At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of July, 2007.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

- X

RICHARD YOUNG,

Plaintiff, Index No. 20857/04

- against -

ARA DAGLIAN, ET. ANO.,

Defendants.

- X

The following papers numbered 1 to 12 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 5
Opposing Affidavits (Affirmations)	4 - 6
Reply Affidavits (Affirmations)	7 - 8
Supplemental Affidavits (Affirmation)	9 - 12
Other Papers	

Upon the foregoing papers: (1) defendant Products Finishing Corp. (PFC) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor dismissing the complaint; (2) plaintiff cross-moves, pursuant to CPLR 3126, for an order (a) striking defendant's answer or, in the alternative, (b) requiring an evidentiary hearing to determine the level of scienter and culpability behind Edward Esposito's failure to disclose prior claims and lawsuits against PFC at his deposition where he testified on behalf of PFC, and (c)

resolving certain issues of law against PFC, as set forth in plaintiff's papers; (3) PFC cross-moves for an order, pursuant to CPLR 3126, precluding plaintiff from using depositions, discovery responses, and other prior statements of PFC that were not previously exchanged, as being in violation of the court's preliminary conference order; (4) plaintiff, by amended cross motion, cross-moves for an order, pursuant to CPLR 3126, (a) permitting plaintiff to serve a late 3101(d) notice for his expert, Ralph L. Barnett (Barnett), (b) striking the answer of PFC for willful and contumacious discovery abuse, or, alternatively, (c) requiring an evidentiary hearing to determine the level of scienter and culpability behind Edward Esposito's failure to disclose prior claims and lawsuits against PFC at his deposition where he testified on behalf of PFC, and (d) resolving certain issues of law against PFC, as set forth in plaintiff's papers[1]; and (5) plaintiff moves, by order to show cause, for an order permitting him to submit a supplemental memorandum of law, in response to that of PFC, which was submitted in response to this court's request for a supplemental affirmation from both plaintiff and PFC.

BACKGROUND

Sometime in 1999, defendant Ara Daglian (Daglian) purchased a portable folding luggage cart (the cart), which was manufactured by PFC, and sold to Daglian by Staples. PFC, which, according to its president, Richard Esposito (Esposito), began distributing

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[1] Plaintiff's amended cross motion, in addition to seeking permission to serve a late 3101(d) notice, incorporates all of the relief sought in his original cross motion dated January 8, 2007.

luggage carts in the early 1970's, manufactured and distributed several different models of luggage carts up to the present. Daglian purchased model number 700.

At the time of its purchase, the cart, for the purpose of securing its load, was equipped with its own hookless strapping system. Additionally, it came with packaging which contained instructions, warranty and component replacement information, the company's phone number and web site, and a warning that, in substance, advised that the use of bungee "straps" (also referred to in the papers as bungee cords) could be dangerous, that face and eye injuries could result, and that hooks and other foreign objects should not be attached to bungee straps. This information was printed on 100 weight glossy paper or cardboard, and was secured to the cart by being wrapped around a rod near the wheel guard and stapled to itself.

At his deposition, Daglian testified that a year after purchasing the cart, he replaced the original strap with a bungee cord which he had purchased from Home Depot. He further testified that he did not attempt to contact PFC or ask anyone at Home Depot about what type of strap to use before deciding to use a bungee cord with the cart, nor did he look to see if there were any warnings from PFC regarding attaching hooks or foreign objects thereto. According to his testimony, there were warnings regarding the use of the bungee cord, which were permanently attached to the bungee cord.[2]

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[2] Plaintiff testified that after the accident, he learned that instructions or warnings were attached to the bungee cord, but that he did not see the tag on the date of the accident.

On June 18, 2001, plaintiff went to the apartment that had belonged to the recently-deceased mother of his then girlfriend, Lisa Daglian, in order to help remove furniture and other items. According to plaintiff's deposition testimony,[3] Daglian brought two luggage carts with him to the apartment and placed them near the entrance of the apartment. Both carts were equipped with bungee-type cords with hooks. Daglian did not give plaintiff or his daughter Lisa any instructions on how to use the carts.

Plaintiff testified that he had used similar carts, equipped with similar cords, in the past, and that he had an understanding that a bungee cord would snap back if stretched while not firmly attached to the cart. He commenced the project with one cart, but was forced to use the second after the bungee cord on the first cart broke. According to his testimony, immediately before the accident, one end of the bungee cord was under boxes and the other end was out and lying in front of the cart. Plaintiff added one or two more boxes to the cart and then began to secure the boxes to the cart. He bent down, picked up the end of the bungee cord that was lying in front of the cart, pulled it around and over the middle of the boxes and moved toward the back of the cart with the end of the cord in his hand. He did not check to see if the hook at the end of the bungee cord under the boxes was actually affixed to the cart. Before plaintiff could affix the end of the bungee cord that was in his hand to the cart, the other end of the bungee cord came out from under the boxes and struck him in the eye, causing serious injury. According to his testimony, plaintiff learned that the bungee cord

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[3] Plaintiff testified at two depositions–the first took place on March 13, 2003, and the second on August 24, 2005.

was a replacement for one which would have had one end attached to the cart, but that he had no idea that there was any danger involved if a bungee cord was not firmly attached to the cart.

Plaintiff commenced the instant lawsuit by filing a verified complaint dated June 30, 2004. On July 28, 2004, PFC joined issue by serving a verified answer in which it denied all wrongdoing and asserted affirmative defenses.[4]

On or about November 9, 2004, plaintiff served a bill of particulars in which, in substance, he claimed that PFC created a dangerous condition by failing to affix a permanent label to its cart warning consumers against replacing the manufacturer's strapping system with a bungee cord that used plastic or metal hooks.

CONTENTIONS

PFC's motion for summary judgment

PFC contends that plaintiff's claims and all cross claims against it should be dismissed because: (1) PFC has no obligation to provide warnings about any alleged danger posed by a product that is manufactured by another company; (2) PFC has no duty to warn consumers against using a bungee cord with its cart because consumers, including plaintiff, are well aware of how a bungee cord works, and that any alleged dangers posed by the bungee cord are open and obvious; and (3) plaintiff has not and cannot establish that there was ever a duty

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[4] On or about November 11, 2004, plaintiff's first action, in which he sued Daglian, was consolidated with that against PFC.

for PFC to warn against using a bungee cord with its carts or that any lack of warning was the proximate cause of his accident.

In opposition, plaintiff argues that issues of fact exist which warrant the denial of summary judgment. He asserts that (1) the cart which he used on the day of his accident was defective, as it lacked warnings of the dangers the cart posed if used with a bungee cord with hooks; (2) PFC initially sold luggage carts with hookless straps, then sold luggage carts with bungee cords and hooks from the late 1970's up to the first quarter of 1998, but switched back to hookless straps in the latter part of 1997 or early 1998 because it had learned that people were being injured by bungee cords with hooks; (3) from the mid 1980's until early 1998, PFC placed stickers on its luggage carts with various warnings which changed over time; (4) despite PFC's knowledge of the dangers posed by the use of its luggage carts with bungee cords, and despite its knowledge that purchasers of its carts did not read the packaging information which contained warnings, PFC sold carts with hookless loop straps that were known to wear out, and that such carts lacked warnings advising users not to replace hookless straps with bungee cords; and (5) at his deposition, Esposito intentionally misrepresented the number of prior claims commenced against PFC by parties who suffered injuries caused by bungee cords with hooks.

In his affidavit which he submits in support of his opposition to defendant's motion, Young disputes defendant's characterization of his deposition testimony, stating that he assumed that the end of the bungee cord that was underneath the cart that had boxes on it was

attached to the cart in some way, and "accordingly, it was not until after my accident that I first learned that a bungee cord should always be securely attached to the luggage cart" and contrary to PFC's allegations, he had no knowledge of the dangers associated with the use of the bungee cord with hooks when used on a luggage cart. He claims that (1) had he known he was at risk for sustaining injury, he would have never used Daglian's bungee cord and cart that day; and (2) had the luggage cart borne a conspicuous warning, he would never used Daglian's cart without the bungee cord being attached thereto–instead, he would have tried to properly attach the bungee cord to the luggage cart, and if that failed, he would have carried the boxes down to his car.

In addition, plaintiff provides Barnett's affidavit, wherein he states that he (1) is a professor of mechanical and aerospace engineering at the Illinois Institute of Technology, where he teaches a course on the topic of luggage cart and bungee cord safety; and (2) is also chairman and president of Triodyne, Inc, a safety firm specializing in mechanical products. He further states that he has participated in six accident investigations involving PFC luggage carts where the user sustained an eye injury from a released bungee cord, and also reviewed photographs of Daglian's luggage cart and the bungee cord, photographs of Young's injury, photographs of a different luggage cart with an elastic strap, PFC operating instructions for its luggage carts, patents of various luggage carts, including those of PFC, and depositions of PFC representatives from prior litigation against PFC.

Based upon his review of the photographs, Barnett states that the PFC luggage cart involved in the instant accident is made of robust materials, but the original elastic strap that came with it is made out of a material whose life expectancy is less than the 10-year life expectancy of the cart, and, as a result, it is reasonably foreseeable that the elastic strap would be replaced during the lifetime of the cart. He goes on to state that manufacturers of luggage carts, including PFC and its competitors, switched to alternate strapping mechanisms after learning that bungee cords posed a significant risk of bodily injury. He further asserts that because of the nature of the danger associated with the use of bungee cords, it is essential that PFC provide a durable label in a highly visible location on the cart, warning of the dangers of using a bungee cord and providing information for obtaining a replacement strap.

Barnett goes on to fault the means by which defendant provided its warnings, opining that glossy cardboard is not sufficiently robust to last the anticipated life of the cart, and that it is easily, and routinely, discarded. He notes that according to the deposition testimony of Patsy Esposito from a previous lawsuit, a Bungee International representative advised him that PFC should put the warnings on the cart itself.

Barnett further states that had the replacement bungee cord with hooks, or a strap, been properly tied to the cart's rear lower cross member, Young's accident would not have occurred because any release of the bungee cord would have caused the elastic member to be pulled away from the user. He concludes by opining that: the Daglian PFC luggage cart

was defective and unreasonably dangerous for its intended use at the time it was manufactured; the defective condition proximately caused Young's accident; Young's use of the subject cart was a common and reasonably foreseeable use; and had the subject cart come with a durable warning label containing appropriate information, the accident would not have occurred.

Plaintiff's cross motion to strike defendant's answer

Citing the results of Barnett's investigation into six other injuries involving PFC luggage carts used with bungee cords, as well as his allegation that he has the names of more than 20 additional persons injured while using said carts with bungee cords, and further cataloging testimony rendered by PFC representatives at other depositions, plaintiff seeks an order striking PFC's answer, contending that Esposito's deposition testimony, wherein he stated that he had knowledge of fewer than 10 bungee cord-related accidents, all of which occurred in the New York area or in California, was a material misrepresentation entitling plaintiff to such relief. Alternatively, plaintiff seeks an evidentiary hearing in order to permit the court to craft an appropriate remedy so as to resolve, as a matter of law, issues concerning actual notice and changes made in the warning language in PFC's literature, so as to leave proximate cause as the sole issue to be considered by the jury.

Defendant's cross motion to preclude

In moving, pursuant to CPLR 3126(b) for an order precluding plaintiff from using depositions, discovery responses and other prior statements of PFC that were not previously

exchanged in violation of the court's preliminary conference order, as well as precluding the use of all untimely expert disclosures, and in opposing plaintiff's cross motion, defendant contends that plaintiff willfully and contumaciously failed to exchange copies of PFC's deposition transcripts from prior cases, arguing that a deposition given by a party in an earlier action qualifies as a statement which that party is entitled to obtain under CPLR 3101(e) as a matter of right, and that plaintiff failed to fully respond to PFC's Demand to Furnish Specified Information served on July 28, 2004. Defendant alleges that it was not provided with a copy of the subject transcripts until it received a copy of plaintiff's opposition to PFC's motion for summary judgment, more than 8 months after plaintiff filed the note of issue, and has not offered any excuse for said failure.

In opposition to plaintiff's cross motion, defendant denies that Esposito misrepresented the number of prior claims and lawsuits against PFC, arguing that plaintiff's question was inadequate for the purpose of refreshing his recollection as to the actual number. Defendant further notes that the prior transcripts upon which plaintiff relies for its "alleged inconsistencies" argument deal with different model luggage carts with different designs using different strapping mechanisms throughout a twenty-plus year period, and argues that the drastic remedy of striking its answer is inappropriate under the circumstances. Rather, defendant argues that the appropriate course of action available to plaintiff is to use said inconsistencies for impeachment purposes if the court deems said transcripts admissible.

Defendant continues, in the nature of a reply, to argue that plaintiff has failed to raise an issue of fact in opposition to its summary judgment motion. It contends that all of the exhibits annexed to plaintiff's opposition, with the exception of plaintiff's affidavit and Barnett's affidavit, were generated, stated, or created by individuals or entities who are not a party to this action, and are thus hearsay. It further contends that even if the court determines that such transcripts should not be precluded, they have no probative value as to the present lawsuit, arguing that because the carts that were involved in the prior lawsuits were of a different design than that involved here, plaintiff has failed to demonstrate that the prior accidents were substantially similar to the present accident. Furthermore, defendant notes that the bungee cord involved in the present accident was manufactured in Malaysia, while the bungee cords involved in the prior lawsuits were manufactured by a company in France. Defendant asserts that defendant had no duty to warn about the alleged dangers of a product which it did not manufacture.

Citing plaintiff's version of how the accident occurred, defendant challenges plaintiff's claim that a warning would have changed the manner in which the bungee cord was affixed to the cart, noting that plaintiff failed to present any evidence that the bungee cord was ever attached to the cart when the accident occurred, and that plaintiff has failed to present any evidence that the bungee cord would not have worked with the PFC cart if it was properly attached. Rather, defendant argues that plaintiff's own misuse of the bungee cord caused it to become dangerous.

Defendant also rejects Barnett's report as being based solely on his experience with PFC's older carts, and asserts that he fails to state the basis for his conclusion that the original elastic strap had a life expectancy of less than 10 years. It further challenges Barnett's opinion with respect to the alleged insufficiency of the warning label, arguing that no such warning is required because it does not come with any items that present a missile hazard nor items that can cause eye injuries. Defendant characterizes Barnett's concluding opinions as speculative.

Finally, defendant asserts that any alleged dangers posed by the bungee cord involved in plaintiff's accident were open and obvious, and reiterates its contention that plaintiff's failure to secure the bungee cord to the cart, or check and see if the bungee cord was previously attached by Lisa Daglian or her father, was misuse of the bungee cord which was the sole proximate cause of the accident.

In opposition to defendant's cross motion to preclude and in further support of his cross motion, plaintiff contends that he was not in violation of the preliminary conference order and, for the first time, seeks an order permitting him to serve a late 3101(d) notice for Barnett[5]. He avers that on July 11, 2006, a date which was in compliance with the terms of the preliminary conference order, he faxed his expert witness disclosure for Dr. C. J. Abraham to defendants. Plaintiff goes on to allege that in September, 2006, after he received

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[5] Although defendant's cross motion, as noted, seeks preclusion of deposition transcripts, pleadings, and discovery from prior lawsuits, it is silent as to any infirmity in plaintiff's 3101(d) notice.

PFC's motion for summary judgment and reviewed Esposito's deposition transcript, his counsel decided to search for "an expert out there with more expertise in the dangers associated with bungee cords, especially when used with luggage carriers such as PFC's." After conducting research, plaintiff hired Dennis Brickman (Brickman) of Triodyne, Inc.[6]

Plaintiff asserts that he has complied with the preliminary conference order inasmuch as he served a 3101(d) notice for Dr. Abraham in July of 2006, and that he should be permitted to serve such notice for Barnett inasmuch as he provided information about Barnett in plaintiff's opposition to defendant's summary judgment motion. Plaintiff further argues that defendant will not be prejudiced, since no trial date has been assigned, and since the information contained in Barnett's affidavit is very similar to the expert opinion given by Brickman in the *Zaslow* case, and the theories of liability as set forth in Abraham's 3101(d) notice, are "similar" to the theories set forth in Barnett's affidavit.

In opposition to that branch of defendant's motion concerning the deposition transcripts who testified in other lawsuits against PFC, plaintiff argues that such documents were provided as soon as possible, in plaintiff's opposition to PFC's summary judgment motion.

Finally, in reply to the argument raised by defendant in its opposition to his motion to strike the answer, plaintiff submits that "as far as Triodyne is concerned, . . . a luggage cart

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[6] Brickman acted as expert in the *Zaslow* case, one of the previous lawsuits brought against PFC which plaintiff seeks to have the court consider here.

is a luggage cart, which when combined with a bungee cord with hooks is an extremely dangerous object."

Plaintiff's amended cross motion

Soon after interposing his opposition to PFC's cross motion, plaintiff served an amended notice of cross motion, seeking the identical relief stated in its previously-interposed cross motion to strike defendant's answer, and, in addition, seeking an order for leave to serve a late 3101(d) notice for Barnett, as set forth in his opposition to defendant's cross motion. In opposition thereto, defendant, by way of an affidavit in opposition as well as a supplementary affidavit, assails plaintiff's motion on procedural grounds as an unsanctioned attempt to amend a motion or cross motion by seeking new and different relief, and claims that it will be prejudiced if such relief is granted. It further contends that plaintiff does not offer any excuse for his untimely disclosure of Barnett as an expert, submits that Abraham's and Barnett's theories are not similar[7], and suggests that if they are, plaintiff can rely on Abraham's report. Defendant claims that controlling authority mandates rejection of plaintiff's expert disclosure as untimely.

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[7] Defendant argues that while Abraham opines that there should have been a permanently-affixed warning label on the cart advising users not to use strapping mechanisms other than the type provided by the manufacturer with the cart, Barnett appears to render an opinion regarding, *inter alia*, the general dangers posed by bungee cords when used with luggage carts as well as the necessity of instructions regarding the proper placement of a hook on the cart to avoid the hook becoming dislodged, and that defendant had no opportunity to prepare for the new arguments raised by Barnett.

Supplemental Affirmations

Pursuant to this court's order, plaintiff was directed to provide the court with a supplemental affidavit concerning what he meant when he testified at his deposition that he presumed that the bungee cord would "snap". In addition, plaintiff annexes a document (what appears to be literature issued by PFC promoting "Le Sandoclick" Safety Cord), which counsel states was referred to by Barnett, and inadvertently omitted from its papers in December of 2006. In response to the court's directive, plaintiff states, inter alia, that "[a]lthough I knew before my accident that a bungee cord could snap like a rubber band, unfortunately, I had no idea before my accident that there was a danger of bodily or eye injury involved if I used a bungee cord with the hooks on a luggage cart. I also did not know that if a bungee cord with hooks was used on a luggage cart, that it must be attached a specific way to the cart. . . . Prior to my accident I had no idea that bungee cords with hooks should be attached so they would snap down if unfastened. . . ."

In response, defendant objects to plaintiff's attempt to introduce additional exhibits as well as his attempt to discuss issues other than his testimony concerning the word "snap", and requests that the court disregard same. Defendant asserts that plaintiff's testimony demonstrates that the potential dangers of a bungee cord snapping back in his direction were open and obvious and there was no need for PFC to warn against the use of a bungee cord with the cart, that it is undisputed that plaintiff had prior experience with bungee cords similar to the one involved in the accident and did not need instruction in its use, that it is of

no consequence that plaintiff did not anticipate that his eye would be hit as opposed to some other part of his body, and that the accident occurred only because plaintiff did not check to see if the bungee cord was properly affixed to the cart. Plaintiff also submitted a supplemental memorandum of law on said issue.

Plaintiff's order to show cause

Moving by order to show cause, plaintiff requests leave to serve a supplemental memorandum of law because defendant did so without having obtained leave of court to do so. In opposition, defendant argues that plaintiff is merely seeking permission to serve a sur-sur-sur reply, and should be disregarded. Plaintiff, in reply, rejects defendant's assertions.

DISCUSSION

At the outset, the court, in the interests of justice, grants plaintiff's order to show cause and will reach its decision upon all papers submitted by the parties (*see Rodriguez v Tiwari,* 265 AD2d 247 [1999]).

Prior to discussing the issues raised by defendant's summary judgment motion, the court will dispose of the parties' cross motions that relate to discovery and disclosure.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party that "refuses to obey an order for disclosure" or "wilfully fails to disclose information which the court finds ought to have been disclosed" (*see Morano v Westchester Paving and Sealing Corp.*, 7 AD3d 495 [2004]). It is well settled that the drastic remedy of striking an answer is inappropriate absent a clear showing that there was a failure

to comply with discovery demands which was willful, contumacious, or in bad faith (CPLR 3126; *see Harris v City of New York,* 211 AD2d 663 [1995]; *Furniture Fantasy v Cerrone,* 154 AD2d 506 [1989]). Indeed, the courts in this State have been unambiguous in expressing their belief that actions should be resolved on their merits whenever possible, and the drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious (*see, e.g., Jenkins v City of New York,* 13 AD3d 342 [2004]).

Here, the basis for the relief sought by plaintiff is not defendant's willful refusal to comply with his discovery demands, but rather upon answers, the content of which are deemed by plaintiff to be unsatisfactory, which Esposito provided in response to questions put to him by plaintiff's attorney. The court finds this branch of plaintiff's cross motion to be wholly devoid of merit.

Willful conduct may be found where a witness appears at a deposition and refuses to be deposed (*see McCue v Battaglia,* 211 AD2d 625 [1995]). It has also been found where a party, without having first sought a protective order or object to the questions put to him, refuses to answer any questions (*see Greenstar Enterprises v DeSalvo,* 9 Misc 3d 1112(A) [2005] [motion to strike answer granted where defendant, after being ordered by court to appear at a deposition, responded to every question, "I'm unable to answer that question"]).

However, plaintiff, who, in support of his cross motion, relies on case law where answers were stricken based upon the outright failure to comply (*see, e.g., Kryzhanovskaya*

v City of New York, 31 AD3d 717 [2006] [defendant, in violation of order, repeatedly failed to produce witnesses for deposition and offered inadequate excuses for repeatedly adjourning depositions]; *Waltzer v Tradescape & Co., LLC,* 31 AD3d 302 [2006 [defendants-appellants' failure to produce certain personal documents and documents in the possession of two law firms that had formerly represented defendants could be inferred from their noncompliance with six separate court orders directing document production coupled with inadequate excuses for those defaults]; *Gutierrez v Bernard,* 267 AD2d 65 [1999] [court held that defendants' answer was properly stricken in view of their willful failure to comply with a prior order directing production of the corporate defendant's checks], has failed to provide the court with any legal authority where a defendant's answer was stricken based upon the content of his deposition testimony. Having thus failed to demonstrate that he is entitled to have defendant's answer stricken, or to the alternate relief of an evidentiary hearing on this issue, the court denies said branch of plaintiff's motion.

The fact that the testimony was elicited in another lawsuit does not preclude its consideration, in the form of sworn deposition testimony, in a subsequent action (*see Harris v Triangle Aviation Services, Inc.,* 110 AD2d 882 [1985]) In this context, although CPLR 3101(e) enables a party to obtain a copy of his or own deposition statements from previous lawsuits (*see Zarate v Mount Sinai Hospital,* 142 Misc2d 426 [1989]), "courts have held that limitations on the timing and use of disclosure devices are left to the sound discretion of the trial court" (Alexander, Practice Commentaries, McKinney's Cons Laws of N Y, Book 7B,

CPLR C3101:46, citing *Theisen v Sunnen,* 186 AD2d 81 [1992]). In the instant set of motions, defendant convincingly argues that plaintiff was put on notice, both by virtue of its Demand which it served on plaintiff on July 28, 2004, as well as by the preliminary conference order of March 22, 2005, that plaintiff was obligated to exchange the opposing party statements of PFC, which by definition included the transcripts of deposition testimony from prior lawsuits. However, plaintiff's representation that it did not commence its research into prior litigation against PFC until it was served with defendant's summary judgment motion in September, 2006, constitutes a reasonable explanation for its failure to turn over said transcripts prior to serving its opposition to defendant's motion. Moreover, although defendant claims that it has been "ambushed" by such tactics, it has failed to demonstrate how, if at all, it would be prejudiced by the inclusion of such transcripts in the record on the instant motions. Similarly, the court finds that no prejudice will ensue, and the interests of justice are best served, by permitting Barnett's affidavit to become part of the record (*see Milazzo v Premium Technical Services Corp.,* 7 AD3d 586 [2004] [the opinion of a qualified expert may raise an issue of fact in a products liability lawsuit]; *see also Vail v Kmart Corp.,* 25 AD3d 549 [2006]). Accordingly, the court (1) denies that branch of defendant's cross motion to preclude plaintiff's use of the deposition transcripts; and (2) grants that branch of plaintiff's amended cross motion seeking leave to serve a late 3101(d) notice, and deems same to have been served.

Defendant's motion for summary judgment

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

A manufacturer who places a defective product on the market that causes injury may be liable for damages (*see Codling v Paglia,* 32 NY2d 330, 342 [1973]). A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings regarding the use of the product (*see id; Micallef v Miehle Co.,* 39 NY2d 376 [1976]; *Torrogrossa v Towmotor Co.,* 44 NY2d 709 [1978]; *see also Robinson v Reed-Prentice Div. of Package Mach. Co.,* 49 NY2d 471, 478 [1980]). A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known (*see Liriano v Hobart Corporation,* 92

AD2d 232 [1998]; *Rastelli v Goodyear Tire & Rubber Co.,* 79 NY2d 289, 297 [1992]). A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable (*see Lugo v LJN Toys,* 75 NY2d 850 [1990]; *McLaughlin v Mine Safety Appliances Co.,* 11 NY2d 62 [1962]; 1 Weinberger, New York Products Liability, § 17:07, at 17-10 [2d ed]).

Defendant has met its burden of demonstrating its entitlement to judgment as a matter of law (*see Rodriguez v Sears Roebuck & Co.,* 22 AD3d 823 [2005]). At the outset, it should be emphasized that plaintiff does not claim that the luggage cart, as manufactured by PFC, was in any way mechanically or structurally defective. Moreover, there is no dispute that PFC did not manufacture the bungee cord, place it into the stream of commerce, or derive any benefit from its sale (*see Rastelli,* 79 NY2d at 298, citing *Ilosky v Michelin Tire Corp.,* 172 W Va 435, 307 SE2d 603 [1983]). Rather, plaintiff's theory of recovery is based upon the allegation that the way in which he used the cart in combination with the bungee cord was foreseeable, and that the inadequacy of the warnings which defendant provided was the proximate cause of the accident. Thus, at best, this is a case where the combination of one sound product with another sound product might create a dangerous condition about which the manufacturer of each product has a duty to warn (*see Rastelli,* 79 NY2d at 289). In this regard, the record establishes that PFC provided ample warnings on the face of its packaging literature. Such literature, which was stapled to the structure of the cart, clearly demonstrates that PFC could foresee that a consumer might, at some point, attempt to use a bungee cord

rather than the replaceable strapping system which PFC provided, and took reasonable measures to warn against such practice: the literature contained (1) instructions for use, (2) language cautioning against the use of bungee cords, and (3) instructions on how to contact PFC in order to obtain a replacement strap (*see id* at 823 [instruction manual that was provided with the machine contained language expressly warning against modification which the plaintiff admittedly performed]).[8] Moreover, defendant has come forward with evidence, in the form of plaintiff's own testimony, establishing that the accident was caused by plaintiff's own misuse of the bungee cord and/or the luggage cart because he failed to insure that one end of the bungee cord was secured to the luggage cart before he attempted to secure the other end.

Accordingly, the burden shifts to plaintiff to establish the existence of a triable issue of fact on the question of whether defendant breached its duty to provide adequate and durable warnings regarding the use of its product, and that such breach was the proximate cause of plaintiff's injury (*see Sosna v American Home Products,* 298 AD2d 158 [2002]). Plaintiff has failed to raise an issue of fact in this regard.

It cannot be disputed that plaintiff himself was not responsible for substituting the strapping system with a bungee cord, as well as that plaintiff, as a "secondary", but reasonably foreseeable user of the cart, lacked an opportunity to read any warnings, as they had been removed from the cart (*see Estrada v Berkel, Inc.,* 14 AD3d 529 [2005]). However,

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[8] Indeed, the content of defendant's warning is confirmed by plaintiff, who, in his opposition papers, provides a copy of the very document whose language he challenges.

"foreseeability of misuse alone is insufficient to make out a cause of action" (*Jackson v Supermarkets General Corp.*, 214 AD2d 650 [1995]). Moreover, "a manufacturer is not required to insure that subsequent owners and users will not adapt the product to their own unique uses" and although "manufacturer liability can exist under a failure-to-warn theory in cases in which [substantial modification of the product] might otherwise preclude a design defect claim,. . . where the injured party was fully aware of the hazard through general knowledge, observation or common sense, or participated in the removal of the safety device whose purpose is obvious, lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger" (*Liriano,* 92 NY2d at 238-241; *Rodriguez,* 22 AD3d at 824 [2005]; *Bazerman v Gardall Safe Corp.*, 203 AD2d 56 [1994]; *cf. Gian v Cincinnati Inc.,* 17 AD3d 1014, 1016 [2005]). "A court may determine that a risk was open and obvious when the established facts compel that conclusion" (*Tagle v Jakob,* 97 NY2d 165, 169 [2001] [summary judgment dismissing complaint affirmed where plaintiff, who was injured when he climbed a tree on defendant's property and touched an electrical transmission box, found not to be entitled to warnings by defendant property owner, since "[i]t is unimaginable that an observer could see the wires entering and leaving the tree and not know that the wires passed through it.").

In the instant case, plaintiff testified that he had used luggage carts with bungee cords similar to the one involved in the accident on numerous occasions prior to the accident. He further testified that he did not ask for instructions, warnings, or a manual before using the

cart and bungee cord on the date of his accident because he did not feel that he needed instructions, and his testimony amply demonstrates his awareness of the elastic properties of bungee cords. It is thus clear that a warning, even if affixed to the cart, would have added nothing to plaintiff's knowledge or appreciation of the alleged danger posed by the bungee cord (*see Caruso v John Street Fitness Club, LLC,* 34 AD3d 296 [2006]).

Finally, plaintiff's own disingenuous statement that "it was not until after the accident that I learned that a bungee cord should always be secured to the luggage cart" lacks credibility. Indeed, plaintiff's testimony, far from raising an issue of fact, establishes that his injuries occurred when the unsecured end of the bungee cord snapped back and struck him, thus undermining (1) his assertion that the inadequacy of any warnings was the proximate cause of the accident (*see Banks v Makita, USA, Inc.,* 226 AD2d 659 [1996]), as well as (2) the affidavit of plaintiff's expert witness, whose abstract and conclusory opinion is unsupported by any competent evidence (*see Caruso,* 34 AD3d at 296).

In view of the foregoing, the court severs the cause of action as against PFC, grants its motion for summary judgment, dismisses the complaint as against it. The action shall continue as against the remaining defendant.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT