

The Law of Spoliation in NY: Three Recent Decisions

BY ROY SIMON

Twenty-five years ago, few lawyers in New York had heard the word “spoliation.” Today, lawyers grapple with spoliation claims frequently. Since mid-march, for example, New York courts have issued at least three separate opinions about spoliation. (Two of these opinions were published only in the New York Law Journal and are not available on Lexis or Westlaw.) This column briefly gives the background of the law of spoliation and discusses the three recent decisions.

Background: The Rise and Fall of the Tort of Spoliation

In the seminal case of *Smith v. Superior Court*, 198 Cal. Rptr. 829 (2d Dist. 1984), the court recognized a new tort, holding that a party who deliberately destroys or negligently fails to preserve evidence that will be needed for litigation may be sued for “spoliation of evidence.” Five years later, in *County of Solano v. Delancy*, 264 Cal. Rptr. 721 (Cal. App. 1st Dist. 1989), the court formally stated the elements of the new tort of spoliation. A cause of action for intentional spoliation of evidence arises when: (1) litigation by or against the plaintiff is pending, threatened or probable; (2) the defendant knows about the pending, threatened or probable litigation; (3) the defendant intentionally spoils evidence to disrupt the plaintiff’s case; and (4) the spoliation of evidence proximately causes damages to the plaintiff.

Other states have followed the lead of the California appellate courts. The courts of Alaska, Florida, Illinois, and Kansas all created a cause of action for spoliation of evidence, and Ohio and New Jersey recognized the analogous tort of fraudulent destruction of evidence. In addition, some states passed statutes requiring potential defendants to preserve certain kinds of evidence. For example, the Illinois legislature passed an X-ray retention Act, and in *Rodgers v. St. Mary’s Hospital of Decatur*, 597 N.E.2d 616 (Ill. 1992), the Illinois Supreme Court recognized a private cause of action under the statute against a hospital that loses an x-ray that a plaintiff needs to prove a medical malpractice case.

In the late 1990s, however, in *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal 4th 1, 954 P2d 511 (1998), the California Supreme Court rejected the reasoning in *Smith v. Superior Court* and refused to adopt the tort of intentional spoliation of evidence if the spoliation victim knew (or should have known) of the spoliation before the court in the underlying decision decided the case on the merits. The court condemned the intentional destruction of evidence because destroying evidence (1) “can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action,” and (2) can “increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.” But, the court continued:

That alone, however, is not enough to justify creating tort liability for such conduct. We must also determine whether a tort remedy for the intentional first party spoliation of evidence would ultimately create social benefits exceeding those created by existing remedies for such conduct, and outweighing any costs and burdens it would impose. Three concerns in particular stand out here: the conflict between a tort remedy for intentional first party spoliation and the policy

against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases.

After weighing these considerations, the court held that there is “no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant” where the spoliation victim “knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action.”

The next year, in *Temple Community Hosp. v. Superior Court*, 976 P.2d 223 (Cal. 1999), the California Supreme Court considered a related issue: will a tort cause of action lie “against a person who is not a party in a lawsuit but who intentionally destroys or suppresses evidence that would be relevant in the lawsuit”? Reiterating the policies articulated in *Cedars-Sinai*, the court refused to recognize a tort cause of action for intentional spoliation by a third party. “The doubtful benefit of the proposed tort remedy is outweighed by the prospect of a spiral of litigation giving rise to verdicts based upon speculation,” the court said. “In addition, it would be anomalous for a nonparty to be liable in damages, including punitive damages, for conduct that would not give rise to tort liability if committed by a party.” The court concluded that a tort cause of action would not lie for intentional third party spoliation of evidence.

In *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478 (2004), the New York Court of Appeals considered the issue for the first time. Like the California Supreme Court, the New York Court of Appeals declined to create or recognize a cause of action for negligent spoliation of evidence. The court identified two main factors that militated against establishing a cause of action for spoliation where there was “no duty, court order, contract or special relationship”: (factor 1) the burden of forcing a party to preserve evidence when it has no notice of an impending lawsuit, and (factor 2) the difficulty of assessing damages.

In 2007, in *Ortega v. City of New York*, 9 N.Y.3d 69 (2007), the Court of Appeals addressed an issue that it had left open in *MetLife*: Does New York recognize the tort of third-party negligent spoliation of evidence? The facts were compelling. Castalia Ortega purchased a used Ford minivan and took it to a service station for an inspection and tune-up. The next day, while Ortega was driving the van in Brooklyn, the van burst into flames, severely injuring Ortega and her passenger, Manuel Peralta. The burned-out van was towed to a pound. When the pound refused to let Peralta inspect the van (because he was not the owner), Peralta brought a special proceeding and obtained a Supreme Court order granting him the right to inspect the van and prohibiting its alteration or destruction until he completed his inspection. But through a bureaucratic snafu, the New York City abandoned vehicle pound destroyed the van anyway. Instead of pursuing a personal injury action against Ford, Peralta sued the City, claiming that by destroying the van the City had breached its duty to preserve evidence, thereby committing the tort of negligent spoliation of evidence. The trial court let the action go forward, but the Appellate Division ordered it dismissed.

The Court of Appeals agreed with the Appellate Division, holding that New York does not recognize the independent tort of negligent spoliation of evidence by a third party. As a policy rationale, the Court said it was “not convinced that existing New York remedies are inadequate to deter spoliation or appropriately compensate its victims.” For example, discovery sanctions and actions for civil contempt can deter and remedy spoliation. In any event, an independent cause of action for third-party negligent spoliation would invite unacceptable speculation. To establish causation and damages, the Court of

Appeals noted, the plaintiff in a spoliation action would have to show that a jury in the underlying litigation would have found differently if the original and unaltered evidence had been before it. But “the jury in the spoliation action could only surmise whether the item in its original state would in fact have been favorable to the party now claiming to have suffered a loss on account of that spoliation.” Thus, it would require “the utmost of surmise and speculation for the jury to decide what persuasive effect that item, if still available in its original state, would have had on the jury in the underlying action.”

Nevertheless, despite the holdings in *MetLife* and *Ortega*, the lack of an independent cause of action for destroying evidence does not mean that a person who destroys evidence will get off scot free. On the contrary, many New York courts have imposed sanctions on parties for destroying evidence. And the sanctions can be severe – they have included (a) dismissal of claims, (b) adverse inferences, (c) preclusion of testimony or other evidence relating to the destroyed items, and (d) other discovery sanctions. These sanctions have been imposed not only against defendants who lost or destroyed evidence that could have helped the plaintiff prove a claim, but also against plaintiffs who lost or destroyed evidence that could have helped defendants establish a defense.

With that background in place, I will turn to three New York spoliation cases decided in March and April, starting with the most recent one.

Spoliation Sanctions as a Plaintiff’s Weapon

Sometimes, plaintiffs seek to wield the doctrine of spoliation as the basis for seeking sanctions against a defendant for destroying evidence during litigation. In *Whitney v. JetBlue Airways Corp.*, 07 CV 1397 (CBA) (E.D.N.Y., April 29, 2008) (Cheryl Pollack, magistrate Judge), an unpublished decision, passenger Denise Whitney sued JetBlue for failure to protect and for gross negligence because no flight attendant or other JetBlue personnel came to her aid when the passenger behind her violently and repeatedly kicked her seat hard enough to injure Ms. Whitney. A JetBlue flight attendant filled out an “in flight irregularity report” that was duly entered into JetBlue’s electronic database and produced to Ms. Whitney during discovery, but – despite a “litigation hold” that should have led JetBlue to preserve all relevant documents – JetBlue had destroyed the original handwritten report. The electronic version in JetBlue’s database mentioned an offensive conversation but did not say anything about a passenger kicking Ms. Whitney’s seat.

Ms. Whitney moved for sanctions for spoliation of evidence, arguing that without the original report, she had no way to determine whether the information in JetBlue’s electronic database “even remotely reflects the information contained in the now destroyed paper-based original.” As a sanction, Ms. Whitney (who is apparently no wallflower) asked the court either to enter judgment in her favor or to give an “adverse inference” instruction to the jury and exclude JetBlue’s evidence, and in either case to grant Ms. Whitney her costs and attorney fees in connection with the motion for sanctions. JetBlue attacked Ms. Whitney’s motion as “speculation, to the point of paranoia,” and said that sanctions were unwarranted because the original paper report was “cumulative and of minimal relevance.”

The facts sound like a badly written final exam question, but magistrate Judge Pollack took the motion seriously, methodically writing a basic primer on the law of spoliation sanctions. Rule 37(b) of the Federal rules of Civil Procedure authorizes a court to impose sanctions when a party “fails to obey an order to provide or permit discovery.” Sanctions clearly may be imposed when a party “spoliates

evidence in violation of a court order.” But if a court has not issued an explicit discovery order, “the court has inherent power to preserve the integrity of the proceedings by ... imposing sanctions for the spoliation.”

The Second Circuit has defined “spoliation” as “the destruction or deliberate alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” A party is obligated to preserve evidence when the party is on notice that the evidence is “relevant to litigation” or when the party “should have known that the evidence may be relevant to future litigation.” Moreover, the obligation to preserve relevant documents “exists whether or not the documents have been specifically requested in a demand for discovery.”

Citing *Farella v. City of New York*, 2007 WL 193867 (S.D.N.Y. 2007), and a string of “see also” cases decided by the Second Circuit or by district courts within the Second Circuit, magistrate Judge Pollack set out the three elements that a party must establish to obtain sanctions for spoliation of evidence: (1) “the party having control over the evidence had an obligation to preserve it at the time it was destroyed”; (2) “the records were destroyed with a culpable state of mind”; and (3) “the evidence was relevant to the party’s claim or defense such that a reasonable tier of fact could find that it supported that claim or defense.” As to the second element, however, courts were split over whether the requisite “a culpable state of mind” element would be satisfied by a showing of (a) bad faith, (b) intentional destruction, or (c) gross negligence, and the Second Circuit had concluded that “a case-by-case approach is appropriate.” magistrate Judge Pollack then applied the three elements of spoliation to the case before her.

As to the first element (notice), JetBlue was clearly on notice of Ms. Whitney’s claim and should have preserved the original handwritten in flight irregularity report. As to the second element (culpable state of mind), however, the court found no evidence that the original report was destroyed “in bad faith.” rather, it was destroyed with other similar documents en masse as part of a bulk destruction. However, even where destruction was not willful or in bad faith, a court may impose sanctions for negligent destruction, because a party’s negligent loss of evidence “can be just as fatal to the other party’s ability to present” its case. Here, the destruction was “at best negligent.”

As to the third element (relevance), the destroyed handwritten report was “obviously relevant to the plaintiff’s case.” However, after reviewing various items of evidence, the court found no indication that the destroyed handwritten report would have shown that a flight attendant observed a passenger kicking Ms. Whitney’s seat. The court found “a disturbing amount of carelessness” on JetBlue’s part in failing to preserve hand-written reports, but Ms. Whitney had not demonstrated that the missing report would be “favorable to her case” or that she was “prejudiced by its absence.” The court therefore denied plaintiff’s motion to give the jury an adverse inference instruction or to exclude JetBlue’s defense evidence. Nevertheless, because JetBlue had “inexplicably destroyed a clearly relevant document in the course of this litigation,” the court awarded Ms. Whitney her costs and reasonable attorney fees in connection with the motion for sanctions.

Spoliation Sanctions as a Defense Weapon

Defendants can also invoke the doctrine of spoliation as a weapon in discovery. In *Castillo v. Staten Island Cable LLC*, 19 Misc.3d 1105(A), 2008 WL 731754 (N.Y. City Civil Ct., March 14, 2008) (Kim Dollard, J.), plaintiff claimed that he had suffered lumbar spine injuries in an auto accident with a vehicle owned by

defendant Staten island Cable. To test the strength of plaintiff's claims, defendant sought discovery of an MRI taken less than ten days after the accident, but the MRI could not be found. Plaintiff had checked the films out of the MRI facility to give them to his neurologist, a Dr. Mormino at the Neuro Diagnostic and Treatment Center, but that place had closed, and Dr. Mormino had moved and could not locate the MRI records. Based on the doctrine of spoliation, defendants moved to preclude the plaintiff from presenting "any evidence as to any allegation of lumbar injuries and all symptomology flowing therefrom"

Analyzing the issues, the court noted that it had "broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence." in appropriate circumstances, a court may 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 that lost or destroyed the evidence was "on notice that the evidence might be needed for future litigation." Striking a pleading is "a drastic sanction to impose in the absence of willful or contumacious conduct," so courts consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of "fundamental fairness." A less severe sanction is appropriate where the missing evidence "does not deprive the moving party of the ability to establish his or her defense or case."

Applying some of these factors, the court denied the motion, saying (with citations omitted):

Under the circumstances here, it cannot be presumed that the plaintiffs are the parties responsible for the disappearance of the MRI films or, more importantly, that the films were discarded by the plaintiffs in an effort to frustrate discovery. Moreover, the plaintiffs are also prejudiced. The court does not find that defendants are deprived of the ability to defend herein. Further, defendants may, at trial, seek an adverse inference jury charge regarding the missing MRI films, at the discretion of the trial Judge.

Although the defense effort to invoke the doctrine of spoliation failed in Castillo, the case shows that defendants often have as much to gain from the doctrine of spoliation as plaintiffs do.

Spoliation as a Cause of Action

The ultimate weapon in the spoliation arsenal is to use spoliation as the basis for a tort cause of action against a person or entity that lost or destroyed evidence. In *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, (N.Y. County Supreme Ct., April 8, 2008), (Herman Cahn, J.), for example, IDT sued its former investment banker, Morgan Stanley, for intentional interference with prospective business relations. IDT claimed that Morgan Stanley had misused and misrepresented IDT's confidential information to persuade another Morgan Stanley client, Telefonica Internacional, S.A. ("Telefonica"), to breach a contract with IDT relating to a Latin American submarine cable network, a fiber optic cable circling Latin America. At that time, in a separate prior proceeding, IDT had gone to arbitration with Telefonica. During the arbitration, IDT subpoenaed key documents from Morgan Stanley, but Morgan Stanley failed to produce the documents and affirmatively represented that they did not exist.

In this action, however, Morgan Stanley produced the key documents that it had withheld in the arbitration proceeding. IDT then added new claims against Morgan Stanley for fraudulent misrepresentation and fraudulent concealment, asserting that it would have obtained a much larger and more favorable recovery in the arbitration proceeding if Morgan Stanley had produced the documents in

response to the document subpoena in the arbitration proceeding. IDT sought both compensatory and punitive damages. Morgan Stanley moved to dismiss the fraudulent misrepresentation and fraudulent concealment counts, contending that discovery abuse is not the basis for an independent tort claim. Specifically, Morgan Stanley argued that New York does not recognize spoliation of evidence as a cognizable tort cause of action. In opposition, IDT contended that it was not alleging spoliation.

Justice Cahn agreed with Morgan Stanley that the fraudulent misrepresentation and fraudulent concealment claims had no merit. “Essentially, these claims seek recovery in tort against an entity that was not a party to the proceeding, in this case an arbitration, for an abuse of discovery,” Justice Cahn wrote. But in *Ortega v. City of New York*, *supra*, the Court of Appeals had held that an independent tort claim for spoliation of evidence against a third party, whether negligent or intentional, is not cognizable. Here, of course, IDT argued that it was not claiming spoliation, but Justice Cahn rejected that argument, stating:

Contrary to IDT’s argument, spoliation is not just alteration and destruction of evidence. The definition includes concealment. The fact that IDT has framed the claim of Morgan Stanley’s concealment of and failure to produce documents as a fraudulent misrepresentation does not take it out of the rules regarding spoliation of evidence claims. Otherwise, a party could easily circumvent the rule against independent spoliation claims by simply asserting fraud or fraudulent concealment. The claims relate to an abuse of discovery, the concealment or withholding of evidence, which occurred in a previous proceeding, and are barred.

Justice Cahn supported this holding with two policy arguments. First, the extent to which Morgan Stanley’s alleged concealment of documents caused a different result in the arbitration was speculative, “particularly given the discretion vested in the arbitrators.” Second, recognizing an independent tort claim “could result in potentially endless litigation requiring relitigation of the arbitration in order to permit IDT to demonstrate in what respect the concealment altered the outcome of the first proceeding.” Accordingly, IDT could not seek redress through an independent tort claim for breach of the duty to produce documents in discovery. It remained possible that the evidence of Morgan Stanley’s claimed concealment might be admitted at trial to prove IDT’s surviving claims against Morgan Stanley, but that issue would necessarily have to await the trial.

Conclusion: Spoliators Beware

Like a July 4th sparkler, the tort of spoliation burned hot for a time but was short lived. It first appeared on the scene in California less than twenty-five years ago as a stunning new independent tort, but in the last decade the highest courts of both New York and California have rejected the tort of spoliation and have made clear that a party aggrieved by the loss or destruction of evidence, whether willful or negligent, has no independent cause of action for spoliation against either a party to litigation or a third party spoliator. Moreover, as the three spoliation decisions described in this column suggest, winning damages against a spoliator by bringing an action for fraudulent concealment or fraudulent misrepresentation is not an option. Even sanctions for spoliation are difficult to win.

But the three cases reviewed in this column also suggest that sanctions for spoliation are potentially devastating, and that parties to litigation who believe they are prejudiced by the loss, destruction, or concealment of evidence will continue to bring motions for sanctions and creative causes of action

seeking remedies for spoliation. And this article has not even touched on the explosive subject of spoliation of electronic evidence, an all but inevitable occurrence in modern litigation. Both litigators and transactional lawyers, and both in-house and outside counsel, need to understand the consequences of failing to preserve or produce relevant evidence and need to keep up with the rapidly evolving law of spoliation. This modest column, with its sampling of recent cases, is intended as a start.

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