

<b>State of New York v Omar</b>
2021 NY Slip Op 33728(U)
January 15, 2021
Supreme Court, Albany County
Docket Number: Index No. 900019-17
Judge: Roger D. McDonough
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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

**STATE OF NEW YORK,**

**Plaintiff,**

**-against-**

**DECISION AND ORDER**

**Index No.: 900019-17**

**RJI No.: 01-20-134709**

**GHALEB OMAR, a/k/a OMAR GHALEB,  
Individually and d/b/a FAST MART, FAST  
MART GAS AND GROCERY, LLC, and  
TEXACO, INC.,**

**Defendants.**

**(Supreme Court, Albany County All Purpose Term)**

**Appearances:**

**SLOWINSKI ATKINS, LLP  
Attorneys for Defendant Texaco Inc. ("Texaco")  
(Angelo A. Cuonzo, Esq., of Counsel)  
Eisenhower Corporate Campus, Suite 2310  
290 West Mount Pleasant Avenue  
Livingston, New Jersey 07039-2729**

**LETITIA JAMES  
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Attorney for Plaintiff  
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The Capitol  
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**Roger D. McDonough, J.:**

Texaco seeks summary judgment dismissing all claims and any cross-claims against it. Plaintiff opposes the summary judgment motion. This litigation involves plaintiff's attempt to recover cleanup costs for alleged discharges at 400 Rhode Island Street in the City of Buffalo ("site"). Texaco's summary judgment motion is based upon plaintiff's purported spoliation of

crucial evidence. The crucial evidence consists of metal pipes that were excavated at the site.

Plaintiff has already secured a judgment against one of the co-defendants in this matter for the full relief sought in the complaint. The other co-defendant passed away prior to plaintiff obtaining jurisdiction over him. Accordingly, Texaco is the only remaining defendant in this matter.

### **Background/Argument**

The spoliation claim involves metal pipes that were found in the subsurface of the site during cleanup/excavation work. Texaco indicates that it was unable to inspect the metal pipes or conduct any lab analysis on same because the piping was lost or destroyed. Without the metal pipes, Texaco contends that it cannot even determine the pipes' ownership. Texaco notes that experts would have been able to test and analyze the metal pipes to determine the dates when corrosion holes would have developed. Physical inspection would also allow for: (1) determinations of whether the pipes had corrosion holes; (2) determinations of the origin and ownership of the metal pipes; (3) the location of the pipes and its direction in placement in the ground as well as the condition of surrounding soils at the time of removal. Texaco's retained expert in this matter opines that plaintiff should have preserved the metal pipes or at least sections of the metal pipes. Without the pipes, the expert states that he is unable to provide the following opinions: (1) the nature of any petroleum product that may have been in the pipes; (2) the type of pipes; (3) the nature and characteristics of the pipes; (4) the age of the piping; and (5) the age/date of any corrosion holes that may have developed in the pipes. Texaco notes that plaintiff contacted it in 2010 to inform Texaco of its potential responsibility for the contamination. While Texaco acknowledges that the destruction of the metal pipes took place before this litigation was commenced, it argues that the Office of Attorney General knew the importance of preserving the evidence no later than 2010. The instant litigation was commenced in March of 2017.

Further, Texaco maintains that it was last involved with the supply of petroleum product to the site in 1978. Specifically, Texaco contends it sold the site's underground storage tanks (USTs) in July of 1978. Additionally, Texaco asserts that it has held no real property interest in the site since October of 1982. Additionally, Texaco points to the absence of any records of

spills/discharged during its ownership period as opposed to those that occurred during subsequent owners' tenure. Finally, Texaco notes that other companies had fuel distribution systems at the site for many years both prior to and subsequent to Texaco's ownership. As such, Texaco maintains that the pipes constitute crucial evidence in establishing responsibility for the contamination of the site.

Plaintiff notes that the heavily impacted soils at the site were discovered in the same location where the "Texaco tank field" is located. Further, plaintiff points to at least nine USTS owned by Texaco at the site during the period of Texaco's site ownership. Plaintiff notified Texaco in October of 2010 of the contamination at the site and Texaco's potential responsibility for the remediation. Texaco denied responsibility and declined to participate in the investigation and cleanup of the site. In March of 2011, plaintiff provided Texaco with subsurface investigation report concerning the site's contamination. Texaco reviewed the report and concluded that it was not liable and declined further participation. Plaintiff maintains that Texaco could have inspected the piping or made requests to preserve it during any of these communications that occurred prior to the cleanup/removal at the site. Plaintiff undertook cleanup and removal activities at the site in December of 2011. The cleanup revealed certain piping that plaintiff maintains was old product piping from a former Texaco system. After photographing the piping, plaintiff's contractor discarded it. The photographs of the piping have been provided to Texaco via discovery responses. Plaintiff and the contractor classify the discarding as routine disposal. Additionally, plaintiff relies upon the other evidence of contamination from the "Texaco tank field" for the proposition that the routine disposal did not cause Texaco any actual prejudice to its defense. The plaintiff also notes the absence of any evidence of any other entity's USTs or piping in the area of the "Texaco tank field". Finally, plaintiff maintains that it has no unfair advantage in this matter because Texaco has equal access to the piping photographs, investigative reports, results from soil and groundwater samples and the historical record.

### Summary Judgment Standard<sup>1</sup>

To obtain summary judgment, it is necessary that movant establish his cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (*Friends of Fur Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 [1979]; CPLR § 3212(b)). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegard v. New York Univ. Med. Center*, 64 NY2d 851 [1985]).

Once such a showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of fact which require a trial (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (*Bethlehem Steel Corp. v. Solow*, 51 NY2d 870 [1980]; *Capelin Assoc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Sternbach v. Cornell University*, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (see, *B. S. Industrial Contractors, Inc. v. Town of Wells*, 173 AD2d 1053 [3rd Dept. 1991]).

While Texaco defendant has styled this action as a CPLR § 3212 summary judgment matter, it is not a standard summary judgment case. Rather, this is a discovery sanction case where the discovery sanction sought is dismissal of plaintiff's complaint.

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<sup>1</sup> Texaco was the only party to request oral argument in this matter. Based on the limited access to the Courthouse due to the pandemic, the Court chose not to entertain oral argument on the instant discovery/summary judgment motion (see, 22 NYCRR 202.8[d]).

### Discussion

Texaco cites three critical factors in support of its spoliation motion for summary judgment, namely: (1) the metal pipes' status as crucial evidence in the litigation; (2) the crucial evidence was inspected by the plaintiff and not by Texaco; and (3) the crucial evidence was negligently or intentionally destroyed before Texaco could inspect it. As a result, Texaco claims its defense has been prejudiced by the purported spoliation.

In opposition, the plaintiff maintains that Texaco was not prejudiced by the absence of the metal pipes. Additionally, plaintiff argues that the pipes were not intentionally destroyed nor destroyed in bad faith. Accordingly, plaintiff asks the Court to deny Texaco's summary judgment motion in its entirety.

In reply, Texaco argues that it was not required to show bad faith or similar aberrant behavior in the plaintiff's spoliation acts. Texaco also argues that the case law relied upon by plaintiff is wholly distinguishable and that plaintiff has failed to distinguish this matter from the relevant, controlling cases where a dismissal sanction was imposed.

Plaintiff also raises a procedural objection based upon Texaco's failure to properly attach a pleading to the summary judgment motion. Texaco challenges the legal merit of this argument on a multitude of grounds. The Court declines to deny the summary judgment motion on said procedural grounds. Initially, the Court again notes that this motion is more akin to a discovery sanction motion as opposed to a summary judgment motion. Additionally, this matter is now an e-file matter and the Court would easily have access to the pleading as a part of the submissions. Further, plaintiff cured the defect by submitting the pleading with the opposition papers. Finally, for the reasons set forth below, the Court finds that the spoliation motion is insufficient to warrant the requested relief or any discovery sanction.

The Court has not been persuaded that plaintiff engaged in any willful or contumacious conduct related to the disposal of the pipes. Accordingly, Texaco was obligated to establish, via a showing of prejudice, that fundamental fairness requires dismissal due to the deprivation of a means of preventing its defense (*see, Mahiques v County of Niagara*, 137 AD3d 1649, 1651 [4<sup>th</sup> Dept. 2016]). Texaco has simply failed to persuade the Court that any of its defenses has been hampered to the extent that a spoliation sanction is warranted. Additionally, Texaco had ample

opportunity to protect its interests and preserve the evidence during the time periods of its communications with plaintiff prior to the cleanup and remediation. Despite this, there is no evidence of Texaco taking any opportunity to inspect the site and the subsurface discoveries. Similarly, there is no evidence of Texaco making any request that any evidence from the site be preserved (*see, Id.* at 1652). The Court also agrees with plaintiff that Texaco is on equal footing with plaintiff as to access to all relevant investigatory materials for the contamination at the site. Further, the Court has not been presented with any meaningful evidence challenging plaintiff's assertion that the disposal was in the ordinary course of business. Based on the foregoing, the Court finds that plaintiff's actions/inactions do not rise to the level of sanctionable conduct. Similarly, the Court finds that dictates of fundamental fairness do not require a different result.

Likewise, the Court also finds that plaintiff's actions/inactions do not warrant any type of preclusion order, adverse inference jury instruction or other discovery sanction. The parties' remaining arguments and requests for relief have been considered and deemed to be lacking in merit and/or unnecessary to reach in light of the Court's findings.

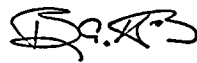
Based upon the foregoing it is hereby

**ORDERED** that defendant Texaco's motion for summary judgment is hereby denied in its entirety and the Court finds insufficient basis to impose any discovery/spoliation sanctions upon the plaintiff.

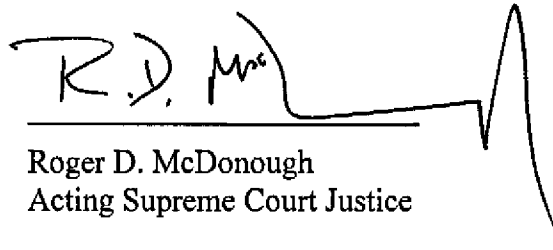
This shall constitute the Decision and Order of the Court. This Decision and Order will be forwarded to the Albany County Clerk. A copy of the Decision and Order is being forwarded to counsel for all parties. The signing of this Decision and Order and delivery of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for the plaintiff is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the Decision and Order. As this is a converted E-FILED case, the Court will only file the pre-conversion papers considered with the Albany County Clerk.

ENTER.

Dated: Albany, New York  
January 15, 2021



01/20/2021



Roger D. McDonough  
Acting Supreme Court Justice

Papers Considered<sup>2</sup>:

1. Notice of Motion for Summary Judgment by Texaco, dated March 6, 2020;
2. Affidavit of Emily Baruque, sworn to February 10, 2020, with annexed exhibits;
3. Affidavit of Joseph J. Liferi, Ph. D., sworn to March 5, 2020;
4. Affirmation of Daniel R. Schlesinger, Esq., A.A.G., dated July 23, 2020, with annexed exhibits;
5. Affirmation of Angelo A. Cuonzo, Esq., dated August 14, 2020, with annexed exhibits.

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<sup>2</sup> Texaco and plaintiff also submitted memoranda of law in support of their respective position. Texaco added a reply memorandum of law as well.