

Goll v American Broadcasting Companies, Inc.

2003 NY Slip Op 30017(U)

June 6, 2003

Supreme Court, Queens County

Docket Number:

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

_____ x Index
 ROBERT GOLL, et al. Number 10868 1998

- against - Motion
 Date April 23, 2003

AMERICAN BROADCASTING COMPANIES, INC. Motion
 Cal. Number 8

_____ x
 AMERICAN BROADCASTING COMPANIES, INC.,
 et al. Index Number: 3501/99

- against -

WALTON HAULING & WAREHOUSE CORP.

_____ x

The following papers numbered 1 to 23 were read on this motion by the third-party defendant Walton Hauling & Warehouse Corp., pursuant to CPLR 3212, for summary judgment dismissing the third and fourth causes of action interposed in the third-party complaint; cross motion, by the plaintiffs pursuant to CPLR 3126, to strike the answer of the third-party defendant Walton Hauling & Warehouse Corp. for violating preliminary and compliance conference orders or, in the alternative, to compel the third-party defendant to respond to their discovery demands; and, cross motion, by the plaintiffs, pursuant to CPLR 3126, to strike the answer of the defendant American Broadcasting Companies, Inc. for failing to provide disclosure, and for spoliation of evidence.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Notice of Cross Motion - Affidavits - Exhibits .	5 - 8
Notice of Cross Motion - Affidavits - Exhibits .	9 - 12
Answering Affidavits - Exhibits	13 - 17
Reply Affidavits	18 - 23

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

I. The Relevant Facts

A. Complaint and Third-Party Complaint

The plaintiffs Robert Goll ("Goll") and his wife, derivatively, commenced this action on or about May 22, 1998, against the defendants American Broadcasting Companies, Inc., ABC Television, Inc. and Capital Cities/ABC, Inc. (collectively, "ABC"). They seek damages for injuries Goll sustained on May 23, 1995, while unloading an alleged defective crate from a truck in ABC's loading area. Goll alleged that the crate was negligently designed, manufactured, maintained and repaired by ABC.

At the time of his injury, Goll was employed by the third-party defendant Walton Hauling & Warehouse Corp. ("Walton"), which had contracted with ABC to provide trucking services. Specifically, Walton agreed to furnish trucking services to ABC in the form of six trucks with hydraulic tail gate lifts, as well as chauffeurs and helpers. Walton also agreed to perform all trucking of scenery, props and other items of theatrical traffic that could not be handled by the contracted-for vehicles. Although the record is not entirely clear on the issue, it appears that the accident occurred when a crate manufactured by ABC containing a couch which was to be, or had been, used as a prop, broke open while Goll was moving the crate.

In response to the complaint, ABC commenced a third-party action against Walton seeking, in four causes of action respectively, common-law indemnification, contribution, contractual indemnification, and damages for breach of an insurance procurement provision. Pursuant to a stipulation executed by all parties, the first and second causes of action interposed against Walton in the third-party complaint were discontinued, without prejudice.

B. Contract and Actions Relating To Indemnification and Insurance

The contract between ABC and Walton, which was drafted by Walton and in effect at the time of the accident provides, in pertinent part, that Walton would procure certain insurance and name ABC as an additional insured. Paragraph VII of the contract, entitled "Responsibility" provides, in pertinent part, that Walton would be responsible for certain property damage caused by the negligence of its personnel.

Paragraph VIII of the contract, entitled "General" states, in pertinent part:

"It is understood that the trucking services hereunder shall be provided by us as independent contractors and not as agent for you, and we further agree to indemnify you and hold you harmless from and against any liability, loss or damage caused by, or arising out of, any acts done by us or our employees in connection therewith, except as limited in Paragraph VII hereof. We agree to defend all actions to which such indemnity applies and to conduct the defense thereof, at our own expense by our own counsel. You shall have the right to participate in such defense at your own cost by your own counsel."

Walton procured a trucker's policy from Country-Wide Insurance Company ("Country-Wide"), which named ABC as an additional insured.

On or about September 25, 1998 and October 14, 1998, ABC forwarded Goll's complaint to Country-Wide seeking a defense and indemnification. Country-Wide responded by disclaiming on grounds of untimely notice. ABC commenced an action against Country-Wide in the Supreme Court, New York County (Index No. 124103/99), as did Walton (Index No. 601564/00), seeking a declaration that Country-Wide was obligated to provide a defense and indemnification.

By order dated December 2, 2002, the Supreme Court, New York County (Kapnick, J.) granted that branch of a motion by Country-Wide to consolidate the actions for joint trial, but denied that branch of the motion by Country-Wide which sought summary judgment dismissing the complaints. The court found that Country-Wide was obligated to assume ABC's defense, but there were issues of fact as to when Countrywide received notice of ABC's claim.

C. Discovery

On or about September 28, 1999, ABC responded to the plaintiffs' combined discovery demands, providing, inter alia, accident reports and the name of a witness. During a preliminary conference held on August 30, 2001, the parties agreed, inter alia, that the plaintiffs would serve a demand for additional documents by September 13, 2001, and the defendants would respond within 30 days of service of that demand. All parties were directed to respond to outstanding discovery requests within 45 days of the date of the preliminary conference order.

On or about September 25, 2001, the plaintiffs served a Notice for Discovery and Inspection on all parties. In addition, by letter of the same date, the plaintiffs informed ABC that they sought to examine five witnesses, and informed Walton that they sought to examine one witness.

On or about October 22, 2001, ABC responded that the plaintiffs' demand was overly broad, burdensome, and requested records which were not in ABC's possession or control. By letter dated October 26, 2001, the plaintiffs responded that their demand was reasonable and limited to records only in ABC's possession or control.

Pursuant to a compliance conference order dated December 20, 2001, ABC was directed to produce two particular witnesses on February 20, 2002 for EBTs, or provide the address of one witness or the address of his new employer, if known, within thirty (30) days. All parties were directed to respond to outstanding discovery requests within 45 days of the date of the compliance order. In addition, Walton was directed to provide one witness for an EBT or provide that witness's last known address on or before February 29, 2002.

During an examination before trial ("EBT"), an employee of ABC stated that he worked in ABC's carpentry shop and built crates to hold props. He also unloaded and loaded trucks, and ensured the scenery was properly shipped and stored. On the day of the accident, he was driving a forklift and backing up to the back of a truck, when he saw Goll fly off the truck, hit the tailgate of the truck which was about four feet lower than the back of the truck, and then hit the forklift, before hitting the concrete ground.

During the EBT of that ABC employee, xerox copies of photographs of a crate were produced by counsel for ABC who noted that he did not possess the original photographs. The ABC employee had no knowledge of the crate depicted in the xerox copies or of the xeroxed copies themselves. During his EBT, Goll stated that he had taken four photographs, apparently of the accident site, sometime in April or May, 1999. A second ABC employee stated during his EBT that he could not tell whether the xeroxed photographs depicted the crate at issue. A third ABC employee stated during his EBT that he had never seen the original photographs of the crate, and he did not know who took the photographs or when they were taken.

The plaintiffs filed a note of issue on June 7, 2002.

By letter dated August 13, 2002, ABC advised the plaintiffs and Walton that it had spoken to two of the persons whose names appeared on the accident reports and who the plaintiffs sought to depose, but those persons had no personal knowledge of the accident and simply reported the information provided to them. ABC contended that an examination of those persons was a waste of time.

On or about September 19, 2002, ABC provided the plaintiffs with an affidavit by its general manager of production services, who stated that she had reviewed all 1995 estimate sheets and trucking logs for any record pertaining to the crate at issue, she never found such a record, and ABC had no other records which could be reviewed. The general manager also averred that she had never seen original photographs of the crate, and had no personal knowledge of anyone who knew about, or took, such photographs.

In response to the cross motions at issue, ABC has also submitted an affidavit dated March 18, 2003, executed by its manager of insurance, who states that he has never seen original photographs of the crate, and does not know who made or possessed the original photographs, or where they might be located.

II. Motion and Cross Motions

Walton moves for summary judgment dismissing the third-party contractual indemnification and breach of insurance procurement causes of action, contending that it obtained the necessary coverage and is not liable to indemnify ABC for its own acts of negligence. In support, Walton notes that the complaint is predicated on ABC's ownership, operation, maintenance and control of the unsafe crate, and there are no allegations of negligence made against Walton.

The plaintiffs cross-move for an order striking Walton's answer to the third-party complaint or, in the alternative, for an order compelling Walton to respond to their discovery demands. The plaintiffs do not oppose Walton's application for summary judgment on the merits, but assert that Walton is not entitled to such relief until it responds to their discovery demands in accordance with the preliminary and compliance conference orders.

The plaintiffs also cross-move to strike ABC's answer for spoliation of evidence and for failure to provide disclosure. In support, they contend that: (1) ABC has never produced the crate or original photographs, and no witness has ever been able to identify the crate that caused the accident; (2) pursuant to an oral ruling by a Referee on July 1, 2002, ABC was directed to prepare a stipulation that it would produce for an EBT, the person

in charge of the carpentry shop or anyone with knowledge of how the crates were manufactured, and the person who took the photographs of the crate but, to date, ABC had not prepared the stipulation or produced or explained the non-production of the photographs; and, (3) ABC responded to discovery demands by stating that it could not locate any documents, and failed to produce certain witnesses.

ABC opposes the plaintiffs' motion, contending that there is no basis for any claim of spoliation or to strike its answer as: (1) its counsel never had original photographs of the crate, there is no evidence that anyone at ABC took or had the photographs and, when its counsel found the xeroxes of photographs in his file, he incorrectly assumed that they came from the plaintiffs or their counsel; (2) any prejudice stemming from the loss of the crate or photographs was created by the plaintiffs' failure to commence this action until one day before the statute of limitations expired; (3) in addition, the plaintiffs' demand for the photographs was not made until four-and-one-half years after the accident; (4) the plaintiffs inaccurately describe the Referee's July 1, 2002 oral ruling, as ABC was directed only to produce a third witness who it did produce, and it was not directed to produce original photographs or the person who took the photographs; (5) in addition, its counsel did prepare and circulate a stipulation to resolve the discovery dispute, but the plaintiffs' counsel refused to execute it and indicated that he would circulate an alternate stipulation, but failed to do so; (6) ABC submitted affidavits of the witnesses sought to be deposed by the plaintiffs, which demonstrate that the witnesses lack any knowledge about the facts and circumstances surrounding the accident; and (7) ABC has complied with all court directives.¹

ABC opposes Walton's motion, contending that General Obligations Law § 5-322.1 does not apply to moving scenery, props and other theatrical items, and it is entitled to indemnification as the injury arose out of Walton's work and Goll's acts.

The plaintiffs reply that the photographs taken by Goll depicted only the accident scene four years after the accident, whereas the xeroxes of the photographs depict the crate and were taken on the day of the accident by ABC. They urge that the crate was a key piece of evidence which ABC failed to preserve even though it knew about the accident and, as a result, ABC's answer should be stricken based upon spoliation.

1

In support, ABC submits, inter alia, the affirmation of its attorney annexing a copy of the facsimile and so-ordered stipulation sent to the plaintiffs' attorney.

III. Decision

A. Spoliation and Discovery Non-Compliance

To impose the drastic remedy of striking a pleading pursuant to CPLR 3126, there must be a clear showing that a party's failure to comply with discovery demands was willful, contumacious, or in bad faith (see, Mylonas v Town of Brookhaven, __AD2d__, 2003 NY App Div LEXIS 5698 [2d Dept. 5/19/03]). The sanction of dismissing a pleading may be imposed even absent willful or contumacious conduct, if a party has been so prejudiced that dismissal is necessary as a matter of fundamental fairness (see, Mylonas v Town of Brookhaven, supra).

Similarly, where a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading (see, Baglio v St. John's Queens Hosp., __AD2d__, 755 NYS2d 427). A pleading may be stricken even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation (see, Baglio v St. John's Queens Hosp., supra; see also, Bertram v SV Danco Corp., 300 AD2d 1108; Piazza v Great Atlantic & Pacific Tea Co., Inc., 300 AD2d 381). Where, however, the lost evidence is not central to the case or its destruction is not prejudicial, a lesser sanction of preclusion may be appropriate (see, Foncette v LA Express, 295 AD2d 471).

Here, the xeroxes of photographs, apparently taken by ABC or its agents at the time of the accident, raise an inference that the crate depicted therein is the crate at issue; however, no witness to the accident could state that the crate depicted therein was, in fact, the crate involved in the accident. It appears that the loss of the crate and original photographs was the result of negligence occasioned, at least in part, by the fact that this action was not commenced until three years after the date of the accident (see, Piazza v Great Atlantic & Pacific Tea Co., Inc., supra; see also, Boyle v City of New York, 291 AD2d 315).

As Goll and other witnesses are available to testify about how the accident occurred, it does not appear that the loss of the original photographs or crate will prevent Goll from proving his claim (see, Mylonas v Town of Brookhaven, supra; compare, Baglio v St. Johns Queens Hosp., supra). Indeed, the loss of the crate and photographs may be equally prejudicial to any defense which ABC sought to interpose (see, Foncette v LA Express, supra). Accordingly, the striking of ABC's pleading based upon spoliation

is unwarranted (see, Mylonas v Town of Brookhaven, supra; Piazza v Great Atlantic & Pacific Tea Co., Inc., supra; Holliday v "John Jones", 297 AD2d 471).

Instead, ABC will be precluded from offering any evidence concerning the condition of the crate at trial (see, Foncette v LA Express, supra).

The plaintiffs have failed to demonstrate that ABC has not complied with discovery orders or demands for discovery or witnesses, and has failed to demonstrate why the examination of certain witnesses, who have averred they have no knowledge of the circumstances of the accident or the crate and photographs, is necessary. Accordingly, the striking of ABC's answer or the imposition of a comparably harsh sanction pursuant to CPLR 3126 is unwarranted (see, Holliday v "John Jones", supra).

To the extent that Walton has not responded to the plaintiffs' discovery demands, it is directed to do so within thirty (30) days of service of a copy of this order with notice of entry upon it, or its third-party answer shall be stricken (see, CPLR 3126).

B. Indemnification/Insurance Procurement

In view of the insurance policy procured by Walton and the determination by the Supreme Court, New York County regarding that policy, Walton is correct in asserting that it is entitled to summary judgment dismissing the fourth cause of action interposed in the third-party complaint, alleging breach of the insurance procurement provision of the parties' contract.

With respect to the indemnification provision, General Obligations Law § 5-322.1 applies to agreements or promises "in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving . . . connected therewith." Contrary to Walton's claim, its trucking contract with ABC does not constitute an agreement falling within the meaning of General Obligations Law § 5-322.1 (see, Pierre v Crown Fire Protection Corp., 240 AD2d 386; Auburn Steel Co., Inc. v Westinghouse Elec. Corp., 158 AD2d 938).

As a result, no public policy is violated by an indemnification agreement which might impose upon Walton liability for ABC's ordinary negligence (see e.g., Graves v Davis, 235 NY 315, reh'g denied, 236 NY 507; see also, Colnaghi USA v Jewelers Protection Servs. Ltd., 81 NY2d 821, 823-824; McDonald v M.J. Peterson Dev. Corp., 269 AD2d 734).

Here, the indemnification provision permits indemnification of ABC for "any liability" "caused by, or arising out of" acts done by Walton or its employees in connection with the trucking services Walton provided to ABC, and Walton drafted the provision at issue. The fact that the provision does not refer to the negligence of ABC or Walton is not a bar to contractual indemnification, if the intention to indemnify ABC can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances (see, Drzewinski v Atlantic Scaffold & Ladder Co., Inc., 70 NY2d 774, 777; see also, Hogeland v Sibley, Lindsay & Curr Co., 42 NY2d 153).

Here, the agreement clearly expressed an unequivocal intention to have Walton assume the entire risk of any liability arising from the performance of trucking services, regardless of whether ABC was negligent (see, County of Nassau v Prudential Star Cleaning Contrs., Inc., 148 AD2d 410).

As a result, Walton's motion for summary judgment dismissing the third cause of action interposed in the third-party complaint is denied.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

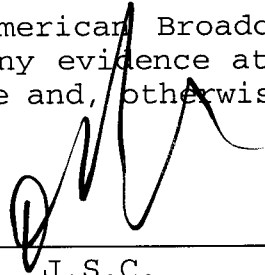
ORDERED that the motion by the third-party defendant Walton Hauling & Warehouse Corp. for summary judgment dismissing the third and fourth causes of action interposed in the third-party complaint is granted to the extent of dismissing the fourth cause of action interposed in the third-party complaint and, otherwise, the motion is denied; and it is further

ORDERED that the cross motion by the plaintiffs to strike the answer of the third-party defendant Walton Hauling & Warehouse Corp. for violating preliminary and compliance conference orders or, in the alternative, to compel that third-party defendant to respond to their discovery demands is granted to the extent that the third-party defendant is directed to respond to all outstanding discovery demands within thirty (30) days of the date of service upon it of a copy of this order with notice of entry, or the third-party answer shall be stricken; and it is further

ORDERED that the cross motion by the plaintiffs to strike the answer of the defendant American Broadcasting Companies, Inc. for failing to provide disclosure and for spoliation of evidence is

granted to the extent that the defendant American Broadcasting Companies, Inc. is precluded from offering any evidence at trial concerning the condition of the crate at issue and, otherwise, the motion is denied.

Dated: June 6, 2003



J.S.C.