



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Common Law Environmental Litigation: New Jersey Court Addresses Whether Destruction of Pipe/Sump/Pit Constitute Evidence Spoliation

Arkansas Environmental, Energy, and Water Law Blog

11/17/2016

Co-author: Rachel Hildebrand

The Appellate Division of the Superior Court of New Jersey ("Court") addressed in an October 31st opinion a number of issues that arose in litigation regarding responsibility for environmental contamination of a commercial property. See 18-01 *Pollitt Drive, LLC v. Engel*, No. A-4833-13T3, 2016 WL 6407280 (N.J. Super. Ct. App. Div. Oct. 31, 2016).

Two key issues involved spoliation of evidence and whether the lower court properly dismissed the entire Complaint.

Plaintiff company, 18-01 Pollitt Drive ("Plaintiff") sought recovery of costs incurred in investigating and remediating contamination discovered after it had purchased a commercial property ("Property"). The Property consisted of 9.14 acres in an industrial park. It is located adjacent to a federal Superfund site. The site received this designation because of the presence of tetrachloroethylene and another chemical in municipal supply wells.

Defendants were individuals and entities that, at various times since 1956, held interests in the Property.

Plaintiff sought on appeal review of the lower court's decision:

1. Determining Plaintiff had spoliated evidence; and
2. dismissing the entire complaint as a remedy for such spoliation.

The Court also addressed Defendants' cross-appeal from the lower court's denial of attorneys' fees and costs.

Since 1956, the Property had been leased to various commercial printers. These printing activities involved the use of chemicals containing volatile organic compounds ("VOCs").

In March 2006, shortly before acquiring the Property, Plaintiff hired a consulting firm, KTR, to perform an environmental site assessment. KTR advised Plaintiff that the Property "had a history of potentially hazardous uses." The firm recommended that Plaintiff investigate further. Despite this report, however, Plaintiff claimed that it did not become aware that the Property was contaminated until 2007.

Environmental Waste Management Associates (“EWMA”) was hired by Plaintiff to investigate and remediate the contamination. EWMA confirmed the presence of extensive soil and groundwater contamination. Plaintiff subsequently assumed responsibility for the remediation in an agreement with the New Jersey of Environmental Protection.

Plaintiff contacted defendants in September 2009 demanding indemnification and contribution for remediation costs related to the contamination. The Plaintiff asserted causes of action which included:

1. the New Jersey Spill Act;
2. Comprehensive Environmental Response Compensation and Liability Act;
3. nuisance; and
4. negligence.

In order to establish the timing and source of the discharges that contaminated the Property, Plaintiff attempted to introduce three items into evidence. These items had already been destroyed by Plaintiff prior to the suit.

First, approximately two years before filing suit, Plaintiff had discarded a pipe that had originally been located beneath a building slab. Plaintiff’s metallurgy expert, O’Krepky relied on photographs of the pipe and a sample replacement, or “coupon,” from a different pipe to conclude that the original pipe had been breached in 1971 due to corrosion and other defects. These events were therefore alleged to have caused the discharges that resulted in the contamination.

Defendants’ experts challenged the scientific soundness of O’Krepky’s conclusions. They asserted that:

1. O’Krepky could not have accurately determined the timing and source of discharge using only photographs and coupon samples; and
2. the original pipe was needed to test his theory.

Plaintiff subsequently disclosed in discovery that it had lost the first replacement coupon, and proffered yet another replacement. Defendants, upon having learned that Plaintiff had disposed of the original pipe and had lost the first coupon, filed a motion to dismiss on spoliation grounds.

The second and third pieces of destroyed evidence pertained to structures within an acid dilution sump pit and a concrete slab floor. Plaintiff’s expert, a hydrogeologist and remediation professional, reported that shortly after the building on the Property was erected in 1956, an acid dilution sump system, which collected and neutralized waste, was installed.

The expert concluded the printing activities caused contamination and corroded drains beneath the concrete slab. This sump pit and concrete floor, however, had been excavated and destroyed by Plaintiff prior to suit. Thus, the expert opinions were based solely on photographs of the structures and data derived from sludge.

Defendants argued it was not possible to verify or refute the scientific basis of Plaintiff’s discharge theories.

The lower court determined that Plaintiff had ignored many discovery requests and departed from accepted protocols. It held that the lateral pipe, acid dilution sump pit, and concrete floors should be excluded from evidence. As a result, the lower court held Plaintiff would be unable to establish the source and time of the contamination. It dismissed the Complaint.

Defendants applied for attorneys’ fees. The lower court held that Plaintiff’s failure to preserve the evidence had not been intentional. Consequently, Defendants were deemed not entitled to fees and costs. An appeal and cross-appeal followed.

The Court on appeal addressed Plaintiff's challenge to the lower court's finding that it had spoliated material evidence. A spoliation claim arises when a party has hidden, destroyed, or lost relevant evidence thereby impairing another party's ability to defend against the action. The duty to preserve evidence arises when there is:

1. pending or probable litigation;
2. knowledge by the Plaintiff of the existence or likelihood of litigation;
3. a likelihood that discarding the evidence would be prejudicial to defendants; and
4. evidence relevant to the litigation.

Plaintiff argued that it was not required to save the lateral pipe because it had no plan to bring suit at the time it disposed of the pipe. This argument was rejected.

The Court reasoned that probable litigation, rather than intent to bring suit, triggers the obligation to preserve evidence. It emphasized that:

1. 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; and
2. in 2008, prior to destruction of evidence, the EWMA had confirmed high concentrations of VOCs on the Property.

As to an obligation to save the dilution sumps and concrete floor, the Court rejected Plaintiff's argument that it was prejudiced more by the loss of such evidence than Defendants. It affirmed the initial determination that Plaintiff had an obligation to preserve the lateral pipe, dilution sumps, and concrete floor materials. The unilateral destruction of those items was deemed a spoliation of relevant evidence.

The Court also addressed Plaintiff's argument that (1) less drastic discovery sanctions would have sufficed; and (2) the lower court erred in electing dismissal of the suit as the remedy.

Generally, there is a broad range of discovery sanctions less severe than dismissal. The Court held dismissal should be ordered only when no lesser sanction can "erase the prejudice" that results from spoliation of evidence.

Therefore, the Court determined that a more moderate sanction should have been imposed. The best remedy in this instance was deemed to have been the adverse-inference presumption. This would allow a jury to presume that the evidence the spoliator destroyed would have been unfavorable to that party.

Plaintiff also argued that the lower court failed to address its nuisance and negligence claims. The court agreed with Plaintiff noting that there was no consideration or explanation by the lower court as to the tort claims.

The Court also dismissed Defendants' cross-appeal which sought review of the lower court's denial of attorneys' fees. It held that any determination of Defendants' entitlement to counsel fees and costs would be premature before remand.

[A copy of the decision can be downloaded here.](#)