State of New York v Shaw Contr. Flooring Servs., Inc.
2008 NY Slip Op 31168(U)
April 22, 2008
Supreme Court, Albany County
Docket Number: 0038752/0061
Judge: Joseph C. Teresi
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[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE STATE OF NEW YORK,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 3875-06
RJI NO. 01-06-086544

SHAW CONTRACTING FLOORING SERVICES, INC.
and ROCHESTER LINOLEUM AND CARPET CENTER, INC.,

Defendants.

Supreme Court, Albany County, All Purpose Term, February 1, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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GRETA K. KOLCON, ESQ.
Attorneys for Defendant Rochester Linoleum and Carpet Center, Inc.
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TERESI, J.:

[* 2]

Defendants filed a motion for summary judgment pursuant to CPLR 3212 and a motion to dismiss pursuant to CPLR 3126. Plaintiff opposes the motions and filed a motion for summary judgment.

On July 8, 2003, Alfred College and Defendant Shaw Contract Flooring Services, Inc. ("Shaw") entered into a contract to have Shaw install new vinyl flooring on all three floors of the three story Robin Chandlin dormitory ("dormitory"). This contract was New York State Office of General Services State Contract No. PS58847. On June 27, 2003, Shaw sold business assets from its office at 595 Blossom Road in Rochester to Winton Flooring Resource, Inc. ("Winton"). An affiliate of Winton, Defendant Rochester Linoleum and Carpet Center, Inc., d/b/a Rochester Flooring Resource ("Rochester Flooring"), did business out of the 595 Blossom Road office. One of the assets sold to Rochester Flooring was State Contract No. PS58847. On July 14, Alfred State College received an announcement explaining that Rochester Flooring obtained Shaw in an acquisition and that all correspondence should be sent to Rochester Flooring at 360 Jefferson Road in Rochester. On February 24, 2004, representatives from Alfred College signed a Request for Purchase Order consistent with discussions between Scott Beale of Rochester Flooring and Al Lewis of Alfred College regarding floor preparation work. On March 3, 2004, Marshelle Gillette of Alfred College issued Purchase Order No. 030703 to Rochester Flooring for floor preparation at the dormitory no to exceed $3,900. This purchase order was issued pursuant to State Contract No.PC58125, which was held by Collins & Aikman, for which Rochester Flooring was a dealer.

Plaintiff contends that Shaw knew there was asbestos in the old vinyl flooring of the

dormitory, while Shaw denies that any information regarding asbestos was relayed to them before preparation work on the floor began. Rochester Flooring also denies knowledge of asbestos in the old vinyl flooring before preparation work began. On April 28, 2004, Rochester Flooring began work to prepare for installation of new vinyl flooring. Preparation began on the north end of the second floor of the dormitory. After at least five to ten rooms were prepped, the workers were told to stop work because a carpenter believed dust was contaminating the building.

Alfred State College contracted with Stohl Environmental, LLC to perform air monitoring tests to determine whether an asbestos contamination occurred. Air sample tests, dated May 5, 2004, revealed asbestos concentrations less than the OSHA Permissible Exposure Limit and less than New York State abatement clearance standards, and bulk dust sample tests came back positive for asbestos, but did not determine the asbestos concentration. Plaintiff did not save any samples and alleges that the samples sent to Stohl Environmental for testing were destroyed as a normal business practice. Nelson Drake, the Director or the Physical Plant at Alfred State College, sent a letter dated May 12, 2004 to Rochester Flooring to inform them that Plaintiff would hold them responsible for the costs associated with the asbestos clean up at the dormitory. Rochester Flooring immediately contacted Nelson Drake requesting access to the dormitory to obtain samples to conduct their own tests. This request was denied. The matter was then turned over to an attorney for SUNY, who wrote to Rochester Linoleum's attorneys on May 25, 2004 reiterating that the State is holding Rochester Linoleum responsible for the cost of the clean up. In 2006, Plaintiff filed a suit to recover costs for the clean up. Plaintiff and Defendants have filed motions for summary judgment, and Defendants have filed motions for spoliation sanctions, including dismissal of the Plaintiff's complaint.

Defendants raise questions here of whether the detected asbestos necessitated immediate clean up, and whether the asbestos was the result of the floor preparation work done on April 28, 2004. Plaintiff asserts that the immediate clean up was reasonable considering the enactment two years later of 12 NYCRR 56-1.5, which now requires immediate clean up for an incidental disturbance of materials containing asbestos. In November 2003, after renovations to the dormitory disturbed pipe insulation, air samples from the dormitory tested positive for asbestos. Plaintiff maintains that clean up was unnecessary because the low asbestos concentrations were permissible by OSHA and the New York State abatement clearance standards. Defendants argue that if quantitative testing of the air samples were needed in 2003 to determine whether clean up was necessary, Plaintiff should have performed the same quantitative tests in this instance, which they did not. Plaintiff maintains here that quantitative tests were unnecessary because clean up had to be performed regardless of the amount of asbestos detected.

"The integrity of our judicial system depends on the ability of litigants to locate and identify relevant proof without fear that the truth-seeking process will be thwarted by spoliation of evidence." Ortega v. City of New York, 9 N.Y.3d 69 (2007). Sanctions for spoliation are appropriate where one party, intentionally or negligently, destroys critical evidence involved in an accident before the adversary has inspected them. Kirkland v. New York City Housing Authority, 236 A.D.2d 170, 173 (1st Dep't 1997). The trial court has the discretion to impose sanctions for the spoliation of evidence by striking a party's pleading or instructing the jury that it may draw negative inferences from the missing evidence. Lawrence Ins. Group, Inc. V. KPMG Peat Marwick L.L.P., 5 A.D.3d 918, 920 (3d Dep't 2004).

Where a party destroys key evidence that deprives the opponent from confronting the

claim with incisive evidence, the spoliator may be punished by striking the pleading. De Los Santos v. Polanco, 21 A.D.3d 397, 398 (2d Dep't 2005). Striking a pleading is a drastic sanction, so the resulting prejudice must be considered to determine whether such relief is necessary for fairness. Id.

A party is severely prejudiced when the opposing party destroys evidence that would clearly show fault. Abulhasan v. Uniroyal-Goodrich Tire Co., 14 A.D.3d 900, 903 (3d Dep't 2005). Rochester Flooring expert, Charles Blake, stated that laboratory tests could have been performed to determine whether the asbestos came from the floor tiles, pipe insulation, or any other asbestos-containing material in the dormitory. Plaintiff's expert, Roger Morse, agreed that more complex tests could have been performed, but were not performed because of their cost. Dismissal is appropriate where the evidence, had it not been destroyed, almost assuredly would have been able to determine fault. Id.

Plaintiff does not deny that the evidence has been destroyed but argues that they should not be sanctioned because they were not responsible for its destruction, but rather Stohl destroyed the air samples pursuant to normal business practices once the tests were completed. Where evidence is destroyed in the course of normal business practices, sanctions are appropriate where the plaintiff destroys evidence with knowledge of pending litigation pertaining to that evidence. See Gallo v. Ricci, 28 A.D.3d 1110 (4th Dep't 2006). Even absent pending litigation, sanctions may be appropriate where the plaintiff destroys evidence prior to commencing an action. Conderman v. Rochester Gas & Elec Corp., 262 A.D.2d 1068, 1070 (4th Dep't 1999). Where the plaintiff is the only party aware of possible litigation arising from evidence and also has that evidence inspected, it is the plaintiff's responsibility to preserve the evidence for the opposing

side. Thornhill v. A.B. Volvo, 304 A.D.2d 651, 652 (2d Dep't 2003). Here, Plaintiff denied Defendants access to the dormitory to collect their own samples for testing, and Plaintiff did not take any steps to preserve samples before commencing their action.

Dismissal of all claims relating to the destroyed evidence has been affirmed where the evidence was not available for testing by defendant experts and was the only means to determine the cause of the incident in question. See generally Cutroneo v. Dryer, 12 A.D.3d 811 (3d Dep't 2004). Plaintiff's and Defendants' experts concede that further testing could have been performed. Although costly, this further testing could have determined the source of the asbestos, which would have determined whether sanding the floor tiles created the asbestos contamination. Without the samples, Defendants were not able to conduct their own tests that could have determined the source and concentration of the asbestos. Plaintiff's test results are indicative only of the existence of asbestos in the settled dust in the dormitory and are not conclusive as to the source or concentration of the asbestos.

Dismissal of the complaint is appropriate for the negligent disposal of evidence deemed critical to the underlying action where the adversary had not been given an opportunity for inspection. Puccia v. Farley, 261 A.D.2d 83, 85 (3d Dep't 1999). It is abuse of the court's discretion not to dismiss a complaint where the plaintiff's failure to preserve key evidence prevents the defendant from being able to conclusively demonstrate whether or not it was liable. Abulhasan, 14 A.D.3d at 903. Through Plaintiff's spoliation of the evidence and Plaintiff's refusal to allow Defendants to conduct their own tests on that evidence, Defendants have been denied the ability to defend the claims made against them. Therefore, Plaintiff's and Defendants' motions for summary judgment are denied and the Defendants' motion to dismiss the Plaintiff's

complaint as a spoliation sanction is granted.

All papers, including this Decision and Order are being returned to the attorneys for Defendant Shaw. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: April 22, 2008
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated November 16, 2007, with Attached Exhibits
A - S.
2. Affidavit of Charles Blake, dated November 19, 2007.
3. Affidavit of David Pelusio, dated November 20, 2007.
4. Notice of Motion for Summary Judgment and to Dismiss, dated November 20, 2007.
5. Affirmation of Robert S. Attardo, dated November 20, 2007, with Attached Exhibits A - K.
6. Affirmation in Opposition to Shaw's Motion for Summary Judgment, dated December 6, 2007, with Attached Exhibits A - F.
7. Affirmation in Opposition of Rochester's Motion for Summary Judgment, dated December 6, 2007, with Attached Exhibits A - J.
8. Affirmation of Robert S. Attardo, dated December 7, 2007, with Attached Exhibits A - H.
9. Affidavit of Richard K. Rote, dated December 13, 2007.
10. Reply Affirmation of Andrew M. Burns, dated December 13, 2007, with Attached Exhibits
T & U.
11. Reply Affirmation of Robert S. Attardo, dated December 13, 2007, with Attached Exhibits
A - E.

12. Affirmation of Charles Blake, dated December 13, 2007, with Attached Exhibits A & B.