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Spoliation of Evidence in Family Matters

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It is a well-established rule of evidence that a party's intentional destruction of written evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. 2 John Henry Wigmore, Evidence in Trials at Common Law § 291 (James H. Chadbourn rev.1979). This common law rule, which was expanded to the area of discovery sanctions in 1994, has recently been applied in matrimonial actions, and creates a potentially perilous path for the matrimonial attorney.

Spoliation Law in New York

The traditional common law rule in New York was that the deliberate destruction of written evidence gives rise to the inference that the matter destroyed or mutilated was unfavorable to the spoliator. The presumption did not arise from the mere destruction of documents; such destruction must be intentional. In re Eno's Will, 196 AD 131(1st Dept 1921). This unfavorable presumption did not dispense with the necessity that the other party introduce some other evidence of the contents of the destroyed documents, and show that those documents were relevant to the case. Id.

The common law rule was expanded to the area of discovery sanctions in negligence and product liability cases in 1994. Abar v. Freightliner Corp., 208 AD2d 999 (1st Dept 1994). The expansion of sanctions for the inadvertent loss of evidence recognized that such physical evidence often is the most eloquent impartial "witness" to what really occurred, and that the resulting unfairness is inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission.

Since then it has become well-settled that under this common law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party of the ability to prove its claim, the responsible party may be sanctioned pursuant to CPLR 3126 by the striking of its pleading. Gotto v Eusebe-Carter, 69 AD3d 566 (2d Dept 2010).

However, a less severe sanction, such as precluding that party from offering evidence as to the destroyed material, has been held to be appropriate where the absence of the missing evidence does not deprive the moving party of the

ability to establish his case, or when the missing evidence does not deprive the moving party of the ability to establish his or her defense, and when the responsible party did not lose evidence intentionally or in bad faith. Mylonas v. Town of Brookhaven, 305 AD2d 561 (2d Dept 2003); De Los Santos v. Polanco, 21 AD3d 397 (2d Dept 2005); Scorano v. Birbitzer, 56 AD3d 750 (2d Dept 2008). The determination of a sanction for spoliation is within the broad discretion of the court. Ortiz v. Bajwa Dev.Corp., 89 AD3d 999 (2d Dept, 2011).

Family Matters

In S.B. v. U.B., 38 Misc. 3d 487 (Sup. Ct., Kings Cty. 2012) (Sunshine, J.), Supreme Court extended the spoliation doctrine to matrimonial actions and granted discovery sanctions for spoliation of evidence in custody litigation. There, the mother sought an order modifying the father's visitation to supervised visitation between the father and the children. The mother based her motion on recent allegations made by the mother's sister, S., who offered to testify that in 2002, when she was 10 years old, the father sexually abused her, and that the abuse continued for a period of three years. The father denied the allegations.

Along with her Order to Show Cause, the mother submitted heavily redacted excerpts of her sister's childhood diary, in which the sister allegedly memorialized her feelings concerning her interactions with the father during the time that the alleged sexual abuse took place. In a second affidavit, S. stated that she was asked by the mother's counsel to provide him with diary entries relating to the father's abuse, and that upon reviewing the diary, she was embarrassed by the private childhood thoughts that it contained. She therefore provided only heavily redacted excerpts of her diary to the mother's counsel.

S. stated that she did not want the mother's counsel to review her diary in its entirety, and that the redacted portions were unrelated to the father's alleged abuse of her. S. further stated that, since providing the excerpts of her diary to the mother's counsel, she "decided that [she] did not want anyone else to review it," that she "discarded it in the trash," and that she no longer possessed the diary. She stated that she believed that she would not be asked to submit the diary after providing the excerpts to the mother's counsel. She also stated that she was not instructed to discard the diary and that she did not tell anyone that she had done so until several months after she threw it away.

The father moved for an order directing witness S. to turn over her complete and unredacted diary covering the period of time from when she first met the defendant-father through Sept. 30, 2012, including the period of time from Jan. 1, 2002 to Dec. 31, 2007; or, in the alternative, precluding witness S. from testifying if she disposed of her diary. Supreme Court pointed out that it had broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence. It discussed at length the origin and evolution of the CPLR 3126 spoliation rule and rejected the mother's argument that she should not be punished for the loss of the diary because it was S. who disposed of the diary, not her.

Supreme Court held that as the mother had submitted the excerpts of the diary, she was the party responsible for preserving it, and should have taken steps to ensure the diary's preservation, once she relied on it to support her application. It found that allowing the mother to use its heavily redacted contents would be severely prejudicial to the father, and directed that the mother and the witness S. were precluded from testifying as to the existence, or contents, of the diary at any hearing.

Practice Pointers

In extending the spoliation doctrine to matrimonial actions, the S.B. v. U.B. court cited to Thornhill v. A.B. Volvo, 304 AD2d 651 (2d Dept. 2003), for the proposition that parties are responsible for preserving evidence when they are on notice that it may be needed for litigation. Citing Amaris v. Sharp Electronic Corp., 304 AD2d 457 (1st Dept. 2003), the court also noted that this responsibility to preserve evidence may extend to items that are not in the possession of a party, when that party negligently fails to take steps to assure their preservation.

In matrimonial actions, the parties are put on notice by the Uniform Rules that they are required to provide the court with certain documents during the course of the matrimonial action. The Uniform Rules provide that unless the order scheduling the preliminary conference directs otherwise, several categories of documents must be exchanged by the parties and filed with the court no later than 10 days prior to the preliminary conference. 22 NYCRR 202.16 (f)(1). This requirement impliedly carries with it the obligation to preserve such documents if they are in a party's possession, custody or control. Failure to do so may result in sanctions for the spoliation of evidence.

In addition, the preliminary conference stipulation/order form, which many attorneys sign as a matter of course at the preliminary conference, contains a "section G," entitled "Discovery." The first part of "section G" requires each party to maintain all financial records in his or her possession through the date of the entry of a judgment of divorce, including electronic files, data and other evidence including, but not limited to, e-mail and other electronic communications, data bases, calendars, telephone logs, contact manager information, information stored on removable media, contained on laptops or other portable devices and network access information. Counsel should be wary of signing this part of section G without first ascertaining if all of these documents are in the client's possession, custody or control. Counsel should explain this provision to the client at the preliminary conference, and make sure the documents are in the client's possession before committing the client to maintain the section G records. If counsel and client are not sure that the client has these records in his possession, the commitment to maintain them should not be made.

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