

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

American Guarantee & Liberty Insurance)	
Company a/s/o/ Rush University Medical Center,)	
)	
Plaintiff,)	
)	
v.)	No. 18 L 1656
)	
Commonwealth Edison Company,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

The dismissal of a case with prejudice as a discovery sanction for failing to preserve evidence is a drastic remedy. For four years, the defendant failed to: (1) investigate a property damage claim; (2) cooperate with the claimant to preserve evidence; (3) inspect or test the damaged property; or (4) request a protective order from this court. In light of its own failures to act, the defendant is in no position to seek a severe penalty against the plaintiff; therefore, the motion to dismiss must be denied.

Facts

On October 6, 2015, an electrical power line was cut at a Commonwealth Edison (ComEd) substation that, in turn, cut off power to a substantial portion of Rush University Medical Center (Rush). ComEd worked to restore power, during which time a power surge occurred. After the surge, a 6650 QTOF mass spectrometer owned by Rush and manufactured by Agilent Technologies, Inc. no longer functioned.

On December 9, 2015, an attorney representing American Guarantee & Liberty Insurance Company (AGLI) – sent a letter to the president of Exelon Corporation, ComEd’s parent company,

placing it on notice of the loss of the mass spectrometer and estimating damages of at least \$550,000. The same day, an Exelon attorney informed AGLI that its letter had been forwarded to Exelon's claims department and assigned to a claims adjuster.

On December 10, 2015, the claims adjuster e-mailed AGLI's attorney a claim form and indicated that ComEd was conducting an investigation. On January 22, 2016, the AGLI attorney e-mailed the claims adjuster indicating that the form had been completed and that AGLI was willing to supply any additional information that ComEd might need. AGLI did not hear back from the claims adjuster.

On April 19, 2016, AGLI's attorney e-mailed ComEd's claims adjuster inquiring as to its position about the claimed loss. Once again, the AGLI attorney did not hear back from the adjuster. On June 2, 2106, AGLI's attorney, once again, e-mailed the claims adjuster inquiring as to ComEd's position about the claim. The claims adjuster did not respond to the inquiry.

On February 15, 2018, AGLI filed a complaint against ComEd and on May 31, 2018 filed a first amended complaint.¹ The most recent complaint alleges that the mass spectrometer had operated without incident between its February 2015 installation at Rush and the October 6, 2015 power surge. The power surge caused irreparable damage to the machine, and resulted in a \$578,626.40 property damage loss to Rush.

AGLI alleges that ComEd owed Rush a duty of reasonable care to furnish electricity so as to avoid damage to its property. ComEd breached that duty by: (1) failing to warn Rush of the interruption of service before or during the power cut; (2) failing to warn Rush of the possibility of a power surge when reconnecting the service; (3) cutting the power line that serviced Rush; (4) creating a power surge when restoring electrical service; (5) failing

¹ Zurich American Insurance Company filed the original complaint. AGLI is a subsidiary of Zurich.

to supervise the cutting of the electrical service; (6) failing to supervise the restoration of the electrical service; and (7) failing to perform in a workmanlike manner. Based on these breaches, the cut in electrical power proximately caused the damage to the mass spectrometer, rendering it inoperable.

The case proceeded to written discovery. ComEd issued to AGLI requests to produce pursuant to Illinois Supreme Court Rule 214 for all items recovered from the scene of the occurrence. AGLI responded that no such evidence was retained. On May 20 and June 11, 2019, ComEd attorneys sent e-mails to AGLI's attorney to seek confirmation that the mass spectrometer was still in Rush's possession. After AGLI's attorney failed to respond, ComEd, on June 26, 2019, filed a Rule 216 request to admit. In the interim, at a July 12, 2019 case management conference, AGLI admitted that the mass spectrometer no longer existed. On July 22, 2019, AGLI responded to the request to admit, stating that Rush removed the mass spectrometer after it became inoperable and that Rush had no knowledge as to what happened to the machine.

On November 11, 2019, ComEd filed a motion to dismiss the first amended complaint with prejudice as a discovery sanction as authorized by Illinois Supreme Court Rule 219(c). ComEd attached to its motion an affidavit of John Martens, an electrical engineer, who averred that the cause of damage to the mass spectrometer could not be determined within a reasonable degree of engineering certainty because Rush had failed to keep the machine after it became inoperable. The parties subsequently submitted their response and reply briefs with additional exhibits.

Analysis

ComEd seeks to dismiss the first amended complaint with prejudice pursuant to Illinois Supreme Court Rule 219(c). The rule provides, in part, that:

If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice. . . .

Ill. S. Ct. R. 219(c). By virtue of its plain language, Rule 219(c) “authorizes a trial court to impose a sanction . . . upon any party who unreasonably refuses to comply with any provisions of this court’s discovery rules or any order entered pursuant to these rules.” *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). Sanctions authorized by Rule 219 “are intended to combat abuses of the discovery system and to maintain the integrity of our court system.” *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067, 1075 (1st Dist. 2001).

Rule 219 sanctions are designed to “to coerce compliance with discovery rules and orders, not to punish the dilatory party.” *Shimanovsky*, 181 Ill. 2d at 123 (citing cases). The ultimate sanction of dismissing a case with prejudice is to be imposed “only in those cases where the party’s actions show a deliberate, contumacious or unwarranted disregard of the court’s authority.” *Id.* (citing cases). The dismissal of a complaint “should only be employed as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.” *Id.*

ComEd’s Rule 219(c) motion to dismiss with prejudice fails in numerous ways to meet any of the requirements set out in the

rule or the common law gloss. First, ComEd's request is not a last resort, but a first resort. ComEd has never filed a motion asking this court to employ its enforcement powers either to compel production of the mass spectrometer or permit its inspection. ComEd cannot at this point seek the ultimate sanction when it has never before raised the controversy.

Second, AGLI did not violate any discovery deadlines that would have authorized this court's use of its enforcement powers. ComEd argues that it had to file a Rule 216 request to admit before AGLI would admit that Rush no longer had possession of the mass spectrometer. Yet, AGLI answered that request to admit in a timely fashion, so there was no discovery violation to justify an earlier, lesser sanction.

Third, there is literally nothing to coerce. AGLI responded to the request to admit by stating that the mass spectrometer no longer exists and that Rush does not know what happened to it. As a matter of simple fact, if the machine is no longer in Rush's possession and Rush does not know what happened to it, Rush certainly cannot be coerced into producing a non-existent machine for inspection.

Fourth, ComEd has failed to present any facts remotely suggesting that Rush's disposal of the mass spectrometer constituted a deliberate, contumacious or unwarranted disregard of this court's authority. ComEd has never come before this court seeking a preservation order, something ComEd could have done immediately after it received notice of the alleged property loss. There cannot be a contumacious violation of this court's authority when ComEd has never previously sought to invoke this court's authority.

Fifth, ComEd's reliance on Martens' affidavit to support its argument is highly presumptuous. It may very well be true that the cause of the mass spectrometer's failure cannot be established without inspection of a machine that no longer exists. Yet that is ComEd's problem, not AGLI's, and is the product of ComEd's

dilatory conduct. Rather than attach an affidavit from Martens, ComEd should have hired him as soon as AGLI filed its property damage claim in 2015. At that point, or soon thereafter, the parties could have agreed, with or without court supervision, to preserve the mass spectrometer and conduct a joint inspection and testing by the parties' experts. Such a reasonable course of action might have even made the filing of this lawsuit unnecessary.

Sixth, ComEd improperly seeks to justify a dismissal with prejudice based on an alleged spoliation of evidence. That conflation of legal concepts is fundamentally flawed. Further, ComEd has not even bothered to file a counterclaim against AGLI for spoliation of evidence. Apart from that procedural defect, there exists, as a general rule, no duty to preserve evidence:

however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. *In any of the foregoing instances*, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.

Dardeen v. Kuehling, 213 Ill. 2d 329, 336 (2004) (emphasis in original, citations omitted) (quoting *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 195 (1995)).

Boyd set out a two-part test to determine if a party has a duty to preserve evidence. First, a court must determine if a duty existed by virtue of an agreement, contract, statute, special circumstance, or voluntary undertaking. *See Boyd*, 166 Ill. 2d at 195. Second, if such a circumstance existed, a court must then determine whether the duty extended, "to the evidence at issue – *i.e.*, whether a reasonable person should have foreseen that the evidence was material to a potential civil action." *Dardeen*, 213 Ill. 2d at 336 (citing *Boyd*, 166 Ill. 2d at 195). If the party alleging spoliation fails to satisfy both parts of the test, there exists no

duty to preserve evidence. *Id.* (citing *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 215 (2003)).

As in *Dardeen*, there is no need for this court to discuss the second test because ComEd fails the first. Quite simply, there existed no agreement or contract between AGLI or Rush and ComEd to preserve the mass spectrometer. Similarly, there was no statute requiring its preservation. Finally, ComEd has failed to identify any special circumstance or voluntary undertaking on the part of Rush or AGLI to preserve the mass spectrometer for ComEd's benefit. Indeed, the record shows just the opposite.

Two months after the power surge and the loss of the mass spectrometer, AGLI contacted Exelon and put it on notice of Rush's property loss. The communications attached as exhibits to AGLI's response brief memorialize a clear and concerted effort on AGLI's part to address the issue with ComEd. At any point in time, ComEd could have contacted AGLI to discuss preservation of the mass spectrometer, its storage at a mutually convenient place, or for an inspection and testing by the parties' experts. Most important, ComEd had the ability to come before this court and request an order that AGLI preserve evidence. ComEd did none of those things.

Equally egregious is that ComEd did nothing until after AGLI filed suit. ComEd did not issue written discovery to learn the fate of the mass spectrometer until nearly four years after the alleged property loss. It is entirely reasonable for AGLI, after waiting four years with no response from ComEd, to have decided that the unusable machine was taking up valuable space, was not needed for purposes of proving its case, and that ComEd had no interest in the machine to defend its case. Rush cannot be faulted for acting rationally by disposing of the mass spectrometer after ComEd repeatedly failed to act responsibly to preserve it.

ComEd's failures to act also mean that its reliance on *Shimanovsky* is inapposite. See 181 Ill. 2d at 124. ComEd cannot claim it is surprised the AGLI did not retain the mass

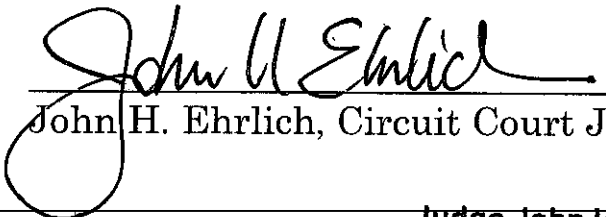
spectrometer given that Exelon and its claims adjuster knew of the property damage merely two months after the incident, and yet did nothing for four years. Any prejudice to ComEd is of its own doing.

As a matter of policy, to grant ComEd's motion to dismiss with prejudice would incentivize similar unacceptable conduct by defendants. ComEd seeks to dismiss with prejudice AGLI's first amended complaint despite ComEd's own failures to preserve evidence. In other words, parties that need evidence either to prove a case or defend against one would be encouraged to do nothing in hopes that a court would later impose harsh sanctions and, effectively, endorse a party's failure to act responsibly to preserve evidence. That is not the kind of incentive any court should adopt.

Conclusion

For the reasons presented above, it is order that:

1. ComEd's motion to dismiss the first amended complaint pursuant to Illinois Supreme Court Rule 219(c) is denied; and
2. This matter will next be heard for case management on a date to be scheduled by notification to the parties.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075