MASSACHUSETTS Lawyers Weekly

Judge orders spoliation sanction in commercial dispute

Broader standard applied after remand from single justice

By: Eric T. Berkman February 8, 2023

The defendants pulled out of a deal to build a luxury condo high-rise over the Massachusetts Turnpike, leading to the BLS dispute. (DEREK YU/WIKIMEDIA COMMONS)

Defendants in a business dispute engaged in sanctionable spoliation of evidence by failing to preserve communications they knew at the time might be relevant to a possible lawsuit, according to a Superior Court judge.

Plaintiff John Fish, owner of Suffolk Construction Co., was partnering with defendant Stephen Weiner, his son, Adam Weiner, and their real estate development firm, Weiner Ventures, to build an $800 million luxury condo high-rise in Boston. In August 2019, the Weiners abruptly pulled out of the project.

Just days later, on Aug. 20, Fish sent the Weiners a "notice of major decision impasse" (described by the court as a "dispute notice") asserting that they had violated the parties' agreement and that he was reserving his legal rights.

From the time the Weiners pulled out of the project until October 2019 when Fish filed suit, the Weiners apparently never instituted a litigation hold or made any efforts to preserve relevant evidence. Additionally, Stephen Weiner allegedly deleted emails, texts and voicemails, while Adam wiped clean the cellphone he apparently used throughout 2019.

Business Litigation Session Judge Kenneth W. Salinger initially denied the plaintiffs' motion for sanctions, ruling that they had not shown that the defendants were on notice that litigation was likely before the lawsuit was filed.

A single justice of the Appeals Court, however, found that Salinger applied an incorrect spoliation standard and remanded the case for a determination as to whether the defendants "knew or reasonably should have known that evidence might have been relevant to a possible action."

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>
> ***— Eric Magnuson, Boston***

Salinger subsequently found they did.

"Though later communications suggested that litigation was not yet likely, the Court finds that the Weiners should have known as of August 20, 2019 … that litigation remained possible," Salinger wrote. "In accord with the single justice's remand order, the Court therefore finds that the Weiners had a duty to preserve relevant evidence starting on August 20, 2019, and continuing thereafter [and] further finds that the Weiners breached that duty [and] that plaintiffs were prejudiced by the Weiners' spoliation of evidence."

The five-page decision is *JFF Cecilia LLC, et al. v. Weiner Ventures, LLC, et al.*, Lawyers Weekly No. 09-012-23. The four-page prior order is *JFF Cecilia LLC, et al. v. Weiner Ventures, LLC, et al.*, Lawyers Weekly No. 09-011-23.

'Clear as mud'

Attorneys for the plaintiffs did not respond to requests for comment. Defense counsel Brian W. Cook of Boston declined to comment on the record.

But David B. Mack, a civil litigator in Burlington, said the decision reinforces how important it is to preserve documents, particularly electronic communications, as soon as there is even a "whiff of a dispute."

"The court here read the remand order as requiring litigation to be somewhere between 'possible' and 'likely,'" Mack said. "The standard is as clear as mud. You don't want to take the risk that a judge, years later, will find that you should have preserved documents earlier than you actually did."

Mack also said a good rule of thumb for clients is that if they get a letter important enough to involve their own lawyer, they should preserve documents at that point, and the attorney should advise the client to impose a litigation hold immediately.

"The spoliation issue can take on a life of its own in a case and can be very distracting to a jury," Mack said.

Daniel P. Dain, a real estate litigator in Boston, had a similar reaction.

"[T]he single justice [directed] the Superior Court to use a 'possibility' of litigation test rather than a 'likely' test, with the first meaning something less than 50 percent likely and the latter meaning something more," he said. "As a practical matter, neither is a very good guide for lawyers counseling their clients. Upon receipt of a letter threatening litigation, most lawyers would counsel preservation at that point, regardless of whether the threat seems possible or likely."

Eric Magnuson of Boston said people should keep an eye on the issue, since courts from other jurisdictions have held that the duty to preserve attaches only when litigation is probable and because Salinger and Appeals Court Judge Vickie L. Henry, the single justice who reviewed Salinger's initial ruling, both cited Supreme Judicial Court precedent when formulating their respective standards.

"My hunch [is that] the rulings in *JFF* are not the last we'll hear from Massachusetts courts about when the duty to preserve evidence arises," he said.

Boston attorney Alan E. Brown said that notwithstanding the ruling, prudent attorneys should still be mindful not to undermine their own correspondence that puts a party on notice of likely litigation by later stating or implying that litigation is not likely.

Doing so could create the risk that spoliation sanctions are later denied, he said.

Non-preservation of communications

Fish and the Weiners worked together for more than a decade on planning, designing, financing and obtaining permitting for a project to build a tower on Boylston Street in Boston above the Massachusetts Turnpike

According to the plaintiffs, on Aug. 15, 2019, just as construction was set to begin, Stephen Weiner told Fish he was backing out. The next night, Adam Weiner apparently leaked to the media, without Fish's consent, that the project itself would not proceed.

Fish asserts that once the media started publishing stories that Weiner Ventures had scrapped the project, he had to try and revive it in an environment in which, in the public's eye, it had been terminated.

The following day, the project's outside counsel emailed Fish and the Weiners with action items to "wind down" the project. Fish's counsel in turn responded that they were not in agreement and instructed the Weiners and their counsel to minimize the harm to Fish, who did not want to give up on the project.

On Aug. 20, Fish's lawyer sent the Weiners the dispute notice pursuant to procedures in the operating agreement. The notice confirmed that Fish intended to complete the project and instructed the Weiners not to do anything to delay, wind down or cancel it.

The notice also stated that the Weiners had violated the operating agreement and that Fish was reserving his legal and equitable rights.

The Weiners allegedly understood the notice to include a warning of potential litigation and hired a litigator days later.

Over the following month, Fish sought to revive the project through alternative proposals that did not include the Weiners, but he could not finalize anything until he reached agreement with them.

During that time, the Weiners also apparently exchanged emails discussing "litigation" with Fish.

On Oct. 1, 2019, Fish's counsel sent the Weiners a proposal to salvage the project. The proposal stated that agreement would prevent litigation while the Weiners' failure to agree would render the project "irrecoverable," in which case Fish would be "compelled to recover through other mechanisms" the millions of dollars he would lose.

The Weiners allegedly responded by delaying, including requesting additional information on topics that had not changed since the unilateral termination, purportedly in an attempt to leverage better economic terms.

Ultimately, on Oct. 18, 2019, MDOT terminated the project development agreement, ending Fish's attempt to rescue the project.

A week later, Fish's companies, JFF Cecilia and Suffolk Construction, sued the Weiners for breach of contract, bad faith, misrepresentation and violation of Chapter 93A.

In November 2022, the plaintiffs moved for sanctions, alleging spoliation of critical evidence, citing Stephen Weiner's deletion of emails and Adam Weiner's erasing of the data on his phone.

Salinger denied the motion, finding that someone in the Weiners' position would not reasonably have been expected to be sued until

JFF Cecilia LLC, et al. v. Weiner Ventures, LLC, et al.

THE ISSUE: Did defendants in a business dispute engage in sanctionable spoliation of evidence by failing to preserve communications that they knew at the time might be relevant to a possible lawsuit?

DECISION: Yes (Suffolk Superior Court/Business Litigation Session)

LAWYERS: Michael H. Bunis, G. Mark Edgarton, Paul D. Popeo and Kevin C. Quigley, of Choate, Hall & Stewart, Boston (plaintiffs)

Brian W. Cook and Mark Tully, of Goodwin, Boston; Kevin T. Peters of Gesmer Updegrove, Boston (defense)

Oct. 1, 2019, and that the plaintiffs could not show prejudice from spoliation between that date and the date they filed suit.

Henry subsequently found in a single justice appeal that Salinger applied an inappropriate standard and remanded the case for a determination as to whether the defendants were on notice of possible litigation starting Aug. 20, 2019.

Possible litigation

Salinger applied the test Henry articulated — whether or not the Weiners reasonably knew or should have known that their texts and emails might be relevant to a possible lawsuit — and found that they had been on notice.

Additionally, Salinger found that the plaintiffs were prejudiced by the spoliation of evidence between Aug. 20 and Sept. 30, 2019.

"[T]he conduct and communications by the Weiners during that period is at the center of this lawsuit, and it is possible that unrecoverable emails or texts during that period would have helped bolster plaintiffs' proof of their claims," Salinger wrote.

Accordingly, Salinger concluded that "[p]laintiffs may offer evidence at trial of the Weiners' alleged spoliation of emails and text messages, and Plaintiffs are entitled at trial to a jury instruction that the jury may, but are not required to, infer from the Weiners' deletion of emails and texts that the message contents were unfavorable to the defendants."

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