

Utica Mut. Ins. Co. v Berkoski Oil Co.
2007 NY Slip Op 31882(U)
June 22, 2007
Supreme Court, Suffolk County
Docket Number: 0028953/2004
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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UTICA MUTUAL INSURANCE COMPANY a/s/o TREZ
BAYER and WALTER THOMAS,

Plaintiff,

-against-

BERKOSKI OIL COMPANY and SECURITY
COMMUNICATIONS AUDIO NETWORK
CORPORATION a/k/a S.C.A.N. SECURITY,

Defendants.
-----x

CALENDAR DATE: December 20, 2006
MNEMONIC: MG; MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

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New York, NY 10006

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Valhalla, NY 10505

Upon the following papers numbered 1 to 46 read on these motions to dismiss _____;
Notice of Motion/Order to Show Cause and supporting papers 1-16; 17-26 _____; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 26-34 _____; Replying
Affidavits and supporting papers 35-41; 42-46 _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that these motions by the defendants, Berkoski Oil Company and Security Communications Audio Network Corporation a/k/a SCAN Security, for dismissal of the plaintiff's action pursuant to CPLR §3126 (3) on the grounds of spoliation of evidence are granted and the plaintiff's action as against the moving defendants, Berkoski Oil Company (hereinafter Berkoski) and Security Communications Audio Network Corporation a/k/a SCAN Security (hereinafter SCAN) is dismissed.

Plaintiff Utica Mutual Insurance Company, (hereinafter Utica) instituted this subrogation action on behalf of its insureds, Trez Bayer and Walter Thomas (hereinafter Bayer) seeking money damages in the amount of \$702,054.00 as a result of a property loss claim resulting from water damage to the Bayer residence located at 25 Casey Lane in Bridgehampton, Suffolk County on Long Island, New York. The defendant Berkoski provided oil under a service contract which contemplated automatic deliveries to the Casey Lane residence and the defendant SCAN provided a low temperature alarm/sensor on the premises with a contract to monitor alarm services provided to the house. On or about March 15, 2003 Walter Thomas came to the house to discover extensive water damage to it. It is alleged by Utica that Berkoski allowed oil to run out of the heater tank causing the pipes to freeze and then burst causing water damage throughout the house and that SCAN failed to properly install or monitor the low temperature alarm sensor. The plaintiffs claim that the extensive water damage to the

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

“Spoilation 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 Utica was put on notice by letter from defendants’ counsel directing the preservation of the plumbing pipes for review, inspection and possible testing, and is the subject of a preliminary discovery order of the Court directing the examination of the plumbing 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 spoilation [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 finds that it does.

The defendants are confronted with the allegation by Utica that the pipes were frozen and burst because of a double failure in that there was no heat because of Berkowski’s failure to deliver oil or service the oil burner and SCAN’s temperature alarm system failed to work. However, the crucial plumbing was within the custody and control of Utica and was lost by it.

Utica fails to support its argument with any evidence and in fact, the conclusions

drawn by Utica are specifically discounted because witnesses claim the heat was on and the homeowner turned the oil burner off. The Court, on reviewing available sanctions, including the striking and preclusion of testimony on the plumbing pipe(s) or the cause of the water damage, finds such a remedy inconclusive because the defendants have been severely prejudiced by their inability to test the conclusions or contentions of Utica concerning frozen pipes, and they must rely on sheer speculation and surmise for what caused the water damage to the Bayer residence. The failure to preserve the critical piece of evidence, i.e., a burst pipe(s) for observation, inspection and/or testing leads to speculation on the causes underlying the water damage to the house. While the plaintiff Utica, in its affirmation in opposition (para. 20), states "Plaintiff has evidence that defendant Berkoski failed to deliver fuel oil in accordance with its contractual duties to the plaintiff's premises", it set forth no evidentiary material to support this statement.

The defendants have been denied the empirical evidence upon which all of Utica's conclusions rest. The evidence presented establishes an oil delivery of 240 gallons by Berkoski on January 23, 2003 with the next scheduled delivery of oil of only 160 gallons occurring on March 20, 2003, five days after the loss, clearly belying a claim of a dry tank or the running out of oil. This coupled with the statements by the homeowner in the property loss report that the heat was on and the report of the responding security officer Donald Bambrick that the homeowner (Walter Thomas) indicated the heat was on and that he shut the boiler switch off when he arrived all leads to a conclusion, not that a frozen pipe burst for lack of heat, but that there was a failure somewhere in the plumbing system causing the extensive damage.

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.)

house caused \$702,054.00 in damages (plus a \$1000.00 deductible by Bayer) and this lawsuit was thereafter instituted.

The Utica reports provided in the moving papers show extensive water damage, a flooded basement with ceilings having collapsed and a statement in the property loss report that the "heat was running when they got there" and a written statement and report of the incident by a SCAN Security Officer, Donald A. Bambrick, that "I then asked the homeowner if the heat was on upon his arrival and he stated it was and that he had to shut the boiler switch off when he arrived." Utica, on the contrary, alleges the heat was off because Berkoski failed to provide oil, the temperature alarm system failed and the pipes froze and then burst causing the water damage to the house. However, Utica failed to preserve the alleged burst pipes and the defendants contend they are not at fault for the water damage.

The defendants now move for dismissal of Utica's lawsuit against them pursuant to CPLR §3126 (3) on the grounds of spoliation of evidence. The defendants complain that Utica removed the offending plumbing and now it claims that the pipes burst due to loss of heat **AND** failure of the temperature alarm system to work, yet Utica failed to preserve any of the burst pipe(s) for inspection or testing by the defendants. The defendants note that, on May 4, 2005, they served a notice of discovery and inspection demanding Utica produce the pipe(s) that allegedly failed and then followed this demand with a letter for inspection and testing, dated January 20, 2006, and another letter, seeking the same relief, on April 27, 2006. On May 17, 2006, a supplementary preliminary conference and Court order directed Utica to advise in writing within ten (10) days the location of the pipe(s) requested and Utica has failed to respond. Utica now appears to take the position in its motion papers that the pipe(s) were not preserved

The defendants argue that the destruction, loss or disposal of any of the burst pipe(s) is critical to their case since Utica contends that it was a burst pipe(s) from freezing in a house with no heat which caused the water damage to the residence. The defendants, in opposition, state that Utica's contention is unsupported by the homeowners or Donald Bambrick, SCAN's security official, who appeared at the house and indicated that the heat was on. The defendants also contend it's a stretch to argue that the boiler didn't work because there was no oil and that the heating alarm system didn't work. The defendants argue that the plaintiffs' assertion, that it was the failure of the two systems, excludes other possible explanations such as a faucet could have been left on or a pipe or fixture could have failed. Berkoski and SCAN state without the pipe(s), Utica, Berkoski, SCAN and ultimately the jury would have to speculate on the cause of the water damage because without the pipe(s) to test and examine, the cause will always remain unknown.

For the following reasons, the defendants' motion to dismissal the plaintiffs' 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.

Under this standard set forth above, Utica is clearly charged with the negligent, not wilful, loss of the critical, central and crucial piece of evidence from which all liability of the defendants flows, *i.e.* the plumbing pipe(s) alleged to have burst as a result of a loss of heat and the subsequent water damage to the house. To suggest, that the defendants are not severely prejudiced or that they could continue somehow to defend themselves without this "key piece of evidence" is inaccurate in light of the allegations contained in the complaint.

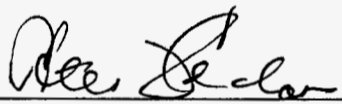
Under the facts and circumstances of this case, the extreme sanction of striking the plaintiff's pleadings and dismissing the action is warranted for the spoliation and loss of the critical and key piece of evidence, *i.e.* the plumbing pipes, upon which this whole case rests. See, ***The Standard Fire Insurance Company v. Federal Pacific Electric Company***, 14 AD3d 213, 786 NYS2d 41 (1st Dept. 2004). The Court notes that the plumbing fixture was the subject of two letters from defendants' counsel and the subject of a discovery order of this Court, all without any explanation or acknowledgment until now of its "unavailability" or "loss" by Utica. This situation compounds the failure to preserve the evidence or advise the Court and counsel earlier of its "unavailability" or "loss".

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 plaintiff's pleadings are stricken and the action against the moving defendants, Berkowski Oil Company and Security Communications Audio Network Corporation a/k/a SCAN Security is dismissed.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: June 22, 2007



J.S.C.