

McMahon v Ford Motor Co.

2006 NY Slip Op 30441(U)

October 6, 2006

Supreme Court, New York County

Docket Number: 112524/99

Judge: Doris Ling-Cohan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

CHRISTOPHER McMAHON AND KATHLEEN GITTO-McMAHON,

Plaintiffs,

- v -

FORD MOTOR COMPANY and METRO FORD,

Defendants.

INDEX NO. 112524/99
MOTION DATE
MOTION SEQ. NO. 008
MOTION CAL.NO.

The following papers, numbered 1 to 4 were read on this motion to/for : compel disclosure.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4
Cross Motion: [] Yes [X] No	

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK

Upon the foregoing papers, it is ordered that this motion is granted, to the extent set forth below.

Background

Plaintiffs Christopher McMahon (McMahon) and Kathleen Gitto-McMahon bring this products liability action to recover damages for personal injuries sustained by Mr. McMahon when the 1991 Ford Explorer which he was driving was struck by another vehicle and caused to roll over in the Town of Claverack, New York on August 11, 1996. Mr. McMahon asserts that the driver's seatbelt disengaged during the collision, causing him to be ejected from the vehicle and resulting in permanent spinal cord injuries rendering him a paraplegic. Mr. McMahon's vehicle was manufactured by defendant Ford Motor Company (Ford) and distributed by defendant Metro Ford.

Defendants move, pursuant to CPLR 3124, for an order compelling: (1) depositions of plaintiffs' expert, Kenneth Brown, and their fact witness, Michael Markushewski, both of whom inspected the 1991 Ford Explorer before the seatbelt at issue was removed, on or about April 16,

1997, and the vehicle, itself, was subsequently destroyed; and (2) a further deposition of plaintiff McMahon, compelling him to answer questions which were the subject of directions by his counsel not to answer at his original deposition, held on November 1 and 2, 2005.

Discussion

1. Depositions of Plaintiffs' Expert and Fact Witnesses

Mr. Brown and Mr. Markushewski were employed by ARCCA, Inc., an engineering firm retained by Farm Family Casualty Company (Farm Family), the insurance company for the driver of the vehicle that collided with Mr. McMahon's Ford Explorer. Mr. Brown originally inspected the Ford Explorer on January 22, 1997 and rendered an opinion to Farm Family's defense counsel that Mr. McMahon was wearing his seatbelt at the time of the accident and that the seatbelt disengaged after the impact, due to a design defect (Affirmation of Antar K. Vaughan, Esq. in Support of Motion [Vaughan Aff.], Ex. A). On or about April 16, 1997, another ARCCA employee, Michael Markushewski, removed the seatbelt at issue from the Ford Explorer, after documenting the removal with photographs (Vaughan Aff., Ex. B; Affirmation of Howard Eison, Esq. in Opposition to Motion [Eison Aff.], Ex. 6). Defendants had no representative at this inspection. Mr. Markushewski also participated in the inspection of the seatbelt at issue in the ARCCA laboratory on May 9, 1997, at which time photographs were also taken (Vaughan Aff., Ex. B). Plaintiffs retained Mr. Brown as their own expert subsequent to his inspection of the Ford Explorer on behalf of Farm Family.

Paul Bacina, a Design Analysis Engineer employed by Ford, states that he inspected the alleged seatbelt removed from the Ford Explorer on or about October 23, 2002. Mr. Bacina further states that he was unable to verify whether the seatbelt he inspected was, indeed, the seatbelt from Mr. McMahon's 1991 Ford Explorer, as that vehicle had been destroyed prior to his inspection (Vaughan Aff., Ex. C). Mr. Bacina's affidavit states that due to his inability to inspect the Ford Explorer involved in the accident, he was unable to verify certain facts, including whether things or parts were missing from the safety belt he inspected, whether the proper hardware was utilized to

secure the belt to the vehicle, if foreign objects were present on the seatbelt buckle or retractor prior to the seatbelt's removal from the vehicle and whether the seatbelt webbing would properly extend and retract within the vehicle (Vaughan Aff., Ex. C. at ¶¶ 12 and 13). Mr. Bacina concludes that, as the result of the removal of the seatbelt from the Ford Explorer and the subsequent destruction of that vehicle, he was unable to perform certain tests and inspections to verify the vehicle's design and/or manufacturing integrity and to determine whether the vehicle was defective or whether it was altered in a way that caused or exacerbated the accident and whether the vehicle and its component parts were properly maintained by plaintiffs (Vaughan Aff., Ex. C).

Defendants assert that the destruction of the Ford Explorer involved in the accident, prior to the inspection conducted by their engineer of a portion of the seatbelt at issue constitutes "special circumstances" warranting this Court to require both Mr. Brown and Mr. Markushewski to appear for depositions to answer questions regarding their inspections of the vehicle and the seatbelt in their original post-accident condition (CPLR 3101 [d] [1] [iii]). They emphasize the fact that Mr. Brown and Mr. Markushewski are the only individuals who have inspect the Ford Explorer and the seatbelt in their original post-accident condition. Defendants emphasize that they have been prejudiced by their inability to inspect the entire vehicle, in order to verify the validity of plaintiffs' theory that the seatbelt became disengaged when it came in contact with the vehicles' center console. They further assert that, without inspecting the entire vehicle, they will not be able to verify their theory that Mr. McMahon was injured because he was not wearing the seatbelt when the accident occurred.

In *Rosario v General Motors Corp.* (148 AD2d 108, 109 [1st Dept 1989]), the Appellate Division concluded:

"We hold that when material physical evidence is inspected by an expert for one side, and then lost or destroyed before the other side has had an opportunity to conduct its own expert inspection, a special circumstance exists within the meaning of CPLR 3101 (d) (1) (iii) that per se warrants disclosure directly from the expert concerning the facts surrounding his inspection."

In *Rosario*, as in the instant case, the automobile involved in an accident was lost or destroyed after an engineering expert retained by the plaintiff had inspected it, but prior to an inspection by the defendant manufacturer. The Appellate Division clearly stated, however, that the deposition of the plaintiff's expert by the defendant manufacturer must be limited to the factual observations underlying his opinion, rather than the opinion itself (*Rosario v General Motors Corp.*, 148 AD2d at 111-114; *see also Tedesco v Dry-Vac Sales, Inc.*, 203 AD2d 873, 874 [3rd Dept 1994]).

Similarly, in the instant case, the destruction of plaintiffs' Ford Explorer before a representative from defendants could inspect it constitutes a "special circumstance" warranting the granting of defendants' motion to compel depositions of Mr. Brown and Mr. Markushewski, the only experts who had the opportunity to examine the vehicle intact, before it was destroyed. This deposition is limited to their factual observations concerning the vehicle and the seat belt at issue, including the identification of any photographs. The prior decision of Hon. Marilyn Shafer in this matter, entered on April 26, 2005, does not compel a different result, as the issues before the Court were different. That decision denied defendants' motions to dismiss the complaint, due to plaintiffs' failure to comply with a prior order requiring Mr. McMahon to submit to a deposition and to produce certain medical, tax, employment and vehicle maintenance and repair records (Eison Aff., Ex. A). The Court, likewise, declined to grant defendants' motion to dismiss due to spoliation of the vehicle involved in the accident, including the seatbelt in its original condition (*id.*). There was, however, no request before the Court for the depositions of Mr. Brown and Mr. Markushewski. Nor was the opportunity of defendants' expert to inspect the seatbelt after its removal from the vehicle equivalent to a complete inspection of the vehicle in its post-accident condition, including the seatbelt, as it was installed in that vehicle.

2. Compelling Additional Deposition of Plaintiff McMahon

Defendants assert that they are entitled to an additional deposition of plaintiff McMahon to obtain his answers to questions which his attorney improperly directed him not to answer at the original deposition. Defendants are correct that, generally, "the proper procedure is to permit the

witness to answer all questions subject to objections in accordance with [CPLR] § 3115" (*White v Martins*, 100 AD2d 805 [1st Dept 1984] [parenthetical supplied]; *see also Orner v Mount Sinai Hosp.*, 305 AD2d 307, 309 [1st Dept 2003]). The Appellate Division noted, however, that "there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered" (*White v Martins*, 100 AD2d at 805).

In this case, defendants are entitled to answers to their questions as to: (1) whether plaintiff McMahon had ever received a summons for failing to use seatbelts prior to the accident; and (2) whether he told the EMT workers that he was unsure as to whether he was wearing a seatbelt when the accident occurred. These responses, however, need not be in the form of a continued oral deposition. Plaintiffs shall provide defendants with a sworn written statement with their answers to these questions and shall annex any documents concerning any summonses received by Mr. McMahon. The following questions which plaintiffs' counsel directed Mr. McMahon not to answer, however, are irrelevant to the main issues in this matter and, thus, are not proper subjects for a continued deposition and the scheduling of such a deposition is not warranted: (1) the amount of time that Mr. McMahon spent with his attorney; (2) whether Mr. McMahon was concerned about the seatbelt when he purchased a 1996 Ford Explorer after the accident; and (3) questions concerning the description of areas of an unclear black and white photograph of the accident scene.

Accordingly, it is

ORDERED that the portion of defendants' motion which seeks to compel a deposition of Mr. Kenneth Brown and Mr. Michael Markushewski is granted, to the extent of directing that such depositions take place within 30 days of the date of this order and that the questions be limited to the witnesses' factual observations during their inspections of the 1991 Ford Explorer involved in the accident and the seatbelt on the driver's side of that vehicle, including identification of any photographs of that vehicle and the seatbelt at issue; and it is further


ORDERED that the portion of defendants' motion to compel further responses from plaintiff Christopher McMahon is granted, to the extent of directing him to respond in a sworn statement, within 30 days of the date of this order, as to whether he received any summonses for failing to use a seatbelt prior to the accident and whether he told the EMT workers who responded to the accident scene that he was unsure as to whether he was wearing a seatbelt when the accident occurred, and to annex any documents concerning any summonses he received for failing to use a seatbelt, if any, and this portion of defendants' motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a discovery conference on this matter on Friday, November 17, 2006, at ~~2:00 P.M.~~ ^{11:15 Am} in Room 279 at 80 Centre Street, New York, New York, and the status conference on this matter previously scheduled for Friday, October 13, 2006 is adjourned to the above date; and it is further

ORDERED, that, within 10 days of entry, defendants shall serve upon plaintiffs a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 10/16/06

ENTER: 
Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST REFERENCE

H:\Supreme Court\Discovery Motions\McMahon.Ford Motor - grant expert deposition & compel plaintiff response to objected Q's.wpd

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE