

Spoiled Trucks & Cars Corp. v C&N Realty Dev. LLC
2011 NY Slip Op 33291(U)
September 28, 2011
Supreme Court, Queens County
Docket Number: 22404/06
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

SPOILED TRUCKS & CARS CORP. d/b/a
BIG BOY TOYS,
Plaintiff,

Index No. 22404/06
Motion
Date July 26, 2011

-against-

C&N REALTY DEVELOPMENT LLC, et al.,
Defendants.

Motion
Cal. No. 32

ST. MARK'S CONSTRUCTION (USA) CORP.,
Third-Party Plaintiff,

Motion
Sequence No. 3

-against-

EURO CONTRACTING, LLC,
Third-Party Defendant.

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Upon the foregoing papers it is ordered that the motion by defendant/third-party defendant, Euro Contracting, LLC ("Euro") for an order dismissing all claims, cross claims, and third-party claims against defendant/third-party defendant Euro Contracting, LLC pursuant to the doctrine of spoliation and CPLR 3126, or in the alternative an order precluding plaintiff from offering evidence of physical or monetary damages at trial and cross motion by defendants, C&N Realty Development LLC, David Chan, Frank Ng and third-party plaintiff, St. Marks Construction (USA) Corp. for an order restoring this matter to the Court's active calendar for the limited purpose of dismissing plaintiff's Complaint pursuant to the doctrine of spoliation and CPLR 3126, or in the alternative, precluding plaintiff from offering any evidence at trial are hereby decided as follows:

At the outset the Court notes that the cross motion for an order restoring the case to the calendar is denied in its entirety as cross movants have presented no evidence whatsoever in support of the their cross motion and therefore failed to establish a prima facie case for the relief sought.

This action arises out of damage allegedly sustained to a building owned by the plaintiff, Spoiled Trucks & Cars Corp. d/b/a Big Boy Toys, at the premises located at 81-05 Queens Boulevard, Elmhurst, New York, which damage was allegedly negligently caused beginning on or about March 26, 2006 to the building due to certain construction activity negligently performed on the adjoining premises, owned by co-defendants, C&N Realty Development, LLC, David Chan, and Frank Ng. Defendants St. Marks Construction (USA) Corp. and moving defendant/third-party defendant, Euro were contractors retained to perform certain work at the adjoining premises. Plaintiff alleges in its Verified Complaint that: the defendants "in the construction of the subject premises did considerable blasting, excavating, demolition and wrecking of the subject premises" and that defendants "did not exercise reasonable care in excavating, blasting, wrecking and demolishing the subject premises, thereby causing damage to the plaintiff's adjoining premises". Defendants maintain that the work was performed properly and within industry standards, and that the plaintiff's building was already in a dilapidated condition prior to construction with much, if not all, of any claimed damage being unrelated to the construction work. Defendant/third-party plaintiff brought a third-party action against Euro seeking common law indemnity.

Spoliation is the destruction of evidence whether intentional or by accident. . . . Sanctions for spoliation are appropriate 'where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has had an opportunity to inspect them.' Dismissal of an action, or the striking of pleadings, while severe, is an appropriate remedy when the evidence spoiled is a 'key piece of evidence', (emphasis added) whose destruction precludes inspection by an adverse party. In determining the severity of the spoliation sanction, it is important to ascertain what prejudice if any the party seeking the sanction has incurred by the absence of the spoiled evidence. . . .

[I]n cases where the spoiled evidence is not crucial to a litigant's case, such that its absence does not prevent the outright prosecution or defense of a case, preclusion of evidence, rather than outright dismissal of pleadings, is the preferred remedy (Shea v. Spellman, 2004 NY Slip Op 50785U, [Sup Ct, Bronx County 2004][internal citations omitted]).

"If the Court in its analysis concludes that because of the spoiled evidence one party has destroyed critical physical proof, such that its opponents are 'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence', the spoliator's pleading is properly stricken in order to obviate a trial that is 'based on rank swearing contests'" (emphasis added) (Id.) (Citations omitted). While a spoliator of key evidence can be punished by the striking of its pleading, the court must determine whether such a drastic remedy is necessary as a matter of fundamental fairness, or whether a less drastic sanction is appropriate (Iannucci v. Rose, 8 AD3d 437 [2d Dept 2004]).

The law is clear that spoliation sanctions are available only if a party has destroyed critical proof (see, Industrial Risk Insurers v. Lizardos Engineering Associates, P.C., 2009 NY Misc Lexis 2620 [Sup Ct, Nassau County 2009]). The main question that must be answered in order to determine whether spoliation sanctions are appropriate is whether the supposed spoliator was on notice of the litigation at the time of the destruction of the evidence (Hennessy v. Restaurant Associates, Inc., 25 AD3d 340 [1st Dept 2006]; Montiero v. R.D. Werner Co., Inc., 301 AD2d 636 [3d Dept 2003]). Such notice creates a duty to preserve the evidence. (Id.).

In the instant case, it is undisputed that a Compliance Conference Order was entered into between the parties on November 5, 2007 whereby the plaintiff was directed to make the subject premises available for a site inspection on January 25, 2008. It is also undisputed that the subject premises were destroyed by the plaintiff before the site inspection took place.

Moving defendants established a prima facie case that spoliation sanctions are appropriate. In support of their motion, defendants present inter alia: an affidavit of John P. Flynn, P.E., who avers that: he is a professional engineer, he has been asked to assess the nature, extent and cause of the

damages alleged by the plaintiff to have been sustained to a building located at 81-05 Queens Boulevard, Elmhurst, New York, the building alleged to have been damaged no longer exists and has been replaced with a new building prior to an opportunity to inspect, and as such, "the exact cause and nature of the alleged cracks sustained to the walls of the subject building cannot be ascertained", "[i]t is necessary and customary to closely evaluate the characteristics of any alleged individual cracks to determine their cause and nature, especially since cracks in exterior building walls are very common and may originate and develop for a wide variety of reasons. A physical inspection of any such cracks is a fundamental and seminal investigation methodology utilized by structural forensic professionals to evaluate wall damage", the necessity to replace a building wall in its entirety, or to replace an entire building, as a consequence of inadequate shoring or underpinning is extremely rare and is generally associated with very severe and extensive damage to building walls", "concrete masonry unit (CMU) walls of older buildings are commonly subject to both cracking and minor shifting as a result of the effects of soil compaction, consolidation and shifting over time," and the destruction of the building in this case is an "insurmountable impediment to a rational determination of the cause of any alleged damage in this case, and results in a denial of an opportunity to apply commonly accepted forensic investigatory techniques to the building and its walls"; and the examination before trial transcript testimony of plaintiff's witness, Mohammad Noori, who testified inter alia, that: he is the president of plaintiff, and the building was demolished in 2008.

In opposition, plaintiff fails to establish that discovery sanctions are inappropriate. Plaintiff contends that defendants were put on notice of the damage within months of the subject occurrence to the subject building and at least six months prior to the initiation of the instant action. Plaintiff provides the examination before trial transcript testimony of Mohammad Noori, president of plaintiff, wherein he testified that: an Insurance Adjustor conducted an inspection, the defendants attempted to patch up the holes on plaintiff's property, his decision to demolish the building was made out of fear that the building would collapse on his employees, he "was feeling that the building was unsafe according to [his] knowledge and [his] architect"; a copy of plaintiff's own damages estimate by architect, Ira J. Benlevi; and a copy of numerous violations from the New York City Buildings Department related to the property adjoining plaintiff's property, among those being for safety hazards stemming from faulty or improper underpinning. Plaintiff additionally argues that in the six months since being put on

notice of the damage to plaintiff's property, the defendants repaired similar damage to other surrounding structures on neighboring property and inspection of those properties would allow defendants to mount a defense as far as the extent of potential damages. Finally, plaintiff maintains that defendants have admitted to the existence of photographs of plaintiff's damaged property and submits photocopies of photographs.

The Court finds that it is undisputed that the subject building was destroyed in 2008 without the provision of notice of the building's destruction to any of the defendants. In the instant case, the Court finds that the subject building is indeed key evidence and is "critical physical proof" such that defendants are "prejudicially bereft of appropriate means to ... confront a claim with incisive evidence" (Shea v. Spellman, 2004 NY Slip Op 50785U, [Sup Ct, Bronx County 2004][internal citations omitted]). Plaintiff has failed to proffer other suitable evidence available to establish inter alia, the cause of the damage. Plaintiff's contention that the defendants repaired similar damage to other surrounding structures on neighboring property and inspection of those properties would allow defendants to mount a defense as far as the extent of potential damages is misplaced, as such repairs would be speculative in this case. Moreover, defendant Euro, an excavation contractor, had no ownership or interest in the property in question and had no opportunity to inspect the property. Additionally, while plaintiff's witness, Mohammad Noori testified that he needed to destroy the building because it was in danger of collapsing, plaintiff provides no admissible evidence supporting Mr. Noori's assertion. Mr. Noori merely testifies that he concluded based upon conversations with his architect and his own opinion, that the building needed to be destroyed. However, plaintiff presents no admissible testimony or affidavit of said architect, nor does it establish how Mr. Noori's own opinion would qualify as expert testimony. Evidence that defendant's construction work caused property damage or injury must be supported by more than observations of a lay witness and where there is no expert evidence submitted in support, plaintiff's assertion that the building was unsafe amounts to no more than mere speculation (see, Holy Name of Jesus Roman Catholic Church v. NYCTA, 28 AD3d 520 [2d Dept 2006]).

Furthermore, plaintiff had no valid excuse for total destruction of the wall or building. Plaintiff's claim that his architect's advise in some way contributed to his decision to demolish the entire building because it was unsafe is disingenuous. By plaintiff's own admission, his architect only advised him that there existed a hazardous condition that was in

need of "repair". There is no evidence submitted by plaintiff to support that he was advised by his architect to take the extraordinary step to replace or demolish the building wall in its entirety, or to replace or demolish the entire building. By the destruction of the entire wall and building, the defendants have been deprived of an opportunity to review and analyze the only relevant physical evidence in this case. Further, there is no valid explanation proffered as to why the plaintiff could not have delayed the demolition of the building until after the January 25, 2008 inspection or why the defendants could not have been notified that the demolition was going to take place.

Moreover, the photocopies of the photographs presented by plaintiff are inadmissible, as no proper foundation has been laid for their admission into evidence (see, People v. Russell, 165 AD2d 327 [2d Dept 1991]). Additionally, a further affidavit of John Flynn, P.E. submitted by defendants in reply indicates, inter alia, that: he has reviewed the subject photographs and "[t]hese photographs do not provide [him] with an ability to accurately assess the cause and extent of allege damage to the subject property," and "the photographs are inadequate to provide a means of inspection with regard to the issue of causation".

As such, the Court concludes that because of the spoiled evidence, plaintiff has destroyed critical physical proof, such that defendants are 'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence', and so, the spoliator's pleading is properly stricken (see, Shea v. Spellman, supra).

Accordingly, the plaintiff's Complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: September 28, 2011

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Howard G. Lane, J.S.C.