IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Andrew Cichon and Susan Cichon, Plaintiffs, v. Steele and Loeber Lumber Co., Metropolitan Lumber Co., Cook County Lumber Co., Seneca Sawmill Co., and Seneca Noti, LLC, Defendants.	)	No. 13 L 14013
Seneca Sawmill Co. and Seneca Noti, LLC, Counter-plaintiffs, v. Andrew Cichon, Counter-defendant.	)	

MEMORANDUM OPINION AND ORDER

A negligent spoliation of evidence cause of action exists only if a duty arises based on a party preserving evidence for the benefit of another. In this case, the plaintiff and his employees took no affirmative steps to preserve or segregate for the benefit of a defendant the wooden cross-tie that had broken and led to the plaintiff's injury. Since the plaintiff owed the defendant no duty to preserve the cross-tie, the defendant's counterclaim for spoliation of evidence must be dismissed with prejudice.

Facts

Seneca Sawmill Company and Seneca Noti, LLC (together, "Seneca") operate three lumber mills in the State of Oregon that manufacture timber framing, structural joists, and planks. Those products are typically sold to intermediaries and suppliers to the trades. Steele and Loeber Lumber Company ("S&L") sells materials for the construction of garages and hires builders to do the work. Beginning approximately in 2003, S&L hired Andrew Cichon, through his company, to construct S&L garages. Andrew worked with his father, Robert, and Jose Nieves.

On March 22, 2013, S&L Lumber Company ordered green Douglas fir, grade two or better, 2"x6"x24" cross-ties from Metropolitan Lumber Company. The same day, Metropolitan purchased the cross-ties from Cook County Lumber for delivery to S&L. The cross-ties had allegedly been previously manufactured by Seneca.

On July 23, 2013, S&L executed a contract with the owner of 11618 South Throop Street, in Chicago, for the construction of a garage. On the same day, S&L hired Andrew and his crew to construct the garage. The next day, S&L delivered to the South Throop Street address various construction materials, including the wooden cross-ties and metal plates.

On July 26, 2013, Andrew and his crew were constructing the roof of the garage. To construct a garage roof, builders must position themselves above the walls. Scaffolding and ladders cannot be sued for roof construction; consequently the top plate, end-to-end tie, and cross-ties may serve as a platform from which a worker can erect a roof. At some point, Andrew stood near the front of the garage on the end-tie where it intersects the first cross-tie. Jose handed a roof support to Andrew, who moved his right foot onto the first cross-tie for leverage. As soon as Andrew moved his foot onto the cross-tie, it broke approximately eight feet away from where he had placed his foot. Andrew fell to the garage floor, resulting in a crushing spinal-cord injury. Emergency medical personnel transported Andrew to the

hospital, where he acceded to complete paraplegia. Although Andrew never returned to work, Robert and Jose completed the garage construction.

On November 10, 2015, Andrew and Susan filed a 19-count, second-amended complaint against the defendants. Counts 12-15 are directed against Seneca Sawmill based on theories of negligence, strict products liability, breach of implied warranty, and loss of consortium. Counts 16-19 are directed against Seneca Noti based on identical facts and raising identical causes of action.

On July 26, 2016, Seneca Sawmill and Seneca Noti filed their second-amended counterclaim against Andrew. The counterclaim alleges that Andrew, Robert, and Jose had exclusive control of the cross-ties after they had been delivered to the work site. The counterclaim further alleges that Andrew had inspected the cross-ties for visual defects and deformities before using the cross-ties and, after finding none, chose to stand on the one that broke.

According to the counterclaim, Robert and Jose remained in exclusive control and possession of the broken cross-tie after the paramedics removed Andrew from the scene. Based on that allegation, Seneca claims it was foreseeable to Robert and Jose, as Andrew's agents, that the broken cross-tie was relevant and material evidence and, therefore, they had a duty to preserve it. Despite the foreseeable need to preserve the cross-tie, Robert and Jose are alleged to have pounded out the nails remaining in the cross-tie and top plate and threw everything in the debris trash. A third party apparently removed the debris the following week.

Seneca suggests that, rather than throw away the broken cross-tie, Andrew, through his agents Robert and Jose, should have left the broken cross-tie nailed to the top plate in the garage, photographed the cross-tie's condition, or preserved the broken members. The counterclaim also alleges that Andrew, through Robert and Jose, failed to notify Seneca that the cross-tie had broken, Andrew had fallen and been severely injured, or the cross-tie's remnants remained at the work site for a period of time. Based on these failures to act,

Seneca alleges that the disposal of the cross-tie deprived Seneca of any opportunity to inspect or preserve evidence. Seneca claims that the failure to notify it of the broken cross-tie or its possible disposal breached Andrew's duty to preserve evidence and now makes it impossible for Seneca to defend itself against the Cichons' causes of action.

On September 26, 2016, the Cichons filed a motion to dismiss Seneca's counterclaim. The Cichons argue that the counterclaim fails to allege any facts that would: (1) give rise to a duty to preserve evidence; or (2) place a reasonable person on notice that it was foreseeable that the cross-tie was material to a potential civil action. The Seneca entities filed a joint response brief, arguing that Andrew, through Robert and Jose, owed Seneca a duty to preserve evidence and that it was reasonably foreseeable to them at the time that the broken cross-tie and top plate were essential to Seneca proving its case. The Cichons filed a reply.

Analysis

The Cichons bring their motion to dismiss the counterclaim pursuant to Code of Civil Procedure section 2-615. A section 2-615 motion attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing in the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must also specify the relief sought. *See* 735 ILCS 5/2-615(a) (2008).

A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Conclusory statements cannot state a cause of action even if they generally inform the defendant of the nature of the claims. *See Adkins v. Sarah Bush Lincoln Health Cntr.*, 129, Ill. 2d

497, 519-20 (1989). The paramount consideration is whether the complaint's allegations, construed in the light most favorable to the non-moving party, are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *See DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

The Seneca counterclaim presents a spoliation-of-evidence cause of action. Spoliation of evidence is an affirmative act that constitutes common-law negligence. *See Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-56 (2004). To establish such a cause of action, the party claiming spoliation must plead and prove that: (1) one party owed the other a duty to preserve evidence; (2) the party that owed the duty breached it by losing or destroying the evidence; (3) the loss or destruction of the evidence proximately caused the party claiming spoliation to be unable to prove its claim; and (4) actual damages accrued. *See Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26, *citing Dardeen*, 213 Ill. 2d at 336. The failure to plead facts to support the existence of a duty is fatal to a negligence claim. *See Kirk v. Michael Reese Hosp. & Med. Cntr.*, 117 Ill. 2d 507, 528 (1987).

As a general matter, there exists no duty to preserve evidence. *See Martin*, 2012 IL 113270, ¶ 27. A duty to preserve evidence may, however, exist if a plaintiff is capable of fulfilling the two-part test established in *Boyd v. Travelers Ins. Co.*, 196 Ill. 2d 188 (2005). The first part concerns the parties' relationship. To satisfy that part of the test, the party bringing the spoliation claim must establish that the other party had a duty to preserve evidence by virtue of an agreement, contract, statute, special circumstance, or voluntary undertaking. *See id.* at 195. The second part concerns the foreseeability of harm. "In any of the foregoing [relationships], a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* at 194. If the party claiming spoliation fails to satisfy both prongs, there existed no duty to preserve evidence. *See Dardeen*, 213 Ill. 2d at 336. In other words, even if the party claiming spoliation is able to establish a duty, that party must still demonstrate that, "the loss or destruction of the

evidence caused [him] to be unable to prove an underlying suit." *See Boyd*, 166 Ill. 2d at 196.

If a party's spoliation claim is based on an agreement or contract, that agreement or contract must be between the parties to the spoliation claim. *See Dardeen*, 213 Ill. 2d at 336-37. In this case, Seneca does not allege the existence of any agreement or contract governing its relationship with Andrew, and it did not attach a copy of any agreement or contract to the response brief. This is not surprising since neither Andrew nor his work crew had anything to do with purchasing or delivering of the cross-tie on which Andrew placed his foot when it broke. The record suggests that there were two intermediate buyers and sellers – Metropolitan Lumber and Cook County Lumber – between Seneca's sale and S&L's purchase of the cross-ties. Lastly, Seneca does not identify any statute that governed its relationship with Andrew.

As to the existence of special circumstances that would raise a duty to preserve evidence, the Supreme Court has made plain that, "something more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit." *Martin*, 2012 IL 113270, ¶ 45. To analyze whether special circumstances existed between the parties in *Dardeen*, the court pointed to three factors. *See* 213 Ill. 2d at 338. The first was whether one party had asked the other to preserve evidence. It has been noted that such a request is impossible to fulfill if a party does not notify the other of an accident. *See Martin*, 2012 IL 113270, ¶ 60 (J. Kilbride dissenting). Yet courts have consistently held that the issue is not what a party would have done had it been notified of an accident, but that, as a counterplaintiff, the party, "bear[s] the burden of establishing all elements of [its] spoliation claims." *Id*. at ¶ 46. *Accord Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶¶ 12-14. In this case, Seneca alleges in its counterclaim that neither Andrew, nor Robert, nor Jose informed Seneca of Andrew's accident; therefore, Seneca could not have asked them to preserve the cross-tie and top plate.

The second *Dardeen* factor is whether the party claiming spoliation had an opportunity either to inspect the evidence or ensure that its condition had sufficiently been documented. This factor is, implicitly, closely related to the first and, once again, presents an insurmountable burden if a party has not been notified of an accident involving evidence that could be preserved. After *Martin*, however, this lost opportunity appears to be unimportant, if not irrelevant, since the court there gave no weight to the fact that the plaintiff had not been given an opportunity to inspect or document the evidence after it had been destroyed only one day after the accident and while still in the defendant's possession and control. *See Martin*, 2012 IL 113270, ¶ 46. In this case, Seneca alleges in its counterclaim that neither Andrew nor his crew informed Seneca of Andrew's accident so that it could inspect the cross-tie and top plate before Robert and Jose removed and threw them away. It remains unclear, however, whether Robert and Jose could have ever contacted Seneca since S&L supplied the building materials and there were two intermediate buyers and sellers between Seneca's sale and S&L's purchase.

The third *Dardeen* factor concerns possession and control of the evidence. As noted above, the Supreme Court in *Martin* found that such an allegation is, by itself, insufficient to establish a duty. *See id.*, ¶ 45. Indeed, "no Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship prong." *Dardeen*, 213 Ill. 2d at 339, *citing Andersen v. Mack Trucks, Inc.*, 314 Ill. App. 3d 212 (2d Dist. 2003); *Jones v. O'Brien Tire & Battery Serv. Cntr., Inc.*, 322 Ill. App. 3d 418 (5th Dist. 2001); *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill. App. 3d 707 (5th Dist. 1999); *Jackson v. Michael Reese Hosp. & Med. Cntr.*, 294 Ill. App. 1 (1st Dist. 1997). A necessary additional fact is that the party controlling the evidence took some affirmative act, such as segregating the evidence "from the rest of the world." *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 30, *substituted by Combs v. Schmidt*, 2015 IL App (2d) 131053. The act of segregating evidence must also be for the benefit of the party claiming spoliation. *See Dardeen*, 213 Ill. 2d at 338. Here, Seneca's counterclaim alleges that, after Andrew's accident, Robert and Jose were in exclusive possession and control of the cross-tie and top plate. The counterclaim does not,

however, allege that Robert or Jose segregated the cross-tie and top plate so that they could be preserved or inspected by Seneca. It is plain that Seneca could never make such an allegation since it would contradict the fundamental factual allegation of its spoliation cause of action – that Robert and Jose threw the cross-tie and top plate onto the debris pile so that they could be taken away for disposal.

The last means available to raise a duty to preserve evidence is for a party to undertake voluntarily the preservation of evidence for another.[1] As noted above, the mere possession of evidence does not constitute a voluntary undertaking to preserve it. *See Combs*, 2012 IL App (2d) 110517, ¶ 33. Rather, an overt act is required, such as an insurer instructing an insured to preserve evidence for the insurer's benefit. *See Jones*, 374 Ill. App. 3d at 927. In contrast, a voluntary undertaking does not exist even if a defendant-general contractor inspects the object that caused the plaintiff's injuries and also allows government investigators to inspect it and the site. *See Martin*, 2012 IL 113270, ¶¶ 31, 36 & 45. Similarly, no voluntary undertaking exists if a party does not seek to preserve a fire scene in its entirety and allows an insurer to investigate the scene and preserve some objects. *See Combs*, 2012 IL App (2d) 110517, ¶¶ 34-35. In this case, Seneca's counterclaim does not allege that Andrew, Robert, or Jose voluntarily undertook to preserve the cross-tie and top plate. As noted immediately above, they could never make such an allegation because it would defeat their spoliation claim.

Conclusion

In sum, Seneca has failed to allege facts from which this court could infer a duty imposed on Andrew, Robert, and Jose to preserve the cross-tie and top plate for Seneca's benefit. Since Andrew owed Seneca no duty, it is unnecessary to address the second prong of a spoliation claim – foreseeability of injury. Rather, based on the

[1] Although Seneca does not argue that Andrew, Robert, or Jose voluntarily undertook to preserve the cross-tie or top plate, this court must consider the possibility in case it might preserve Seneca's cause of action.

foregoing analysis, the Cichons' motion to dismiss Seneca's counterclaim is granted with prejudice.

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John H. Ehrlich, Circuit Court Judge