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

Clarissa Davis, Valerie Davis, Chaquelah Davis, Marshall Davis, Mitchell Walker, Eddie Walker, Jr., Kenneth Weston, Alma Weston, and Frieda Polk,	)	
Plaintiffs,	)	
v.	)	No. 19 L 5616
Ayodeji Sanyaolu, Abati Investment Group, LLC, an Illinois limited liability company, Navarro's Heating and Cooling Corporation, an Illinois corporation, Allstate Insurance Holdings, LLC, a Delaware limited liability company, the Allstate Corporation, a Delaware corporation, individually and d/b/a Allstate Insurance Company, Allstate Fire and Casualty Insurance Company, Allstate Property and Casualty Insurance Company, and Allstate Indemnity Company,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

There exists no general duty to preserve evidence for the benefit of another. A duty does exist, however, if, as in this case, an insurance company defendant removed a furnace, gave it to a contractor for a fire cause-and-origin investigation, and ordered the furnace to be disposed of despite the plaintiffs' having filed personal injury and property damage claims against the insurance company's insured. Given those facts, the defendant's motion to dismiss must be denied.

Facts

Ayodeji Sanyaolu owned a house located at 7146 South Wolcott Avenue in Chicago. Allstate Insurance Holdings, LLC or another Allstate entity insured the property. On March 11, 2018, a fire occurred in the house, resulting in the plaintiffs' personal injuries and property damages.

After the fire, Allstate hired a consultant to conduct a cause-and-origin investigation that included examining and testing the house furnace. The consultant concluded the furnace had not been defective and did not cause the fire. On December 6, 2018, Allstate instructed the consultant to dispose of the furnace.

On March 11, 2021, the plaintiffs filed their fifth amended complaint against the defendants, including the various Allstate entities. In counts 28-72, each plaintiff pleads identically against each Allstate entity. The plaintiffs allege each of them made a personal injury or property damage claim, or both, against Sanyaolu, effectively placing Allstate on notice of their claims. The complaint does not specify when each of the plaintiffs filed their claims. They further allege that Allstate took possession of the premises after the fire and removed and stored the furnace.

The plaintiffs allege Allstate owed them a duty of reasonable care to retain the furnace because Allstate knew the furnace was material to the plaintiffs' potential civil damages claims against Sanyaolu, Allstate's insured. The plaintiffs further allege that Allstate, by hiring a contractor to conduct a cause-and-origin investigation, voluntarily assumed to preserve the furnace. Finally, the plaintiffs allege the furnace was valuable and material evidence to their claims. The plaintiffs claim Allstate breached its duty by, among other things: (1) failing to preserve the furnace; (2) improperly disposing of the furnace; (3) failing to instruct the contractor to preserve the furnace; (4) instructing the contractor to dispose of the furnace; (5) failing to give the furnace

to the plaintiffs and their attorney; and (6) failing to get the furnace back from the contractor.

On May 10, 2021, Allstate filed a motion to strike counts 28-72, arguing, in essence, that it owed the plaintiffs no duty to preserve the furnace. On June 24, 2021, the plaintiffs filed their response.

Analysis

Allstate brings its motion pursuant to Code of Civil Procedure section 2-615 that authorizes striking a pleading or a portion of it if it is "substantially insufficient in law. . . ." 735 ILCS 5/2-615(a). Allstate argues the plaintiffs' complaint fails to allege facts indicating Allstate's negligence or that Allstate knew or should have known the furnace should have been preserved. Allstate points out that nine months passed between the fire and the furnace's disposal during which time the plaintiffs never requested or demanded Allstate preserve the furnace. Allstate also emphasizes that the independent investigation established that the furnace was not the cause of the fire and, therefore, the disposal does not prejudice the plaintiffs.

A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *Id.* at 485. All well pleaded facts and reasonable inferences arising from them must be accepted as true. *See Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004). The paramount consideration is whether the complaint's allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a

cause of action. *See DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

In Illinois, spoliation of evidence constitutes a common law tort. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-36 (2004); *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 194-95 (1995). As with any other tort, a plaintiff claiming spoliation of evidence must plead and eventually prove a tort's essential elements: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached its duty by disposing of the evidence; (3) the disposal of the evidence proximately caused the plaintiff's inability to prove an underlying lawsuit; and (4) the plaintiff suffered actual damages. *Dardeen*, 213 Ill. 2d at 336; *Boyd*, 166 Ill. 2d at 194, 196.

As a general rule, a defendant owes a plaintiff no duty to preserve evidence. *Boyd*, 166 Ill. 2d at 195. In *Boyd*, the Supreme Court established a two-part test a plaintiff must meet to show an exception to the general no-duty rule. *Id.* First, under the "relationship" test, a plaintiff must show "an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant." *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 27 (quoting *Boyd*, 166 Ill. 2d at 195). Second, the "foreseeability" test requires a plaintiff to show "the duty extends to the specific evidence at issue by demonstrating that 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.'" *Martin*, 2012 IL 133270, ¶ 27 (citing *Boyd*, 166 Ill. 2d at 195). A plaintiff must pass both tests to establish a defendant's duty to preserve evidence. *Dardeen*, 213 Ill. 2d at 336.

A defendant's possession of or control over the evidence sought to be preserved is, by itself, insufficient to establish a special circumstance creating a duty to preserve. *See Martin*, at ¶ 45 (possession of video recording). "[S]omething more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit." *Id.*

Similarly, "mere knowledge of the accident and of the possible causes of the accident, standing alone, is insufficient to create a duty to preserve the evidence." *Kilburg v. Munawar Mohiuddin, Zante Cab Co.*, 2013 IL App (1st) 113408, ¶ 32.

Martin remains the Supreme Court's most recent pronouncement on the tort of spoliation. That case concerned the collapse of a concrete I-beam in a bridge construction project, resulting in Martin falling into a creek and sustaining injuries. 2012 IL 113270, ¶ 3. The Illinois Department of Transportation and the Occupational Health and Safety Administration inspected the site and concluded that the workers' weight on the bridge might have caused the beam to roll over before it broke. *Id.* ¶¶ 9-13. The next day, and after the inspections, Keeley instructed its workers to break up the I-beam. *Id.* ¶ 14.

Martin sued Keeley, arguing that the beam's destruction made it impossible for him to prove his negligence claims against the beam's manufacturer and the bearing assembly designer. *Id.* ¶ 4. Keeley subsequently admitted there was nothing preventing it from preserving the I-beam. *Id.* ¶ 15. Keeley further indicated that it had received no requests to preserve the I-beam. *Id.* ¶ 16.

The court first recognized that no contract or agreement required Keeley to preserve the I-beam for Martin's benefit. *Id.* ¶ 28. The court then concluded there existed no evidence suggesting that Keeley voluntarily undertook to preserve the I-beam for future litigation. *Id.* ¶ 31. "Even if Keeley 'preserved' the evidence for its own investigative purposes, which is questionable, since Keeley never performed any testing of the beam or moved the beam from the place where it fell, plaintiffs must demonstrate affirmative conduct by Keeley showing its intent to voluntarily undertake a duty to the plaintiffs." *Id.*

The court contrasted the facts in *Martin* with those in *Boyd.* 166 Ill. 2d 188 (1995). There, Boyd was working in his employer's van when a portable propane heater exploded. *Id.* at 191. An insurance claims adjuster took possession of the heater, telling

Boyd's wife that the carrier needed it to investigate Boyd's workers' compensation claim and to inspect the heater to determine the explosion's cause. *Id.* The claims adjustor took the heater to the insurance office and placed it in a closet. *Id.* The heater was lost and never tested. *Id.* The court ultimately found a voluntary undertaking existed because: (1) the insurer's employee took possession of the heater; (2) took possession for the purpose of testing and investigating the workers' compensation claim; and (3) knew the heater was evidence relevant to future litigation. *Id.* at 195.

Both *Martin* and *Boyd* support a determination at this stage in this litigation that Allstate owed the plaintiffs a duty to preserve the furnace. *Martin* spells out in the disjunctive that, even if Keeley had preserved the I-beam for its own investigation, Keeley never performed any testing or moved the I-beam; therefore, Martin had to identify some other conduct by Keeley demonstrating its intent to undertake voluntarily a duty owed to the plaintiffs. 2012 IL 113270, ¶ 31. In contrast, here, the facts are that Allstate specifically preserved the furnace for its own purposes and hired a contactor to conduct a cause-and-origin investigation. As a result, the plaintiffs need not show some other conduct by Allstate demonstrating a voluntary undertaking.

The facts also bear out the foreseeability test because "'a reasonable person in [Allstate's] position should have foreseen that the evidence was material to a potential civil action.'" *Martin*, 2012 IL 133270, ¶ 27 (quoting *Boyd*, 166 Ill. 2d at 195). It is fair to conclude, as Allstate did, that the furnace was material evidence. Allstate certainly did not hire a contractor to conduct a cause-and-origin analysis for no reason. Rather, Allstate may have sought a positive cause-and-origin conclusion pointing to the furnace on which Allstate could file potential contribution causes of action against the furnace's manufacturer, seller, installer, or others. Alternatively, Allstate may have wanted an undetermined cause-and-origin conclusion on which it could deny the plaintiffs' personal injury and property damage claims. Regardless of Allstate's motivation, the contractor's conclusion that the furnace

did not cause the fire does not mean another investigator would have reached the same conclusion. What is certain is that the furnace's disposal now makes it impossible for the plaintiffs to challenge the contractor's opinion.

While these facts are, alone, sufficient from which to raise a duty owed by Allstate to the plaintiffs, one particular allegation in the complaint bears emphasis. The plaintiffs allege that each of them filed claims with Allstate for their personal injuries and property losses. Although it is unclear when each plaintiff filed a claim, a fair reading of the complaint infers that they filed their claims before Allstate had its contractor dispose of the furnace nine months after the fire. Allstate's alleged knowledge of the plaintiffs' claims further confirms this court's analysis of the foreseeability test in the spoliation analysis.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' motion to strike counts 28-72 is denied; and
2. The defendants have until October 5, 2021 to answer the complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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