

Nicole S. Fashions, Inc. v Merci Shoes, Inc.
2003 NY Slip Op 30050(U)
March 31, 2003
Supreme Court, New York County
Docket Number: 0122622/6221
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 36

NICOLE S. FASHIONS, INC., YARON ZOHAR,
TAMA HEN, CLAIRE PRENDERGAST, MOHAMMAD ZAIDI,
JUAN LARRANGA, ANNA MARIA LARRANGA, SERGIO
LARRANGA, ANDRES LOPEZ, OLGA LOPEZ, DAN
MARSHALL, KRISTEN DONOHUE, THOMAS HAMLIN,
ANNETTE JACKMAN, ROBERT HOGAN, WILLIAM MOTLEY,
MAJOR BURKE, PEARLINE BURKE, PATRICK HOFFMAN,
STEPHANIE BULLARD, ED FIGUEROA, TOMO OMORI,
MIKE ROGERS

Plaintiffs,

-against-

MERCI SHOES, INC., d/b/a MAKE 10, 1014 SIXTH
AVENUE REALTY CORP., JOEL COHEN, MAURICE MANN,
MANN MANAGEMENT, INC. and EFRAIM CAMACHO
Defendants.

And other consolidated actions.

122622-1997

INDEX NO. 122622/97

MOTION DATE _____

MOTION SEQ. NO. 006

SCANNED
APR 02 2003

The following papers, numbered 1 to 4, were read on this motion for amendment of the complaint :

	<u>PAPERS NUMBERED</u>
Notices of Motion — Affidavits — Exhibit	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits — Exhibits	4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion to amend is denied.

This action is based upon property damage resulting from a fire that occurred on May 5, 1997. The fire originated in a building located at 1014-1018 Sixth Avenue in New York County

(the “fire building”). The fire building eventually collapsed as a result of the fire. The building located immediately South of the fire building, 1010-1012 Sixth Avenue, was occupied by plaintiff M & J Trimming Co., Inc., subrogor of American Manufacturers Mutual Insurance Company (“plaintiff”) and was demolished by emergency order of the Department of Buildings of the City of New York (the “demolished building”).

Plaintiff now moves, *inter alia*, for leave to amend its complaint to assert an additional cause of action for spoliation of evidence. Specifically, plaintiff claims that defendant City of New York (“defendant”) not only prevented plaintiff from conducting any evaluation of the conditions that existed in the demolished building prior to its demolition, but also failed to record or document the conditions as they existed at that time. Defendant failed to take photographs or measurements and failed to make sketches or drawings of the conditions of the demolished building. The remainder of plaintiff’s motion has been resolved pursuant to a stipulation dated December 6, 2002.

In opposition, defendant maintains that since no record was made, there was nothing to destroy, and thus, there can be no spoliation of evidence. Defendant further maintains that even where evidence has been destroyed, New York State has not recognized a cause of action for spoliation of evidence and accordingly, plaintiff’s motion should be denied. This Court agrees.

While leave to amend pleadings should be freely given pursuant to CPLR §3025(b), that the determination to allow or disallow the amendment is committed to the court’s discretion (*Lanpoint v. Savvas Cab Corp.*, 244 AD2d 208 [1st Dept. 1997]). A search of legal authority reveals that a cause of action for spoliation of evidence is generally not recognized in New York State, with a few rare and limited exceptions. One of these exceptions is found in the only case cited by plaintiff, *Fada v Falchi Bldg Co.*, 189 Misc2d 1 (Sup Ct., Queens County 2001). In *Fada*, the court held 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" (*Id.* at 3). However, *Fada* is not relevant to the facts in this case where there was no prior relationship between the parties (*Hulett v Niagara Mohawk Power Corp.*, 2002 NY Slip Op 40402(u) [Sup Ct., Onondaga County 2002]). Destruction of property for safety reasons is also a consideration against the recognition of a cause of action for spoliation of evidence (*Id.*). Here, it is undisputed that the demolished building was destroyed pursuant to an emergency order due to public safety concerns.

The facts in the instant matter are more akin to the circumstances presented in *Carroll v City of New York*, 287 AD2d 430 (2d Dept 2001), wherein plaintiffs cross-motion to strike defendant's answer as a sanction for spoliation of evidence was denied as academic because defendant neglected to obtain evidence in the first place.

Accordingly, plaintiffs motion to leave to amend its complaint to assert a claim for spoliation of evidence is denied.

Dated: 3/31/07

MANLYN CHAFFER
 J.S.C.

 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION