SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190281/2014

IN RE NEW YORK CITY ASBESTOS LITIGATION

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RICHARD WARREN,

Plaintiffs

-against-

AMCHEM PRODUCTS, INC. et al

Defendants

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Plaintiff (who was diagnosed with mesothelioma and has since passed away) moves for spoilation sanctions against defendant J-M Manufacturing Company, Inc. ("J-M" or "defendant"). As is relevant to this motion, plaintiff maintains that he was exposed to asbestos in the mid-1980s as a result of work performed by him (and others in his immediate vicinity) on J-M's asbestos cement pipes known in the industry as transite pipe, which contained crocidolite asbestos.[1] Plaintiff asserts that in 1997 J-M intentionally destroyed approximately 27 boxes of business records, subsequent to ending its asbestos cement pipe business in 1988 and fully expecting to be sued. Additionally, in 1990 more than 10 bankers boxes (and possibly more than 50 boxes) disappeared during a move to JM's new headquarters in Livingston, New Jersey, even though other records arrived safely. Plaintiff asserts that J-M was grossly negligent in both the disappearance of these documents and in its efforts to discern what happened to them. The documents were destroyed by James Reichert ("Reichert"), a former Johns -Manville employee who began working for J-M when

[1]Transit pipe was originally a Johns-Manville brand for a line of asbestos cement products although other companies later referred to their own similar asbestos products as transite (*see Quarles v Mines Advocate, Ltd.* 2006 Cal App. Unpub. LEXIS 11318 [First App. Dist., Div Two 2006]).

it started selling asbestos cement pipe in January 1983. Reichert explained that he destroyed the records in 1997 because he had been moving them from place to place and "you just get tired of moving stuff. And after they became - - There was no more J-M A/C Pipe."[2] He was also the individual who assisted J-M in the 1990 headquarters move where boxes of documents were lost. Plaintiff briefly refers to the remedy of striking defendant's answer, and seeks "at the very least" a lesser sanction, such as an adverse inference charge.[3]

J-M maintains that plaintiff has not demonstrated that (1) it had an obligation to preserve documents, (2) it disposed of documents with a culpable state of mind, (3) it disposed of relevant documents and (4) plaintiff was prejudiced. J-M asserts that it did not have the obligation to preserve documents in 1990 and 1997 because, at the time, the company had no notice of a credible threat of litigation. Documents were, at most, negligently lost in 1990 in a headquarters move and were, at most, negligently disposed in 1997 "in an effort to free up workspace." Because plaintiff has not demonstrated that the documents were relevant and not duplicative of the tens of thousands of documents already produced by J-M, no prejudice exists.

Plaintiff's Arguments

Plaintiff asserts that as early as December 1982, when J-M's affiliate J-M A/C Pipe Company (the "affiliate") purchased the pipe business from Johns-Manville, J-M knew that it was

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[2]*See* Reichert Deposition in the California action *Hardcastle v Advocate Mines* at Tr 123.

[3]At oral argument, plaintiff's counsel stated that he was seeking an adverse inference charge similar to what Justice Joan Madden gave for spoliation of electronic evidence in the employment discrimination case *Ahroner v Israel Discount Bank of N.Y.* (2009 Slip Op 31526 (U), affd 79 AD3d 481 [1st Dept 2010]). Counsel also stated that plaintiff was not seeking to strike defendant's answer (Oral Argument Tr at 8).

exposed to future asbestos litigation.[4] Plaintiff contends that J-M knew Johns-Manville declared bankruptcy in 1982 because of massive asbestos litigation liabilities. Therefore, in accordance with the law in the First Department (*see Voom HD Holdings, LLC v EchoStar Satellite LLC,* 93 AD3d 33 [1st Dept 2012]) J-M should have placed a litigation hold on relevant documents to prevent their destruction as early as December 1982.[5] Plaintiff points to a December 1982 Purchase Agreement and a Litigation Support Agreement between the affiliate and Johns-Manville which references the need for cooperation regarding pending and future claims and lawsuits related to its operations and products. The Litigation Support Agreement includes a list of seven workers' compensation cases alleging "Asbestos Health Claims."[6]

Plaintiff also cites the testimony of James Reichert, J-M's corporate designee, for testimony

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[4]Unless otherwise noted, the court will refer to J-M and the affiliate collectively as J-M. J-M has not disputed liability for the acts of its affiliate.

[5]J-M has not argued or cited any cases indicating that the law in the 1990s was substantively different from what it is now. Nor was it. The propriety of an adverse inference charge in cases involving willful or grossly negligent destruction of evidence was recognized as early as 1898 (see *Armour v Gaffey,* 30 App Div 121 [3d Dept 1898], aff'd 165 NY 630 [1901]). In 1994, for example, the court held that "[t]he fact that relevant information is destroyed before a notice or order to produce is served does not preclude application of sanctions under CPLR 3126 . . . Indeed, it has been suggested that if a party deliberately destroys evidence because he or she knows it will be required in anticipated litigation, the penalties of CPLR 3126 may be applied (see, 3A Weinstein-Korn-Miller, NY Civ Prac P 3126.05)" (*Hallock v Bogart*, 206 AD2d 735 [3d Dept 1994]). In 1997 for example, the court held that given defendant's awareness of the importance of the evidence, defendant had a duty to preserve evidence which it negligently destroyed one year before the lawsuit (*see Kirkland v New York City Hous. Auth.*, 236 AD2d 170 [1st Dept 1997]). New York federal courts had similar standards. In 1991 for example, one court noted that "the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced" (*Turner v Hudson Transit Lines*, 142 FRD 68, 73 [SDNY 1991]).

[6]Defendant points out that plaintiff has attached unsigned and undated copies of the agreements and has not authenticated them, but J-M does not actually deny their authenticity.

in various asbestos cases across the country. That testimony, plaintiff argues, is further evidence of J-M's knowledge of the likelihood of future asbestos litigation as well as the long latency period of the disease. In his 2012 trial testimony in *Dawes v Certainteed Corporation*, an asbestos action in Washington State, Reichert admitted that in connection with a document identified as Exhibit Number 354-A (which was redacted), the company considered the risks of future asbestos lawsuits and knew of the long latency period. Reichert admitted that one interpretation of the document was that it considered the benefits of immediate profits versus the risk of having to pay claims to plaintiffs harmed by asbestos in the future (*see* Tr 37-38).[7] Plaintiff also cites to similar testimony in Reichert's November 2000 deposition in a California action *Hardcastle v Advocate Mines,* in an August 2008 deposition in a California action *Stewart v AW Chesterton Company*, and in a March 2015 transcript of a videotapped deposition in a Delaware asbestos litigation *In re: Asbestos Litigation 032015 DB Trial Group v Bormuth.*

In reply, plaintiff points to additional Reichert testimony from transcripts attached to J-M's

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[7]Presumably, the referenced document is the Memorandum dated August 14, 1983 ("Memorandum"), which defendant asserts is subject to the attorney-client privilege. Whether the document is privileged is an issue currently waiting determination of a motion yet to be filed by J-M which objects to the Special Master's finding that the privilege was waived. Because the motion can be decided without consideration of the Memo, based on the other evidence before the court, the court will not adjourn the motion pending decision whether the Memo is privileged. The evidence before the court includes, among other things, Reichert's trial and deposition testimony. By Decision and Order dated October 2, 2015, the court has already decided that Reichert's testimony discussing the Memo, which had not been sealed by the judges in other states who have heard his testimony, is not subject to the privilege. As explained in the decision, defendant waived any attorney-client privilege by repeatedly testifying about the document in multiple actions and by waiting years to take any corrective measures. The testimony was also not fruit of the poisonous tree, an inaccurate reference to CPLR § 3103 (c), because defendant failed to demonstrate prejudice of a substantial right and because there was no evidence that plaintiff or his attorneys improperly obtained the transcripts, which were already a matter of public record.

opposition and attaches evidence not previously submitted from prior J-M litigation.[8] Plaintiff cites to the further testimony of Reichert in *Hardcastle v Advocate Mines*. Reichert testified that the dangers of asbestos were the subject of articles and that he presumed that J-M knew of the dangers (Tr at 121). Plaintiff cites to another deposition in *George v AmCord*. In that deposition Reichert was questioned about A/C Pipe Product Producers Association's internal correspondence dated June 28, 1983. The correspondence referred to a substantial body of scientific evidence that more closely linked amphiboles (including crocidolite asbestos) with mesothelioma and Reichert believed that J-M would have been aware of this correspondence (Tr at 45). Further, Reichert believed that J-M would have been aware of a June 17, 1983 A/C Pipe Product Producers Association internal correspondence that indicated that OSHA wanted to prohibit the use of crocidolite asbestos because of the "overwhelming evidence of the risk that it presents to those who are exposed to that" (Tr at 34-35). Reichert also testified that he believed J-M would have known the dangers of asbestos after he was confronted with a March 25, 1985 internal J-M correspondence that indicated "Moreover, no safe level of exposure or threshold level has ever been established" (Tr at 52). He also agreed that A/C pipe had the potential of killing individuals (Tr at 29).

Both Reichert and another former Johns-Manville employee Ernest Pronske (who later became Vice President and President of J-M and Vice President of the affiliate) testified to a general

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[8]In a sur-reply defendant complains (and correctly so) that plaintiff cites evidence in reply which should have been attached to his initial moving papers. Defendant further argues that plaintiff has mischaracterized and distorted the cited testimony. Defendant also reiterates that plaintiff has not demonstrated that the documents in question were in fact relevant. Even though plaintiff should have cited the evidence in his initial papers, any prejudice to J-M is cured by the court's acceptance of defendant's sur-reply and the fact that the evidence involves testimony from prior J-M litigation, well known to J-M.

awareness that at least one of the factors in Johns-Manville's bankruptcy was financial concerns arising from asbestos lawsuits (deposition of Reichert in *Ornellas and Nadeau v A. H. Voss* Tr at 118-121 and deposition of Pronske in *Hardcastle v Advocate Mines* Tr at 146). Further, plaintiff notes that after J-M purchased the pipe business, many Johns-Manville employees became J-M employees (deposition of Reichert in *Hardcastle v Advocate Mines* Tr at 54), presumably bringing with them the knowledge of the business and its risks. Additionally, plaintiff points to three California asbestos lawsuits filed against J-M, as successor to Johns-Manville, starting in late 1983. While the court in those three cases determined that plaintiff's remedy was against the proceeds of the sale of Johns-Manville's business, plaintiff asserts that the lawsuits provide further evidence that J-M knew very early on of a reasonable probability of future lawsuits.

As further evidence of J-M's knowledge, plaintiff points to 1983 worker's compensation claim records regarding one J-M employee who claimed he had clinical findings suggestive of asbestosis. In connection therewith, defendant issued an internal correspondence from "E.E. Wang–Stockton, HQ"[9] regarding the claim and of J-M's need to "[t]o better monitor the situation." Additionally plaintiff cites to a letter dated August 19, 1986 in which J-M's liability insurance broker informed J-M's Treasury Assistant that J-M's underwriters "are seriously concerned with the Liability and Workers' Compensation exposures" for the pipe business. The letter explains that the "overriding concern seems to be the Environmental Health Loss Control Coordinator advising OSHA has revised their standards on employee exposure to asbestos." That would mean, the letter states, that seven employees were subject to an impermissible amount of asbestos exposure. The

[9]HQ is not defined in the correspondence, but the Merriam-Webster dictionary, among others, indicate that HQ is an abbreviation for "Headquarters."

letter reflects that this sounded the alarm for the underwriters who "[c]onsidering this exposure, Underwriters do not feel that they can maintain a position on the program if J-M Management decides to continue with the A/C Pipe Company Operation." Apparently the letter did not sound the alarm for J-M, which continued the pipe business until 1988.

In addition to all the above evidence, plaintiff asserts that the documents were also destroyed in violation of J-M's own record retention policy.[10]

Defendant's Arguments

J-M asserts that plaintiff failed to demonstrated that J-M had an obligation to preserve documents. Reichert, the company argues, disposed of records before J-M was sued and without "notice of a specific case."[11] J-M also argues that "a general awareness on the part of a corporation that it may be sued in the future for products it either manufactures or sells cannot, by any practical measure, be the standard by which courts retroactively determine whether a "litigation hold" applies. Such a standard would mean that every corporation involved in the manufacture, distribution or sale of any product would be subject to a litigation hold of indeterminate length and scope" (Affirm. in Opp at 11). J-M distinguishes *Voom* (93 AD3d 33, *supra*) because here J-M had no notice of a credible threat, whereas in *Voom* the defendant had such notice because defendant itself had threatened litigation. Defendant cites *Boyle v City of New York* (291 AD2d 315 [1st Dept 2002]), where the court denied plaintiff's spoilation motion against the City for destruction of sidewalk maintenance records. There the court found no evidence of impropriety in the City's destruction of

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[10]In one deposition Reichert testified that he believed that the retention policy was six years and in another deposition he thought it was seven years.

[11]Furthermore, at the time that he disposed of the documents, Reichert was only "a cost accountant at the Stockton plant." He was not J-M's agent, officer or manager at that time.

15-year-old records two years before the plaintiff had requested them. Plaintiff's cases, defendant argues, are inopposite or stand for the proposition that the duty to preserve arises only when a defendant is served with a complaint or receives a direct threat of impending litigation.

The company also contends plaintiff failed to demonstrate that it disposed of documents with a culpable state of mind. Reichert, defendant asserts, disposed of the documents in 1997 "in an effort to free up workspace" and other documents were "lost in a cross country move of corporate headquarters" (Affirm in Opp at 2). Thus, the disposal and loss of the documents was merely negligent, which triggers the requirement under *Voom* (and other cases) that plaintiff prove that the documents were relevant.

J-M maintains that plaintiff failed to demonstrate that the documents that were lost and destroyed were relevant. J-M concedes that Reichert testified that some documents were likely related to defendant's pipe business. However, documents could have been unrelated (e.g., relate to the purchase of cans of spray paint) or could have been duplicates of what had already been produced.

J-M also asserts that because plaintiff has not demonstrated that the documents were relevant and not duplicative of the tens of thousands of documents J-M previously produced, plaintiff has not demonstrated prejudice. The lack of prejudice to plaintiff is also evidenced by the fact that plaintiff's counsel has filed many asbestos actions against J-M and never contended a lack of sufficient evidence.

Discussion

"Spoliation is the destruction of evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]; *see also Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept

1998] [spoliation is "(w)hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert"]). The Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence (*see De Los Santos v Polanco*, 21 AD3d 397, 397 [2d Dept 2005]). Pursuant to CPLR § 3126, the court is empowered to employ a variety of sanctions (*see Melcher v Apollo Med. Fund Mgt., L..L.C.,* 105 AD3d 15 [1st Dept 2013]). However, at issue here is only the sanction of an adverse inference.[12]

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents (*see Voom,* 93 AD3d at 33, *supra* citing *Zubulake*, 220 FRD 212, 218 [SDNY 2003]). When this occurs the party must direct its employees to preserve all relevant evidence (*id.* at 41).

A party seeking sanctions based on the spoliation of evidence must demonstrate (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed, (2) that the records were destroyed with a "culpable state of mind" (which includes ordinary negligence), and (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of

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[12]Counsel stated at oral argument that plaintiff was not seeking the remedy of striking defendant's pleading because plaintiff had other evidence to prove his case. The drastic remedy of striking a pleading "is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of N. Am., LLC*, 82 AD3d 643, 644 [1st Dept 2011]). Striking a party's pleading "would be too drastic a remedy where [the opposing party is] not entirely bereft of evidence tending to establish [its] position" (*Cohen Bros. Realty v Rosenberg Elec. Contrs.*, 265 AD2d 242, 244 [1st Dept 1999]). Thus, where spoliation of evidence deprives a plaintiff of any means of establishing a prima facie case, striking the answer is an appropriate remedy (see *Gray v Jaeger*, 17 AD3d 286 [1st Dept 2005]; *Herrera v Matlin*, 303 AD2d 198 [1st Dept 2003]). Striking a pleading may also be justified where the spoliation deprives the plaintiff of the ability to confront a defense (*see Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58 [1st Dept 2002]).

fact could find that the evidence would support that claim or defense (*id.* at 45).

The intentional or willful destruction of evidence or destruction that is the result of gross negligence, is sufficient to presume relevance (*id.*). When the destruction of evidence is merely negligent, relevance must be proven by the party seeking spoliation sanctions (*id.*). However, the presumption is rebuttable by demonstrating that there could be no prejudice to the other party which in turn could be shown by proving that the other party had access to the evidence that was destroyed or that the evidence would not have supported the other party's claims (*id.*)

J-M's lackadaisical, if not intentional, approach to a litigation hold commencing with defendant's purchase of a company synonymous with asbestos litigation, and in the face of the overwhelming evidence that J-M knew of both the hazards and the long latency period of the disease as far back as 1983, is egregious and in bad faith. Even assuming the good faith nature of Reichert's destruction of documents, and regardless of the fact that Reichert was only "a cost accountant at the Stockton plant" when he destroyed documents, J-M acted in bad faith by failing to instruct Reichert and other employees to preserve relevant evidence. The fact that the documents were inexplicably lost on J-M's corporate move, while other documents arrived, amounts to gross negligence at a minimum. Therefore, the relevance of the documents both destroyed and haphazardly lost must be presumed.[13]

J-M has failed to rebut the presumption of relevance. Counsel's sheer speculation that some of the documents might be irrelevant or duplicative does not suffice to rebut the presumption. Nor has J-M demonstrated that plaintiff was not prejudiced by the destruction or loss of the documents

[13]Reichert's testimony establishes the relevance of some of the documents. In *Voom* the court found that it was proper to infer the relevance of all e-mails when only a handful of emails, which were fortuitously recovered, were relevant (*Voom,* 93 AD3d at 46-47).

even though plaintiff has other means to prove his case. To rebut the presumption of relevance, *Voom* holds that it is not enough to demonstrate that the innocent party has other means to prove his or her case (*Voom* at 47) but rather, the spoliating party must demonstrate that the innocent party had access to the evidence or that the evidence would not have supported the claim.[14]

Contrary to J-M's argument, a defendant need not be served with a complaint or have notice of a specific claim or pending litigation (or a direct threat of litigation) in order to be sanctioned. This argument was specifically addressed and rejected in *Voom*. There the court stated:

> EchoStar and amicus believe that "in the absence of 'pending litigation' or 'notice of a specific claim,' defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices." We disagree.

Voom at 42-43.

In rejecting EchoStar's argument, the court noted that such a position would encourage parties who actually anticipate litigation, but do not yet have notice of a specific claim, to destroy their documents with impunity. This concern is even stronger when dealing with asbestos related diseases, which by their nature have long latency periods. Furthermore, there is even more reason to reject a requirement of pending litigation when human lives are at issue, as opposed to the demise

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[14]Defendant generally asserts that "a party claiming spoliation must establish actual *prejudice* as a result of the destruction of relevant documents" and cites Appellate Division cases which require the demonstration of prejudice to strike a pleading (Affirm in Opp at 8). As explained previously in footnote 10, this is a true statement where the remedy of striking a pleading is sought. However, where a lesser sanction is requested, such as an adverse inference, defendant's statement is incorrect. As explained in *Voom*, where the destruction of evidence is willful or the result of gross negligence, the burden is not on the party claiming spoliation but rather on the alleged spoliating party. Additionally, that party must "demonstrate to a court's satisfaction that there could not have been any prejudice to the innocent party" and this prejudice is irrespective of whether the party claiming spoilation has other means to prove his or her case (*Voom* at 45-47).

of a business, as in *Voom*. In any event, J-M had notice of specific claims as litigation and workers' compensation claims were filed against J-M as early as 1983.

J-M's citation to *Boyle,* 291 AD2d 315, *supra* is unpersuasive. There is no indication in *Boyle* that it would be reasonable to assume that the sidewalk defect would be present for 15 years and therefore no reason to question the City's destruction of 15 year old sidewalk maintenance records. Here, however, asbestos-related diseases involve long latency periods. J-M unpersuasively complains that spoilation based on a corporation's general awareness of future lawsuits would mean that every corporation involved in the manufacture, distribution or sale of any product would be subject to a litigation hold of indeterminate length and scope. J-M cites no cases which place a time limitation on a litigation hold. Not every corporation must preserve relevant evidence. Rather, every corporation which "reasonably anticipates litigation" must preserve relevant evidence. Additionally, it is neither unfair nor overly burdensome for a company to place a litigation hold for a time period commensurate with the nature and risks of the product. Were this otherwise, companies with knowledge of the dangers of asbestos could intentionally destroy relevant evidence, while simultaneously knowing that due to the long latency period of asbestos-related diseases they would not be sued until decades later.

Plaintiff is entitled to the strongest adverse inference. In *Ahroner*, 79 AD3d at 483, *supra* the jury was permitted to infer that the missing documents would not have supported defendant's defense or contradicted plaintiff's claims. However, because of J-M's bad faith and disturbing behavior, plaintiff is entitled to a jury instruction that the jury is not only permitted this inference but is also permitted to infer that the missing documents would have supported plaintiff's claims.

Accordingly, it is

ORDERED that plaintiff's motion for spoilation is granted; and it is further

ORDERED that at trial, the court shall instruct the jury that it is permitted to infer that the missing documents would have supported plaintiff's claims and would not have supported defendant's defense.

This Constitutes the Decision and Order of the Court.

Dated: November 5, 2015

ENTER:

11/5/15

J.S.C.

HON. PETER H. MOULTON
J.S.C.