District Court, Adams County, State of Colorado Adams County Justice Center 1100 Judicial Center Drive Brighton, Colorado 80601 (303) 659-1161	
JAMES NURSERY COMPANY, INC. Plaintiff v. **B.O.S.S. COMPOST, INC.** Defendant.	▲ COURT USE ONLY ▲ Case No.: 08 CV 195 Division: A

ORDER

Defendant B.O.S.S. Compost, Inc. (B.O.S.S.) filed a Motion for Sanctions against Plaintiff James Nursery Company, Inc. (James) for Spoliation of Material Evidence on March 30, 2009. A Response was filed on April 14, 2009, and B.O.S.S. filed a Reply on April 24, 2009. The Court being fully advised FINDS AND ORDERS AS FOLLOWS:

Statement of the Case

In the summer or fall of 2004, James talked with B.O.S.S. about buying compost and topsoil from B.O.S.S. *Complaint*, ¶ 10. B.O.S.S. assured James representatives that it could supply compost and topsoil that would be appropriate for James' potting soil needs, and thereafter James purchased compost and topsoil from B.O.S.S. *Id.* at ¶¶ 11, 12. In the fall of

2006, James placed another order with B.O.S.S., and in October, James received about 300 yards of both compost and topsoil. *Id.* at ¶ 13. James mixed this with sawdust into one large pile and then redistributed the large pile into smaller piles, as it normally did, to pot approximately 34,000 plants. *Id.* at ¶¶ 14-16.

Thereafter, James found that an alarming number of plants potted with this soil were damaged, dead, or dying, and over twenty-five percent of the plants were damaged beyond commercial sale value. *Id.* at ¶ 17. An investigation revealed that the compost B.O.S.S. delivered was raw and not true compost, and the topsoil B.O.S.S. delivered was defective because it contained manure. *Id.* at ¶¶ 18, 19. The combination of the defective compost and topsoil created a soil mix that generated heat, contained an unacceptably high amount of salt, and had a number of essential minerals in proportions that rendered the potting soil ill suited for James' needs. *Id.* at ¶ 20.

As a result of James' loss of plant stock, property damage, and consequential damages, it filed the following claims against B.O.S.S.: negligence, strict liability, breach of the implied warranty of fitness, breach of the implied warranty of merchantability, and breach of contract. Pursuant to its normal practice, James got rid of the plants that did not appear healthy sometime before the lawsuit was actually filed in February 2008. *See Lefevre Aff.*, ¶ 15.

Parties' Arguments

Defendant B.O.S.S.

B.O.S.S. argued that its ability to defend this action has been "incurably prejudiced by James' destruction of physical evidence after the

complaint was filed." *Motion*, p. 1. It is now impossible for B.O.S.S. or its expert to examine the allegedly defective soil or plants, and the Court cannot examine the soil or plants to determine the cause(s) of the alleged damages. *Id.* at p. 2.

Because "B.O.S.S.'s defense is incurably prejudiced by James' spoliation because it can neither examine the evidence prior to trial nor show it to the court," B.O.S.S. argued that this action should be dismissed or the references to the evidence James spoiled should be excluded from the trial record. *Reply*, p. 9.

Plaintiff James

James argued that after B.O.S.S. conducted an unlimited investigation, it advised B.O.S.S. that it was disposing of the damaged plants. *Response*, pp. 1-2. James asserted that B.O.S.S. never preserved evidence or requested that James preserve evidence. *Id.* at p. 2. Because B.O.S.S. had a meaningful opportunity to investigate the material evidence, James argued that B.O.S.S.'s Motion should be denied.

Issues

Did James prejudice B.O.S.S. or affect its ability to defend itself in this action by disposing of the allegedly defective soil and/or allegedly damaged plants?

Principles of Law

C.R.C.P. 37. Failure to make disclosure or cooperate in discovery; sanctions

(4) Expenses and Sanctions. (A) If a motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court may, after affording an opportunity to be heard, require the party or deponent

whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust. (B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Analysis

Trial courts have "broad discretion to impose sanctions for spoliation of evidence, even if the evidence was not subject to a discovery order permitting sanctions under C.R.C.P. 37." *Castillo v. Chief Alternative, LLC*, 140 P.3d 234, 236 (Colo. App. 2006). A finding that the evidence was destroyed in bad faith is not necessary; rather, the Court "may sanction a party who willfully destroys evidence relevant to a contested issue." *Id.*

"[T]he behavior of the party moving for sanctions is an important factor for assessing whether sanctions are appropriate." *Id.* at 237; *see also Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423 (2d Cir. 2001) (trial court did not abuse its discretion in denying Federal Express's motion for

sanctions where it was undisputed that it never contacted the plaintiff to seek an opportunity to inspect the evidence or otherwise requested that the evidence be retained); *see also In re Wechsler,* 121 F.Supp.2d 404 (D. Del. 2000) (court should take into account whether party had a meaningful opportunity to examine the evidence in question before it was destroyed); *Thiele v. Oddy's Auto & Marine, Inc.,* 906 F.Supp. 158 (W.D.N.Y. 1995) (party's opportunity to inspect evidence before spoliation is relevant to issue of sanctions).

In his deposition, B.O.S.S. president H. Michael Croissant stated that he never requested the opportunity to take some of the damaged plants or sawdust back with him or to sample James' water. *Crossiant Depo.*, p. 102, ll. 18-25; p. 126, ll. 4-13. In fact, James "provided everything [Croissant] asked for" but Croissant "didn't ask for anything." *Id.* at p. 103, ll. 12, 13. Nor did Croissant request that James preserve anything. *Lefevre Aff.*, ¶ 7. Croissant's failure to take any of the evidence in question for further evaluation or preservation was not James' fault.

Croissant attended a meeting at James on July 25, 2007, where James' General Manager of Operations Robert Lefevre took several samples for B.O.S.S. to test. *Id.* at ¶¶ 6, 7. Croissant performed tests on the soil at that meeting, explaining in great detail how he went about taking the temperature of the soil. *Croissant Depo.*, p. 97, ll. 10-18. Croissant had a second opportunity to obtain samples of the evidence in question at a September 4, 2007 meeting at James Nursery, but declined to do so. *Id.* at ¶ 10. James also provided Croissant with reports from its experts, Drs. Klett and Rodebaugh. *DeJacamo Aff.*, ¶ 4.

B.O.S.S. had many opportunities to take samples of the soil and was even aware that James was planning to discard the plants. *See DeJacamo*

Aff., ¶ 11. Croissant did not take any photographs at James Nursery, but Leferve took "something like 130" photos of the damaged plants. *See Croissant Depo.*, p. 123, ll. 14-16 and *Lefevre Aff.*, ¶ 14.

Furthermore, the Court agrees that James had no reason to prevent B.O.S.S. from obtaining any of the damaged plants or defective soil. James could not keep the plants at the nursery, and it was "normal practice to get rid of any plants that did not appear healthy." *Lefevre Aff.*, ¶¶ 6, 16.

Lastly, contrary to B.O.S.S.'s assertion, the Court does not believe that an examination of the soil or plants will assist in its determination of the cause(s) of the alleged damages; the scientific evaluations, photographs, and expert testimony should be sufficient.

Conclusions of Law

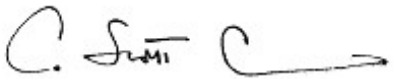
Based on the foregoing analysis, B.O.S.S. had sufficient opportunities to examine the evidence in question before it was disposed of. B.O.S.S. was not prejudiced and its defense was not affected when James disposed of the allegedly defective soil and/or allegedly damaged plants.

Order

Defendant B.O.S.S.'s Motion for Sanctions against Plaintiff James for Spoliation of Material Evidence is DENIED. James may file a Motion for Attorney Fees associated with defending this Motion for Sanctions within twenty (20) days of this Order.

Dated this 27th day of April, 2009.

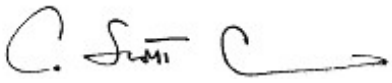
By the Court:



C. Scott Crabtree
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via LexisNexis (e-file) to all counsel of record and to all *pro se* parties this 27th day of April, 2009.



Court