

## Real Estate Title Insurance & Construction Law

### Inform Before You Perform: Sanctions for Destroying Evidence of Defective Work

By Anthony M. Bottenfield

**O**n Aug. 3, a unanimous New Jersey Supreme Court issued an opinion that may have startling effects on parties that dispose of evidence of alleged construction defects without providing potentially affected parties with an opportunity to inspect. In *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.*, the Court wrote a comprehensive and lengthy opinion that delves into many of the nuances found in commercial construction litigation. The Court's thorough review of the spoliation of evidence doctrine provides us with a rare juridical view of the complexities of construction litigation.

In *Robertet Flavors*, the Court was faced with the situation where an owner of a construction project moved forward to remediate an alleged construction defect,

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*Bottenfield is an associate at Cohen Seglias Pallas Greenhall & Furman in Philadelphia, and concentrates his practice on construction litigation.*

but, in doing so, it failed to notify certain parties and provided insufficient notice to others. As a result, the owner eliminated the other parties' ability to inspect the alleged defect and spoliated evidence of the defect. The Court dismissed the claims against the construction manager and its representative entirely because they were not given notice and an opportunity to inspect the alleged deficiencies before remediation. The claims against the contractor that originally performed the work remained, but the owner was limited to only presenting evidence that occurred before the removal and remediation of the alleged defects. In other words, due to the spoliation, the Court precluded the owner from presenting evidence relating to the removal of the defect, inspection by its expert consultant, and remediation of the defective work and surrounding areas.

The owner, a manufacturer of food flavorings, planned the construction of its new headquarters. Acting as its own general contractor, the owner hired a construction manager to supervise the work, as well as a glass contractor to install

curtain wall and strip window systems. The glass contractor installed both systems and completed its work in 1998. In 1999, after the owner began occupying the building, it noticed that substantial leaking occurred around the strip windows. The glass contractor was called to investigate the leaks, made several visual inspections, and undertook some repair efforts. The leaks continued, however, and, about two years later, the owner hired a private consultant to address the problem. The consultant inspected the windows and surrounding area and discovered pervasive mold. The consultant recommended that the windows, inside walls, insulation, and carpeting be replaced, and the owner agreed. Unfortunately for the owner, it did not share its plans with the glass contractor or construction manager.

In January 2002, the owner filed suit against the construction manager, one of its representatives, and the glass contractor. In March 2002, the defendants served their answer and requested to inspect the alleged defects. However, counsel for the owner did not inform the owner of the request and also failed to notify the defendants' counsel about the consultant's investigations, mold discovery, or owner's plan to replace the strip windows. The owner began the remediation process on Dec. 13, 2002, yet did not notify the defendants. It was not until a hearing on Jan. 24, 2003 — three weeks prior to its completion — that defendants' counsel was alerted that the remediation had

begun. At this time, the defendants were still kept in the dark about the discovery of mold. Counsel for the glass contractor requested that the remediation stop immediately and that it have the opportunity to inspect the building. In response, the owner claimed that halting the process would be impractical and denied the glass contractor's request. In mid-February, the glass contractor and a private consultant visited the building but found that the strip window system had been replaced and all conditions that the owner complained about had been remediated.

The severe limitation on their ability to inspect led the defendants to file a motion to prevent the owner from offering any evidence relating to the installation of the strip window system; the trial court granted their motion. Thereafter, the defendants filed motions for summary judgment on the basis that the owner could not sustain its burden of proof on liability without the testimony of its expert consultant. Again, the trial court agreed and granted defendants' motions. The Appellate Division reversed and remanded, and the Supreme Court granted the appeal.

The Court's analysis begins with an overview of the spoliation doctrine, and then focuses on the need for a specific test applicable to the commercial construction context. The Court's opinion is replete with other jurisdictions' tests for spoliation, although, according to the Court, none are satisfactory for this arena. Rather, the Court synthesizes the test used by the Third Circuit in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994), with the Alabama Supreme Court's test in *Story v. RAJ Props., Inc.*, 909 So. 2d 797 (Ala. 2005), and then incorporates additional factors germane to construction litigation.

In creating its test, the Court recognizes that "[c]ommercial construction projects present the courts with unique challenges, but they also provide opportunities to achieve creative ways of fairly sanctioning acts of spoliation." The test contains three main prongs, with various factors built into each prong. The first

prong focuses on the degree of fault, and includes factors such as the identity of the spoliator, the manner in which the spoliation occurred, the reason why the evidence was spoliated and the timing of the spoliation. In determining the degree of fault, it was important to the Court to weigh factors such as whether the evidence was spoliated by the plaintiff, defendant or third party; whether it was spoliated in an innocent or premeditated manner; whether the evidence was destroyed to protect the integrity of a building or an innocuous reason; and whether the spoliation is discovered during discovery or after the conclusion of trial.

The test's second prong deals with the degree of prejudice on a party. Here, the Court addressed factors such as whether there are alternative sources of information available and whether the nonspoliating party may bear some part of the responsibility for the spoliation. The Court paid special attention to the fact that the commercial construction industry customarily maintains a wide range of documentation and records for each project. As such, it is possible that although one source of evidence has been destroyed, there are sufficient records and documents from other sources that sufficiently allow a party to evaluate an alleged defect. Further, a party "that is called back to the building repeatedly but that merely glances at the work and makes little effort to identify a cause, to document the conditions observed, or to effect [sic] a solution will have less ground to complain when the owner seeks assistance from others."

The third prong is less fact-specific and calls upon the Court's equitable discretion to select the sanction that will reduce unfairness and deter future misconduct. This is the balancing test prong in which the Court evaluates the facts identified in prongs one and two, then analyzes them in conjunction with the sanctions that it has at its disposal. The Court cites sanctions, including adverse inferences, bifurcated proceedings, preclusion of some or all evidence, payment of costs, or partial or complete dismissal of claims. After balancing

all of these factors, the Court will impose a sanction "consistent with fundamental fairness to both parties."

In evaluating the facts of this case, and weighing the applicable factors, the Court admits that although it does not "condone spoliation," the harsh penalty of dismissal "will often not be the appropriate sanction." However, the Court found that dismissal was appropriate in this case. The Court held, because the construction manager and its representative did not have an adequate opportunity to inspect the leaking windows before remediation and did not have an independent source of evidence to allow them to mount a defense, the owner's claims against them should be dismissed. The owner's claims against the glass contractor relating to the curtain wall and mold were also dismissed because the glass contractor was not given a chance to inspect the allegedly defective conditions. Although the owner's claim against the glass contractor relating to the ribbon windows was not dismissed, it was significantly limited. The owner is only permitted to present evidence relating to the condition and inspection of the windows prior to remediation; any evidence relating to the windows post-removal will be barred. Therefore, although the claim remains, the owner will be faced with the difficult task of proving causation and liability based on relatively scant evidence.

The Court's rationale shows that spoliation of evidence can impact numerous players in the construction industry. Through this case, the Court demonstrated how severe penalties — such as preventing all evidence relating to the removal, inspection and remediation of the windows — can result when a party fails to avail a contractor the right to investigate defective work. Owners and contractors should not take lightly noticing, or receiving notices, of a right to inspect defective work. If notice requirements are not abided by, one can find oneself at trial without the ability to present evidence telling your side of the story. ■