S

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

---x

EZRA DORI and IRIS E. DORI,

Plaintiff(s),

Index No. 7719/08

Motion Submitted: 11/22/10
Motion Sequence: 004

-against-

RABCO ENGINEERING, P.C. and ROBERT BENNETT,

Defendant(s).

---x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an Order precluding plaintiffs from introducing evidence at trial in connection with their claim for damages, and dismissing the complaint as against defendants on the ground that plaintiffs engaged in spoliation of critical evidence in this matter. Plaintiffs oppose the requested relief.

In this action sounding in negligence and professional malpractice, plaintiffs seek to recover damages they allegedly suffered as a result of the defendants' negligent inspection of their residence located at 212 Woodside Road in Hewlett Bay Park. Defendants conducted the home inspection on May 6, 2005. In conjunction with defendants' inspection of the premises, defendant Bennett took six (6) photographs, and prepared a four-page typewritten report, which has been submitted to the Court.

Plaintiffs state that they hired the defendants to inspect that property, in contemplation of purchasing it, and that they eventually purchased the property relying on the defendants' report and advice. Plaintiffs specifically claim, among other things, that the defendants failed to adequately advise them of the extent of the severe mold condition beneath their siding and roof, and the improper application of Dryvit siding to the house. Plaintiffs seek to recover the monies expended "in the past and the future" to remedy the conditions.

This action was commenced on April 28, 2008, just before the statute of limitations expired. Defendants interposed an answer on August 14, 2008. Defendants served a Demand for Preservation on or about August 19, 2008, demanding that plaintiffs refrain from spoliation of the evidence, and that they preserve the damaged property as it existed on the alleged accrual dates. Defendants also served a Demand for Site Inspection on August 19, 2008, demanding that they be permitted to inspect, measure, survey, sample, test and/or photograph the damaged areas.

Prior to commencing this action, plaintiffs contracted with a company to repair the alleged damage that they discovered after they purchased the house on the December 5, 2005 closing date. Apparently, the contractor repaired the house by removing any and all rotted wood, replacing the roof, and replacing the Dryvit siding with vinyl siding. The repairs to the house were made during the period of time ranging from approximately April to August 2006, some two years prior to the commencement of this suit.

Plaintiffs allege that they attempted to contact defendants once by telephone in early 2006, after plaintiffs were notified that their homeowner's insurance had been cancelled because of the fact that Dryvit siding was affixed to their house. According to plaintiff Ezra Dori, defendants' office advised Mr. Dori that defendant Bennett was "in Germany." Plaintiffs never received a return call from defendants, nor did plaintiffs make any further attempts to contact defendants, either by telephone, or in writing. Shortly after the one unsuccessful attempt to contact defendants, plaintiffs had their home repaired, as set forth above.

Further according to plaintiffs, no pictures of the alleged damage were taken by them, or by their contractor, as repairs were being made to the premises. Plaintiff has produced handwritten proposals and receipts from the contractor outlining the work that was done to the premises, which total at least $56,000.

"When 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." ***Utica Mutual Insurance***

Company v. Berkoski Oil Company, 58 A.D.3d 717, 872 N.Y.S.2d 166 (2d Dept., 2009), quoting ***Denoyelles v. Gallagher***, 40 A.D.3d 1027, 834 N.Y.S.2d 868 (2d Dept., 2007); ***Baglio v. St. John's Queens Hosp.,*** 303 A.D.2d 341, 755 N.Y.S.2d 427 (2d Dept., 2003); ***Madison Ave. Caviarteria v. Hartford Steam Boiler Inspection & Ins. Co.***, 2 A.D.3d 793, 796, 770 N.Y.S.2d 724 [2d Dept., 2003]).

"The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to defend [the] action'" (***Utica Mutual Insurance Company v. Berkoski Oil Company, supra*** at 718, quoting ***Lawson v. Aspen Ford, Inc.***, 15 A.D.3d 628, 629, 791 N.Y.S.2d 119 (2d Dept., 2005), and citing ***Kirschen v. Marino***, 16 A.D.3d 555, 556, 792 N.Y.S.2d 171 [2d Dept., 2005]). "The Court 'may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation'" (***Kovit v. CVS***, 14 Misc.3d 1210(A), 2006 WL 3833653 (Supreme Court, Nassau County 2006), quoting ***Iannucci v. Rose***, 8 A.D.3d 437, 778 N.Y.S.2d 525 (2d Dept., 2004), quoting ***DiDomenico v. C & S Aeromatik Supplies***, 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dept., 1998), and citing ***Favish v. Tepler***, 294 A.D.2d 396, 741 N.Y.S.2d 910 (2d Dept., 2002) and ***Baglio v. St. John's Queens Hosp.***, 303 A.D.2d 341, 755 N.Y.S.2d 427 [2d Dept., 2003]).

"However, 'striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct' and, thus, the courts must 'consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" (***Utica Mutual Insurance Company v. Berkoski Oil Company, supra*** at 718, quoting ***Iannucci v. Rose, supra***, at p. 438, and citing ***Favish v. Tepler, supra***, at p. 397). "When the moving party is still able to establish or defend a case, a less severe sanction is appropriate" (***Utica Mutual Insurance Company v. Berkoski Oil Company, supra*** at 718, quoting ***De Los Santos v. Polanco***, 21 A.D.3d 397, 398, 799 N.Y.S.2d 776 (2d Dept., 2005); ***Fossing v. Townsend Manor Inn, Inc.***, 72 A.D.3d 884, 900 N.Y.S.2d 101 (2d Dept., 2010); ***Oppenheim v. Mojo-Stumer Associates Architects, P.C.***, 69 A.D.3d 407, 892 N.Y.S.2d 91 (1st Dept., 2010); ***Iannucci v. Rose, supra***, at p. 438; ***Favish v. Tepler, supra***, at p. 397).

In this case, there has been no evidence presented establishing that plaintiffs' conduct in repairing their home, and thereby destroying potential evidence, was willful or contumacious. By the same token, the Court does not find that defendants "ignored" a request, or "refused" to return to plaintiffs' home after plaintiffs' insurance was canceled in 2006. Plaintiffs, who had a prior existing business relationship with defendants,[1]

---

[1]Defendants conducted home inspections for plaintiffs in 2000 and 2004.

acknowledge that they made but a single attempt to contact defendant Bennett, who was out of the country. Plaintiffs have failed to submit any evidence that they called defendants more than once, or that they put their concerns in writing, given the magnitude of this matter.

Accordingly, the question to be resolved is whether the defendants have been deprived of establishing their defense in this case due to the remedial measures taken by plaintiffs prior to the filing of this action (*see* ***Scordo v. Costco Wholesale Corporation***, 77 A.D.3d 725, 910 N.Y.S.2d 440 (2d Dept., 2010); ***Utica Mutual Insurance Company v. Berkoski Oil Company, supra***; ***Marro v. St. Vincent's Hospital***, 294 A.D.2d 341, 742 N.Y.S.2d 327 [2d Dept., 2002]).

Plaintiffs allege in their complaint, bill of particulars, and supplemental bill of particulars that defendants failed to adequately advise plaintiffs of the following items:

> 1) the extent of the severe mold condition of and beneath the exterior siding and roof; 2) the improper application of Dryvit siding; 3) that the exterior siding of the premises lacked a vapor barrier; 4) that the valleys on the roof were leaking and lacked flashing; 5) that the premises lacked step flashing against the exterior walls; 6) that the premises suffered from water intrusion; 7) that the roof and exterior sheathing was rotted; and 8) that the presence of EIFS (Dryvit) siding on the premises would render the premises uninsurable.

Defendants' typewritten report dated May 6, 2005 notes that the exterior of the premises were, at that time, covered with Dryvit applied coating. The inspection report also states that the roof "consisted of a newer single course of Architectural asphalt shingle tile in generally good condition" (p. 1).[2] Defendants also recommended that "some general maintenance including ***flashing*** and sealing at the vents, chimney, and other roof penetrations should allow for a minimum 15 year additional life" (emphasis added) (pp. 1-2). Additionally, defendants noted the presence of mold along the north face of the exterior of the home. Defendants recommended "some minor service along with general cleaning throughout" (p. 1).

Although defendants noted that, at the time of inspection, the interior of the home was clean and dry, there was evidence of "previous water infiltration and leaks to the living space" (p. 2), which in defendants' opinion, required regular monitoring and servicing. There were no signs of active water or moisture infiltration, except some moisture was observed in the basement. Defendants also observed that sump pumps, french drains and dehumidifiers were present in the basement to limit moisture in that area (p. 3).

---

[2]Page references are to defendants' typewritten inspection report.

With respect to the attic area, defendants observed that the rafters were in good condition, but that access to the attic area at the rear southeast part of the home was "extremely limited" and should be enhanced (p. 2). On the whole, defendants' professional opinion was that the home was in "stable" and "sound" structural condition" (pp. 1, 4).

Based on the foregoing, this Court finds that evidence as to the condition of the house at the time of inspection (May 6, 2005) was, and remains, readily available to both parties. The fact that defendant Bennet personally observed plaintiffs' house, took photographs, and authored a detailed inspection report, which he provided to plaintiffs, satisfies the Court that evidence as to the house's condition on May 6, 2005 has been preserved, as well as defendants' methodology for conducting the inspection, such that defendants will be able to establish their defense to plaintiffs' allegation that defendants performed the inspection in "a careless, negligent, and improper manner and not in accordance with the good and accepted standards of home inspection services and practice" (Complaint, paragraph 16).

The Court's finding is, however, narrowly drawn. Plaintiffs may utilize the services of an expert to testify about good and accepted standards related to conducting home inspections at that time, and what should, or should not, have been done during the May 6, 2005 inspection. The proof being confined to that issue, defendants will be able to mount a meaningful defense thereto. Thus, the Court has determined that dismissal of the complaint is not warranted.

On the other hand, this Court finds that defendants have been deprived of establishing their defense to the necessity for, and cost of the alleged remedial measures taken by plaintiffs in this case. The remedial measures taken by plaintiffs prior to the filing of this action have destroyed the evidence necessary for defendants to mount a meaningful defense to the damages aspect of this matter. Consequently, plaintiffs are precluded from introducing evidence of the necessity for, and extent (cost) of the work done to their home during the period from April to August 2006. The alleged defects were removed and/or repaired almost two years prior to defendants' being made a party to this action, and the alleged defects were not photographed. Thus, defendants' expert, Bart M. Rodi, P.E., was unable to conduct a meaningful inspection of the premises in July 2010, resulting in severe prejudice to defendants.

Additionally, plaintiffs will not be permitted to attempt to establish defendants' liability for conducting an allegedly negligent home inspection through the testimony of an expert basing his or her opinion upon an inspection of the premises after the remedial work commenced and/or was completed.

The foregoing constitutes the Order of this Court.

Dated: February 23, 2011
Mineola, N.Y.

Karen D. Murphy
J. S. C.