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LITIGATION REVIEW

Two Recent Spoliation Rulings Impose Severe Sanctions

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Courts have long grappled with how to deal with the situation where a party loses or destroys essential evidence before or during litigation. The legal doctrine is known as "spoliation," and courts have imposed sanctions from the most drastic remedy of outright dismissal, to adverse inferences, to preclusion of evidence. As discussed below, two recent Nassau County decisions imposed severe sanctions in non-traditional spoliation contexts, providing additional notice to parties and their counsel to be vigilant and proactive, both before and during litigation, in preserving potential evidence.

Spoliation Doctrine

Federal courts describe spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." In federal court, the determination of an appropriate sanction for spoliation, if any, is left "to the sound discretion of the trial judge, . . . assessed on a case-by-case basis."

Similarly, in state court, "[w]here a party destroys essential physical evidence 'such that its opponents are "prejudicially bereft of appropriate means to confront a claim with incisive evidence," the spoliator may be sanctioned by the striking of its pleading'." The state courts do acknowledge, however, that "the striking of a pleading is a drastic sanction that is warranted as a matter of elemental fairness . . . Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate." Moreover, the court "may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation.'" As in federal court, the trial "court has broad discretion in determining what, if any, sanctions should be imposed for spoliation of evidence. . . ."

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Issues of spoliation appear often in personal injury cases, and specifically products liability actions, where a particular product or instrumentality alleged to have caused personal injuries is lost or destroyed. More recently, with the explosion of electronic discovery issues, courts have labored over quite intricate issues involving the nature and extent of lost or destroyed electronic evidence, including, of course, the most prominent form of electronic evidence: e-mails. For example, in the case of *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, Judge Shira A. Scheindlin imposed three basic sanctions against the defendant for destroying e-mail during the pendency of the litigation and failing to produce other e-mails in a timely manner: (1) instructing the jury that the evidence in question would have been unfavorable to the defendant; (2) ordering the defendant to pay the costs of any depositions or re-depositions required by the late production of evidence; and (3) ordering the defendant to pay the costs of the motion required by the spoliation.

Recent Nassau County Decisions

As two recent Nassau County decisions show, parties and their counsel must be aware that spoliation is clearly not limited to the traditional area of products liability, or the fast-developing area of electronic discovery, but can rear its ugly head in other interesting contexts as well. In *Monchinski v. Caserta*, an action in the Supreme Court, Nassau County, Justice John P. Dunne imposed a severe sanction against the defendants for failing to preserve corporate records in an action alleging that the corporate veil should be pierced to hold two individual defendants personally liable. Plaintiffs, homeowners, entered into contracts for home improvement and remodeling with the two corporate defendants. The corporate defendants were owned solely by the two named individual defendants, respectively. In addition to other causes of action arising from the defendants' alleged failure to complete the work, plaintiffs alleged that "the individual defendants operated the defendant corporations as alter-egos, did not adhere to corporate formalities and intermingled funds." During the action, the two corporate defendants were dissolved and the corporate records were discarded.

Plaintiffs alleged that the "defendants have failed to provide the disclosure with regard to corporate records, including, inter alia, minute books, payroll records, vehicle registrations, licensing and insurance records, and certain checks, as well as certain bank statements." The court noted that "[a]s defendants disposed of documents while this action was pending, and while they were on notice that plaintiffs were required to pierce the corporate veil to hold them personally liable, a question of spoliation of evidence is raised."

Justice Dunne began his analysis by reviewing the basic spoliation principles:

"While 'reluctant' to dismiss a pleading absent willful or contumacious conduct, courts will consider the extent of prejudice to determine 'whether dismissal is necessary as a "matter of elementary fairness"' . . . . The reasonableness of the non preserving party's conduct will be evaluated as against the resulting prejudice

to the adversary, and whether the defense is 'fatally' compromised and the offended party 'bereft of appropriate means to confront a claim with incisive evidence' . . . . When there is 'extreme prejudice' dismissal is warranted . . . ."

Noting that the corporate veil can be pierced where there has been "a failure to adhere to corporate formalities, inadequate capitalization, [and] use of corporate funds for personal purpose," the court observed that the corporate defendant's checks indicated that one of the individual defendants freely used corporate checks to pay personal obligations, while the other individual defendant and corporate entity failed completely to provide corporate disclosure. Oddly, both individual defendants submitted affidavits on the motion admitting that "many of the [corporate] documents were lost [when the corporations "closed"] and [were] not retrievable," asserting that there was nothing unlawful about dissolving the corporations during the pendency of the action. While they had the right to dissolve the corporations, neither defendant seemed to be aware of the consequences of discarding relevant evidence during the litigation.

The court proceeded to impose severe sanctions upon the defendants:

Plaintiffs 'are entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil' . . . The destruction or loss of the records during the pendency of this action which would evidence compliance with the corporate form and formalities have left plaintiffs 'bereft of appropriate means' to prove that the individual defendants used their corporations as alter egos. The loss to plaintiffs constitutes extreme prejudice, as the dissolution of the corporate defendants ha[s] left plaintiffs without the ability to collect upon any judgment which may be rendered against them in this proceeding. Accordingly, [the individual defendants'] affirmative defenses which claim that the contracts at issue were solely corporate obligations are stricken, and they are precluded from contesting plaintiffs' claim that the corporate veil should be pierced.

In *Russell Place Associates LLP v. Super*, the doctrine of spoliation was analyzed in the context of a landlord-tenant eviction proceeding. The landlord alleged that the tenant should be evicted because she violated a prior stipulation of settlement prohibiting the tenant from permitting her daughter into the apartment building. The landlord's building manager testified that he believed he observed the tenant's daughter in the subject apartment, called the police and instructed the building super to direct a video surveillance camera towards both the elevator and front door of the building in an attempt to catch the daughter on video. When the building manager later went to the apartment with the police, however, no one answered the door at the apartment, and no one observed the woman who had previously answered the door leave the building. Upon the instruction of the landlord's building manager, the building super reviewed the video covering the time after the daughter was allegedly observed in the apartment, but he was unable to identify the daughter, allegedly because of the camera angle. The building super then testified that he recorded over the tape the next day, thereby erasing the film and destroying the evidence, before the eviction proceeding was commenced.

Nassau County District Court Judge Scott Fairgrieve considered whether the landlord's taping over the videotape could give rise to sanctions for spoliation of evidence. Citing the Second Department's decision in *Thornhill v. A.B. Volvo*, 304 A.D.2d 651, 757 N.Y.S.2d 598 (2d Dep't 2003), the court focused on whether the landlord was on notice of the relevance of the videotape before the litigation commenced and, if so, whether it had an obligation to preserve the tape. Judge Fairgrieve found that "the building manager/building super, were the only ones who knew of the existence of the tape and the possibility that [the landlord] would seek [the tenant's] eviction." The court further found that the building manager and super were "'sufficiently aware of the importance of the' surveillance tape" and by "taping over the video after reviewing its contents, the super either willfully or negligently destroyed its contents, thereby constituting an expulsion/spoliation of evidence." The court therefore drew an inference that the daughter was *not* observed leaving the building, ruling that the landlord had not proved that the tenant violated the stipulation of settlement.

Conclusion

These latest Nassau County cases, arising in "non-typical" spoliation contexts, provide continuing notice that the destruction or failure to preserve relevant evidence, either before or during litigation, can lead to extreme consequences. Counsel should be proactive in advising clients who are likely to be or are involved in litigation of the need to preserve relevant evidence and the consequences for their failure to do so.

Endnotes

1. *West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2d Cir. 1999).
2. *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).
3. *Klein v. Ford Motor Co.,* 303 A.D.2d 376, 377, 756 N.Y.S.2d 271 (2d Dep't 2003).
4. *Id.*
5. *Iannucci v. Rose*, 8 A.D.2d 437, 438, 778 N.Y.S.2d 525 (2d Dep't 2004).
6. *Id.*
7. *See,e.g., Horace Mann Ins. Co. v. E.T. Appliances, Inc.*, 290 A.D.2d 418, 736 N.Y.S.2d 79 (2d Dep't 2002) (alleged defective stove claimed to have caused fire was destroyed); *Behrbom v.Healthco Intern., Inc.*, 285 A.D.2d 573, 728 N.Y.S.2d 96 (2d Dep't 2001)(nitrous oxide tanks allegedly causing personal injuries lost).
8. 2004 WL 1620866 (S.D.N.Y.), 94 Fair Empl.Prac.Cas. (BNA) 1.
9. NYLJ, September 7, 2004, p.19, col. 1.
10. NYLJ, July 21, 2004, p. 20, col. 1.