

Klein v Ford Motor Company

2002 NY Slip Op 30029(U)

August 15, 2002

Supreme Court, Suffolk County

Docket Number: 0020682/0682

Judge: Thomas F. Whelan

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to CPLR 3126 and the common law doctrine of spoliation of evidence, to dismiss the plaintiff's case, or in the alternative, precluding plaintiff from offering any evidence including expert testimony, regarding the subject vehicle or an accident reconstruction and ordering that a curative instruction be given to the jury, permitting the jury to draw an adverse inference that the missing evidence would have been detrimental to the spoliator's claim.

In support of its motion, defendant submits a copy of the affidavit of Paul Zanini (hereinafter "Zanini"), which states that he is the President of Alliance Auto Parts, located in Woodside, Queens; that the subject vehicle, the 1996 Ford Explorer bearing VIN # 1FM5DU34X8UC89037, had been stored at his yard pursuant to the instructions from the referring law firm, namely the law firm of Siben & Siben; that he was instructed to retain the vehicle until the litigation was over or until he received further instructions from the attorneys; that inadvertently and without instructions from the attorneys, the Ford Explorer was scrapped in July 2001; and that this was done in error since he did not receive any instructions from the attorneys involved to destroy the vehicle and the destruction of the vehicle was simply done by mistake. Zanini further indicates in his affidavit that the vehicle was inspected by inspectors from the Ford Motor Company who completely examined the entire vehicle and whom he believes made certain cuts in the vehicle and cut off the windshield brackets and took them with them. In conclusion, Zanini states that the destruction of the vehicle was done through his human error, was not intentionally done and that he apologizes for his mistake (see, affd. of Paul Zanini, 1/29/02).

Plaintiff opposes the instant motion and submits an attorney's affirmation and the examination before trial of James Mason (hereinafter "Mason"), conducted on March 5, 2002. Mason, a Design Systems Engineer employed by Ford, stated that he inspected the Explorer and took photographs and measurements of the vehicle but nothing more. The genesis of plaintiff's opposition is that because Mason examined the Explorer, took some 270 photographs and prepared a sketch which showed the left and right side of the Explorer Ford, there exists sufficient evidence to defend the action.

Plaintiff also states that she opposes dismissal of the instant action as same would be inappropriate because the instant action is only alleging a design defect and that in design defect cases, dismissal is an inappropriate sanction where the design defect can be proven without the actual physical product, here the Explorer. However, the Court finds that while plaintiff states that the inspection by a design expert is sufficient for defendant to defend the accident, plaintiff's opposition leaves the unanswered question of whether or not the Explorer rolled over because of the accident or did the accident cause the Explorer to roll over. The Court notes that in plaintiff's complaint (¶¶ 10 and 11), she alleges the following:

On January 23, plaintiff, Jill L. Klein, was caused the injuries, disabilities and hereinbelow set forth by reason of the defective, unreasonably unsafe and dangerous condition the vehicle when, as the plaintiff was operating the vehicle it was caused to roll over, causing the plaintiff severe and permanent injuries.

As a result of the foregoing, Ford, became, remained, was and is strictly liable in tort to plaintiff for the injuries, disabilities and harm herein below set forth, due to the defective, unreasonably unsafe and dangerous design, manufacture, assembly and sale of the vehicle and failure to give plaintiff any or adequate warning of the dangerous, defective and unreasonably unsafe condition of the vehicle.

The complaint, while alleging a design defect in the Explorer, also alleges that because of the design defect, the Explorer rolled over in the accident.

On January 9, 2001, six months after the inspection by Mason, plaintiff moved for an order permitting her to sell or otherwise dispose of the 1996 Ford Explorer. Plaintiff cited two reasons for bringing the motion before the Court. The first being that plaintiff was bearing the expense of paying for storage of the vehicle and was continuing to make car payments and the second being that as the action was one of a products liability case in design defect and as the vehicle was inspected by a representative of Ford, defendant would not be prejudiced in any way by the disposal of the subject vehicle. Defendant opposed that motion stating that although Mr. Mason inspected the Explorer, his inspection took place prior to the commencement of the action and before any allegation of a design defect was advanced by plaintiff. Defendant further stated in its opposition that Mason's inspection was not conducted for the purpose of preparing an accident reconstruction report.

Plaintiff has not adequately addressed the issue of the destruction of the Explorer and the affidavit of Zanini is inadequate, as well. Although Zanini states that the Explorer was stored in his yard at the instructions of the referring law firm of Siben & Siben, he does not mention the law firm of plaintiff's present counsel, nor does he mention that he ever received any communication from plaintiff's present counsel. Additionally, counsel in his affirmation, does not state that the Order of the Court was ever communicated to Zanini from the time it was issued to the date of destruction sometime in July, a period of over four months. When this Court issued its order on February 27, 2001 denying plaintiff's request to dispose of the Explorer, counsel was under a court ordered obligation and duty to notify Zanini to insure that the Explorer was preserved. It is patently obvious from reading the affidavit of Zanini that he received no communication nor instructions from plaintiff's counsel regarding the Court's Order. In fact, the only communication Zanini speaks of was from the original referring law firm of Siben & Siben. Whether, Zanini assumed that the Explorer could be destroyed after the inspection by Mason, begs the question of the responsibility and duty imposed by the Court upon the plaintiff to insure the preservation of the Explorer.

In *DiDomenico v C&S Aeromatik Supplies, Inc.*, 252 AD2d 41, 682 NYS2d 452 (2d Dept 1998), the Second Department stated:

Separate and apart from CPLR 3126 sanctions is the evolving rule that a spoliator of key evidence is properly punished by the striking of its pleading. This sanction had been applied even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided that it was on notice that the evidence might be needed for future litigation (*see, e.g. Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 666 NYS2d 609 [dismissal of third-party action appropriate where crucial evidence was negligently destroyed]; accord *Healey v Firestone Tire & Rubber Co.*, 121 AD2d 351, 622 NYS2d 246 rev'd on other grounds 87 NY2d 596, 640 NYS2d 860, 663 NE2d 901; *Vaughn v City of New York*, 201 AD2d 556, 607 NYS2d 726; *see also Squitieri v City of New York*, 248 AD2d 201, 669 NYS2d 589). To quote *Squitieri v City of New York, supra* at 590, 669 NYS2d 589, "[s]poliation sanctions are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to [an] other party's ability to present [a case or] a defense." (*see also Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp.*, 221 AD2d 243, 633 NYS2d 243, 633 NYS2d 493 [dismissal of complaint warranted where plaintiff negligently lost key piece of evidence before defendants could examine it])." (*DiDomenico v C&S Aeromatik Supplies, Inc., supra* at 459).

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The very clear rationale enunciated in *DiDomenico v C&S Aeromatik Supplies, Inc., supra*, is that the spoliation of key evidence, whether intentional or negligently by a party that prohibits another party **from** advancing a cause of action or defense subjects that party to the draconian remedy of **striking** the pleadings (see *Playball at Hauppauge v Narotzky*, ___ AD2d ___, 745 NYS2d 70 [2d Dept 2002]; *Cummings v Central Tractor Farm & Country, Inc.*, 280 AD2d 652, 721 NYS2d 92 [3d Dept 2001]; app den 96 NY2d 896, 703 NYS2d 792 [2001]; *Puccia v Farley*, 261 AD2d 83, 699 NYS2d 576 [3d Dept 2001]; *Jaffe v PJA Motors*, 253 AD2d 853, 678 NYS2d 503 [2d Dept 1998]).

The Order of **this** Court (Whelan, J., 2/27/01) denied plaintiffs motion to dispose of the Explorer. The Order was clear, direct, explicit and specifically stated that **"It is the responsibility of the moving party to preserve any evidence necessary for the prosecution and defense of an action, such as the 1996 Ford Explorer."** (emphasis added). Regardless of how it happened, plaintiff was under a Court Order to preserve the Explorer. "[I]f the credibility of court orders and the integrity of **our** judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Peffer*, 94 NY2d 118, 700 NYS2d 87 [1999]).

Accordingly, the motion is granted and the complaint dismissed.

DATED: 8/15/02



THOMAS F. WHELAN, J.S.C.