NYSBA CasePrepPlus

A New York State Bar Association member benefit

June 21, 2024

Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

It's spoliation week here at the NYSBA CasePrepPlus newsletter. Both the First and Fourth Departments had a chance to explain the severe consequences that can result if parties fail to preserve relevant information, especially electronic information, for disclosure in discovery. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CRIMINAL LAW, TRIAL READINESS

People v King, 2024 NY Slip Op 03322 (Ct App June 18, 2024)

Issue: **Do the amendments to the Criminal Procedure Law imposing additional requirements that the People must fulfill before announcing their readiness for trial apply where the People declared ready for trial before the amendments' effective date?**

Facts: Defendant was charged with attempted second-degree murder, second-degree assault, and other charges, arising out of an incident where he threatened his children with a knife and stabbed his pregnant wife several times in her hands, feet, and chest. In 2019, defendant was indicted, and the People declared ready for trial with approximately one week remaining on their speedy trial clock. On January 1, 2020, the Legislature's discovery reforms in criminal cases became effective, which required the People to disclose certain information and then file a certificate of compliance with the new discovery rules before declaring their trial readiness. On the first day of trial in January 2020, defendant moved to dismiss the indictment on statutory speedy trial grounds because the People did not comply with the new discovery rules by filing a certificate of compliance and thus were not ready for trial under the new rules. Supreme Court denied the motion, holding that the new rules did not apply to defendants arraigned before January 1, 2020. The Appellate Division reversed and dismissed the indictment, holding that "the People were placed in a state of unreadiness on January 1, 2020, and were required to file a COC to become ready thereafter."

Holding: The Court of Appeals held that the new discovery amendments did not vitiate the People's 2019 trial readiness statement when they became effective on January 1, 2020. In particular, the Court held, "[t]here is no evidence, in the plain language of the amendments or the legislative history, that the legislature intended to—or did—revert the People to a state of unreadiness on January 1, 2020. Rather, the amendments specifically tie the COC requirement to the People's ability to state ready and be deemed ready. Because the legislature established the COC requirement as a condition precedent to declaring ready for trial and did not indicate an intent to undo the People's prior readiness statements, there is no basis to apply that requirement prospectively to a case such as the present one where the People were in a trial-ready posture when it went into effect. In other words, the People are not required to fulfill a prerequisite to declaring trial readiness when they have already validly declared ready for trial."

FIRST AND FOURTH DEPARTMENTS

DISCOVERY, SPOLIATION

Ferrer v Go N.Y. Tours Inc., 2024 NY Slip Op 03133 (1st Dept June 11, 2024)

Issue: **What must a party show to obtain spoliation sanctions for the other party's failure to preserve relevant discoverable information?**

Facts: In a personal injury action, the defendant deleted four of six videos of the accident taken on cameras on the bus. As a result, Supreme Court granted plaintiff's motion for spoliation sanctions to the extent of ordering an adverse inference charge against defendant.

Holding: The First Department affirmed, holding that it was not an abuse of discretion for Supreme Court to order an adverse inference charge against the defendant as a spoliation sanction. The Court held that "[o]n a motion for spoliation sanctions, the moving party bears the burden of showing [1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a culpable state of mind, and [3] that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence."

The Court held that plaintiff satisfied that standard by demonstrating that defendant's "operations manager testified that he was aware that litigation was a real possibility. Once a party reasonably anticipates litigation, it must, at a minimum, hold or prevent the routine

destruction of electronic data. The undisputed testimony established that immediately after plaintiff's accident, [defendant's] employees reviewed video footage from the six cameras on the bus, forwarded two videos to its insurer, and deleted the rest. Plaintiff showed that footage from four of the cameras on the bus was destroyed through negligence, if not deliberately. Plaintiff demonstrated that the deleted footage was potentially relevant to his claims as it might show misconduct by the driver or reveal traffic or other conditions that might have impacted an understanding of the cause of the accident. The operations manager testified that [defendant's] employees determined what footage was relevant, what should be preserved, and what should be deleted or overwritten. However, the defendant did not have the right to make this determination unilaterally."

DISCOVERY, SPOLIATION

***Buffalo Biodiesel, Inc. v Blue Bridge Fin., LLC*, 2024 NY Slip Op 03259 (4th Dept June 14, 2024)**

Issue: **When may a court strike a pleading as a spoliation sanction for the other party's failure to preserve relevant discoverable information?**

Facts: Plaintiff commenced an action for libel and tortious interference with business relations arising from allegations that defendant sent an email to a financial services company in which defendant falsely characterized an ongoing legal dispute between the parties. Defendant served discovery demands in which it sought copies of all communications between plaintiff and the financial services company, but plaintiff advised that it no longer had those documents in its possession. Plaintiff revealed that it had failed to issue a litigation hold and that all of its emails were deleted while the action was pending, either by plaintiff itself or by the company hosting plaintiff's server with plaintiff's approval. Although Plaintiff attempted to subpoena the deleted emails directly from the financial services company, it was no longer operating and the emails could not be recovered. Supreme Court granted defendant's motion for spoliation sanctions pursuant to CPLR 3126, striking the complaint and dismissing plaintiff's remaining causes of action with prejudice.

Holding: The Fourth Department affirmed the striking of plaintiff's complaint as a discovery sanction for the spoliation. The Court explained, "[u]nder the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126. The nature and severity of the sanction depends upon a number of factors, including . . . the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party . . . While the striking of a pleading is generally limited to instances of willful or contumacious conduct, it may also be warranted where the negligent destruction of relevant evidence leaves a party prejudicially bereft of the means of proving its claim or defense." Under this standard, the Court held, "plaintiff's failure to suspend the routine deletion of its emails during the course of litigation constituted the grossly negligent spoliation of evidence. Although plaintiff contends that defendant failed to establish the relevance of the deleted emails, it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly and, thus, where emails are deleted either intentionally or as the result of gross negligence, the court may properly draw an inference as to their relevance." That inference was properly drawn here.

SECOND DEPARTMENT

MORTGAGE FORECLOSURE, CIVIL PROCEDURE

***Trento 67, LLC v OneWest Bank, N.A.*, 2024 NY Slip Op 03198 (2d Dept June 12, 2024)**

Issue: **May the statute of limitations for commencing a foreclosure action be tolled by virtue of the United States Department of Housing and Urban Development's COVID-19-related moratorium that effectively stayed foreclosures with respect to mortgages insured by the Federal Housing Administration?**

Facts: In 2007, a borrower obtained a reverse mortgage insured by the FHA. In 2013, the borrower died, which was a basis on which the lender could choose to accelerate the debt. So, on April 4, 2014, the lender filed a foreclosure action and accelerated the debt. In 2019, however, the trial court dismissed the foreclosure action because the borrower was dead at the time of filing, which rendered the action a legal nullity. Even so, the dismissal of the complaint did not revoke the acceleration, so the 6-year statute of limitations to bring a new foreclosure action began to run on April 4, 2014. On March 18, 2020, just a few weeks before the expiration of the statute of limitations, the HUD imposed a 60-day moratorium on foreclosures of FHA-backed mortgages in light of the COVID-19 pandemic. The moratorium was eventually extended and expired on July 31, 2021. While the moratorium was in effect, the borrower's heirs commenced this action to quiet title and discharge the mortgage, arguing that the lender was barred by the statute of limitations from commencing a new foreclosure action. The lender moved to dismiss, arguing that the statute of limitations was tolled by the HUD COVID-19 moratorium and that its August 1, 2021, foreclosure action was timely commenced. Supreme Court granted the motion, holding that HUD's COVID-19 moratorium on foreclosures operated to toll the statute of limitations during the period in which the moratorium was in effect.

Holding: The Second Department affirmed, holding that like its prior decisions on Governor Andrew Cuomo's COVID-19 executive orders, the HUD COVID-19 moratorium similarly "effectively tolled the statute of limitations from March 18, 2020, through July 31, 2021." Specifically, the Court noted, "[c]onsistent with the language of the mortgagee letters and the CARES Act, various courts, including in the United States District Court for the Eastern District of New York, have recognized the FHA COVID-19 moratorium as a moratorium on foreclosures

of federally backed, or FHA-insured, mortgages from March 18, 2020, to July 31, 2021 . . . Trial courts in this State have specifically held that the FHA COVID-19 moratorium constituted a stay applicable to foreclosures of federally backed mortgages." The Court thus rejected the borrower's heirs' arguments that the moratorium shouldn't toll the statute of limitation because the property is a two-family residence. The Court noted that the HUD COVID-19 moratorium applied to all FHA-backed mortgages, unless the properties were vacant or abandoned, exceptions that didn't apply here.

THIRD DEPARTMENT

TORTS, RECREATIONAL USE STATUTE

***Fleming v Jenna's Forest Homeowners' Assn., Inc.*, 2024 NY Slip Op 03216 (3d Dept June 13, 2024)**

Issue: **When does General Obligations Law § 9-103, the recreational use statute, grant immunity to landowners who permit members of the public to enter their property to engage in certain recreational activities?**

Facts: Plaintiff was riding his mountain bike on trails that spanned properties owned by defendants, when he fell from a small wooden bridge that spanned a streambed. As a result of this accident, Plaintiff sustained a neck fracture and is now partially paralyzed. Plaintiff and his wife, derivatively, commenced an action, alleging that defendants were negligent for their failure to maintain the bridge and failure to warn of the dangerous condition presented by the bridge and/or trail. Defendants moved to dismiss, arguing that General Obligations Law § 9-103, the recreational use statute, barred plaintiffs' claims. Plaintiff cross-moved to amend the complaint to allege that "defendants' construction and failure to maintain the bridge had created a dangerous condition, and that, in failing to maintain the bridge, defendants' actions had been willful and malicious." Supreme Court granted the motions and dismissed the complaint.

Holding: The Third Department reversed the dismissal of plaintiff's complaint. The Court held, "General Obligations Law § 9-103, the recreational use statute, grants immunity for ordinary negligence to landowners who permit members of the public to enter their property to engage in certain recreational activities, including bicycle riding. However, this limitation to liability does not extend to the 'willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity' (General Obligations Law § 9-103 [2] [a]). The sole purpose of General Obligations Law § 9-103 is . . . to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities. Thus, the exception provided by General Obligations Law § 9-103 (2) (a) must be strictly construed so as not to defeat the statute's broad purpose." Here, the Court held, the defendants were entitled to immunity under the recreational use statute because the plaintiff's complaint alleged only negligence. But, the Court held, Supreme Court should have allowed plaintiff to amend the complaint to include allegations that would fit the claim within the statute's exception for a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity," because at this early stage of the action, the facts pled, viewed favorably to the plaintiff, fit within a cognizable theory of recovery.

CasePrepPlus | June 21, 2024

To view archived issues of CasePrepPlus,
visit NYSBA.ORG/caseprepplus/.