Smith v Cunningham
2015 NY Slip Op 32799(U)
July 7, 2015
Supreme Court, Dutchess County
Docket Number: 6070/12
Judge: Peter M. Forman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
----------X
KENNETH J. SMITH,

Plaintiff,

-against-

KEITH T. CUNNINGHAM,

Defendant.
----------X

DECISION AND ORDER

Index No. 6070/12

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon this motion:

	PAPERS NUMBERED
NOTICE OF MOTION	1
AFFIRMATION	2
AFFIDAVIT	3
EXHIBITS	4-12
AFFIDAVIT IN OPPOSITION	13
EXHIBITS	14-20
MEMORANDUM OF LAW	21
REPLY AFFIRMATION	22
EXHIBIT	23

Defendant Keith Cunningham owns a house located at 127 Chestnut Ridge Road in the Town of Union Vale (the "Premises"). In November of 2011, the Premises suffered damage as a result of a chimney fire. In 2012, Defendant hired Plaintiff Kenneth Smith to perform certain fire damage repair work at the Premises (the "Project").

Defendant became dissatisfied with Plaintiff's work during the course of the Project, and terminated his employment in June

of 2012. Plaintiff has commenced this action seeking $20,180.00 in damages, as payment for work that he allegedly performed prior to his termination. Defendant has asserted a counterclaim seeking $25,000.00 in damages, as reimbursement for the costs that he allegedly incurred to complete and correct Plaintiff's work.

Plaintiff now moves for an Order striking Defendant's Answer, and related relief, on the grounds that Defendant has spoliated physical evidence. Specifically, Plaintiff alleges that Defendant hired contractors to replace Plaintiff's work without providing Plaintiff a reasonable opportunity to hire an expert and to inspect that allegedly incomplete and defective work.

For the reasons stated herein, Plaintiff's motion is granted in part and denied in part as follows: (1) Defendant is precluded from calling any expert witness at trial to testify regarding alleged defects in Plaintiff's work, with the exception of any alleged defects in the siding that Plaintiff installed on the south wall of the house; (2) the Court will give an adverse inference charge at trial relating to Defendant's spoliation of physical evidence; and (3) Defendant shall reimburse Plaintiff for the $2,695.00 that Plaintiff paid to its expert, Derek Graham.

Plaintiff's motion for attorneys' fees in the amount of $27,292.83 is denied. However, that motion is denied without prejudice to renewal upon an affidavit of services and itemized billing statement that is limited to the fees and disbursements

[* 3]

that were incurred in responding to the April 8, 2013 fax from Defendant's counsel, hiring an expert, preparing and arguing the April 11, 2013 TRO application, and conducting the May 10, 2013 inspection.

BACKGROUND

On November 21, 2011, the Premises suffered structural and smoke damage as a result of a chimney fire. In January of 2012, Defendant met with Plaintiff to discuss portions of the repair work that needed to be performed.

Defendant ultimately hired Plaintiff to perform this work. However, no formal contract was ever signed. Plaintiff has produced a written proposal that he asserts accurately identifies the scope of the work that he was originally hired to perform. Plaintiff also asserts that Defendant issued numerous verbal change orders during the course of the Project. Defendant denies that the written proposal accurately describes the scope of the agreed work, and denies Plaintiff's verbal change order allegations. Defendant has also produced a written punch list which he asserts more accurately describes the agreed scope of work.

Plaintiff commenced work on the Project in April of 2012. Defendant asserts that he expressed his displeasure with Plaintiff's work no later than May of 2012. Defendant asserts that he fired Plaintiff in June of 2012, and told him to remove his tools, scaffolding and equipment from the Premises.

Plaintiff removed his tools and equipment from the Premises on June 23, 2012. Defendant states that he invited Plaintiff to inspect the Premises on that date, but that Plaintiff declined that invitation.

During his pre-trial deposition, Defendant testified that he knew that Plaintiff was asserting that he was owed money when he was fired in June of 2012 [Ex. H, pp. 65-66]. This is confirmed by text messages produced by Defendant during the course of this litigation. Specifically, on June 18, 2012, Plaintiff sent Defendant several texts asking where he could find a check that he was expecting to receive from Defendant. Defendant responded by stating that "There is a check in the house," but that "The check is well hidden and you will not find it." Defendant also represented that he had spoken "with a good friend who is a Sheriff," and warned Plaintiff that he should not attempt to cause any problems. In a June 22, 2012 text, Defendant also told Plaintiff that he was in consultation with an attorney regarding this dispute. [Ex. E].

Plaintiff commenced this action on October 3, 2012, and caused Defendant to be served on that same date. Defendant asserts that the service of these papers was the first notice that he ever received that Plaintiff intended to pursue this claim in litigation.

Plaintiff is represented in this action by Pascazi Law Offices, LLC ("Pascazi"). Defendant is represented by Corbally,

Gartland and Rappleyea, LLP ("CGR"). On April 8, 2013, CGR sent a fax to Pascazi stating:

> Please note that our client will be having renovations done to his property in the very near future. If your client wishes to perform an inspection of his work, it must be done by April 15th. After that, some/all of the work will be re-done and may be affected by other renovations.
>
> Please contact our office to arrange a date and time if you plan to have an inspection.

By letter dated April 8, 2013, Pascazi objected to any renovations to the Premises prior to an inspection by Plaintiff's expert. Specifically, Pascazi objected on the grounds that any renovations to Plaintiff's work "will destroy a great deal of evidence useful to my client." Pascazi also objected to Defendant's unilateral one-week deadline for the completion of that inspection.

By fax dated April 9, 2013, CGR rejected Plaintiff's request for additional time beyond mid-April to conduct an expert inspection. CGR also stated:

> There's nothing in the law to require our client to leave your client's poor and incomplete work in the state it is in until your client feels like conducting an inspection.. To contend that the work must remain exactly as it was is simply not the law.

By letter dated April 9, 2013, Pascazi offered to retain an expert and complete an inspection of the Premises by June 15, 2013. Pascazi also asked Defendant to voluntarily agree to suspend any renovations to Plaintiff's work until June 15, 2013. CGR responded on that same date in a handwritten note stating "Not agreeable. Make your motion if you feel you need to."

On April 11, 2013, Plaintiff filed an Order to Show Cause seeking a temporary restraining order preventing Defendant from proceeding with these renovations until Plaintiff had been provided a reasonable opportunity to hire an expert and conduct an inspection of the Premises. After hearing argument from both sides, this Court denied the request for a temporary restraining order, but issued a protective order directing Defendant to maintain the *status quo* pending an inspection of the Premises by Plaintiff's expert. Specifically, the Court barred Defendant from making any changes to work that had been performed by Plaintiff at the Premises, or to work that Defendant claims Plaintiff failed to perform, until May 13, 2013. The Court also directed CGR to make the Premises available for inspection by any expert that Pascazi might hire.

Following the entry of that protective order, Pascazi retained Derek Graham, of REP1 Independent Building Consultants, as Plaintiff's expert. Graham inspected the Premises on May 10, 2013, and prepared a written report documenting his observations and opinions. Pascazi paid Graham $2,695.00 for these services.[1]

Plaintiff asserts that the May 10, 2013 inspection revealed that nearly all of the work that he had performed at the Premises had been removed, replaced, or otherwise altered. For instance, Plaintiff asserts that changes had been made to the work he had performed on the siding of the house. Plaintiff also asserts that

[1] Plaintiff, Pascazi, and an agent of Defendant were also present during the inspection.

the walls, trim and ceiling had been painted in the living room, master bedroom, and attic. Plaintiff also identified a number of additional changes to the master bedroom, including the installation of crown molding and a new fireplace mantel, the replacement of a closet door, and the addition of shelving to another closet. Plaintiff also asserts that the base trim around the chimney in the attic had ben replaced, and that the wood floors in the house had been refinished.

Plaintiff asserts that these renovations destroyed material evidence that was crucial to his ability to prove his claim, and to mount an effective defense to Defendant's counterclaim. Plaintiff also asserts that he subsequently learned that most of these renovations had taken place in July and August of 2012, and that all of these renovations had been completed no later than February of 2013. Therefore, Plaintiff asserts that the April 8, 2013 fax stating that renovations to Plaintiff's work would be starting in the very near future, and the corresponding offer to provide Plaintiff with an extremely limited time to conduct an inspection of his work before these renovations commenced, was issued in bad faith and caused him to incur unnecessary expert fees and attorneys' fees.

Defendant admits that the fireplace mantel and hearth were purchased and installed in February of 2013. Defendant also admits that he hired a contractor in September of 2012 to install siding above the second floor windows on the south side of the

house, and to replace a vent that Plaintiff had removed. However, Defendant asserts that the siding that Plaintiff installed below the second floor windows remains intact. Finally, Defendant admits that the other renovations cited by Plaintiff were completed in July and August of 2012.

Defendant opposes Plaintiff's motion on the grounds, *inter alia*, that he did not have notice that Plaintiff intended to pursue this matter in litigation until he was served with this lawsuit on October 3, 2012. Defendant also argues that he was entitled to proceed with necessary renovations to the Premises in the absence of a pre-litigation demand for inspection or a litigation hold letter. With respect to the siding work that was completed after this action was commenced, Defendant asserts that it was necessary to complete that work before the onset of winter. Defendant also asserts that Plaintiff has not been able to demonstrate any prejudice as a result of these renovations, in that Plaintiff has been provided with full discovery from the non-party contractors who performed this work, along with nearly 70 color photographs that were taken of Plaintiff's work on June 13, 2012.

Defendant also argues that Pascazi's legal fees are excessive given the nature and size of this case. Defendant also asserts that most of those fees are not directly attributable to any alleged spoliation of evidence.

DISCUSSION

"It is well settled that 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." [***Baglio v. St. John's Queens Hospital***, 303 A.D.2d 341, 342 (2d Dept. 2003)]. "A sanction for spoliation of evidence may be warranted even if the evidence was destroyed before the spoliator became a party to the subject lawsuit, provided it was on notice that the evidence might be needed for future litigation." [***Jamindar v. Uniondale Union Free School District***, 90 A.D.3d 610, 611].

"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 fo fundamental fairness.'" [***Utica Mutual Insurance Co., v. Berkoski Oil Co.***, 58 A.D.3d 717, 718 (2d Dept. 2009), *quoting* ***Iannucci v. Rose***, 8 A.D.3d 437, 438 (2d Dept. 2004)]. "Less severe sanctions for spoliation of evidence are appropriate where the missing evidence does not deprive the moving party of the ability to establish his defense or case." [***Jennings v. Orange Regional Medical Center***, 102 A.D.3d 654, 656 (2d Dept. 2013). *See also* ***Fossing v. Townsend Manor Inn, Inc.***, 72 A.D.3d 884, 885 (2d Dept. 2010) (less severe sanctions were

appropriate where the moving party failed to demonstrate that it would be "prejudicially bereft of the means" of prosecuting its claims, or defending against the responsible party's claims, due to spoliation)].

"The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party." [***Samaroo v. Bogopa Service Corp.***, 106 A.D.3d 713,714 (2d Dept. 2013)]. "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 prove its claim or defense." [***Lentini v. Weschler***, 120 A.D.3d 1200, 1201 (2d Dept. 2014)(internal citations omitted)].

Here, Defendant intentionally altered or replaced nearly all of Plaintiff's work without providing him with a reasonable opportunity to engage an expert and to conduct an inspection of the Premises. To the extent that Defendant offered Plaintiff an opportunity to inspect the Premises while he was in the process of removing his tools and equipment, that informal invitation did not rise to the level necessary to permit Defendant to move forward with significant alterations to Plaintiff's work without further notice.

Defendant has also admitted that he knew that Plaintiff was asserting a claim for unpaid work when Defendant terminated his employment in June of 2012. This admission is corroborated by Defendant's June 18, 2012 text messages, which responded to Plaintiff's payment inquiries by stating "There is a check in the house," but that "The check is well hidden and you will not find it." Although Defendant claims that he did not realize that Plaintiff would go so far as to file a lawsuit enforcing this claim, Defendant's own evidence demonstrates that he was consulting with an attorney, and with law enforcement representatives, about this dispute no later than June 22, 2012. Therefore, when he terminated Plaintiff's employment, Defendant was on notice that evidence relating to the quality of Plaintiff's work might be needed for future litigation.

While this evidence demonstrates that Defendant disposed of physical evidence in a manner that is prejudicial to Plaintiff, it does not also support the drastic sanction of striking the Answer and Counterclaims. Specifically, there is no evidence that the alterations and renovations to Plaintiff's work were motivated by a desire to gain a tactical advantage in litigation. Rather, the evidence demonstrates that these alterations and renovations were conducted to complete a home-repair project that was in midstream. In addition, Plaintiff did not serve Defendant with a pre-litigation demand for inspection or a litigation hold letter, and Defendant has produced numerous color photographs

that were taken of the Premises before any alterations were made to Plaintiff's work. Plaintiff also has extensive personal knowledge of the work that he performed, and is therefore able to rely on his own description of that work.

Therefore, under the facts and circumstances of this case, the appropriate sanctions are an order of preclusion and an adverse inference charge. Specifically, Defendant is precluded from calling any expert witness at trial to testify regarding alleged defects in Plaintiff's work, with the exception of any alleged defects in the siding that Plaintiff installed on the south wall of the house below the second floor windows. This preclusion order does not bar Defendant from calling contractors as fact witnesses to describe the work they performed and to provide foundation testimony for the bills they charged. But it does bar these contractors from expressing any opinion as to the quality of Plaintiff's work, including whether that work was consistent with local building and construction standards. The Court will also give an adverse inference charge at trial relating to Defendant's spoliation of physical evidence. [*see* ***Merrill v. Elmira Heights Central School District***, 77 A.D.3d 1165, 1167 (2d Dept. 2010) (adverse inference charge appropriate where plaintiff did not make a request to inspect prior to removal of defective railings, and where photographs of railings were available); ***Fossing v. Townsend Manor Inn, Inc.***, 72 A.D.3d 884, 885 (2d Dept. 2010) (preclusion and an adverse inference

charge were appropriate where disposal of boat in violation of court order did not leave the moving party "prejudicially bereft of the means" to defend itself or to prosecute its claims); ***Seda v. Epstein***, 72 A.D.3d 455, 456 (1st Dept. 2010) (adverse inference charge was appropriate where defendant failed to notify plaintiff's counsel that debris related to Labor Law construction claim would be removed from the premises); ***Oppenheim v. Mojo-Stummer Associates Architects, P.C.***, 69 A.D.3d 407 (1st Dept. 2010) (where defendant architect was not provided opportunity to inspect premises before new contractor performed renovations and alterations to premises, but architect had extensive knowledge of the work that was performed by the original contractor, "the appropriate sanction was preclusion of plaintiffs' witness *as an expert*, but not as a fact witness") (emphasis in original)].

The April 8, 2013 fax giving Plaintiff one week to inspect the Premises, and the April 9, 2013 refusal to give Plaintiff additional time to conduct that inspection, warrant additional sanctions. The April 8 fax represented that a small window of opportunity existed to conduct an inspection of the Premises before the commencement of renovations that would alter some or all of Plaintiff's work. However, Defendant concedes that most of Plaintiff's work had been replaced in July and August of 2012, and that the remaining work (other than some siding on the south side of the house) had been replaced no later than February of 2013. Taken in combination with Defendant's April 9th direction

to "Make your motion if you feel you need to," it is clear that Defendant's conduct caused Plaintiff to needlessly incur legal fees and expert fees in a futile attempt to temporarily preserve and inspect work that no longer existed.

Therefore, Defendant shall reimburse Plaintiff for the $2,695.00 that Plaintiff paid to Derek Graham for the May 10, 2013 inspection and report. Plaintiff is also entitled to recover the reasonable attorneys' fees and disbursements that he incurred when Pascazi responded to the April 8, 2013 fax, hired an expert, prepared and argued the April 11, 2013 TRO application, and conducted the May 10, 2013 inspection.

Plaintiff has not produced an affidavit of services or itemized billing statement permitting an assessment as to the reasonableness of these legal services and disbursements. As to these legal services and disbursements, Plaintiff's motion is denied without prejudice to renewal. To the extent that Plaintiff seeks to recover additional legal fees and disbursements beyond the limited scope authorized herein, that motion is denied. Based on the foregoing, it is hereby

ORDERED, that Defendant is precluded from calling any expert witness at trial to testify regarding alleged defects in Plaintiff's work, with the exception of any alleged defects in the siding that Plaintiff installed on the south wall of the house below the second floor windows; and it is further

ORDERED, that this preclusion order does not bar Defendant from calling contractors as fact witnesses to describe the work they performed and to provide foundation testimony for the bills they charged; and it is further

ORDERED, that the Court will give an adverse inference charge at trial relating to Defendant's spoliation of physical evidence; and it is further

ORDERED, that Defendant shall pay $2,695.00 to Plaintiff, as reimbursement for the fee that Plaintiff paid Derek Graham. This payment shall be made within thirty (30) days of the date of this Decision and Order; and it is further

ORDERED, that Plaintiff's motion for attorneys' fees is denied, without prejudice to renewal upon an affidavit of services and itemized billing statement identifying the reasonable attorneys' fees and disbursements that Plaintiff was forced to incur when Pascazi responded to the April 8, 2013 fax, hired an expert, prepared and argued the April 11, 2013 TRO application, and conducted the May 10, 2013 inspection; and it is further

ORDERED, that counsel shall appear before the Court for a pre-trial conference on August 5, 2015, at 9:30 a.m.

The foregoing constitutes the Decision and Order of this court.

Dated: July 7, 2015
Poughkeepsie, New York

Hon. Peter M. Forman
Acting Supreme Court Justice