

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25929
H/cb

_____AD3d_____

Argued - November 12, 2009

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2009-01537
2009-02966

DECISION & ORDER

Milan K. Awon, respondent, v Harran Transportation
Co., Inc., et al., appellants.
(Action No. 1)

Claridelia Guillen, et al., plaintiffs, v Harran Transportation
Co., Inc., et al., appellants, Milan K. Awon, respondent.
(Action No. 2)

(Index Nos. 34029/06 and 5342/07)

Keller, O'Reilly & Watson, P.C., Woodbury, N.Y. (Laurence G. McDonnell and
Vincent Petrozzo of counsel), for appellants.

Taller & Wizman, P.C., Forest Hills, N.Y. (Y. David Taller and Craig Phemister of
counsel), for respondent in Action No. 1.

Robin, Harris, King & Fodera (Mauro Goldberg & Lilling LLP, Great Neck, N.Y.
[Matthew W. Naparty and Richard J. Montes], of counsel), for respondent in Action
No. 2.

In two related actions, inter alia, to recover damages for personal injuries, which were consolidated for trial, the defendants Harran Transportation Co., Inc., and Samuel S. Webb appeal, as limited by their brief, from (1) stated portions of an order of the Supreme Court, Kings County (Steinhardt, J.), dated December 11, 2008, and (2) so much of an amended order of the same court

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dated January 30, 2009, as denied their separate motions pursuant to CPLR 3126 to strike the pleadings of Milan K. Awon in Action Nos. 1 and 2.

ORDERED that the appeal from the order is dismissed, as it was superseded by the amended order; and it is further,

ORDERED that the amended order is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

The Supreme Court providently exercised its discretion in denying the motions of the defendants Harran Transportation Co., Inc., and Samuel S. Webb (hereinafter together the appellants) to strike the pleadings of Milan K. Awon in Action Nos. 1 and 2. A party that destroys essential evidence such that its opponent is “prejudicially bereft of appropriate means to either present or confront a claim with incisive evidence” is subject to severe sanctions (*DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [internal quotation marks omitted]; see *Horace Mann Ins. Co. v E.T. Appliances*, 290 AD2d 418). As a matter of fairness, this is true even in cases where the destruction of the evidence was not willful or contumacious if the other party has been severely prejudiced by the destruction (see *Neal v Easton Aluminum, Inc.*, 15 AD3d 459). “Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate” (*Klein v Ford Motor Co.*, 303 AD2d 376, 377; see *Jenkins v Proto Prop. Servs., LLC*, 54 AD3d 726; *Dean v Usine Campagna*, 44 AD3d 603; *De Los Santos v Polanco*, 21 AD3d 397; *Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695; *Lawson v Aspen Ford, Inc.*, 15 AD3d 628; *Riley v ISS Intl. Serv. Sys.* 304 AD2d 637; *Favish v Tepler*, 294 AD2d 396). Here, the appellants failed to show that the sale of Awon’s totaled vehicle for scrap severely prejudiced their ability to defend the two related actions (see *Iannucci v Rose*, 8 AD3d 437).

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court