

<b>Rossi v Doka USA, Ltd.</b>
2018 NY Slip Op 32203(U)
September 7, 2018
Supreme Court, New York County
Docket Number: 156072/2013
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES** PART IAS MOTION 59EFM

*Justice*

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DOMENICK ROSSI,

Plaintiff,

- v -

DOKA USA, LTD., WORLD TRADE CENTER PROPERTIES, LLC.,  
4 WORLD TRADE CENTER, LLC., SILVERSTEIN PROPERTIES,  
INC., TISHMAN CONSTRUCTION CORPORATION, LESLIE E.  
ROBERTSON ASSOCIATES, R.L.L.P.,

Defendant.

INDEX NO. 156072/2013

MOTION DATE 09/26/2017,  
09/26/2017

MOTION SEQ. NO. 003 004

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 171, 193, 194, 195, 196, 197, 198, 199, 213, 214, 215, 216, 217

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 218

were read on this motion to/for SANCTIONS.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant Doka USA, Ltd. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against such defendant, with costs and disbursements to such defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)), and it is further

ORDERED that plaintiff's motion for sanctions is denied.

#### DECISION

Motion sequence numbers 003 and 004 are consolidated for disposition.

In this personal injury action, plaintiff Domenick Rossi alleges that he was injured at a construction site after the gears in a defective ratchet tool collapsed.

Defendant Doka USA, Ltd. (Doka) moves for spoliation sanctions (CPLR 3126), arguing that the loss of the ratchet entitles it to dismissal of the complaint, or alternatively, an order affording Doka an adverse inference (Motion Sequence Number 003). On the same grounds, Doka seeks sanctions against plaintiff's employer, third-party defendant Roger & Sons Concrete, Inc. (Roger & Sons) and co-defendant Tishman Construction Corporation (Tishman).

Plaintiff moves to strike Doka's answer, also on the ground of spoliation, alleging the destruction of email evidence (Motion Sequence Number 004).

#### Facts

Plaintiff was employed as a carpenter by Rogers & Sons. Beginning in 2009, he worked on the construction of concrete walls at Tower 4 of the World Trade Center (the Project). Tishman was the general contractor and/or construction manager for the Project. Under a contract, Doka supplied Rogers & Sons with equipment and tools. The walls were created and installed using Doka's Xclimb 60 and the SKE 100 climbing systems.

Doka also supplied ratchets made specifically to work with those systems but did not manufacture them. They were known internally at Doka as the "Ratchet SW50, the "Ratchet MF" or the "MF 50" and workers at Tower 4 referred to them as "Doka ratchets." Doka promoted the ratchets in its literature and

recommended that they be purchased as part of a tool package to be used with their system, but their customers were free to decline to buy it. Doka also provided on-site instruction on the use of the ratchets. An inventory list indicates that Doka supplied at least ten ratchets to Rogers & Sons.

Plaintiff alleges that he was injured on the job on February 3, 2011. He was using a ratchet to push concrete-filled forms when something along the track on which they were moving jammed. He placed his right foot on the ratchet shaft to apply some extra force, at which point he believes that the gear mechanism near the top of the ratchet broke. This caused his knee to be propelled forward and injured by its impact with a metal post or brace.

Plaintiff told his supervisor within five minutes of the accident that the tool he was using was a Doka ratchet. At his deposition, he testified that it was a new ratchet that he took it from a steel Doka box that he personally opened. However, he later stated that it was a used one, and that used ratchets were stored after work in Roger & Sons boxes. However, he said that the ratchet was the same color and size as the ratchets he had seen come out of the Doka boxes.

An accident investigation report was issued at some later date by Rogers & Sons. In it, plaintiff reported that "Doka key wrench gears slipped up and my leg banged up against the wrench

and brace." Tishman also created a report, which recited that plaintiff was injured "when the ratchet used to rotate the mechanism slipped." The report stated that after an investigation, representatives of Tishman and Rogers & Sons had decided that Doka needed to inspect the wall-building system, tools, means and methods. It also stated that Rogers & Sons had requested that the inspection be performed help find the cause and remedy for the accident. Doka's head of engineering testified that Doka did not do so because it did not learn of the accident until well after it happened.

What happened to the ratchet after the accident has not been determined. Plaintiff testified that as he was holding his injured knee, his partner on the job picked up the ratchet and examined it. Plaintiff left it behind when he went to see a medic, and then went home when he discovered that the medic had left for the day. He does not know what the co-worker did with the ratchet and did not recall whether anyone from Doka was present. Plaintiff's supervisor testified that broken ratchets were generally placed in a Rogers & Sons toolbox, but he did not know what they did with them, although believed that some of them were given to a Rogers & Sons foreman to show to Doka.

Plaintiff stated that he had seen approximately ten ratchets break while working on the Project. His supervisor claimed that he saw that happen four or five times.

Additionally, in an internal email sent approximately six weeks before plaintiff's accident, a Doka senior account executive stated that he had been informed that there were several Doka ratchets that were defective at the work site, which should be collected to determine whether they should be replaced without charge.

The instant action was commenced on July 2, 2013. The complaint alleges that plaintiff was "injured when using a wrench, the internal gear snapped." In August and October 2013, Doka's counsel wrote to Rogers & Sons cautioning it to preserve all evidence relating to the accident, including equipment and tools.

In an April 2014 discovery response, plaintiff's counsel produced a color photograph which purported to "depict[] the wrench in question." However, when Doka served a notice to inspect the tool the next month, plaintiff responded that he was "not in possession of the wrench/ratchet." In a follow-up response a couple of weeks later, plaintiff's counsel asserted that plaintiff might have been subject to larceny charge had he removed the tool from the workplace and suggested that Doka or Rogers & Sons might have it.

At their depositions, neither plaintiff nor other witnesses who looked at the photograph of the ratchet could say whether it was the exact ratchet, or the same brand of ratchet, that caused

plaintiff's injury. Nor could plaintiff or anyone else say who took the photograph, when it was taken, or where the ratchet pictured in it was obtained. Plaintiff stated only that the ratchet was "similar" to the one he had been using.

#### Discussion

Doka's motion to dismiss is granted and plaintiff's motion is denied as moot.

Under CPLR 3126 and the common law, the court has "broad discretion" in selecting remedial measures to cure the prejudice caused by the loss or destruction of evidence. Ortega v City of New York, 9 NY3d 69, 77 (2007) (quotations and citations omitted). However, "[w]hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation." Squitieri v City of New York, 248 AD2d 201, 202 (1st Dept 1998); see Kirkland v New York City Hous. Auth., 236 AD2d 170, 173 (1st Dept 1997) ("We have found dismissal to be a viable remedy for loss of a 'key piece of evidence' that thereby precludes inspection"); Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp., 221 AD2d 243, 243 (1st Dept 1995). Where physical evidence is involved, dismissal is appropriate even where the loss is merely inadvertent or negligent, as such evidence "often is the most

eloquent impartial 'witness' to what really occurred. Kirkland, 236 AD2d 170, 173.

Furthermore, where a party is on notice that an item of evidence may be relevant to litigation, the law imposes a duty to preserve it even before any action has been commenced. Malouf v Equinox Holdings, Inc., 113 AD3d 422, 422 (1st Dept 2014); Standard Fire Ins. Co. v Fed. Pac. Elec. Co., 14 AD3d 213, 220 (1st Dept 2004); see Ortega, 9 NY3d 69, 76 ("Discovery sanctions have also been employed against a litigant who had an opportunity to safeguard evidence but failed to do so"). This obligation is enforced even where the spoiler is not the legal owner of the evidence in question. Standard Fire, 14 AD3d 213, 219-20; Amaris v Sharp Electronics Corp., 304 AD2d 457, 457 (1st Dept 2003), lv denied 1 NY3d 504 (2004). Although it may appear harsh to require an injured plaintiff to have the presence of mind to collect or preserve evidence at the time of an accident, the obligation has nevertheless been imposed in view of the prejudice to the defendant. See Amaris, supra; Langer v Well Done, Ltd., 2006 WL 462125 (Sup Ct, Nassau Co 2006) (plaintiff who sustained chemical burns from oven cleaner charged with loss of the product even though the bottle was disposed of by the hospital staff after she brought it with her to the emergency room for treatment: "the loss of the bottle of oven cleaner at

issue herein renders defendants bereft of appropriate means to confront plaintiff's claim with incisive evidence").

Amaris is particularly instructive, and ultimately controlling of the result in this case. In Amaris, an appliance store employee was injured at his workplace by a television set. Although the television belonged to his employer, a non-party, the First Department upheld the dismissal of the case on the ground of spoliation. The court noted that "[p]laintiff made no showing that defendant was on notice that he intended to commence litigation until one year following the accident" and that "[a]lthough he was aware the television that allegedly caused the injury was a crucial piece of evidence, he negligently failed to take sufficient steps to assure its preservation." Amaris, 304 AD2d 457, 457. The court concluded that dismissal was appropriate because "[d]efendant did nothing to contribute to the loss of the evidence, and its unavailability for examination and analysis was highly prejudicial." Id. at 458.

The record upon which Amaris was decided is also illuminating. On appeal, plaintiff had argued that dismissal was unwarranted because he was not responsible for the disposition of the television, which was lost or discarded by his employer or the manufacturer. In this connection, he submitted affidavits alleging that it was his employer's

practice to return defective products to the manufacturer within days. See Amaris v Sharp, Brief of Plaintiff-Appellant, 2003 WL 25587435, \*1-2. In response, however, defendant observed that plaintiff's only effort to safeguard the evidence was an attorney's letter sent approximately five weeks after the accident asking the employer to set aside the television, and upon receiving no response, he made no further inquiries for nearly two years and never obtained an inspection. See Amaris v Sharp, Brief of Defendant-Appellee, 2003 WL 25587436, \*3-4. Furthermore, although plaintiff purported to identify the exact model of the television shortly after the accident, he later produced a product slip which he conceded might only identify a model "similar" to the one that injured him. Id. at 3. Defendant also noted that notwithstanding the employer's alleged policy, there was no evidence that the television was returned to the manufacturer. Id.

In ruling in favor of the defendant, the trial court determined that the plaintiff was aware of "the crucial nature of the future evidentiary value" of the television and was "negligent in not taking sufficient action to ensure that his then employer . . . saved and preserved said electrical unit to be available as evidence in the subsequent litigation." Amaris v Sharp, Bronx Co Index No. 0023048/1999 (unpublished disposition) quoted at 2003 WL 25587436, \*5. The court also

found it "noteworthy that no photos of the unit were ever taken by plaintiff in its post-accident condition" and that defendant was "effectively denied. . . a reasonable opportunity to provide itself a defense to the action as commenced by plaintiff." Id. at 4-5

Defendant's case for spoliation sanctions is stronger than that asserted in Amaris. Plaintiff has not recounted any efforts whatsoever to safeguard the ratchet at or around the time of the accident, even though he immediately identified that tool as the cause of his injuries. Rather, the first demand to preserve the evidence was not made until after this action was commenced, over two years after plaintiff was injured. And even then, the ratchet was misidentified as a "wrench" in the complaint and the discovery demands and submissions. No photographs of it were taken, and as in Amaris, plaintiff has only offered testimony regarding the possible appearance of a "similar" item of physical evidence.

Plaintiff's theory that Doka may have taken possession of the ratchet is wholly unsubstantiated. As in Amaris, it is merely speculation based upon an alleged policy of the employer to sometimes return defective merchandise to its source. Yet there is no evidence that the actual ratchet in question was ever in the possession of Doka, or of what happened to it after it was picked up by plaintiff's co-worker.

Plaintiff does not meaningfully dispute that the lost ratchet is "key" physical evidence, but nevertheless argues that he can prove a circumstantial case based upon Doka's alleged history of supplying defective tools to the work site. However, without the actual ratchet used by plaintiff, defendant would not be able to exclude the various possibilities that the accident was caused by "misuse, alteration, or poor maintenance" of the ratchet, Squitieri, 248 AD2d 201, 204, rather than some design or manufacturing defect. The "drastic sanction" of dismissal is thus required. See Antonucci v Home Depot U.S.A., Inc., 2012 WL 163829,\*2 (Sup Ct, Dutchess Co 2012) ("While the plaintiffs contend they can still prove their case through the use of circumstantial evidence, the defendants remain in the untenable situation of having to defend the undefendable in the absence of this crucial piece of evidence.")

Finally, the action must be dismissed notwithstanding the allegations in plaintiff's separate spoliation motion, that Doka destroyed relevant messages when it changed its email system from Lotus Notes to Outlook in September 2014. In the context of such electronically stored information (ESI), the Court of Appeals has held that "[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a

culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 547 (2015) (internal quotations and citations omitted). The duty to preserve ESI is triggered when the party is "on notice of a credible probability that it will become involved in litigation." VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 43 (1st Dept 2012). Where ESI is destroyed intentionally or due to gross negligence, the relevance of the lost evidence is presumed, but if only ordinary evidence was involved, the party moving for sanctions bear the burden of establishing its relevance. Id. at 547-48. The failure to institute a "litigation hold" to halt the company's usual email deletion procedure does not constitute gross negligence as a matter of law but is merely one factor the trial court can consider in making its determination. Id. at 553.

Plaintiff has not established the elements of spoliation on the facts established by discovery. Here, in his complaint plaintiff misidentified the tool involved as a "wrench," and it was not until April 2014, more than three years after the accident, the Doka was placed on notice of the actual basis of its liability. At that time, the relevant Doka employees searched their computers emails regarding the Project and

ratchet issues and did not find any pertinent messages. Accordingly, plaintiff cannot establish that any data lost months later during the email system changeover was relevant to the events occurring at or around the time of the accident.

As noted above, plaintiff's failure to preserve the actual ratchet that caused his injury renders it irrelevant that Doka may have supplied other defective ratchets to the Project. That being the case, even if Doka could locate messages responsive to the December 2010 email regarding the replacement of such ratchet, they would have no bearing on plaintiff's claim. There is no reasonable probability that any Doka emails addressed plaintiff's accident, or the particular ratchet involved, as the record is bereft of evidence that plaintiff, his employer, or any other party reported the accident to Doka.

9/7/2018  
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE