

**Associated Mut. Ins. Coop. v Consolidated Edison  
Co.**

2014 NY Slip Op 32679(U)

September 2, 2014

Supreme Court, Bronx County

Docket Number: 305587/10

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25**

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ASSOCIATED MUTUAL INSURANCE  
COOPERATIVE A/S/O TO GO EXPRESS,

Plaintiff,

**MEMORANDUM  
DECISION/ORDER**  
Index No.: 305587/10

-against-

CONSOLIDATED EDISON COMPANY and  
BALJ CITY ISLAND CORP.,

Defendants.

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HON. MARK FRIEDLANDER

Defendant, Balj City Island Corp. ("Balj"), moves for an order, pursuant to CPLR§3212, granting summary judgment to Balj as to all claims and cross-claims asserted against it.

Defendant, Consolidated Edison Company ("Con Ed"), cross-moves for an order, pursuant to CPLR§3212, granting summary judgment to Con Ed as to all claims and cross-claims against it.

Plaintiff, Associated Mutual Insurance Company a/s/o To Go Express ("AMIC"), cross-moves for an order, pursuant to CPLR§3126, striking the answers of the defendants, based on the alleged spoliation and intentional destruction of evidence. The motion and cross-motions are decided as hereinafter indicated.

This is an action by plaintiff AMIC to recover monetary damages resulting from a fire on October 5, 2009, at the premises known as 415 City Island Avenue, Bronx, New York (the "premises"). After the fire, To Go Express ("TGE"), a commercial tenant at the premises, submitted a Contents Statement of Loss and Loss Detail, pursuant to its insurance policy, to its insurance carrier, in the amount of \$41,000.00, and AMIC paid this claim. AMIC asserts that the

fire was caused by the negligence of BALJ and Con Ed. More specifically, AMIC alleges in its bill of particulars, dated February 8, 2011 (Exhibit "D"), that defendants:

"3. ... were negligent in the operation, maintenance, installation, repair and control of the electrical wiring and electrical service conduit arcing wires in front of the building where the electrical service extended to the utility drop in the northeast corner of the premises; in failing to maintain the electrical wiring and electrical service conduit at the premises in a reasonably safe condition; in allowing the electrical wiring and electrical service conduit at the premises to be, become and remain in a defective, dangerous and hazardous condition; in improperly installing or inspecting the electrical wiring and electrical service conduit at the premises; in failing to inspect; in improperly inspecting; in improperly repairing the electrical wiring and electrical service conduit at the premises; in failing to take adequate safety measure; in failing to safely repair the electrical wiring and electrical service conduit at the premises; and in failing to prevent the subject fire.

"4. The fire and property damages that are the subject of the instant proceedings were caused by arcing in the electrical wiring and electrical service conduit in front of the building where the electrical service extended to the utility drop in the northeast corner of the premises."

In support of the motion, defendant Balj submits a copy of the pleadings, transcripts of the deposition testimony of Patrice Ortega, the president of TGE, of Joseph Del Guidice, president of defendant Balj, of non-party witness Michael Swift ("Swift"), a Fire Marshall with the New York City Fire Department, of Pasquale Mancuso ("Mancuso"), employed as a "troubleshooter, overhead high voltage," for defendant Con Ed, of non-party witness Marc Rosenthal ("Rosenthal"), a partner and adjuster for Bills Adjustment Bureau, Inc., together with the Fire Incident Report of the Bureau of Fire Investigation, FDNY, prepared by Swift, and a photograph of damaged conduit referred to by Swift. In support of plaintiff's cross-motion, plaintiff submits a copy of plaintiff's bill of particulars, a Discovery and Inspection Demand made by letter from plaintiff's attorney, dated May 3, 2012, to defendants, and the letter response thereto, dated March 19, 2013, by defendant Balj's attorney.

The facts, as culled from the pleadings, deposition transcripts and exhibits, are as follows: Balj acquired the premises in 1999. The premises consisted of two apartments on the basement level, a hair salon, GTE on the main level, and two more apartments on the upper floor. GTE occupied the premises from approximately 1997, operating a take-out restaurant. It rented from Balj on a month to month basis starting sometime in 1999. Prior to and at the time of the fire, Con Ed provided electrical service to the premises from an entrance cable connected to the side of the premises. Before the subject fire neither Balj nor GTE ever did any electrical wiring or electrical service to the premises. Balj never complained about any electrical problems with the premises and Balj never experienced or received any complaints from tenants of the premises about electrical problems.

On the day of the fire, Con Ed, after receiving a call from the Fire Department, dispatched one of its troubleshooters, Mancuso, to the premises. Mancuso was instructed by a Fire Chief to cut the (electrical) service. He did so by physically cutting a wire going from the pole to the premises, where the service was attached, and insulated it to "kill it." When Mancuso cut the wire, he was just following instructions issued by the Fire Chief and did not know what the specific problem was or what caused the fire. Mancuso testified at his deposition as follows:

- Q. Do you know what happened to any of the wiring or circuitry from this scene?
- A. It was burnt.
- Q. Do you know whether any of this was removed, any of the components?
- A. I took it, yes. Our cable is Con Ed property, so I secured it.
- Q. What happened to the wire that you secured?

- A. It wound up on the back of my truck.
- Q. And when where did it go?
- A. I have no idea.
- Q. Can you tell me where that wiring came from that you took?
- A. The service.
- Q. So when you say "the service," do you know - - do you mean it was wiring from the utility pole leading to what exactly?
- A. From the pole to the attachment point on the house.
- Q. When you respond to an electrical emergency, is that typical that you might take some of the property or equipment from the scene, you might remove things?
- A. Yes.
- Q. Usually what happens when you remove things? What happens to the things you remove?
- A. It depends on what it is. If it's cable, it goes into the collection bin. If it's garbage, it goes into the garbage.
- Q. Do you know whether the wiring that you removed from here went into the collection bin or into the garbage?
- A. Probably into the collection bin.
- Q. Did the stuff from the collection bin get logged at any point?
- A. No.
- Q. What happens to it?
- A. It gets recycled.
- Q. The stuff that goes into the collection bin and gets recycled, do you personally know about it or have knowledge of it or know who uses it?

Q. The recycling, who does that?

A. The contractor comes in and carts it away.

Q. Do you know of any situations where anyone ever asked Con Ed for that stuff back, whether anyone ever said it was evidence in a case or anything like that?

A. No.

Q. Other than the wiring from the truck that went to the service of the house, did you take anything else from the scene physically?

A. No.

(Tr. p. 25, lines 8 – 25; p. 26, lines 2 –6, 11 – 25; p. 27, lines 2 – 13, 16 – 26; p. 28, lines 2– 4).

The New York City Fire Department responded to the fire and assigned fire marshals to investigate its cause and origin. The Fire Incident Report, signed by Swift, stated that the cause of the fire was “electrical wiring,” “NFA - in area of electrical service” (NFA - Not Fully Ascertained). Swift’s report further stated the following:

“ORIGIN AND EXTENSION

Examination showed the fire originated at the subject premises, on the north exterior exposure of the S/P, at an area approximately five feet west of the east exterior wall and approximately three feet below street level, in the area of the electrical service conduit. Fire extended up the exterior siding of the north wall. Fire further extended into and up an open interior wall bay of the north exterior wall approximately three feet west of the east wall. Fire further extended to the floor joists of the east (front) room of the second floor apartment. Fire further extended to the four walls, ceiling, floor and contents of said east room. Fire further extended to the exterior of the east wall. Fire was thereto confined and extinguished.”

Fire Marshal Swift’s deposition testimony also confirmed his conclusion that the fire originated in the area of an exterior electrical service conduit/wire feed line in the north wall that ran from the nearby utility pole to lower northeast corner of the premises. Swift did not observe any

evidence of arcing of the conduit or wires. He opined, based upon his observation, that it had something to do with the electric because of the amount of damage done at that location.

However, he "was not able to fully ascertain the cause."

According to the report of Peter Vallas Associates, Inc. ("Vallas"), dated December 9, 2009, a joint inspection of the premises was conducted on October 13, 2009, in an effort to determine the origin and cause of the subject fire. The following persons were present:

1. William Hayden, fire investigator for Hayden Karn Consulting who was retained by the insurance company for the building owner;
2. Evan Haynes, engineer from EFI Global retained on behalf of Hayden and Karn Investigations;
3. Steve Pietropoalo, engineer from LGI Forensic Investigations, retained by Con Ed;
4. Andrew Pietropaolo, electrical engineer for LGI Forensic Investigation;
5. James Ortega, the business owner of TGE; and
6. Louise, the building owner.

The Vallas Report stated the following:

**CONCLUSION**

It is the opinion of this organization, based on the evaluation of the fire pattern and information to date, the fire that damaged the To go Express business did not originate in or develop in the leased space area. All fire patterns indicated the fire developed in the second-floor apartment causing extensive damage before venting from the windows and created a secondary fire condition along the north side of the structure. The first arriving fire apparatus indicated greater damage existing on the second floor of the structure rather than the first floor. No exterior fire and/or flames were reported on tje incident report as well.

The To Go Express was not involved in the cause of the fire and therefore bears no responsibility for the damage. *The fire originates within the second-floor apartment specifically the front room. The exact ignition source was not recovered due to the*

*unstable conditions of the room and flooring.” (Italics added).*

By letter dated May 3, 2012, over two and one half years after both the fire and the joint inspection of the premises, plaintiff’s attorney sent a letter demand (“D & I”) to defendants’ attorneys, stating in relevant part, as follows:

“Please take notice that pursuant to CPLR Article 31, the plaintiff requests that the following physical evidence removed from the loss location be made available for inspection:

the overhead utility drop; conduit tubing; electrical wiring and connections; conduit; service panel box; electrical junction box; electrical trough from the basement; any garbage cans; any charred or melted debris; and any cause and origin evidence removed from the loss location.”

By letter dated March 19, 2013, the attorneys for defendant Balj, sent to plaintiff’s attorney the following response:

“Please be advised that the items that were removed from the subject premises by Hayden Karn Consulting Inc. are no longer in their possession. Upon information and belief, said items were disposed of in October of 2010. However, we are informed that Dan Steeley of Peter Vallas Associates inspected said items personally on October 16, 2009 on behalf of Associated Mutual Insurance Company.”

The defendants’ submissions, establish *prima facie* plaintiff’s inability to prove the cause of the fire, much less defendants’ liability therefor, shifting to plaintiff the burden to establish the existence of a triable issue of fact. *Travelers Property Casualty v. Gomez Supermarket*, 195 Misc.2d 876 (App. Term, 2<sup>nd</sup> Dept. 2003). Plaintiff asserts that there was intentional destruction of key evidence and spoliation by the defendants, with the appropriate remedy being the striking of defendants’ answers, pursuant to CPLR§3126.

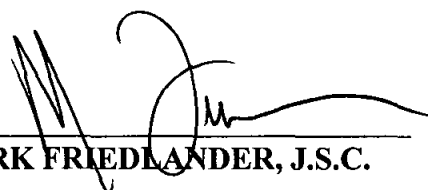
Sanctions for spoliation, including the striking of a pleading, may be imposed when a litigant intentionally disposes of critical items of evidence before an opposing party has an

opportunity to inspect them. *Markel Ins. Co. v. Bottini Fuel*, 116 A.D.3d 1143 (1<sup>st</sup> Dept. 2014). There is no evidence in the record that defendants deprived plaintiff of such an opportunity. To the contrary, AMIC's representatives were present at the premises on December 9, 2009, less than one week after the fire. AMIC does not claim that it sought any additional investigation or was prevented from so doing. No request or demand was made for preservation of any evidence until plaintiff's attorney sent a letter D & I demand to defendants on March 19, 2012, over two years and five months after AMIC's inspection. The Court further notes that there is no affidavit submitted by AMIC from an electrical engineer or other qualified expert detailing the "key" or "critical" items needed for review, and how these items could or would demonstrate any negligence on the part of either of the defendants.

The motion of defendant Balj and the cross-motion of defendant Con Ed for summary judgment are granted and plaintiff's complaint is dismissed in its entirety. Plaintiff's cross-motion for an order striking the answers of defendants is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: 9/2/14

  
MARK FRIEDLANDER, J.S.C.