ONE PARTY'S TRASH IS ANOTHER PARTY'S EVIDENCE: A LESSON IN SPOLIATION IN THE DIGITAL AGE

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As the use of computers, cell phones and other electronic devices continues to rise, litigants and their attorneys are faced with new and unique challenges regarding the preservation of evidence to avoid potential repercussions resulting from claims for spoliation. Spoliation is defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument that is relevant to pending or potential litigation. From evidentiary presumptions to the imposition of drastic sanctions, including the striking of pleadings, spoliation issues can materially affect the outcome of litigation. As such, it is incumbent upon attorneys to understand this nuanced area of the law so that they can properly inform their clients of their preservation obligations – with respect to both traditional and electronic records – so as to avoid the pitfalls that could mean the difference between winning and losing.

Under Florida law, prior to a court imposing any sanctions due to spoliation of any form of evidence, the court must answer the following threshold questions: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve the evidence; and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Jordan ex rel. Shealey v. Masters*, 821 So. 2d 342, 347 (Fla. 4th DCA 2002). The duty to preserve applies to evidence that a litigant knows, or reasonably should know, is relevant in an action. Such duty arises not only during the litigation, but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. This, of course, includes electronically stored information including the often critical metadata.

In 2012, Rule 1.380(e) of the Florida Rules of Civil Procedure was amended to add the following language:

> (e) Electronically Stored Information; Sanctions for Failure to Preserve. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Thus, where purportedly spoliated evidence consists of electronically stored information, the Court must consider the foregoing established Florida spoliation case law in conjunction with Rule 1.380(e).

The case of *Progress Residential, LP f/k/a Fundamental Reo LP v. Title Capital Management LLC*,currently pending in the Eleventh Judicial Circuit Court, is a good example of how Courts perform this analysis and provides a valuable lesson to all litigants and practitioners alike about the application of Rule 1.380(e) and the importance of preserving electronically stored information. There, the plaintiff filed an action alleging breach of contract, breach of fiduciary duty, and constructive fraud against the defendants whom it hired to serve as its agent in conjunction with the acquisition of property at foreclosure auctions.

Under their business arrangement, the defendants were to provide complete due diligence on properties that were the subject of foreclosure actions, including performing research on the properties to determine their value, and then prepare bid sheets reflecting their research results which they would send to the plaintiff in

advance of the auctions. The data contained in the bid sheets, which were prepared using Microsoft Excel, was subsequently inputted into a formula to calculate the maximum authority extended to the defendants to bid on a given property. The defendants were then paid a four percent commission on each piece of property acquired by the defendants on plaintiff's behalf. In support of its claims against the defendants, the plaintiff alleged that the defendants manipulated the data, specifically inflating the carrying costs associated with each acquired property, thereby resulting in a greater profit for the defendants and financial loss to the plaintiff.

In the months immediately preceding the filing of the lawsuit, in an effort to avoid litigation, the parties engaged in substantial settlement negotiations, which ultimately failed. After the suit was filed, the plaintiff propounded a request for production seeking all emails generated by the defendants' office staff in conjunction with the services they performed on the plaintiff's behalf. Nearly one year after receiving the initial production, the plaintiff sought production of additional documents, including internal emails between the defendants' employees. The defendants objected to the request stating that it was now inactive with no internal emails and that it was unfair and prejudicial to require them to expend additional resources to go back and search for any such responsive documents that would have been easier to locate in the same year that the request was made. Ultimately, the Court ordered production of the additional documents. In response, the defendants served the plaintiff with an affidavit indicating that with the exception of certain computers, the computers of all of the defendants' staff were wiped clean and discarded or given away around the time the complaint was filed.

In light of the forgoing, the plaintiff filed a motion for spoliation arguing that the defendants were under a duty to preserve the email correspondence, which was critical evidence, and asserted that the defendants' iCloud backup system was tampered with in an attempt to further conceal evidence – without ever advising plaintiff of its destruction – thereby demonstrating bad faith. The defendants opposed the motion arguing that the destruction of the electronic data was part and parcel with the termination of the business relationship.

After applying the factors set forth in *Jordan*, the Court found that: (1) the record evidence established that subject internal e-mails existed at one time; (2) the defendants knew at the time of deletion that litigation was imminent and, thus, were under a duty to preserve the emails; and (3) the information contained in said e-mails would have been critical in either proving or disproving the plaintiff's case. Finally, the Court concluded that the good faith exception set forth in Rule 1.380(e) was not implicated, because the discovery responses, and ensuing correspondence and hearings, "were clearly designed to thwart Plaintiff's access to the information."

As a result, the Court granted the plaintiff's spoliation motion and ordered that at trial the jury be instructed as follows:

> The Court has determined that Defendants had a duty to maintain and keep the electronically stored information. Because Defendants did not maintain or keep the electronically stored information, you should find that Plaintiffs established their claim against Defendants unless Defendants prove otherwise by the greater weight of the evidence.

While not quite as extreme as a default judgment, this jury instruction is an extraordinary sanction that effectively creates a rebuttable presumption that the plaintiff proved its case in chief.

This case is the perfect example of why it is so imperative that lawyers understand spoliation and properly instruct their clients regarding their preservation obligations, especially with respect to electronically stored information that routinely gets deleted. The failure to do so can be ruinous.

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