Brief It

2016 WL 6407280
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18-01 POLLITT DRIVE, LLC, A New Jersey limited liability company, Plaintiff-Appellant/ Cross-Respondent, v. HAR...
Superior Court of New Jersey, Appellate Division. October 31, 2016 Not Reported in A.3d 2016 WL 6407280 (Approx. 9 pages)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

Superior Court of New Jersey,
Appellate Division.

18-01 POLLITT DRIVE, LLC, A New Jersey limited liability company, Plaintiff-Appellant/ Cross-Respondent,

v.

HARVEY ENGEL, ESTATE OF ROBERT P. ENGEL, deceased by Jane Engel, as executrix and individually, ESTATE OF ROBERT R. WECHSLER, deceased by Doris Wechsler, as administratrix and individually, ESTATE OF JOHN R. WECHSLER, deceased by Jeanne Wechsler, as executrix and individually, JONATHAN W. LEIGH, individually and as Trustee u/a/d 12/15/75, DAVID I. LEIGH, individually and as Trustee u/a/d 12/15/75, JOSEPHINE L. WAYBRIGHT, individually and as Trustee u/a/d 12/15/75, THE JAQUA FOUNDATION, ESTATE OF GEORGE R. JAQUA, deceased (by and through PNC **Bank** as successor to New Jersey **Bank**, N.A., Executor), ESTATE OF WILLIAM H. SCOBLE, deceased (by and through The **Bank** of New York Mellon Corp., as successor to Irving Trust Company, co-Executor), WILLIAM SCOBLE TRUST (by and through The **Bank** of New York Mellon Corp., as successor to Irving Trust Company), THE **BANK** OF NEW YORK MELLON CORP. (as successor to Irving Trust Co.), WILLIAM C. SCOBLE, SUZANNE SCOBLE MACKLIN, ESTATE OF ALBERT HAILPARN, deceased (by and through Floreine Winthrop f/k/a Floreine Hailparn, executrix), FLOREINE WINTHROP f/k/a FLOREINE HAILPARN, NORTHERN NEW JERSEY EQUITIES, INC., GLENFAIR INDUSTRIAL REALTY CORP., POLLITT DRIVE REALTY CORP., HARWOOD REALTY CORP., INTERROGATORIES INC., SPEARHEAD EQUITIES, EINSONFREEMAN CO., INC., EINSON FREEMAN AND DETROY CORP., INTERSTATE BOECHEVER CORP., LUTZ & SCHEINKMAN CORP., UNIFIED DATA PRODUCTS CORP., KTR NEWMARK CONSULTANTS, LLC, POLEVOY ASSOCIATES, STUART POLEVOY, Defendants-Respondents/ Cross-Appellants.

HARVEY J. ENGEL, ESTATE OF ROBERT P. ENGEL, deceased by Jane Engel, as executrix and individually, ROBERT R. WECHSLER, deceased by Doris Wechsler, as administratrix and individually, JONATHAN W. LEIGH, individually and as Trustee u/a/d 12/15/75, DAVID I. LEIGH, individually and as Trustee u/a/d 12/15/75, JOSEPHINE L. WAYBRIGHT, individually and as Trustee u/a/d 12/15/75, THE JAQUA FOUNDATION, WILLIAM C. SCOBLE, SUZANNE SCOBLE MACKLIN, ESTATE OF

SELECTED TOPICS

Costs

Discretion of Court
Third Party Spoliation of Evidence

Secondary Sources

Intentional Spoliation of Evidence

18 Am. Jur. Proof of Facts 3d 515 (Originally published in 1992)

...In a products liability action, the "star witness" is the product itself. "The product has the capacity to testify through so-called positive evidence, in which the product's condition, markings, featu...

APPENDIX B: FEDERAL REGULATIONS

Employer's Guide to the Health Insurance Portability and Accountability Act Appendix B

...Editor's Note: Many of HIPAA's portability rules, as finalized Dec. 30, 2004 (69 Fed. Reg. 78763), were superseded or rendered moot by the Patient Protection and Affordable Care Act, which required the...

Sanctions for Spoliation of Electronic Evidence

126 Am. Jur. Proof of Facts 3d 1 (Originally published in 2012)

...The prevalence of electronic evidence has changed the landscape of spoliation and the sanctions that courts are willing to impose for the destruction of evidence. Parties to litigation, or those that a...

See More Secondary Sources

Briefs

JOINT APPENDIX, VOL. I

2002 WL 33933818
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, v. CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL, Respondents.
Supreme Court of the United States
Aug. 19, 2002

...WILLIAM B. BOHLING Plaintiff - CURTIS B. CAMPBELL Represented by: W. SCOTT BARRETT Represented by: ROGER P. CHRISTENSEN Represented by: L. RICH HUMPHERYS Defendant - STATE FARM MUTUAL AUTOMOBILE Repres...

JOINT APPENDIX, VOL. VII

2002 WL 33933824
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, v. CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL, Respondents.
Supreme Court of the United States
Aug. 19, 2002

...V. RAY SUMMERS called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows: Q Would you state your full name, please. A V. Ray Summers. Q ...

JOINT APPENDIX, VOL. II

2016 WL 4659055
UNITED STATES OF AMERICA, et al., Petitioners, v. STATE OF TEXAS, et al.
Supreme Court of the United States
Mar. 01, 2016

ALBERT HAILPARN, deceased (by and through Floreine Winthrop f/k/a Floreine Hailparn, executrix), and FLOREINE WINTHROP f/k/a FLOREINE HAILPARN, Third-Party Plaintiffs,

v.

PUBLIC SERVICE MUTUAL INSURANCE COMPANY, GREATER NEW YORK MUTUAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANIES, ZURIH NORTH AMERICA, CHUBB GROUP OF INSURANCE COMPANIES, TRAVELERS INSURANCE COMPANY, Third-Party Defendants.

DOCKET NO. A-4833-13T3
Argued October 6, 2016
Decided October 31, 2016

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3472-10.

Attorneys and Law Firms

Joseph P. LaSala and Robert Shapiro argued the cause for appellant/cross-respondent (McElroy, Deutsch, Mulvaney & Carpenter, LLP, and Shapiro, Croland, Reiser, Apfel & Di Iorio, LLP, attorneys; Mr. LaSala, William F. O'Connor, Jr. and James J. Di Giulio, of counsel and on the briefs).

Lawrence H. Wertheim and Stephen R. Geller argued the cause for respondents/cross-appellants (Wertheim & Geller, attorneys; Mr. Wertheim and Mr. Geller, of counsel and on the brief).

Anne L. H. Studholme argued the cause for respondent/cross-appellant The **Bank** of New York Mellon (Post, Polak, Goodsell, MacNeill & Strauchler, P.A., attorneys; Robert A. Goodsell, of counsel and on the brief; Ms. Studholme, on the brief).

Christopher J. Carey argued the cause for respondent Shapiro, Croland, Reiser, Apfel & Di Iorio, LLP (Graham Curtin, attorneys; Mr. Carey, of counsel; Adam J. Adrignolo and Michelle M. O'Brien, on the brief).

Before Judges Fuentes, Carroll, and Gooden Brown.

Opinion

PER CURIAM

*1 This is an **environmental** contamination case. Plaintiff, 18-01 Pollitt Drive, LLC, commenced this action to recover costs incurred in investigating and remediating contamination discovered after it purchased a commercial property in Fair Lawn in 2006. Defendants are alleged to be former record owners of the property during the time period the contamination occurred. Among other causes of action, plaintiff asserted a statutory claim against defendants for violation of the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 (Spill Act), and common law claims of nuisance and negligence.

Plaintiff appeals from orders of the Law Division determining that it spoliated evidence and dismissing the entire complaint as a remedy for such spoliation. Defendants cross-appeal from the court's orders denying attorney's fees and costs pursuant to Rule 4:23-2, Rule 1:4-8, and N.J.S.A. 2A:15-59.1. For the reasons that follow, we affirm the trial court's findings of spoliation. However, because we conclude that the trial court failed to fully explore alternative sanctions, and that the record was inadequate to permit dismissal of all of plaintiff's claims, we reverse and remand for further proceedings. Consequently, the cross-appeals are dismissed without prejudice as premature.

I.

We summarize those portions of the complex facts and procedural history that are most pertinent to the narrow issues on appeal. The dispute concerns a 9.14–acre tract of land located at 18-01 Pollitt Drive in Fair Lawn (the property), located within the Fair Lawn Industrial Park. The property is adjacent to the Fair Lawn Well Field Site (Well Field), which was designated a Superfund site in September 1983 by the United States **Environmental**

Protection Agency (EPA), after the agency found tetrachloroethylene (PCE) and trichloroethylene (TCE) in municipal supply wells.

The original grantees, Harvey J. Engel (H. Engel), N. Joseph Leigh (N.J. Leigh), Robert P. Engel (R. Engel), Albert Hailparn (A. Hailparn), Robert R. Wechsler (R. Wechsler), Spearhead Equities, Inc. (Spearhead), John Wechsler (J. Wechsler), and Alphonse Schmidt (A. Schmidt) acquired the property on June 7, 1956. Although apparently the subject of some dispute, defendants in this action consist of some of the individuals and entities that, at various points since 1956, held an interest in the property or in operations conducted on the premises. [1]

*2 In 1956, the property was improved with a single slab one-story 145,195 square-foot building. An addition was built on the northeast side of the building in the late 1970's or early 1980's. Shortly after the building was constructed, the property owners leased the premises to Einson Freeman Co. (Einson Freeman), a commercial printer.

In 1963, Einson Freeman merged with another printing company, Bergen-Detroy, to become Einson Freeman Detroy. Einson Freeman Detroy acquired additional printing companies in the years that followed and continued its operations until 1979, when another commercial printing business, Unified Data Products, Inc. (UDP) leased the premises. The bulk of the printing activities occurring on the site took place in the northwest area (NW area) of the building and "most likely" involved the use of chemicals containing volatile organic compounds (VOCs), such as PCE and TCE. Defendant Polevoy Associates (Polevoy) eventually acquired the property in 1988, and later sold it to plaintiff on May 11, 2006.

A. Detection of the Contamination

In March 2006, before acquiring the property, plaintiff commissioned defendant KTR Newmark Consultants (KTR) to perform an **environmental** site assessment. In its ensuing report, KTR advised plaintiff that the property "had a history of potentially hazardous uses from at least 1958 until 1973" and that there was "a potential for impact to the subject property subsurface from these historical uses." KTR recommended that plaintiff investigate before undertaking "any demolition or renovation activities that would disturb the subsurface in order to determine whether the historical uses have impacted the subsurface." Notwithstanding that background, plaintiff claims it did not learn that the land was near a Superfund site until December 2007, when it became aware the property was contaminated.

After discovering the contamination, plaintiff hired **Environmental** Waste Management Associates (EWMA) to investigate and remediate the conditions. At separate times between January and April 2008, EWMA performed multiple soil, ground water and air quality tests at various locations on the property and confirmed the presence of VOCs and extensive soil and groundwater contamination. Plaintiff reported the discharge to the New Jersey Department of **Environmental** Protection (DEP) on February 26, 2008, and assumed responsibility for remediation pursuant to a July 2008 memorandum of agreement with the DEP.

Around this same time, several businesses that had assumed responsibility for cleaning up the neighboring Superfund site-Fisher Scientific Company, Sandvik, Inc., and Eastman Kodak Company (collectively "Superfund parties")--demanded contribution from plaintiff for clean-up costs when they discovered that PCE discharges from plaintiff's property had migrated to the Well Field.

B. The Pleadings

In September 2009, plaintiff's counsel contacted several of the defendants demanding indemnification and contribution for remediation costs related to the contamination. Plaintiff filed its original complaint on April 12, 2010, and an amended complaint on January 5, 2011. Plaintiff asserted claims for contribution from all defendants under the Spill Act (count one), and the Comprehensive **Environmental** Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675 (count two). [2] Plaintiff also asserted related nuisance (count three) and negligence (count four) claims. [3]

C. Spoliated Evidence and Accompanying Motions

*3 Some of the remediation activities occurred during the discovery period and the disputes that arose during that time culminated in the motions that are the subjects of this appeal. Specifically at issue was the destruction of three pieces of evidence that were offered by plaintiff to establish the timing and source of the discharges.

1. LATERAL PIPE

The first disputed item was a corroded segment of a lateral pipe (original pipe) that had originally been located beneath the building slab within the foundation walls. After taking photographs of the original pipe plaintiff discarded it in May 2008, approximately two years before filing its complaint.

In May 2012, one year after it filed its amended complaint, plaintiff retained Jack O'Krepky, a metallurgy expert, to attest to the cause of the contamination. Because the original pipe was no longer available, O'Krepky relied on the photographs plaintiff had taken in 2008 and a replacement sample, or "coupon," from a different pipe located outside the foundation walls. Based on his review of those items, O'Krepky concluded that the original pipe excavated from beneath the building slab had breached in 1971 due to corrosion and other defects and had caused the discharges that resulted in the contamination.

Defendants requested additional information regarding the materials that O'Krepky had reviewed. On March 14, 2013, plaintiff disclosed for the first time that it had lost the 2012 replacement coupon and proffered a supplemental report that O'Krepky had prepared based on yet another sample (second coupon) it had collected in February 2013.

O'Krepky's reports generated a succession of competing expert opinions that challenged the scientific soundness of his conclusions. Defendants' experts asserted that O'Krepky could not have accurately determined the timing and source of the discharge using only the photographs and coupon samples and that the original pipe was needed to test his theory. Those experts also criticized plaintiff's failure to adhere to the remediation industry's practices in preserving evidence.

When the Engel defendants learned that plaintiff had disposed of the original pipe and had lost the first coupon, they filed a motion on March 19, 2013, to dismiss the amended complaint on spoliation grounds. Alternatively, they sought to bar the introduction of the pipe or any related evidence. On April 18, 2013, BNY joined in those motions.

On June 7, 2013, the court issued an order barring plaintiff's reliance on any evidence concerning the pipe and replacement coupons. It reasoned that plaintiff was a sophisticated investor which, having received guidance from experienced remediation professionals and **environmental** experts, should have known that litigation was possible. The court faulted plaintiff for its failure to direct its agent to preserve the original pipe and to notify defendants before collecting the replacement coupons. The court highlighted plaintiff's loss of the replacement coupon and its acknowledgment that the pipe and coupon were important evidentiary items.

2. ACID DILUTION SUMP PIT & CONCRETE FLOOR

The second and third items of evidence challenged in the motions pertained to structures within an acid dilution sump pit and the concrete slab floor in the NW area.

Plaintiff's expert on the subject, David Terry, was a professional hydrogeologist and licensed site remediation professional (LSRP). According to Terry's October 2012 report, at some point during its occupancy, Einson Freeman installed a subgrade acid dilution sump system along the northern wall of the building. That sump system consisted of large concrete structures that were "intended to neutralize acidic waste prior to its discharge to the sanitary sewer system." Beneath the concrete slab was a sanitary sewer piping system that connected to a series of floor drains in the NW area of the building, and "[w]astewater discharged through certain drains in the building [was] routed through the sump system." Terry asserted that the prior printing activities on the site were the source of the discharges and that the soil contamination "discovered immediately beneath the floor slab could only have arisen from discharges" that occurred after the building was constructed. He further opined that "[b]ased on the distribution of soil contamination beneath the floor slab, the corroded sewer pipe leading from the floor drains ... was a major conduit and source of contamination beneath the building floor slab." David Vaccari, another expert retained by plaintiff, reviewed photographs of the structures and expressed agreement with Terry's conclusions and methodology.

*4 Because plaintiff had excavated the sump pit and concrete floor in July 2011, and had destroyed them before its experts had examined them, both Terry's and Vaccari's opinions were based on photographs of the structures and data derived from sludge within the sump structures and from soil found beneath the sump. Thus, similar to the positions taken with regard to the lateral pipe, defendants' experts argued that it was not possible to verify or refute the scientific basis of plaintiff's discharge theories without examining the actual sump structures and flooring, which could not be done because those items had been discarded.

Consequently, on July 9, 2013, the Engel defendants filed another motion to dismiss plaintiff's suit on spoliation grounds. BNY filed a similar motion on August 7, 2013.

Following lengthy oral argument, the trial court rendered an oral decision on September 27, 2013. It reiterated that litigation had been foreseeable when plaintiff disposed of the lateral pipe. It noted that plaintiff had excavated and destroyed the sump and flooring after it filed its suit. Based on those facts, the court held that plaintiff had breached its duty to preserve the pipe, sump and concrete floor.

The court recounted the prolonged discovery period that had preceded the most recent motions, and highlighted plaintiff's unresponsiveness to defendants' requests for discovery and plaintiff's failure to adhere to discovery deadlines. In the court's view, plaintiff's failure to preserve all relevant evidence departed from accepted remediation protocols and prejudiced defendants' ability to mount a proper defense.

The court held that precluding the controverted evidence would render plaintiff unable to establish the source and time of the leak. It reasoned that plaintiff could offer no alternative proofs to link defendants to the contamination. On October 4, 2013, it entered memorializing orders dismissing the amended complaint with prejudice as to all defendants, and agreed to entertain fee applications. In addition to dismissing the amended complaint on spoliation grounds, the court concluded that BNY did not acquire an interest in the subject property until after the discharges had occurred under plaintiff's theory of liability. Therefore, it specifically dismissed BNY over plaintiff's objection that it was seeking to hold BNY liable as a successor.

D. Defendants' Applications for Attorney's Fees

On November 19, 2013, the Engel defendants applied for attorney's fees pursuant to Rule 4:23-2 and N.J.S.A. 2A:15-59.1. Additionally, they sought fees against plaintiff's trial counsel pursuant to Rule 1:4-8. On November 27, 2013, BNY also filed a motion to recover expenses and fees paid in connection with plaintiff's spoliation of evidence.

The court denied both fee applications on April 4, 2014. The court acknowledged that Rule 4:23-2 gave it authority to sanction plaintiff with attorney fees, but noted that defendants had not identified any legal precedent for sanctioning a party with both counsel fees and dismissal of the complaint. It found that plaintiff's failure to preserve the evidence had not been intentional and that plaintiff had no incentive to destroy evidence that was so critical to its own case.

The court also ruled that the Engel defendants were not entitled to fees under the frivolous litigation provisions of N.J.S.A. 2A:15-59.1 and Rule 1:4-8. It reasoned that neither the statute nor court rule was applicable because the complaint had been dismissed on discovery grounds rather than on the merits. It also found that the acts of spoliation could not be attributed to plaintiff's counsel because they occurred before plaintiff retained the firm and, therefore, denied defendant's request for sanctions against plaintiff's trial counsel. This appeal and cross-appeal followed.

II.

A.

***5** We first address plaintiff's challenge to the court's threshold finding that it spoliated material evidence. A spoliation claim arises when a party in a civil action has hidden, destroyed, or lost relevant evidence and thereby impaired another party's ability to prosecute or defend the action. Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001); Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 226 (App. Div. 2001).

Spoliation encompasses any conduct "that spoils, impairs or taints the value or usefulness of a thing." Rosenblit, supra, 166 N.J. at 400. Such acts are subject to sanctions because the law recognizes that a "plaintiff who destroys evidence interferes with a defendant's ability to defend a lawsuit and right to discovery." Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 365 (App. Div. 1998). A party is not obligated to preserve every item and document once a complaint is filed, but it is required to do what is reasonable under the circumstances. Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 250 (Law Div. 1993). That duty to preserve evidence arises when there is: "(1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm to the defendants, or in other words, [a likelihood that] discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation." Ibid.

Whether a party has an obligation to save evidence in a given context is a question of law. Aetna Life, supra, 309 N.J. Super. at 365 (citing Hirsch, supra, 266 N.J. Super. at 249). Thus, the trial court's conclusion that plaintiff had a duty to preserve the disputed evidence is subject to de novo review. See Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). However, the factual findings on which the trial court based its legal conclusions are entitled to deference. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474 (1974).

Plaintiff does not dispute that the lateral pipe was relevant to establish defendants' liability for the contaminated property. The essence of plaintiff's argument is that it was not required to save the pipe because it had no plan to bring suit at the time it disposed of the pipe. This contention lacks merit because the obligation to preserve evidence is not triggered by the spoliator's intent to bring suit but rather it arises when litigation is "probable." Hirsch, supra, 266 N.J. Super. at 250 (citing William T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443 (C.D. Ca. 1984)). In this case, plaintiff knew before purchasing the property in 2006 that the site had hosted printing activities for decades and that those operations had relied on chemical substances. Indeed, for those very reasons, KTR recommended that plaintiff investigate before undertaking acts that would disturb the subsurface of the property.

Moreover, by December 2007, there was no question that the property was indeed contaminated. As early as June 2008, EWMA had confirmed high concentrations of VOCs on the property and plaintiff learned around this time that the Superfund parties intended to seek contribution for cleaning up the Well Field.

***6** Given the extent of the contamination on the subject property, plaintiff's sophistication and access to remediation experts, and the clean-up occurring at the Superfund site, plaintiff should have anticipated that it could become involved in litigation, whether as plaintiff against the prior owners and users of the property or in some other capacity in regards to the Superfund site. Thus, the trial court reasonably concluded that plaintiff had a legal duty to preserve the lateral pipe.

Plaintiff also does not dispute that it had an obligation to save the dilution sumps and concrete floor. However, it insists the unavailability of these items is of no moment because the loss of this evidence constrains both parties equally. Plaintiff contends that it, more than defendants, is prejudiced by the loss of the lateral pipe because it "lost direct evidence of contamination." It further argues that the residual pipes and soil provide defendants alternate sources of evidence.

We do not find these arguments persuasive. Plaintiff's assertions fail to negate the fact that it had a duty to preserve the evidence. Plaintiff advanced multiple theories to establish the source and timing of the discharges. All of those theories are based on the very evidence that plaintiff destroyed. The record sufficiently supports the trial court's determination that plaintiff had a duty to preserve the evidence in dispute and that its failure to do so represented a breach of that duty. Accordingly, we affirm the court's determination that plaintiff had an obligation to preserve the lateral pipe, dilution sumps and concrete floor materials and that its unilateral destruction of those items constituted a spoliation of relevant evidence.

B.

We next address plaintiff's argument that the court erred in dismissing its amended complaint because less drastic discovery sanctions could have restored a "level playing field." Plaintiff also contends that the court improperly considered the merits of its complaint based solely on the discovery motion record, and that the court's alternate basis for dismissing its claims against BNY was erroneous because the nature of BNY's interests was a disputed material fact. We agree.

Trial courts have broad authority to sanction abusive discovery tactics and a reviewing court will not disturb the sanction if it is fair and reasonable under the circumstances. Manorcare, supra, 336 N.J. Super. at 230-31. The range of discovery sanctions can include:

> (1) An order that ... designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

[R. 4:23-2(b).]

The remedies are cumulative and the ultimate sanction depends on a variety of factors, such as the identity of the spoliator and where in the litigation process the concealment or destruction of evidence is uncovered. Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 121-22 (2008).

*7 For example, if "the spoliation is not discovered until after the underlying action has been lost or otherwise seriously inhibited, the [affected party] may file a separate tort action." Rosenblit, supra, 166 N.J. at 408. By contrast, where a party learns of the destruction or concealment of evidence during litigation, a court may restore the parties to equipoise by issuing an adverse-inference presumption "that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her." Id. at 401-02.

As a general matter, the Supreme Court has recognized that the spoliation of evidence can occur in a wide range of contexts and, therefore, it has encouraged trial courts to adopt a situation-specific approach in crafting a remedy. See Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 203 N.J. 252, 284 (2010) ("Our purpose is not to create a catalog of the many possibilities ... but to use this case as an illustration of how courts can address [spoliation] both fairly and creatively."). To that end, Robertet stressed that

courts faced with spoliation claims should strive to impose a remedy that will serve the ends of justice by creating a level playing field, by ensuring that the consequence of the lost evidence falls on the spoliator rather than on an innocent party, and by using their considerable powers to deter future acts of spoliation.

[Ibid.]

Accordingly, while dismissal may be ordered, it should only be imposed when no lesser sanction could erase the prejudice borne by the innocent party. Id. at 283. If a lesser sanction is available, the imposition of a more severe sanction would not be appropriate and will be deemed an abuse of discretion. Manorcare, supra, 336 N.J. Super. at 230-31.

The dispositive question thus becomes whether the trial court could have imposed more moderate sanctions, such as an adverse inference presumption, to restore equipoise. Courts frequently sanction a spoliator by giving the jury an adverse inference charge:

The best known civil remedy that has been developed is the so-called spoliation inference that comes into play where a litigant is made aware of the destruction or concealment of evidence during the underlying litigation .... Courts use the spoliation inference during the underlying litigation as a method of evening the playing field where evidence has been hidden or destroyed. It essentially allows a jury in the underlying case to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.

[Rosenblit, supra, 166 N.J. at 401-02 (citations omitted).]

Here, the flaw in the trial court's decision is that while it correctly found that plaintiff spoliated relevant evidence, it never considered whether less severe sanctions, including an adverse inference charge, could have erased the prejudice to defendants. That failure to consider lesser options is contrary to the fact-sensitive approach prescribed in Robertet, supra, 203 N.J. at 273-74.

Instead of evaluating the available remedies, the court effectively presumed that it would be futile for plaintiff to press its case without the missing evidence. Indeed, noting the unavailability of other alternate proofs and the questionable aspects of the conclusions of plaintiff's experts, the court reasoned:

Plaintiff's destruction of the sumps materially prejudices all defendants. The discovery [of the] destruction and disposal of the sumps in the middle of this litigation ... speak to [plaintiff's] fault and culpability ...

> *8 The sump evidence is not only relevant to the litigation. It now constitutes the entirety of plaintiff's evidence for the essential elements of its case, basically, being [sic] the timing of the discharge.
>
> ....
>
> The prejudice to the defendant[s] is severe due to the great importance of being able to time the discharge in this case with multiple owners – periods of time. There is no way to reconstruct the physical evidence of the ... discharge. Which is at the core of plaintiff's case.
>
> ....
>
> Plaintiff's inability to time the discharge, and defendant[s'] inability to contest any opinion as to [the] timing asserted on behalf of the plaintiff by plaintiff's expert, warrants dismissal of plaintiff's case. Accordingly, plaintiff's case is dismissed as to all defendants based on spoliation.

In its later addendum, the court rejected plaintiff's suggestion that it had rendered a summary decision and asserted that it did not consider the parties' motions for summary judgment, which were then pending, because it felt that the arguments raised in those applications were irrelevant to the spoliation issues. However, a careful reading of the court's rationale contradicts that characterization and reveals that it dismissed the complaint on substantive grounds. More specifically, the court assumed that plaintiff would not be able to meet the essential elements of a Spill Act contribution claim without the spoliated evidence. Whether or not that proves to be true, it was improper for the court to consider the merits of plaintiff's case in crafting a spoliation sanction. This is especially so where, as here, the court specifically noted that it had not reviewed the full summary judgment record, or analyzed that record in accordance with the well-established standards set forth in Rule 4:46-2(c) and Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), before dismissing plaintiff's complaint with prejudice.

Accordingly, we reverse the dismissal of plaintiff's complaint. We conclude that a remand is necessary because the court failed to consider whether a lesser sanction could have cured the prejudice occasioned by the spoliation of evidence and prematurely considered plaintiff's ability to prove its case without the barred evidence.

C.

Plaintiff also argues that even if it was proper for the court to dismiss its Spill Act claim, reversal is required because the court never addressed its nuisance and negligence claims. Again we agree.

The record reflects no consideration or explanation by the court as to the tort claims. We surmise that the court deemed it unnecessary to address those counts because it had dismissed the entirety of the amended complaint. Nonetheless, "[a]s a matter of fairness to the process and to enable meaningful appellate review, a trial court" is required to provide "adequate factual findings and a statement of reasons." Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 1:7-4 (2017). The court's failure to explain its reasoning contravenes the requirement of Rule 1:7-4. Accordingly, on remand, the court should address the viability of plaintiff's tort claims.

III.

Finally, Both BNY and the Engel defendants argue that the court's denial of attorney fees upon the dismissal of plaintiff's complaint was erroneous because Rule 4:23-2(b) affirmatively required the imposition of fees under the circumstances presented. In addition to that broader argument, BNY challenges the court's reliance on its finding that plaintiff did not intentionally destroy the evidence, arguing that the determination effectively added a "malice" requirement to the applicable rule governing attorney fees.

*9 In light of our determination to reverse the dismissal of plaintiff's complaint and remand the matter to the trial court for further proceedings, we conclude that any determination of defendants' entitlement to counsel fees and costs is premature. Accordingly, defendants' cross-appeals are dismissed without prejudice.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction. Defendants' cross-appeals are dismissed without prejudice.

All Citations

Not Reported in A.3d, 2016 WL 6407280

Footnotes

1 For ease of reference, the relevant defendants will be referred to as they have been denominated by the parties to this appeal. The Engel defendants consist of: H. Engel; R. Engel's estate (by Jane Engel, as executrix and individually); R. Wechsler's estate (by Doris Wechsler, as executrix and individually); J. Wechsler's estate (by Jeanne Wechsler, as executrix and individually); Jonathan W. Leigh, individually and as trustee; David I. Leigh, individually and as trustee; Josephine L. Waybright, individually and as trustee; the Jaqua Foundation; William C. Scoble; Suzanne Scoble Macklin; A. Hailparn's estate (by Floreine Winthrop, formerly Floreine Hailparn, individually and as executrix). The **Bank** of New York Mellon Corp. (BNY) defendants consist of BNY (as successor to Irving Trust Co.) and the estate of William H. Scoble (by BNY as successor to Irving Trust Company). The bulk of the remaining defendants were administratively dismissed for lack of prosecution.

2 The parties later consented to the voluntary dismissal of the CERCLA claim.

3 Additional claims concerning defendants not involved in this appeal will not be discussed.

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