SHORT FORM ORDER

INDEX No. 03-20348
CAL. No. 06-01714-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-19-06
ADJ. DATE 2-20-07
Mot. Seq. # 004 - MG
005 - XMD

JANINE DONOHUE, Plaintiff, - against - L. DeLEA & SONS, INC., DeLEA LEASING CORP., EAST NORTHPORT EQUIPMENT CORP., DeLEA LANDSCAPING SUPPLIES, INC., DeLEA SOD FARMS and XYZ COMPANIES 1 THROUGH 15, Defendants.	WILLIAM V. DECANDIDO, P.C. Attorney for Plaintiff 71-50 Austin Street, Suite 208 Forest Hills, New York 11375 MAZZARA & SMALL, P.C. Attorney for Defendants DeLea & East Northport Equipment 800 Veterans Memorial Highway Hauppauge, New York 11788

Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 27; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 28 - 31; Other 32 -33; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, DeLea Leasing Corp. ("DeLea Leasing"), East Northport Equipment Corp., DeLea Landscaping Supplies, Inc. and DeLea Sod Farms, for an order granting summary judgment dismissing the complaint of plaintiff, Janine Donohue is granted; and it is

ORDERED that this cross-motion by plaintiff for an order granting partial summary judgment on her complaint against defendant Delea Leasing Corp on the issue of liability; granting leave to amend their complaint to add a cause of action against defendant DeLea Leasing for negligence arising out of the bailor-bailee relationship between DeLea Leasing and L. DeLea & Sons, Inc. ("L. DeLea & Sons") and a cause of action for spoliation of the evidence; and for leave to supplement and amend their response to defendants request for a Bill of Particulars is denied.

Plaintiff instituted this negligence action against the above captioned defendants to recover damages allegedly suffered as a result of an accident which occurred on December 19, 2000. On that

date, plaintiff was employed by L. DeLea & Sons and was operating a truck equipped with a boom and cable from which a fork assembly was suspended and was used to deliver sod to various locations. During one of plaintiff's deliveries, plaintiff was holding a remote that controlled the crane and standing under the boom when the steel cable to the boom snapped, causing the fork assembly to hit plaintiff and causing the injuries complained of herein.

In her complaint plaintiff alleges causes of action for negligence, product liability, manufacturing defect and gross negligence. Only the first cause of action, for negligence, relates to the moving defendants. By order of this court dated July 1, 2005 (Jones, J.), plaintiff's action against her employer, defendant L. DeLea & Sons, was dismissed based upon a worker's compensation defense.

Defendants now move for an order granting summary judgment dismissing plaintiff's complaint, arguing that plaintiff has failed to prove that any of the moving defendants owed plaintiff a duty of care which was breached causing the alleged injury to plaintiff. Defendants state that while Delea Leasing did purchase the subject vehicle for use by plaintiff's employer, none of the moving defendants maintained, made repairs to or operated the vehicle in question or the boom and cable attached thereto. Rather, all maintenance and repairs were done by plaintiff's employer, including the purchase and installation of the subject boom cable which was purchased from a third party not named herein. Additionally, defendants argue that none of the moving defendants had notice of any defect in the cable at issue and thus cannot be held liable for any injury suffered by plaintiff.

Plaintiff does not oppose that part of the motion which pertains to defendants East Northport Equipment Corp., DeLea Landscaping Supplies, Inc. and DeLea Sod Farms and that part of defendants motion is hereby granted.

In opposition to defendant DeLea Leasing's motion for summary judgment and in support of her motion for leave to amend her complaint and supplement her bill of particulars, plaintiff proposes to add causes of action against DeLea Leasing for negligence based on the alleged bailor-bailee relationship between DeLea Leasing and L. DeLea & Sons as well as one for spoliation of the evidence. Plaintiff argues that DeLea Leasing owned the truck in question and informally (and for little or no compensation) loaned it to L. DeLea & Sons. Plaintiff argues that this loan was tantamount to a bailment and as such DeLea Leasing is liable to her for the injuries she sustained when the cable on the truck owned by them snapped. Plaintiff argues that DeLea Leasing, as owner, had an ongoing duty to inspect the vehicle to discover defects such as the one at issue here. Plaintiff also seeks leave to amend her complaint and supplement her bill of particulars to add a cause of action for spoliation, arguing that the subject cable was either wrongfully destroyed, disposed of or lost. Finally, plaintiff wishes to supplement her bill of particulars to add and clarify information about plaintiff's medical condition based on a recent diagnosis and new treatment as well as plaintiffs lost wages.

In reply and in opposition to plaintiff's cross-motion, defendants argue that the bailor-bailee theory of liability is inapplicable to the facts of this case and that there is no evidence that plaintiff has requested that these defendants preserve or locate the cable at issue or that they had anything to do with its alleged destruction or misplacement. Furthermore, they state that it was plaintiff's employer, and not the separate entity of DeLea Leasing, which assumed full responsibility for inspecting, repairing and maintaining the vehicle and control over the cable at issue. Additionally, defendant oppose that part of

plaintiff's motion which seeks leave to serve an amended complaint and supplement her bill of particulars, arguing that such would be extremely unfair and prejudicial in view of the fact that no affidavit of merit or excuse for the delay was offered by plaintiff. Furthermore, defendants state that plaintiff for the first time is alleging that the controls on the boom were malfunctioning and to allow such a new factual allegation at this stage in the litigation would be extremely prejudicial. Defendant argues that in allowing six years to pass from the date of the incident and three years since the onset or litigation to assert these new claims has deprived defendant of the opportunity to investigate these allegations and prepare a defense. Finally, defendants note that plaintiff's allegedly "new diagnoses" are not new at all but rather are based on reports from 2001, 2002, 2004, 2005 and as such this court should not allow them to form the basis of an amendment at this late date.

Plaintiff, in reply, states that her attorney sent a letter in April of 2001 to L. DeLea & Sons asking it to preserve the subject cable and that no meaningful response from the defendants was ever made. Further, plaintiff's attorney states he thought it was in the interest of judicial economy to wait until defendant moved for summary judgment to cross-move for leave to amend and that defendants have shown no prejudice caused by the delay, particularly in light of the fact that plaintiff is willing to provide any further discovery requested.

Defendants' and Plaintiff's Motions for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact (***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1993]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). Until the burden is met, the opponent of the motion is under no burden to make an evidentiary showing to raise a triable issue of fact (***Romano v St. Vincent's Medical Center,*** 178 AD2d 467, 577 NYS2d 311 [2d Dept. 1991]). Failure of the movant to make the required showing mandates a denial of the motion regardless of the sufficiency of the opposing papers (***JMD Holding Corp. v Congress Financial Corp.,*** 4 NY3d 373, 795 NYS2d 502 [2005]). Moreover, it is well settled that the remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. The competing contentions of the parties must be viewed in a light most favorable to the party opposing the motion (***Marine Midland Bank, NA v Dino & Artie's Automatic Transmission Co.,*** 168 AD2d 610, 563 NYS2d 449 (2d Dept. 1990).

It is fundamental that to recover damages in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see,* ***Tercet v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of negligence such as the one in the case at bar, plaintiff is required to show that the defendant created the condition which caused the accident or that it had actual or constructive notice of the condition (*see*, ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [1995]; ***Pirillo v Longwood Assocs.***, 179 AD2d 744, 579 NYS2d 120 [1992]). Liability is predicated only on a failure of defendant to remedy the danger after actual or constructive notice of the condition (*see*, ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a

defendant] to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646, 647 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.,*** 210 AD2d 280, 619 NYS2d 760 [2d Dept. 1994]).

Here, on plaintiff's original complaint, it is clear that defendant DeLea Leasing has sustained its burden in establishing that even assuming it owed plaintiff a duty of care, it had no notice of the defect which led to the cable breaking and injuring plaintiff. While the defect may have existed for a short while prior to plaintiff's accident, the evidence adduced demonstrates only that plaintiff's employer was on notice of the fraying cable. The court notes, however, that even plaintiff herself, on the date of the accident, saw nothing wrong with the cable when she signed the truck out the morning thereof. Plaintiff has failed to offer sufficient evidence in opposition or in support of its own motion to rebut defendant DeLea Leasing's assertion that they did not receive notice. Plaintiff's argument in that part of her motion which seeks leave to amend her complaint to add a negligence claim based on the alleged bailment of the vehicle is addressed below.

Plaintiff's Motion for Leave to Amend Her Complaint and Bill of Particulars

Absent prejudice or unfair surprise to the defendant, leave to amend a bill of particulars or a pleading should be freely given (*see*, ***Scheuerman v. Health & Hosps. Corp. of City of NY,*** 243 AD2d 553, 663 NYS2d 123 [2nd Dept. 1997]; ***Volpe v Good Samaritan Hosp.***, 213 AD2d 398, 623 NYS2d 330 [2nd Dept. 1995]). However, a plaintiff guilty of an extended delay in seeking leave to amend a pleading must establish a reasonable excuse for the delay and submit an affidavit demonstrating the merits of the proposed amendment by a person with direct knowledge of the pertinent facts (*see*, ***Smith v Plaza Trans. Ambulance Serv.*** 243 AD2d 555, 665 NYS2d 513 [1997]; ***Kyong Hi Wohn v County of Suffolk,*** *supra;* ***Raies v Apple Annie's Rest.,*** 115 AD2d 599. 496 NYS2d 260 [1985]). Furthermore, "leave should be denied if the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit" (***Leszczynski v Kelly and McGlynn,*** 281 AD2d 519, 520, 722 NYS2d 254 [2001]; ***Butt v New York Medical College, et al.***, 7 AD3d 744, 776 NYS2d 897 [2004]).

The court notes that plaintiff has failed to offer a reasonable excuse for her extended delay in seeking to amend the pleadings. However, even assuming arguendo that plaintiff had a reasonable excuse for waiting for years to seek to amend the pleadings, the plaintiff's application must still be denied for the reasons set forth below.

When one loans property to another, a duty of care arises, including a duty upon the loaner to act reasonably. For instance, courts of this state have found that owners of property have a duty to warn bailees of the dangers of removing safety guards or of using the product in a hazardous manor (***Defur v Lavin and Bowling Green Lanes, Inc.,*** 101 AD2d 319, 476 NYS2d 389 [1984]. Additionally, where an owner continues to maintain, inspect or repair a product after loaning it to another, liability may also attach if the existence of the danger would have been reasonably discoverable by visual inspection (***Theoharis v Pengate Handling Systems of N.Y., Inc.,*** 300 AD2d 884, 752 NYS2d 419 [2002]; ***La Rocca v Farrington***, 301 NY 247, 93 NE2d 829 [1950]). If a bailment is gratuitous in nature and not one in which compensation or rent is paid by the bailee, a bailor or owner owes to it's a bailee "only the duty of giving warning or notice of those defects...[in the bailed article], if any, of which it had knowledge and which in reasonable probability would imperil those using it" (***Hood v New York,*** 48

Misc. 2d 43, 264 NYS2d 134 [1965], *quoting*, ***Knapp v Gould Auto. Co,*** 252 AD 430, 299 NYS 688 [1937]). A defendant does not have to warn of a hazard of which it is unaware nor can it be held responsible for modifications which were made to a machine after it has left defendant's control (***Vergara v Howard***, 261 AD2d 302, 691 NYS2d 392 [1999]).

Here, plaintiff argues that DeLea Leasing loaned the truck to L. DeLea & Sons, forming a bailment. Plaintiff alleges under this theory, that DeLea Leasing, as the bailor, owed her a duty to inspect the vehicle to discover defects and its failure to do so supports an amended negligence cause of action. The court disagrees. While DeLea Leasing may be the registered owner of the truck, it did not repair, maintain or inspect the truck and reserved no contractual right or obligation to do so. Moreover, it did not own the cable at issue and it was plaintiff's employer, and not the defendant DeLea Leasing, that replaced the original cable which came with the vehicle. Plaintiff's employer purchased the cable which ultimately snapped from an unnamed party approximately 6 months prior to plaintiff's accident and arranged for its installation on the truck owned by DeLea Leasing. Thus, it cannot be said, under any theory, that defendant, as an out of possession owner of the vehicle, had an obligation to inspect that modified part of the truck which it did not own, possess, install or maintain.

Turning to plaintiff's proposed amendment to add spoliation claim, the court finds that this claim is also without merit. Plaintiff alleges that her father went to L. DeLea & Sons the day after her accident and asked to see the cable at issue. Mr. Porto, a manager at L. DeLea & Sons, and plaintiff's father looked for but were unable to locate the cable. Five months later, plaintiff's attorneys state they sent a letter to L. DeLea & Sons, requesting that plaintiff's employer preserve the cable. Plaintiff now, for the first time and in opposition to defendants' motion, seeks to add the claim that the moving defendants should be held liable to her for the independent tort of spoliation, based on their failure to preserve the cable at issue. Plaintiff alleges that without the cable, she is unable to maintain a products liability claim against the manufacturer of the cable.

Spoliation is the destruction of evidence (***Kirkland v New York City Hous. Auth.***, 236 AD2d 170, 666 NYS2d 609 [1997]). New York courts have traditionally imposed sanctions where there is a clear showing that a litigant willfully, contumaciously, or in bad faith failed to comply with discovery demands or destroyed crucial items of evidence prior to an adversary's inspection (***Fellin v Sahgal***, 268 AD2d 456, 702 NYS2d 338 [2000]; ***Puccia v Farley***, 261 AD2d 83, 699 NYS2d 576 [1999]), or negligently disposed of crucial evidence prior to an adversary's inspection (***Kirkland v New York City Housing Auth.***, *supra*), or destroyed the evidence before becoming a party, if on notice that the evidence might be needed for future litigation (***DiDomenico v C & S Aeromatik Supplies, Inc.***, 252 AD2d 41, 682 NYS2d 452 [1998]).

Independent of the imposition of sanction, New York courts have grappled with the concept of whether to recognize an independent tort for spoliation of the evidence. The Second Department has held that the existence of two court orders compelling the preservation of evidence warrant the striking of plaintiff's employer's pleadings and awarding summary judgment to the plaintiff (***DiDomenico v C & S Aeromatik***, 252 AD2d 41, 682 NYS2d [1998]. In that case, plaintiff's employer destroyed key evidence and the court awarded plaintiff summary judgment on its cause of action against the employer-defendant for impairing plaintiff's right to sue a third party. Recently, the Court of Appeals, in ***MetLife Auto and Home v Joe Basil Chevrolet, Inc.,*** 1 NY3d 478, 775 NYS2d 754 [2004], held that there can

be no independent cause of action for spoliation where there is no duty, court order, contract or special relationship which would require a party to preserve the evidence in question.

Thus, a proponent of a spoliation cause of action must establish the following elements "(1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the potential civil action; (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages" (***Castalia Ortega v City of New York,*** 11 Misc. 3d 848, 860 809 NYS2d 884, 895 [2006], *quoting* ***Oliver v Stimson Lbr. Co.***, 297 Mont. 336, 348, 993 P2d 11,19 [1999]) .

Here, plaintiff has failed to prove that defendant had a legal or contractual duty, consistent with the Court's decision in ***MetLife***, to preserve the cable at issue. There was no written communication or court order which required any of the moving defendants to preserve the cable.[1] Indeed, there is no evidence that any of the moving defendants destroyed or lost the cable at issue. Furthermore, plaintiff has failed to assert that there is a casual connection, beyond mere speculation, between the alleged destruction of the evidence and her alleged inability to prove a potential civil action in which the she has a significant possibility of success. As there is no merit to this cause of action, the plaintiff's motion to amend her complaint to add a spoliation claim and to supplement bill of particulars to accurately reflect such is denied.

In view of the aforementioned, plaintiff's remaining contentions are without merit.

Therefore, defendants' motion for an order granting summary judgement dismissing the plaintiff's complaint is granted and plaintiff's motion for an order granting her summary judgment and leave to amend her complaint and supplement her bill of particulars is denied.

Dated: MAY 3 1 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**

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[1] The court notes that plaintiff's allegation concerning the alleged notice and subsequent conduct of her employer is irrelevant as L. DeLea & Sons is no longer a party to this action.