Penick v. Harbor Freight Tools, USA, Inc.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA Case No. 19-cv-23134-BLOOM/Louis GARY R PENICK, Plaintiff, v. HARBOR FREIGHT TOOLS, USA, INC., Defendant. _____/

ORDER THIS CAUSE is before the Court upon in opposition, ECF No. [42] reviewed the Motion, the Response, the record in this case, the applicable law, and is otherwise

fully advised. For the reasons set forth below, the Motion is granted in part and denied in part.

I. BACKGROUND Plaintiff initiated a lawsuit in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida that was removed to this Court on July 29, 2019 on diversity of citizenship grounds. ECF No. [1]. According to the Complaint, ECF No. [1-1] at 10-16, Plaintiff sustained serious injuries to his face and his eyes while operating a Predator 4000 Generator sold by Defendant. In particular, he alleges that after removing the gas cap on top of the generator to check the volume of gas while the generator was running, fumes from the gas tank ignited and created a flash explosion. The explosion resulted in facial burns and bilateral corneal burns to his eyes. The Complaint asserts three causes of action against Defendant: negligence (Count I), strict liability (Count II), and failure to warn (Count III). Defendant filed its answer and affirmative defenses to the Complaint on

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2 August 5, 2019. ECF No. [7].

Defendant now moves for sanctions against Plaintiff dismissal of the lawsuit or alternatively excluding any Plaintiff liability expert testimony and issuing a burden-shifting presumption jury instruction due to No. [33]. As set forth in generator occurred on

Spring of 2019, Plaintiff disposed of the generator by personally driving it and turning it over to a scrap yard. Id. at 2-3. about May 20, 2019, id. at 3, which is before the Complaint was filed in state court on June 19,

2019, ECF No. [1-1] at 4, 10. Defendant asserts that it was not given any opportunity to inspect the generator nor was it notified beforehand that Plaintiff intended to dispose of it. ECF No. [33] at 3.

ly and irreparably prejudiced Id. at 4. In particular, Defendant argues as follows:

single most important piece of evidence in this products liability case, the Generator itself. The inability to examine the Generator has precluded Harbor Freight from, among other things, having its experts examine the Generator to test the validity of d fire; determining whether or not aftermarket modifications were made to the Generator; testing whether or not the Generator had been properly maintained, or it if had been broken or misused; and determining whether or not the Generator even exhibited any evidence of being involved in the violent fiery explosion alleged by Mr. Penick. Without the Generator, there is no way to determine if Mr. Penick is even telling the truth about the alleged incident. Notably, there are no witnesses, other than Mr. Penick himself, to the alleged incident. Young, IAAI, CFI, (V) CFEI, CFII, and mechanical engineering expert, Avelaino McGibbon, BSME, P.E., demonstrate the prejudice created by M intentional destruction of the Generator. Both experts opine that destruction of the

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3 EXHIBIT B - May 22, 2020, Report Prepared by Thomas Young, IAAI, CFI, (V) CFEI, CFII at Page 2; 1

and EXHIBIT C - May 20, 2020, Report Prepared by Avelaino McGibbon, BSME, P.E. at Page 2. 2 Id. at 3-4 (bolding omitted; citations removed; footnotes added).

only piece of evidence that could Id. at 4 (emphasis in original). He makes three general faith and warrant dismissal of the case in its entirety. Id. at 5-8 (citing Flury v. Daimler Chrysler Corp., 427 F.3d 939 (11th Cir. 2005) and Torres v. Matsushita Elec. Corp., 762 So. 2d 1014 (Fla. 5th DCA generator. Id. at 8-11. Finally, Defendant maintains that lesser sanctions are nonetheless

appropriate if the Court is unwilling to dismiss the case. Id. at 11-13.

In response, Plaintiff admits that he disposed of the generator, but he argues that his actions were not born out of a bad faith generator. ECF No. [42] at 8. In particular, he notes that his attorney took pictures of the generator

1 conducted on the generator reported to have spontaneously erupted into an explosive event remains a non-validated event. There was no supporting evidence that the generator represented in the photos provided was involved in a fiery explosive event. The photographs provided were insufficient to render any opinion with any professional certainty as to the authenticity of the photos taken, nor the item as [33-2] at 2. The report also notes that the events was inconsistent with the sequence or mechanism with this type of event as reported. The pressure rise associated with the ignition of an unconfined diffuse vapor is not enough in magnitude or duration to result in the damage presented by the images nor the description of explosive force by Mr. Penick. Id. 2 Mr. M

verified because he reportedly disposed of his generator n exemplar generator was purchased and operated. During this operation, the generator operated as expected and did not catch fire. Based on the Rimkus inspection of the exemplar generator, no design defects were observed. -3] at 3.

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4 in November 2018, and he cites the following deposition testimony for context:

Every time I walked by it I remembered because my face was all messed up and I -- I mean, that I was then. I mean, I was scared painful, what I had to go through, for a long time. I went through a lot of pain, and mind is not the same as it was either.

Id. at 7-8 (citing ECF No. [33-1] at 92:11-24). Id. at 9. He adds that he disposed

of the genera Id. remarks that he was not Id. at 8. Plaintiff further contends that the generator is not the only piece of evidence that could support or refute his allegations. In this respect, he Id. at 10. He concludes

However, he agrees that should the Court conclude that sanctions are warranted, the alternative

sanctions requested by Defendant should be imposed. Id. at 11-12. The Motion, accordingly, is ripe for consideration. II. LEGAL STANDARD property for another Graff v.

Baja Marine Corp., 310 F. App x 298, 301 (11th Cir. 2009) (citation omitted). In a diversity action such as the instant case, federal law governs the imposition of spoliation sanctions. See Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. Case 1:19-cv-23134-BB Document 45 Entered on FLSD Docket 08/19/2020 Page 4 of 12

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5 federal law go

Wilson v. Wal Mart Stores, Inc., No. 5:07 cv 394 Oc 10GRJ, 2008 WL 4642596, at * 2 (M.D. Fla. Oct. 17, 2008) (footnote omitted).

The moving party carries To establish spoliation, the party seeking sanctions must prove several things; first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was Walter v. Carnival Corp., No. 09 20962 CIV, 2010 WL 2927962, at *2 (S.D.Fla. July 23, 2010) (citing Floeter v. City of Orlando, 6:05 cv 400 Orl 22KRS, 2007 WL 486633, at *5 (M.D. Fla. Feb. 9, 2007)). s failure to preserve evidence rises to the level of sanctionable spoliation only where the absences of that evidence is predicated on bad faith, such

as where a party purposely loses or destroys relevant evidence. Id. at *2 (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) evidence must be predicated on bad faith). cords is

Vick v. Texas Employment Comm n, 514 F.2d 734, 737 (5th Cir. 1975). See also In

Matter of Complaint of Bos. Boat III, L.L.C., 310 F.R.D. 510, 516 (S.D. Fla. 2015) (noting that

If direct evidence of bad faith is unavailable, the moving party may establish bad faith through circumstantial evidence. Id.; see also Atl. Sea Co. v. Anais Worldwide Shipping, Inc., No. 08 23079 CIV, 2010 WL 2346665, at *2 (S.D. Fla. June 9, 2010) (noting that where the movant . . . this Court must assess the circumstantial evidence of

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6 bad faith under the standard set forth in Calixto. evidence of bad faith:

(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. Walter, 2010 WL 2927962, at *2 (citing Calixto v. Watson Bowman Acme Corp., No. 07 60077 CIV, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)). The party seeking the sanctions must

establish all four of these factors where there is no direct evidence of bad faith. Calixto, 2009 WL

s inherent power to manage its own affairs and to achieve the orderly and expeditious Flury, 427 F.3d at 944. exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a

Id. at 945. Dismissal represents the most severe sanction and where lesser sanction Id. at 944.

of bad faith before sanctioning a party when there is spoliation of evidence, courts in this Circuit Bos. Boat III, 310 F.R.D. at 516.

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7 III. DISCUSSION The instant dispute invokes two key issues: whether disposal of the generator amounts to bad faith, and if so, whether sanctions are warranted. The Court answers both issues in the affirmative.

As an initial matter, the Court finds that Defendant has demonstrated the three foundational

elements to establish spoliation. Walter, 2010 WL 2927962 at *2. First, the generator existed at one time. In fact, based on the materials presented, the generator existed sometime prior to May 20, 2019 (when counsel learned that the generator was discarded) at the latest. Second, Plaintiff knew or should have known he had a duty to preserve the generator. Not only had he retained counsel at that time (thus contemplating litigation), but the central role in allegedly causing his injuries made it patently obvious that the generator would be relevant to potential litigation with Defendant. Calixto, 2009 WL 3823390, at *16 Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation . . . [A litigant] is under a duty to preserve what it (citation omitted; emphasis in original); Managed Care Sols., Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 1324 (S.D. Fla. 2010) A party has an obligation to retain relevant documents, including emails, where litigation is reasonably anticipated.

condition in its design, manufacture, components and failure to have sufficient warning

-1] at 13 ¶¶ 16-24. While Plaintiff is correct that the generator is not the only evidence that could

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8 corroborate or refute his allegations, it undoubtedly is one of the main pieces of evidence that could be used to help resolve the underlying matters in this products liability case.

To further merit sanctions, Defendant must establish bad faith destruction of the generator by direct evidence or by circumstantial evidence. Courts in this district have interpreted in the spoliation context to not require a showing of malice or ill-will, but rather conduct evidencing more than mere negligence. See, e.g., Austrum v. Fed. Cleaning Contractors, Inc., 149 F. Supp. 3d 1343, 1350 51 (S.D. Fla. 2016) (noting that in the spoliation context,

n omitted); Bos. Boat III, 310 F.R.D. at 514 Because the

Eleventh Circuit s decision in Green Leaf Nursery did not include intentional in its definition of the destruction of evidence requirement for spoliation, the Undersigned will not include that requirement in the analysis. ; Schultze v. 2K Clevelander, LLC, No. 17-CV-22684, 2018 WL 4859071, at *6 (S.D. Fla. Oct. 4, 2018) ; Long v. Celebrity Cruises, Inc., No. 12-

22807-CIV, 2013 WL 12092088, at *7 (S.D. Fla. July 31, 2013) (granting in part motion for sanctions based bad faith is not limited to acts of malice or willful intent. In the Eleventh Circuit, in a variety of contexts bad faith is deemed to exist in either a case of intentional misconduct or reckless disregard of the consequences See also Graff plaintiffs did not act with malice when they spoliated evidence, the plaintiffs were the more satisfy a showing of bad faith.

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9 disposal of the generator was not accidental nor merely negligent. He voluntarily and personally took it to a scrap yard after he had retained counsel and anticipated filing suit against Defendant. Although the record does not reflect that Plaintiff specifically intended to harm Defendant or obstruct this lawsuit by disposing of the generator, Defendant has demonstrated that decision was purposeful, fully considered, and based on a desire to destroy the generator itself. For instance, when asked what he did with the generator, Plaintiff admitted that he scrapped it because while he about giving it to somebody else . . . [he did not] want that [same underlying incident] to happen to somebody and he was [] tired of looking at it and the damage it did to ECF No. [33-1] at 24:12-25. Additionally, Plaintiff represents in the Response that for the psychological impact which the generator caused him every day, he would not have scrapped ECF No. [42] at 9. He also represents that he scrapped the generator preserve his Id. at 10. P personal feelings aside, he should have known that the generator would need to by physically inspected and tested by Defendant, preserved for this litigation, and that it would be important to both arguments. That photographs of the generator were taken, see ECF No. [42] at 2, supports the finding that was aware the generator was a critical piece of evidence. After all, lawsuit alleges that the generator was inherently defective, not simply that it lacked sufficient warnings about the dangers.

In applying the circumstantial evidence factors above, Walter, 2010 WL 2927962, at *2, each factor is satisfied. The generator once existed, and it is material to the proof or defense of a claim at issue in this case. Plaintiff engaged in an affirmative act causing the generator to be lost. Plaintiff did so while he knew or should have known of his duty to preserve the evidence. And his scrapping of the generator cannot be credibly explained as not involving bad faith (as that term is construed in this context) by Plaintiff. Indeed, Plaintiff fails to offer an excuse that in any way

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10 places fault on anyone else or which otherwise sets forth a valid reason to destroy the generator. See Austrum, 149 F. Supp. 3d at 1351- term is defined in Flury. . . . While the Court does not find that Federal acted deliberately to hinder

it. Under the facts of this case, Federal is sufficiently culpable, and the prejudice to Austrum is

sufficiently high, to warrant a finding of bad faith as defined in Flury. spoliation exists warranting sanctions.

against a party for failure to preserve critical evidence in its custody vary according to (1) the

willfulness or bad faith of the party responsible for the loss or destruction of the evidence; (2) the

Bos. Boat III, 310 F.R.D. at 523 (citation omitted). Defendant requests that the Court either (i) dismiss the lawsuit in its entirety or (ii) exclude any Plaintiff liability expert testimony and take judicial

notice and issue a burden shifting presumption jury instruction that establishes that (a)

generator malfunctioning; and (c) following the alleged incident, there was no damage to the interior or exterior of the generator. ECF No. [33] at 4-5, 12-13.

Upon review and consideration, the Court does not agree that the severe sanction of dismissal is appropriate, nor does it conclude Regarding the former, Defe , nor has it

shown that Plaintiff intended to harm Defendant or impede this litigation. 3

Regarding the latter,

3 we know that s-examination, Defendant

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11 Defendant supported despite their inability to directly examine and test the generator itself. See ECF No. [33- ECF No. [33-3] at An exemplar Harbor Freight Predator 4000 gasoline-

powered, electric generator was purchased by Rimkus for this investigation. The generator was inspected and operated. During this testing, the generator operated as expected and did not catch fire. Based on the inspection of the exemplar generator, no design defects were observed with this E , which would result in pitting Plaintiff n explosion-related products liability lawsuit, is too harsh a sanction under these circumstances. Instead, a fairer sanction and less punitive measure to cure is an appropriate adverse inference jury instruction. 4

See also Austrum Flury, Hicks, and Byrnie, a

There are different types of adverse inferences: (1) a jury may be instructed that certain facts are deemed admitted and must be accepted as true; (2) the Court may impose a mandatory, albeit rebuttable, presumption; or (3) the jury must presume that the lost evidence is relevant and al evidence, and then decides whether to draw an adverse inference. Schultze, 2018 WL 4859071, at *7. Here, the Court

can also put forward The mere destruction of evidence alone does not justify dismissal sanctions, especially under the present circumstances. 4 Although Defendant has been prejud is not so extreme that it irreparable. The generator was discarded before the lawsuit was incepted. Neither party has had the benefit of directly testing the generator, and both parties have P of the generator from November 2018. In this respect, the Court further conducting their analyses. itself in this litigation.

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12 finds that the second category of adverse inference should be imposed. Under this sanction, the jury is to presume that the destroyed generator was relevant and favorable to Defendant and unfavorable to Plaintiff, but Plaintiff can rebut this presumption through his presentation of evidence, including expert testimony. See id. at *8 (determining that the sanction of a rebuttable ; Austrum, 149 F. Supp. 3d at 1351

(same). Through this balance, sufficiently mitigated while ability to benefit from the evidentiary problem created by his actions is lessened.

IV. CONCLUSION Accordingly, it is ORDERED AND ADJUDGED that the Motion, ECF No. [33], is GRANTED IN PART AND DENIED IN PART consistent with this Order. DONE AND ORDERED in Chambers at Miami, Florida, on August 18, 2020.

_____ BETH BLOOM UNITED STATES DISTRICT JUDGE Copies to: Counsel of Record