

Robertet Flavors, Inc. v. Tri-Form Construction, Inc.

The New Jersey Supreme Court Sets Guidelines Addressing Spoliation of Evidence in Construction Defect Cases

by *Damian Santomauro*

Construction defects that require repair pose significant challenges to property owners that either have instituted or intend to institute litigation against those parties responsible for the defects. In particular, such property owners are often confronted with the tension inherent in wanting to make the necessary repairs as soon as possible while simultaneously complying with their obligation to preserve relevant evidence. When owners make the repairs without proper consideration of their preservation obligations, they can subject themselves to claims of spoliation by the defendants.

The New Jersey Supreme Court recently addressed these circumstances in *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.*¹ and, in doing so set forth a framework for courts to utilize in determining the appropriate remedy for spoliation in construction defect cases.

Robertet involved a dispute over the construction of a window system in a commercial building owned by Robertet Flavors. In connection with the construction of its new headquarters, Robertet retained Tri-Form Construction, Inc. and its president as a construction manager, and contracted with Academy Glass, Inc. to install a strip-window system in the building.

After construction was completed and it had moved into its new

building, Robertet's employees noticed water was leaking through the window system. Robertet contacted Academy Glass, which conducted a visual inspection of the interior and exterior of the building and suggested the windows be re-caulked. Re-caulking did not resolve the problem and, when the leaking became worse, Robertet retained experts to investigate the leaking.

Robertet filed a complaint against Academy Glass and Tri-Form, alleging the windows were defectively constructed and the construction project was not properly managed. Thereafter, while removing a section of the windows, Robertet's experts discovered a significant mold problem they claimed was caused by the leaking, and recommended to Robertet that it remove and replace everything that had been contaminated with the mold. Robertet decided to make the necessary repairs, but never advised the defendants that remedial work was contemplated, even though Tri-Form had served discovery requests demanding notification of any planned or intended repairs.

Academy Glass learned of the remediation after it had started, and requested that Robertet cease repairs until Academy Glass had a chance to evaluate Robertet's claims of defective construction and resulting damage. Robertet, however, refused to do so. When Academy Glass ultimately visited

the building with its expert, the allegedly defective window system had been replaced and all repairs had been made.

Academy Glass filed a motion seeking to bar Robertet from offering any expert testimony relating to the installation of the window system on the grounds that preclusion of such evidence was an appropriate remedy for Robertet's spoliation. The trial court granted the motion and subsequent motions by Academy Glass and Tri-Form seeking summary judgment as a result of Robertet's inability to offer expert testimony.

On appeal, the Appellate Division held that because Academy Glass had the opportunity to inspect the windows prior to their replacement, Robertet's expert should have been permitted to offer an opinion based upon observations the expert made prior to the replacement. The Appellate Division's ruling, however, effectively precluded evidence relating to the mold contamination, which Robertet did not discover until after Academy Glass had the opportunity to inspect the windows. Robertet, Academy Glass, and Tri-Form all appealed to the New Jersey Supreme Court.

Recognizing that construction projects "present the courts with unique challenges" regarding spoliation, the Court noted that parties to construction projects have compet-

ing interests regarding the need for repairs and that these interests are “compounded when they play out in the shadow of threatened or actual litigation.”² As the Court noted, while “[i]t is preferable, of course, to have an orderly procedure for identifying a defect, alerting the allegedly culpable party, conducting an investigation and testing that is observed and documented by representatives for all potentially responsible parties, identifying a cause, and achieving a solution[,] [i]n the real world of construction projects, however, the parties do not always behave that way and may proceed to develop a solution without preserving all of the evidence that is needed to determine liability or prove damages.”³ Because Robertet conceded there had been spoliation in this case, the Court was confronted with assessing whether the Appellate Division had fashioned an appropriate remedy.

While the Appellate Division had previously issued decisions in *Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc.*⁴ and *Tribble v. Mytelka*⁵ on this issue, *Robertet* is the first New Jersey Supreme Court case to address the particular factors that are implicated by spoliation in the context of construction disputes. Indeed, while noting that three essential principles that guide courts in determining the appropriate remedy for spoliation generally—1) the identity of the spoliator, 2) the timing of the when the spoliation is discovered, and 3) whether the remedy makes whole, as much as possible, the party who has been impaired by the spoliation, punishes the wrongdoer, and deters others—are equally applicable in construction defect cases,⁶ the Court also considered concerns that are specific to construction defect litigation.

Although acknowledging that factors articulated by the Third Circuit Court of Appeals in *Schmid v. Milwaukee Elec. Tool Corp.*⁷ and the Alabama Supreme Court in *Story v.*

*RAJ Props., Inc.*⁸ were “useful guides,” the Court concluded that the tests set forth in these cases were not “sufficiently precise...to focus on the questions that arise in construction defect litigation,” which include issues relating to the “competing concerns of the various parties involved in such disputes, the frequent need to effect a timely resolution to a problem in a building, and the records that are generally kept in the course of such projects.”⁹

As a result, the Court identified its own list of factors, stating:

[C]ourts confronted with spoliation in the context of commercial construction litigation should recognize that a variety of factors bear on the appropriate remedy. In particular, courts should consider all of the following: the identity of the spoliator; the manner in which the spoliation occurred, including the reason for and timing of its occurrence; the prejudice to the non-spoliating party, including whether the non-spoliating party bears any responsibility for the loss of the spoliated evidence; and the alternate sources of information that are, or are likely to be, available to the non-spoliator from its own records and personnel, from contemporaneous documentation or recordings made by or on behalf of the spoliator, and from others as a result of the usual and customary business practices in the construction industry. Courts should then balance all of those considerations in crafting the appropriate remedy with an appreciation for the ways in which the construction industry itself provides them with unique tools with which to “level the playing field” and achieve an appropriate remedy for spoliation.¹⁰

While the appropriate remedy will be dependent upon the balancing of these factors on a case-by-case basis, the Court noted that “it will often be the case that a sanction for spoliation other than dismissal” will be appropriate because of the wide array of alternative

sources of information available on a construction project.¹¹

Applying this framework, the Court, held the Appellate Division correctly concluded that dismissal of all of Robertet’s claims against Academy Glass was not warranted, and that limiting the claims to conditions that could be observed when Academy Glass visited the site to address the leaking windows was a proper sanction.¹² With respect to the claims against Tri-Form, however, the Court ruled that because Tri-Form, unlike Academy Glass, never had the opportunity to inspect the leaking windows, Robertet’s claims against Tri-Form should have been dismissed because that was “the only fair remedy for plaintiff’s spoliation.”¹³

While the principles enunciated by the Court in *Robertet* will likely be applied to a broad range of spoliation cases, it provides useful guidance for parties and their attorneys involved in pending or existing construction defect litigation.

First, where a defective condition has been identified, a party should notify the party(ies) it believes are potentially responsible as soon as practicably possible. Thereafter, if the party is contemplating a repair to the defective structure it should weigh the need to make the repair versus the potential for claims of spoliation. If the defect does not need to be immediately addressed, it may be more appropriate to wait to remediate until such time as the threat of spoliation claims has been abated. Where the repairs are necessary due to safety or other concerns, the potentially responsible party or parties should be notified and invited, along with their representatives or third-party consultants, to inspect and analyze the defective structure before the repairs are made.

Throughout the process of identifying the defect and evaluating and implementing repairs, the party making the repairs should endeavor to provide significant documentation (including photographs and

other visual evidence) to preserve, to the greatest extent possible, evidence relating to the condition prior to repairs.

The *Robertet* decision makes clear that, although the sanction of dismissal may be a last resort, spoliation of evidence on a construction project can have drastic results where a party makes repairs to a construction defect without taking appropriate steps to notify potentially responsible parties of the defects and repairs. The greater the

degree of communication and documentation a party provides regarding the defect and the contemplated repairs, the more likely it is that a party will be able to avoid a sanction for spoliation. ■

ENDNOTES

1. 203 N.J. 242 (2010).
2. *Id.* at 257-58.
3. *Id.* at 258.
4. 336 N.J. Super. 218 (App. Div. 2001).
5. 2006 N.J. Super. Unpub. LEXIS 1564 (App. Div. Nov. 30, 2006).
6. 203 N.J. at 272-73.
7. 13 F3d 76 (3d Cir. 1994).
8. 909 So. 2d 797 (Ala. 2005).
9. 203 N.J. at 280.
10. *Id.* at 282.
11. *Id.* at 282-83.
12. *Id.* at 284-85.
13. *Id.* at 285.

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