

**Admiral Indem. Co. v Bovis Lend Lease LMB, Inc.**

2014 NY Slip Op 30098(U)

January 8, 2014

Sup Ct, New York County

Docket Number: 102772/08

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ADMIRAL INDEMNITY CO. A/S/O PLACE 57  
CONDOMINIUM ASSOCIATION,,  
Plaintiff,

Index No.: 102772/08

Motion Date: 07/13/13

Motion Seq. No.: 004

Motion Cal. No.: \_\_\_\_\_

- v -

BOVIS LEND LEASE LMB, INC. and R&J  
CONSTRUCTION CORP.,,  
Defendant.

The following papers, numbered 1 to 5 were read on this motion for summary judgment based upon spoliation \_\_\_\_\_.

PAPERS NUMBERED	
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No JAN 14 2014

Upon the foregoing papers,  
NEW YORK  
COUNTY CLERK'S OFFICE

The defendant R&J Construction Corp. (R&J Construction) moves, pursuant to CPLR 3212 (b), for an order granting summary judgment dismissing the complaint on the ground of spoliation of evidence.

Admiral Indemnity Co. (Admiral), as subrogee of Place 57 Condominium Association (Place 57 Condominium) (plaintiff), commenced this action to recover damages to property caused on June 7, 2007, by two separate water leaks in a one-year-old

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

residential building owned by Place 57 Condominium. One of the water leaks was allegedly caused by a defective or blocked condensate line in an HVAC unit in apartment 25A. Plaintiff alleges that the other water leak, the one at issue here, was allegedly caused on June 5, 2007 when R&J Construction negligently punctured a cold water supply line behind a refrigerator appliance in apartment 22B, with a sheetrock screw.

R&J Construction asserts that plaintiff unintentionally, or negligently, discarded such screw, in that plaintiff has been unable to produce it for discovery and inspection. R&J argues that such inability constitutes spoliation of evidence, and that the complaint should be dismissed.

In opposition, plaintiff argues that critical discovery remains outstanding, including the depositions of Place 57 Condominium's onsite superintendent of the building, Louis Rivera, who personally observed the cold water line pierced with a sheetrock screw; other Place 57 Condominium staff who observed the screw; plaintiff's insurance adjuster Mitch Siegel; plaintiff's plumber ATF Mechanical; and plaintiff's expert Jerome Levine M.E. who examined the scene after the wall had been repaired. Plaintiff also argues that there is no prejudice to R&J Construction as the plaintiff's own expert engineer, Jerome Levine, was only able to examine the site after sheetrock repairs were made, and the screw was lost. Finally, plaintiff argues

that alternative remedies are warranted since the screw was disposed of in good faith before litigation commenced.

In partial opposition, the codefendant Bovis Lend Lease LMB, Inc. argues that this court has previously granted it summary judgment on its cross claim for indemnification and therefore its cross claim should not be dismissed.

In reply, R&J Construction now alleges that the screw was not a screw at all, but was a small tack, and that in the course of construction other trades used tacks in the course of their work. R&J Construction argues that it is unable to mount a proper defense since it is impossible to determine if the tack is the type of hardware that it uses as Louis Rivera never took photographs of the hardware.

"[S]poliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). The sanction of striking a pleading should generally be granted only when the spoliation is deliberate (*Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1<sup>st</sup> Dept 2012]; *Melendez v. City of New York*, 2 AD3d 170 [1<sup>st</sup> Dept 2003]). In addition to striking pleadings, other possible sanctions for spoliation include preclusion of physical evidence, an adverse inference charge,

preclusion of expert evidence, and monetary sanctions (*Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [1<sup>st</sup> Dept 2010]; *Oppenheim v Mojo-Stumer Assoc. Architects, P.C.*, 69 AD3d 407 [1<sup>st</sup> Dept 2010]; *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 [1<sup>st</sup> Dept 2009])). However, dismissal of the action is often appropriate where the spoliated evidence is the very instrumentality giving rise to the plaintiff's injuries (*Hotel 57 LLC v Harvard Maintenance, Inc.*, 29 AD3d 462 [1<sup>st</sup> Dept 2006])).

Although the failure to preserve the screw places R&J Construction at a significant disadvantage, its ability to defend the action is not fatally compromised. Presumably, a sheetrock screw is a generic piece of hardware, easily identifiable, one looking exactly like another. The absence of the subject screw does not leave R&J Construction "prejudicially bereft of appropriate means to confront a claim ... with incisive evidence" (*Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1<sup>st</sup> Dept 2013] [internal quotation marks and citations omitted]).

Moreover, the evidence does not show the spoliation to be intentional, but supports a finding that screw was negligently discarded. Although a party is responsible for preserving a particular piece of evidence when that party is on notice that the evidence may be needed for future litigation (*Adrian v Good Neighbor Apt. Assoc.*, 277 AD2d 146 [1<sup>st</sup> Dept 2000]), the loss of the evidence did not "irrevocably strip" defendants of their

useful defenses, and that dismissal is too drastic under the circumstances (*Kirkland v New York City Hous. Auth.*, 236 AD2d at 175). Instead, as an alternative remedy, plaintiff shall produce responsive material created in anticipation of this litigation, such as expert reports, but any privileged opinions and conclusions may be redacted (*Town of N. Hempstead v Wiedersum*, 131 AD2d 661 [2d Dept 1987]).

In addition, R&J Construction may depose any experts, insurance adjusters, employees, and third parties who examined the screw and/or inspected the site of the accident (*Prasad v B.K. Chevrolet*, 184 AD2d 626 [2d Dept 1992]).

Finally, R&J Construction may, at the time of trial, seek an adverse inference charge.

Accordingly, it is

ORDERED that within 10 days of service of a copy of this order with notice of entry, plaintiff produce its expert reports, redacting any privileged opinions and conclusions, and it is further

ORDERED that on a mutually convenient date, but within 30 days of service of a copy of this order with notice of entry, plaintiff make available for deposition any experts (including Jerome Levine), insurance adjusters, employees, and third parties who examined the screw and/or inspected the site of the accident, and it is further

ORDERED that within 10 days of service of a copy of this order with notice of entry, plaintiff provide contact information for its plumber who made the repair, ATF Mechanical, and that R&J Construction may subpoena and depose ATF Mechanical, and it is further

ORDERED that R&J Construction may, at the time of trial, seek an adverse inference charge as it deems appropriate.

This is the decision and order of the court.

Dated: January 8, 2014

ENTER:

*Debra A. James*  
**DEBRA A. JAMES** J.S.C.

**FILED**  
JAN 14 2014  
NEW YORK  
COUNTY CLERK'S OFFICE