

Sims v Electrolux Home Prods., Inc.
2016 NY Slip Op 33128(U)
October 24, 2016
Supreme Court, Onondaga County
Docket Number: 2014EF2017
Judge: Hugh A. Gilbert
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At a Term of Supreme Court held in and for the County of Onondaga, in the City of Watertown, New York on the 6th day of September, 2016.

PRESENT: HONORABLE HUGH A. GILBERT
Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT COUNTY OF ONONDAGA

DEBORAH A. SIMS, Individually and as Executor of the Estate of ROBERT F. ZOLL, deceased,

Plaintiff,

MEMORANDUM
DECISION AND ORDER

Index No. 2014EF2017
RJI No. 33-15-0418

-vs-

ELECTROLUX HOME PRODUCTS, INC.;
ELECTROLUX NORTH AMERICA, INC.;
SOUTHWIRE COMPANY; and CHRISTOPHER
F. SHEEHAN d/b/a Sheehan's Appliances,

Defendants.

ELECTROLUX HOME PRODUCTS, INC.,

Defendant/Third-Party
Plaintiff,

-vs-

EMBRACO NORTH AMERICA, INC.,

Third-Party Defendant.

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This action stems from a residential fire that took place on May 31, 2011 that claimed the life of Plaintiff's decedent Robert F. Zoll. Plaintiff commenced this wrongful death action on April 26, 2013 alleging, inter alia, that the fire was caused by a refrigerator manufactured by Defendant Electrolux. A separate subrogation action brought by Liberty Mutual Insurance Company in the United States District Court for the Northern District of New York in May 2013 recently settled. Therefore, we will not discuss or consider any issues or deadlines in that resolved action.

On May 25, 2016, Electrolux filed a Third-Party Summons and Complaint seeking contribution or indemnification from Embraco North America, Inc. ("Embraco"). Embraco now moves for an Order pursuant to CPLR §3211 dismissing the Third-Party Complaint on the grounds that Electrolux failed to assert its claims within the deadlines prescribed for impleader which has prejudiced its rights to defend itself, particularly since destructive testing has taken place. Embraco also asserts that Electrolux unduly delayed the main action and its Third-Party Complaint fails to state a cause of action.

Only Defendant Electrolux opposed the motion. The remaining parties, including Plaintiff, have not asserted that the Third-Party action will unduly delay the determination of the primary action or prejudice their rights. Electrolux

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challenged Embraco's contentions and asserts that its Complaint was timely filed, is not time barred and there is no prejudice to Embraco. We note that Plaintiff's counsel wrote to the Court to clarify the record to make clear that Plaintiff has not yet articulated a specific defect claim. Plaintiff hopes that further discovery will assist in determining the cause of the fire.

Embraco accurately outlined the chronology of this action since its commencement and highlights several facts in its motion. It is undisputed that, when the case was assigned to Acting Justice Walter Hafner, Jr., the parties agreed to a Preliminary Conference Stipulation and Order dated July 23, 2015 which imposed a November 30, 2015 date for impleader. Although that Order was not amended, it is evident that the parties have not been abiding by the dates set forth therein. Depositions have not been taken, despite the February 29, 2016 deadline. The end dates for discovery and filing of the Trial Note of Issue have likewise passed. Outstanding discovery and the prospect of a third-party action were discussed with the Court at the conference held on May 25, 2016. We disagree with Embraco that Electrolux is attempting to skirt the Court Ordered or statutorily imposed deadlines for a third-party action. Under the circumstances outlined above, we conclude that third-party action was timely filed.

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We also disagree with Embraco that it met the standard to dismiss the Third-Party Complaint for failure to state a cause of action. We suspect that, had Electrolux commenced suit against Embraco a year or so ago, Embraco would have suggested that Electrolux failed to allege sufficient facts to support a claim. Here, Electrolux waited until the inspection revealed the possibility of an Embraco product as a cause of the fire. While its assertions will be further explored and tested through discovery, we find that the Complaint sufficiently states a cause of action.

The second cause of action in the Third-Party Complaint seeks indemnification for any judgment rendered or settlement paid in the wrongful death action (Paragraph 15). It does not, as Embraco suggests, seek indemnification or contribution for any judgment obtained in the Federal action, nor would we expect it to as the actions are in two different forums. We are not persuaded that Electrolux is barred from seeking indemnification against Embraco due to the provisions of General Obligations Law §15-108(c). Its claim and potential right of recovery must await discovery and possibly trial.

The more important issue raised by Embraco to support its claim of prejudice relates to the testing performed on evidence from the fire. It is undisputed that there have been two examinations and one laboratory inspection of the

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evidence. Embraco claims Electrolux removed the compressor from the refrigerator, cut it open, removed a “crimp” and subjected the crimp to testing, materially altering the refrigerator and compressor. Embraco was not notified of the examinations or inspection and therefore it did not have an opportunity to attend. Electrolux offers no explanation why it failed to notify the manufacturer of the compressor, which, though not a party, should have been provided notice and given an opportunity to be present.

Electrolux does assert, however, that the evidence remains in the possession of Plaintiff’s expert witness and Embraco will have the opportunity to inspect and test the evidence. It also explains that the inspections and testing were fully documented and memorialized and that Embraco will be provided the photographs and testing documents. It contends that Embraco’s argument that evidence was destroyed or lost during the inspection or testing is premature at best. There is no evidence to support a claim of intentional destruction of key evidence as Embraco has not received any documentation or inspected the evidence.

Embraco has not demonstrated that the evidence from the fire was spoliated. “Spoliation is the destruction of evidence.” *Kirkland vs. NYCHA*, 236 AD2d 170, 173 (1997). “Spoliation sanctions are appropriate where a litigant,

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intentionally or negligently, disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them. ***Abar vs. Freightliner Corporation***, 208 AD2d 999, 1001 (1994) (citation omitted). Dismissal of a Complaint would be warranted where the alleged spoliation prevents the movant from inspecting crucial evidence or left it “prejudicially bereft” of the means of presenting its claim. (***Kirkland, supra***, quoting ***Hoenig Products Liability, Impeachment Exception: Spoliation Update, NYLJ April 12, 1993***).

We concur with Electrolux that Embraco has not demonstrated that dismissal is appropriate. Embraco has not yet had an opportunity to inspect the evidence and review the testing documentation provided by Plaintiff and Defendants and therefore cannot establish that it is “prejudicially bereft” of the means to defend the Third-Party Complaint. Embraco may have the opportunity to seek relief after it has completed its review. If the evidence has been spoliated, we have “broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliation or restore balance to the litigation. . .or employing an adverse inference instruction at the trial of the action.” ***Ortega vs. City of New York***, 9 NY3d 69, 76 (2007). Since the evidence is available for inspection and testing by Embraco, dismissal of the Third-Party Complaint is not appropriate.

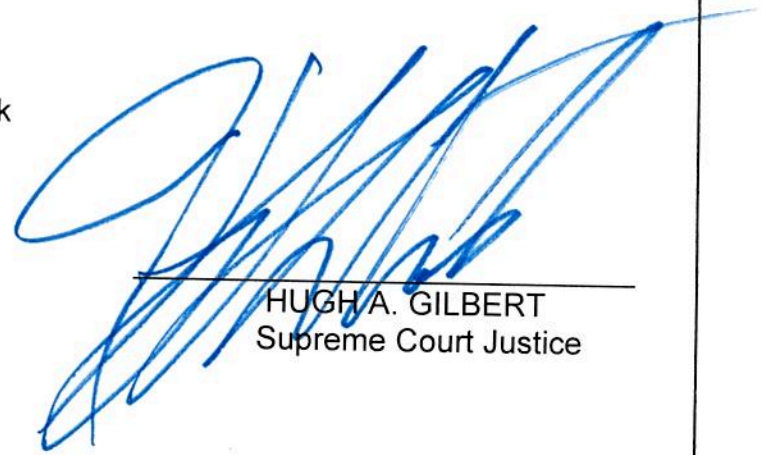
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THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that the motion of Third-Party Defendant Embraco North America, Inc., is respectfully denied

Dated: October 24, 2016
at Watertown, New York

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HUGH A. GILBERT
Supreme Court Justice