, 698 N.Y.S.2d 300, in which the court determined that a toaster oven, which the defendants contended was an alternative cause of a fire, was not a key piece of evidence that should have been preserved. See, also, Longo v. Armor Elevator, Co., Inc., ___ A.D.2d ___, 720 N.Y.S.2d 443 [refusing to impose spoliation of evidence sanction where the missing items will not prevent a plaintiff from supporting her causes of action.]; Fairclough v. Hugo, 207 A.D.2d 707 [we agree with the IAS court that the plaintiffs have failed to establish that the alleged failure to preserve evidence would make it extremely difficult or impossible for the plaintiffs to establish their claim for malpractice]; compare, Gallo v. Bay Ridge Lincoln Mercury, Inc., 262 A.D.2d 450 [finding that plaintiff’s failure to preserve the destroyed automobile at issue was not intentional, and that the plaintiff did not obtain any unfair advantage from the failure to preserve evidence]. Certainly, General Accident had a duty to preserve all evidence related to Koolwear’s claim pertaining to its own property damage and the potential claim of other tenants for damage to their property resulting from Koolwear’s leaking water heater.

As General Accident took possession of the water heater during the course of its investigation, it is not unreasonable to hold it responsible for its destruction or loss and to subject it to third-party liability for indemnification to Koolwear, which has nothing to defend itself against plaintiff’s cause of action against it. See, Cohen Bros. Realty v. J.J. Rosenberg Elec. Contractors, Inc., 265 A.D.2d 242, 243-244 [finding plaintiffs’ investigator negligent in failing to preserve all evidence relative to the origin and causation of a fire, since he should have known that the defendant would be identified as a potential defendant for having negligently installed a 20 amp circuit printer]; compare, Allis-Chalmers Corporation Product Liability Trust, 305 N.J. Super. at 558, 702 A.2d 1336 [holding that the defendant manufacturer could not assert a third-party claim of spoliation of evidence against the insurance company as the insurance company had not affirmatively undertaken to preserve this evidence and it was not in the insurance company’s possession or control].

⁶General Accident argues that the complaint fails to allege that “KOOLWEAR attempted to retrieve the hot water heater at any time prior to FADA instituting suit or that KOOLWEAR requested General Accident or its ‘plumber’ to preserve or return the hot water heater.” This claim is of no consequence.

In sum, Koolwear has alleged facts sufficient to establish the elements necessary to a state a cause of action in negligence. The facts alleged establish that General Accident owed it a duty to preserve the water heater, that General Accident breached that duty, and that Koolwear has sustained an injury as a result. Moreover, the facts alleged also show that there was a reasonable basis for General Accident to know that litigation was probable, that the negligent loss of the water heater is disruptive of Koolwear's defense, since in the absence of the water heater, which undisputedly is the key piece of evidence, Koolwear is prevented from proving any defense to the action, as well as impleading any alleged tortfeasor with actual responsibility. In short, the allegations are sufficient to show that the missing water heater impairs Koolwear's ability to defend against plaintiff's claims. Inasmuch as the original third-party complaint is viable, the motion to amend that complaint is granted, except to the extent that leave was sought to add a cause of action for the intentional spoliation of evidence.

Conclusion

Based upon the forgoing, it is ordered that General Accident's motion to dismiss the third-party complaint is denied. Koolwear's cross-motion to amend is granted except to the extent that it seeks leave to amend the complaint to add a cause of action for intentional spoliation of evidence. Koolwear is directed to serve the amended third-party complaint within ten (10) days of the date of this order, a copy of which is to be sent to all counsel for the parties, and General Accident's answer to the third-party complaint shall be served within twenty (20) days of that service. The parties are directed to appear for the Preliminary Conference scheduled for July 17, 2001.

Dated: June 22, 2001

PPS

J.S.C.