

**Farm Family Cas. Ins. Co. v Big
Apple Contr. Co., Inc.**

2007 NY Slip Op 31872(U)

June 22, 2007

Supreme Court, Suffolk County

Docket Number: 0002654/2004

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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FARM FAMILY CASUALTY INSURANCE COMPANY
a/s/o DAVID and PATRICIA BOFILL, LEASING
CORPORATION,

Plaintiffs,

-against-

BIG APPLE CONTRACTING CO., INC. PETER
DULFON, JOHN PEDERSON, d/b/a SHIRLEY
PLUMBERS, SHIRLEY PLUMBERS, INC. and
SHIRLEY PLUMBERS NEW WORK, INC.,

Defendants.
-----x

CALENDAR DATE: December 6, 2006
MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

Speyer & Perlberg
115 Broad Hollow Road
Melville, NY 11747

DEFT'S/RESP ATTORNEY:

Devitt Spellman Barrett
50 Route 111
Smithtown, NY 11787

Upon the following papers numbered 1 to 33 read on this motion to dismiss _____;
Notice of Motion/Order to Show Cause and supporting papers 1-23 _____; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 24-30 _____; Replying
Affidavits and supporting papers 31-33 _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the defendants, Big Apple Contracting Co., Inc., and Peter Dulfon for dismissal of the plaintiffs' action pursuant to CPLR §3126 (3) on the grounds of spoliation of evidence is hereby granted and the plaintiffs' action as against the moving defendants, Big Apple Contracting Co., Inc., and Peter Dulfon, is dismissed.

Plaintiff, Farm Family Casualty Insurance Company (hereinafter Farm Family), instituted this subrogation action on behalf of their insureds, David and Patricia Bofill (hereinafter Bofills), seeking money damages in the amount of \$865,000.00 as a result of two separate and distinct property loss claims resulting in damage to the Bofills' residence located at 8 Tuts Lane in Jamesport, Suffolk County on Long Island, New York. Defendant, Big Apple Contracting Co., Inc. (hereinafter Big Apple), through its principal, Peter Dulfon, was the general contractor on the residence to be constructed for the Bofills pursuant to a contract. On December 7, 2002, the day before the Bofills were to move into their Jamesport residence, they discovered extensive water damage to the house caused by a leak in a shower plumbing fixture installed in the second floor guest bath. Farm Family claims that the extensive water damage to the house caused \$80,000 in damages and \$35,000 in additional living expenses incurred by the Bofills.

Farm Family also complains that the water damage, which occurred on December 7, 2002, allegedly entered the circuit breaker panel located in the basement and, on February 24, 2003, caused a massive fire to occur at the residence with damages in the amount of \$750,000. Farm Family thereafter instituted the present lawsuit seeking \$865,000 for both the water and fire damage which Farm Family was required to pay out in insurance claims from the Bofills.

The defendant Shirley Plumbers, Shirley Plumbers, Inc. and Shirley Plumbers New York, Inc. (hereinafter Shirley), settled with plaintiff upon payment of \$166,965.36 for the water damage sustained by the Bofills' residence. The fire which broke out at the Bofill house in February 2003 apparently resulted from David Bofill shutting off the water main which then disabled the sprinkler system. The fire report by John Ferro, a plumbing expert, (hereinafter Ferro), hired by Farm Family, stated that the ignition source of the fire was "heat from an electrical short within the subject premises circuit breaker panel box."

Big Apple, pursuant to CPLR §3126 (3), now moves for dismissal of Farm Family's lawsuit as against it and its principal Peter Dulfon named as an individual defendant on the grounds of spoliation of evidence. Big Apple complains that Farm Family cut out the offending plumbing fixture in the second floor guest shower and had the fixture examined and tested by its expert, John Pedneault, the laboratory director of Pedneault Associates (hereinafter Pedneault). Pedneault noted in his report, dated February 6, 2003, that the fault lay with the installer, Shirley, a subcontractor hired by Big Apple. Pedneault opined that it was not a design defect but the installer who:

"essentially overtorqued one side which resulted in the lip of the plastic housing being pulled down and away from the housing... The damage was the direct result of the installer over tightening the escutcheon plate without it being in its proper position. Viewed under a microscope, the crack in the plastic was typical of a stress break"

However, Big Apple points to a Farm Family claim log entry on January 27, 2003 at 2:07 pm in which the plaintiff, referring to the Ferro report, states:

"We have had our plumber go to inspect and he indicates that there was nothing wrong with the installation of the fixture so the plumber who installed it appears (sic) to be off the hook. **Other alternative is a defect in the fixture, which we have.**"

Big Apple, through its attorney William J. Barrett, Esq., wrote a letter to the plaintiff on April 15, 2004 making a formal demand that the plumbing fixture and the connecting water pipes to the fixture, as well as the circuit breaker panel and the circuit breakers be preserved and safeguarded so that the defendants could be permitted to conduct their own inspection and possible testing. On January 28, 2005, a pre-trial preliminary conference order directed that Farm Family allow a physical inspection of the fixtures in its possession. A second preliminary conference order, dated September 14, 2005, directed that the physical inspection of the plumbing fixture was to be conducted on or before November 15, 2005 at Farm Family's expert's offices. Thereafter, Big Apple, on September 19, 2005, followed up the preliminary conference order with a letter to make arrangements to inspect the fixture. Farm Family indicated on February 15, 2006 the fixture was with its expert Pedneault and had not been returned. Subsequently, Farm Family advised Big Apple on February 28, 2006, in a rather cryptic letter, that Pedneault "advise[s] that the plumbing fixture is no longer available for inspection.

The defendants' claim that the destruction, loss or disposal of the fixture itself is critical to its case since the Farm Family expert claims it was improper installation of the fixture which is the causative factor in both the water damage and subsequently the circuit breaker panel defect. However, its claim file entry on January 27, 2003 stated that an inspection done by Ferro, its plumber, prior to removal of the fixture indicated that the installer (Shirley) "is off the hook" and suggested a possible manufacturing defect in the fixture. Farm Family claims the severe sanction of dismissal is unwarranted because the defendants can rely on the report and photos of Pedneault showing the defect. However Big Apple argues in its reply, that no mention is made of when the stress split in the fitting shown in the pictures occurred, whether it was during testing at the lab, on removal of the fixture from the basement or whether it was present at the time of its removal. All these points necessarily conflict with the report of Ferro, the Farm Family plumber, who viewed the fixture at the house and claimed installation of the fixture was proper. Big Apple further argues that the loss of the fixture has deprived it of an opportunity to raise an issue of a design defect because the fixture is unidentified in either the photos or the Pedneault report and therefore the manufacturer and distributor of the fixture remains a mystery and is immune from a lawsuit or further testing on a similar design.

For the following reasons, the defendants Big Apple and Peter Dulfon's motion for dismissal of Farm Family's subrogation action as against them pursuant to CPLR §3126 (3) for spoliation of the key and critical evidence in this case is granted and the plaintiff's pleading is struck and the action is dismissed as against the moving defendants.

It is well settled law with regard to missing or lost evidence that:

"Spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence in an accident before the adversary has an opportunity to inspect them." ***Kirkland v. New York City Housing Authority***, 236 AD2d 170, 173, 666 NYS2d 609, 611 (1st Dept. 1997).

Thus in ***Didomenico v. C & S Aeromatik Supplies***, 252 AD2d 41, 682 NYS2d 452 (2nd Dept. 1998) the Court held:

"Separate and apart from the CPLR 3126 sanctions is the evolving rule that a spoiler of key physical evidence is properly punished by the striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than wilfulness..."

And, in ***Cutroneo v. Dryer***, 12 AD3d 811, 784 NYS2d 247 (3rd Dept. 2004), the Court held:

“We have recently held that the sanction of dismissal is ‘appropriate for the negligent disposal of evidence deemed crucial to the underlying action when the adversary had not been given an opportunity for inspection’ “ [citation omitted] “This is especially true where that which is lost is ‘the very instrumentality giving rise to plaintiff’s injuries’ “

Thus, here in the case at bar, where Farm Family was put on notice by letter from Big Apple’s counsel directing the preservation of the plumbing fixture, and was the subject of not one but two preliminary discovery orders of the Court directing the examination of the plumbing fixture at the center of this dispute, “dismissal is required as a matter of elementary fairness.” ***Cutroneo v. Dryer***, supra, 813. The Court, being mindful of the reluctance to dismiss cases as a sanction for spoliation [see, ***Lawson v. Aspen Ford, Inc.***, 15 AD2d 628, 791 NYS2d 119 (2nd Dept. 2005)], reviewed the nature of the evidence denied to the defendants on the issue of whether or not the plaintiff “reaps an unfair advantage in the litigation” and has concurred that this has in fact occurred.

The defendants are confronted with the allegation that the crucial plumbing fixture lost by Farm Family is claimed to have been improperly installed and “over torqued” by Shirley (the plumber hired by Big Apple), causing a leak and water damage to the house and two months later causing a circuit breaker malfunction which destroyed the house in a massive fire. Farm Family (notwithstanding the report of its plumbing expert Ferro who went to the house, saw the fixture and claimed the installation was proper and opined a “possible manufacturing defect”) then subsequently removed the fixture from the house and sent it to Pedneault who recited a contrary opinion. Thereafter, a report was made by Pedneault that the installation was defective and, inexplicably and without explanation, the report stated that the fixture was “unavailable for inspection”. The Court finds that the defendants have been seriously prejudiced by the loss of this vital piece of evidence. The Court, on reviewing available sanctions, including the striking and preclusion of the Pedneault report, or precluding testimony on the cause of the water damage or even preclusion of the whole “plumbing fixture consisting of two copper pipes, two male threaded ends, solder, a plastic missing chamber and a metal escutcheon plate”, finds such remedies inconclusive because the defendants have been prejudiced by their inability to test Ferro’s conclusions that the installation was proper, and they must rely on sheer speculation and surmise for what caused the defective fitting and/or water damage involved in this case.

Compounding the error is the fact that neither Farm Family nor the Pedneault report identify the fixture by make, model or manufacturer so that Big Apple can conduct and test its examination and conclusions on a similar fixture and/or initiate legal proceedings against the unidentified manufacturer and distributor of the fixture. The photographs submitted by Farm Family show a cracked seam in the plastic housing of the plumbing fixture, but leave unexplained if the cracked plastic housing shown in the photographs is a result of the testing by Pedneault and the manner in which the seam was cracked or is the cracked plastic housing as

provided by Ferro the fixture as it was received. Finally, as the defendants point out, if the plastic cracked housing was broken, did the break occur on its removal from the house, especially as the Ferro report stated the installation was correct and Shirley “was off the hook.”

Farm Family’s offer to present John Pedneault for a deposition to discuss his testing methods and to answer questions on the details about his inspection and findings with regard to the fixture in question is of little consequence since Pedneault will rely on his report for his conclusions; and for Farm Family to suggest that “whether or not the plumbing fixture in this matter was in fact over-tightened can be ascertained from the photographs” ignores the conclusions of Ferro, the plaintiffs’ plumbing inspector. Unfortunately, over-tightening of a fixture cannot be ascertained by the photographs presented because the defendants have been denied the empirical evidence upon which all the conclusions in the Pedneault report are based. Further, the Pedneault report in the first paragraph states that the fixture “apparently leaked upon installation from an unseen point.”

The Court in *De Los Santos v. Polanco*, 21 AD3d 397, 799 NYS2d 776 (2nd Dept. 2005) noted that:

“The Supreme court has broad discretion in determining the appropriate sanction for spoliation of evidence (see *Allstate Ins. Co. v. Kearns*, 309 AD2d 776, 765 NYS2d 806). Because striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness (see *Favish v. Tepler*, 294 AD2d 396, 741 NYS2d 910). Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading “ [citations omitted]... “A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense” [citations omitted.]

Under this standard set forth above, Farm Family is charged negligently, not wilfully, with losing the critical, central and crucial piece of evidence from which all the liability of the defendants flows, *i.e.* the plumbing fixture alleged to have been improperly installed resulting in the water damage to the house and the subsequent circuit breaker damage and resultant fire which destroyed the house. To suggest that the defendants are not severely prejudiced or that they could somehow continue to defend themselves without this “key piece of evidence” is not warranted in light of the allegations in the complaint and the Pedneault report. Also, the fixture is

left unidentified in every report, test and log entry of the plaintiff. Thus the unidentified fixture is incapable of being re-produced so as to provide the defendants with a means to test the conclusions of Farm Family's expert that the fixture was the proximate cause of the water leak and that there were not a number of other possible causes for a broken water pipe. See, Simmons v. Pierce, 39 AD3d 1252, 833 NYS2d 800 (4th Dept. 2007).


Under the facts and circumstances of this case, the extreme sanction of striking the plaintiff's pleadings and dismissing the action as against the defendants is warranted for the spoliation and loss of the critical and key piece of evidence, i.e. the plumbing fixture, upon which this whole case rests against the defendants. See, The Standard Fire Insurance Company v. Federal Pacific Electric Company, 14 AD3d 213, 786 NYS2d 41 (1st Dept. 2004). The fact that the plumbing fixture was the subject of a letter from defense counsel two years prior to its loss (or "unavailability" as claimed by Farm Family) seeking preservation of the fixture and was the subject of two discovery orders of this Court, all without any acknowledgment of its "unavailability" by Farm Family, merely compounds the failure to preserve the fixture or advise defendants' counsel and the Court earlier of its "unavailability."

Accordingly, the defendants' motion for dismissal of the plaintiff's action pursuant to CPLR §3126 (3) on the grounds of spoliation of evidence is hereby granted and the plaintiffs' pleadings are stricken and the action as against the moving defendants, Big Apple Contracting Co., Inc. and Peter Dulfon is dismissed.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: June 22, 2007



J.S.C.