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Kyle C. Bisceglie on
Ortega v. City of New York
9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007)

2008 Emerging Issues 2858

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In *Ortega v. City of New York*, [9 N.Y.3d 69](#), [2007 N.Y. LEXIS 2715](#) (2007), the Court of Appeals, by unanimous decision, held that New York does not recognize a tort claim of third-party negligent spoliation of evidence. A claim for third-party spoliation would arise when a party with custody of evidence crucial to a claim between two other parties destroys or loses it, thereby compromising one of the two parties' ability to prosecute its claim or defend itself against the other party's claim. This is in contrast to the more common circumstance in which a defendant fails to preserve evidence which the plaintiff needs to prosecute a claim against it.

Spoliation has been defined as "[t]he intentional destruction of evidence" and "[t]he destruction, or the significant and meaningful alteration of a document or instrument." Black's Law Dictionary 1401 (6th ed. 1990). Under the common-law doctrine of spoliation, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, ___ A.D.3d ___, [2008 N.Y. App. Div. LEXIS 1479](#) (2d Dep't 2008). Equivalent sanctions for intentional spoliation by a party are available to courts under CPLR 3126.

Given the availability of other remedies, most New York courts have declined to recognize an independent tort for spoliation against a party. See *Black Radio Network, Inc. v. NYNEX Corp.*, [44 F. Supp. 2d 565, 586](#), [1999 U.S. Dist. LEXIS 7072](#) (S.D.N.Y. 1999) (New York follows "the majority view and [does] not recognize spoliation of evidence as a cognizable tort action", quoting *Weigl v. Quincy Specialties Co.*, [158 Misc. 2d 753](#) (Sup. Ct. N.Y. Co. 1993) (discussed *infra*)). See, e.g., *Pharr v. Cortese*, [146 Misc. 2d 1078](#), [1990 N.Y. Misc. LEXIS 389](#) (Sup. Ct. N.Y. Co. 1990) (declining to recognize independent claim for intentional spoliation against physician who allegedly falsified medical records to avoid malpractice liability). The availability of an appropriate remedy may not be so clear, however, when the spoliator is not a party to the case in which the evidence is relevant.

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The plaintiffs in *Ortega* claimed that the City's negligent destruction of a defective vehicle in which the plaintiffs were injured prevented them from even identifying the responsible parties to sue, and they instead sought to recover the entire amounts of their personal injury damages from the City. See *Ortega*, [9 N.Y.3d at 74](#). The *Ortega* Court refused to recognize such a claim, finding the essential elements of causation and damages claims inherently too hypothetical and speculative without the key evidence necessary to prove them. See [id. at 81-82](#). Despite the Court's categorical rejection of a cause of action for third-party negligent spoliation, however, it did not explicitly rule out an equivalent cause of action in circumstances where the injury caused by the third party's spoliation is easier to determine.

The So-Called "Common-Law Claim for Intentional or Negligent Impairment of a Claim or Defense. New York courts have recognized an independent tort claim against an actor who is deemed to have some duty to another party to preserve evidence, usually characterizing it as a tort for impairment of another's right to sue a third party, or impairment of a defense against a third party's claim, rather than for spoliation. This claim has been recognized most commonly in the employer-employee context.

For example, in *Wiegl v. Quincy Specialties Co.*, [158 Misc. 2d 753](#), [1993 N.Y. Misc. LEXIS 339](#) (Sup. Ct. N.Y. Co. 1993), the plaintiff was a laboratory technician who was injured on the job when her lab coat caught fire. Her employer generally cooperated with pre-litigation discovery, but lost the lab coat. The plaintiff sued the party believed responsible for her injuries, and also asserted claims against her employer for negligent and intentional spoliation. On the employer's motion to dismiss, the Supreme Court concluded that New York courts do not recognize spoliation as a tort action, but nevertheless sustained the spoliation claims by construing them as claims for negligent and intentional impairment by an employer of its employee's right to sue a third-party. See [id. at 757](#).

In *DiDomenico v. C&S Aeromatik Supplies, Inc.*, [252 A.D.2d 41](#), [1998 N.Y. App. Div. LEXIS 14050](#) (2d Dep't 1998), the plaintiff, an employee of United Parcel Service ("UPS"), was injured on the job by an allegedly defective package containing a caustic substance. UPS initially refused to cooperate with the plaintiff's attorney, violated a pre-litigation discovery order pursuant to CPLR 3102(c), and destroyed the defective package. The plaintiff sued various parties believed responsible for his injuries, and also sued UPS for deliberate impairment of his right to sue a third party. See [id. at 46](#). UPS continued to violate discovery orders even after it was made a party to the lawsuit, and

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the Second Department sanctioned it by striking its answer and granting summary judgment to the plaintiff on its claims against UPS.

The Second Department found striking of the employer's answer warranted under CPLR 3126, but also noted "the evolving rule" that a spoliator of key evidence may be sanctioned by striking of pleadings even where the spoliation is not willful, and even if the spoliation occurred before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed in future litigation. [Id. at 53](#).

In *Fada Industries, Inc. v. Falchi Building Co., LP*, [189 Misc. 2d 1](#), [2001 N.Y. Misc. LEXIS 225](#) (Sup. Ct. Queens Co. 2001), the Supreme Court extended the cause of action for impairment of a claim or defense beyond the employee-employer relationship, to encompass a spoliation claim by an insured against its insurer. In that case, a defendant's leaking water heater damaged its own premises and the premises of a neighbor. During the inspection of the defendant's premises by its insurer, the insurer removed the water heater, and subsequently lost or destroyed it. The neighbor sued the defendant, and the defendant brought a third-party action for indemnification against its insurer, on the grounds that the insurer's negligent loss of the water heater impaired the insured's defense in the underlying action, and prevented it from identifying other potential third-party defendants. See [id. at 3](#).

The *Fada Industries* court, relying on *DiDomenico* and *Wiegl*, sustained the insured's third-party complaint against its insurer, ruling that it stated valid causes of action "for negligent spoliation of evidence" and "for negligent impairment of the ability to sue a third party". [Id. at 12-13](#). The Court expressly limited its decision to the facts of the case before it, noting that because the insured sought only indemnification for its liability in the underlying action, the damages were not speculative, and that the sanctions normally available to a party under the spoliation doctrine, such as striking of pleadings or preclusion of evidence, would be of little use. See [id. at 9, 11](#). The Court acknowledged that it was recognizing a previously unrecognized cause of action for negligent spoliation, but found it "fitting that a party should have a remedy against a nonparty, particularly when that nonparty is the party's insurer, for the nonparty's loss or destruction of key evidence." [Id. at 12](#).

The Court of Appeals' Rejection of Negligent Third-Party Spoliation Claims. In *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, [1 N.Y.3d 478](#), [2004 N.Y. LEXIS 228](#) (2004), the Court of Appeals declined to "recognize a cause of action for third-party negligent spoliation of evidence and impairment of a claim or defense as an independent

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tort" on the facts of that case, but stopped short of ruling out such a cause of action altogether. [Id. at 480](#). That case involved an apparently spontaneous automobile fire, which damaged the home where the car was parked. The vehicle owner's insurance carrier, Royal, took possession of the vehicle and then mistakenly destroyed it. MetLife, as subrogee of the damaged homeowner, sued the vehicle's owner and other responsible parties for damages from the fire, and included a claim against Royal for reckless spoliation of evidence.

The Court of Appeals dismissed MetLife's spoliation claim against Royal, distinguishing the facts of that case from those of *DiDomenico* in that "there was no duty, court order, contract or special relationship" between Royal and MetLife that would have required Royal to preserve the vehicle. [Id. at 484](#). In particular, the Court noted that although MetLife had received verbal assurance from Royal that it would preserve the vehicle, it had "made no effort to preserve the evidence by court order or written agreement." [Id.](#)

The take-away from *MetLife Auto* - a cause of action for third-party spoliation of evidence would require, at least, a duty or other obligation on the part of the third party to the injured party to preserve the evidence. See, e.g., *Hennessy v. Restaurant Assoc., Inc.*, [25 A.D.2d 340, 341](#), [2006 N.Y. App. Div. LEXIS 71](#) (1st Dep't 2006) ("Absent some duty to preserve evidence, there is no cause of action for negligent spoliation", citing *MetLife Auto*). Three and one half years later, however, in *Ortega v. City of New York*, [9 N.Y.3d 69](#), [2007 N.Y. LEXIS 2715](#) (2007), the Court of Appeals ostensibly ruled out any cognizable tort claim for negligent spoliation by a third party.

Ortega v. City of New York involved yet another apparently spontaneous automobile fire, this time while the owner and a passenger were inside the vehicle, causing them both serious injury. The vehicle was subsequently towed and impounded by the City, and the passenger obtained a Court order directing the City to preserve the vehicle for inspection by her attorney. Instead, the City Pound inadvertently destroyed the vehicle in violation of the preservation order.

It would appear that the passenger, having attempted to preserve the vehicle by obtaining a court order just as the *MetLife Auto* Court seemed to prescribe, might have had a viable spoliation claim against the City. Both the owner and the passenger sued the City for negligent spoliation of evidence, claiming that the destruction of the vehicle prevented them from determining the cause of the fire or identifying responsible parties, and seeking damages comparable to what they believed they would have won had they

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sued the responsible parties. Neither plaintiff pursued a direct personal injury claim against any anyone that might have been identified responsible party.

On the City's summary judgment motion, the Supreme Court dismissed the owner's spoliation claim but sustained the passenger's, noting the City's obligation to the passenger to preserve the vehicle pursuant to the Court order, and relying on *MetLife Auto and DiDomenico*. See *Ortega v. City of New York*, [11 Misc. 3d 848, 853-55, 2006 N.Y. Misc. LEXIS 267](#) (Sup. Ct. Kings Co. 2006). On appeal, however, the Second Department dismissed the passenger's spoliation claim as well as the owner's, see *Ortega v. City of New York*, [35 A.D.3d 422, 2006 N.Y. App. Div. LEXIS 14547](#) (2d Dep't 2006), and the Court of Appeals affirmed.

The Court of Appeals expressly rejected what it viewed as the *Ortega* plaintiffs' attempt for "recognition of a new cause of action because they cannot meet the traditional proximate cause and actual damages standards at the foundation of our common-law tort jurisprudence." [9 N.Y.3d at 80](#). Citing its general reluctance "to embrace claims that reply on hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages", the Court refused to hold a negligent third party liable for all of the damages the plaintiff might have recovered from a potential tortfeasor, "because the content of the lost evidence is unknown, there is no way of ascertaining to what extent the proof would have benefited either the plaintiff or defendant in the underlying lawsuit and it is therefore impossible to identify which party, if any, was actually harmed." [Id. at 81](#). The Court also expressed concern about leaving municipalities vulnerable as attractive alternative defendants to actual tortfeasors. See [id. at 82-83](#).

Instead, the party claiming injury as a result of the spoliation may be able to seek more limited recovery by other means. Had the *Ortega* plaintiffs pursued a claim against the City for contempt of the preservation order pursuant to Judiciary Law § 773, for example, they might have been able to recover the additional expenses incurred in attempting to prove their personal injury claims without the ability to inspect the vehicle which the City negligently destroyed. See [id. at 80](#).

How Far Does Ortega Go? In *Ortega* the Court of Appeals did not reference the Second Department's decision in *DiDomenico*, even though the Supreme Court had expressly relied on that case in the decision appealed from, and the Court of Appeals itself in its *MetLife Auto* decision had been careful to distinguish *DiDomenico*. Nor did the Court of Appeals mention "impairment of a claim or defense" as it did in *MetLife Auto*,

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leaving open the question of whether a claim for negligent third-party spoliation might survive under a different guise within a limited scope.

The Court of Appeals' reasons for refusing to recognize the spoliation claims in *Ortega* do not apply to the same degree in all circumstances. For example, when the party claiming its interests were impaired by the spoliation is a defendant and seeks indemnification for its own potential liability as in *Fada Indus.*, uncertainty in the calculation of damages is not an issue. In fact, whenever the third-party spoliation claim is ancillary to a lawsuit against the parties deemed directly responsible for the underlying damages, as in *Fada Indus.*, *DiDomenico*, and *Weigl*, as well as in *MetLife Auto*, the hypothetical and speculative aspects of the spoliation claim should not be nearly as great as in *Ortega*, where the effects of the spoliation was the only matter being litigated.

Thus, the Court of Appeals may have left the door open, albeit only slightly, to a spoliation claim against a third party in the context of a special relationship giving rise to obligations beyond the mere duty to preserve evidence, such as the employer-employee relationship, or the relationship between an insurer and its insured. In addition, the Court of Appeals in *Ortega* addressed only *negligent* third-party spoliation, and has not yet ruled out an independent claim against a third party who intentionally destroys evidence despite a legally cognizable duty or obligation to preserve it. Likewise, if the party has agreed to produce certain evidence either because of a pre-existing relationship between the parties or a promise and allows it to be destroyed, the requesting party may have viable beach of contract or promissory estoppels claims. Finally, *Ortega* certainly does not preclude an aggrieved party from pursuing relief under [NY CLS Jud §773](#), FRCP45(e)([USCS Fed Rules Civ Proc R 45](#)), etc. if the evidence is destroyed after a subpoena has been issued or a preservation order entered.

For additional discussion of potential claims and remedies for third-party spoliation, see Brian Warwick, *Smith v. Atkinson*: The Supreme Court of Alabama Holds that Liability Can Be Imposed on a Third Party for Negligent Spoliation of Evidence, [62 Ala. Law. 201](#) (May 2001); Benjamin Clark, The License to Spoliate Must Be Revoked: Why Missouri Should Recognize a Tort for Third-Party Spoliation, 59 J. Mo. B 308 (Nov./Dec. 2003); James Killelea, Spoliation of Evidence: Proposals for [New York State, Note, 70](#) Brooklyn L. Rev. 1045 (2005).

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