SHORT FORM ORDER

INDEX No. 05-14218
CAL. No. 07-00386-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 7-11-07
Mot. Seq. #001 - MD

NATIONWIDE MUTUAL INSURANCE COMPANY a/s/o JOANNA BORK, Plaintiffs, - against - BAY SHORE CHRYSLER JEEP, LLC, Defendants.	D'AMBROSIO & D'AMBROSIO, P.C. Attorneys for Plaintiff 42 Main Street Irvington, New York 10533 AHMUTY, DEMERS & McMANUS Attorneys for Defendant 200 I.U. Willets Road Albertson, New York 11507

Upon the following papers numbered 1 to 17 read on this motion for dismissal under CPLR 3126 ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3126 dismissing plaintiff's complaint based on spoliation of crucial evidence is denied.

This is an action brought by plaintiff subrogee, Nationwide Mutual Insurance Company, on behalf of its insured and subrogor, Joanna Vicerra s/h/a Joanna Bork, to recover the sum of $13,000 that it paid to her for damages to a vehicle, a 2001 Dodge BR 1500 4 x 4, sold to Joanna Vicerra by defendant, Bay Shore Chrysler Jeep, LLC, that was involved in an accident on January 23, 2005 allegedly as a result of the malfunction of defective steering and braking systems. The vehicle was repaired at Schubert's Auto Body in Smithtown, New York.

By its complaint, plaintiff alleges a first cause of action to recover $13,000 as subrogee of its insured Joanna Bork to whom it paid said sum for damages sustained to her vehicle allegedly as a result of the negligence and gross negligence of defendant in the vehicle's design, specification, testing, manufacturing, assembling, distribution, sale, inspection, servicing and maintenance. In addition, plaintiff alleges a second cause of action for breach of defendant's implied and express warranties of merchantable quality and fitness for intended purpose; a third cause of action sounding in strict products liability; a fourth cause of action for negligence; and a fifth cause of action for breach of contract.

By its bill of particulars, plaintiff claims that defendant failed to ascertain the defects in the braking and steering systems of the subject vehicle when it was manufactured, inspected and serviced by defendant. Specifically, plaintiff alleges that on January 11, 2005, defendant failed to install or tighten the nut that held the left front spindle assembly to the ball joint causing the ball joint to break off and causing the failure of the left front suspension. Plaintiff claims that defendant had actual and constructive notice of the alleged defects.

Defendant now moves to dismiss the complaint on the grounds that plaintiff spoliated crucial evidence, the component parts of the front suspension including the ball joint, that form the basis of the claims being asserted in this action without providing defendant an opportunity to inspect the subject vehicle and ball joint as defendant had requested. In support of the motion, defendant submits, among other things, the complaint; its answer; plaintiff's bill of particulars; the deposition transcripts of Joanna Vicerra and non-parties Nuno Reis and Christopher Butler; and the affidavit of defendant's Service Manager, Robert Kennedy.

The Court has broad discretion in determining the appropriate sanction for spoliation of evidence (*see*, ***De Los Santos v Polanco***, 21 AD3d 397, 799 NYS2d 776 [2d Dept 2005]). A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that "a litigant, intentionally or negligently, dispose[d] of crucial items of evidence *** before the adversary ha[d] an opportunity to inspect them" (***Kirkland v New York City Hous. Auth.***, 236 AD2d 170, 173, 666 NYS2d 609 [1st Dept 1997]; ***Popfinger v Terminix Intl., Co. Ltd. Partnership***, 251 AD2d 564, 674 NYS2d 769 [2d Dept 1998]), thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice and severe prejudice for dismissal (*see*, ***Favish v Tepler***, 294 AD2d 396, 741 NYS2d 910 [2d Dept 2002]; ***Romano v Scalia and DeLucia Plumbing***, 280 AD2d 658, 721 NYS2d 245 [2d Dept 2001]; ***Knightner v Custom Window and Door Prods.***, 289 AD2d 455, 735 NYS2d 576 [2d Dept 2001]; ***Squitieri v City of New York***, 248 AD2d 201, 669 NYS2d 589 [1st Dept 1998]). Where the plaintiffs and the defendants are equally affected by the loss of the items and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation (*see*, ***De Los Santos v Polanco***, *supra*; ***Lawson v Aspen Ford***, 15 AD3d 628, 629-630, 791 NYS2d 119 [2d Dept 2005]; ***Ifraimov v Phoenix Indus. Gas***, 4 AD3d 332, 334, 772 NYS2d 78 [2d Dept 2004]).

At her deposition, Joanna Vicerra testified that she purchased the subject vehicle "used" from defendant by taking out a loan and that her then fiancee Nuno Reis was a co-signer on the loan. In addition, Joanna Vicerra testified that Nuno Reis would take the vehicle in for service and that he would talk to the mechanics for her and that she noticed noise in the front of the vehicle. She also testified that in January 2005 Nuno Reis took the vehicle in for service, that she was not present, that Nuno Reis had the documents for the repairs and that she never saw said documents.

Nuno Reis testified at his deposition that Joanna Vicerra purchased the vehicle in 2003; that the vehicle had 48,000 or 49,000 miles on it; and that no changes were made to the vehicle after its purchase. In addition, he testified that the vehicle was brought in to defendant's dealership many times prior to the subject accident; that it was always serviced at said dealership; and that there was a warranty on the vehicle and that they had purchased a plan for maintenance. Nuno Reis also testified that he took the vehicle in for service in January 2005 at the request of Joanna Vicerra because she told him that there

were loud noises coming out of the front of the vehicle and for another problem, if the vehicle hit a bump it swerved out of control. According to Nuno Reis, he told defendant's service department of these complaints, the service department explained to him that the ball joint and steering were involved and they told him that they replaced the ball joint and gave him an invoice. Nuno Reis testified that the accident occurred shortly after he picked up the vehicle from the dealership following its service. Nuno Reis explained that it was a cold evening; that he was in the left lane of the Sunrise Highway; that he heard the same knocking noise and the left front of the vehicle went down and the vehicle hit the divider wall on his left. According to Nuno Reis, the vehicle was towed to his parent's house in Ronkonkoma and after it was towed he notified the manager of defendant's service department of the accident. Nuno Reis further testified that the vehicle was repaired at Shubert's Auto; that he did not ask the repair shop to save any items from the vehicle; that the repair shop told him that the cause of the accident was related to the ball joint; and that he actually went and saw the part but he did not ask the repair shop to save the ball joint for him. He stated that the vehicle was currently in his possession.

Christopher Butler, a Material Damage Specialty Claims Representative for plaintiff, testified at his deposition that his work involved inspecting vehicles as an auto damage appraiser. In addition, Christopher Butler testified that he remembered physically inspecting the subject vehicle twice at Schubert's Auto Body in Smithtown to prepare an initial estimate and then a final estimate of damages. He also testified that while inspecting the subject vehicle he noticed that a nut was missing on a brand new replaced ball joint on the left front suspension. Christopher Butler stated that he did not know if the repair shop saved the ball joints; that he never asked anyone at the repair shop to save the ball joint for him; but that he knew that the whole front end assembly was replaced during the repair of the vehicle. He testified with respect to a color photograph marked as exhibit C that he had taken during his first inspection of the vehicle that depicted the subject ball joint. Christopher Butler further testified that he never had any contact with Joanna Vicerra or Nuno Reis or with anyone from defendant's dealership.

Robert Kennedy stated in his affidavit that following the subject accident, he "requested the opportunity to inspect the subject vehicle and ball joint which request was denied." In addition, he stated that "an inspection of the actual component parts of the front suspension of the subject vehicle that were in place on January 23, 2005 is absolutely essential to [his] review and analysis of the validity [sic] plaintiff's claims asserted herein as well as to [defendant's] defense thereof." Robert Kennedy concluded in his affidavit that his inability to inspect the actual component parts resulted in undue prejudice to defendant in its preparation of a defense.

In opposition to the motion, plaintiff submits the affirmation of its attorney and its complaint, bill of particulars and affidavit of service of its opposition papers. Plaintiff's attorney emphasizes in his affirmation that plaintiff did not wilfully destroy the component parts of the vehicle that are involved in this action and that the discarding of the parts by the repair shop and defendant's inability to inspect those parts has also hurt plaintiff inasmuch as plaintiff was unable to show defendant the existence of the defect. Plaintiff's attorney also points to a lack of specificity in Robert Kennedy's affidavit as to who made the request on behalf of defendant to inspect the subject vehicle and who denied that request.

In reply, defendant contends that plaintiff's opposition to the motion is deficient inasmuch as it contains no sworn statement from someone with personal knowledge concerning where the subject component parts are that were removed from the vehicle or why the parts were not preserved or whether

the repair shop actually destroyed the parts. In addition, defendant contends that the repair shop would have required the prior approval of plaintiff's claims representative to discard any parts and that the failure of plaintiff's claims representative to preserve those parts constituted negligence, at least.

Here, defendant's submissions reveal that the subject accident occurred in 2005; that plaintiff's representative Christopher Butler had an opportunity to inspect the subject vehicle prior to its repair and subsequent to its repair; and that plaintiff commenced this action that same year to recover the sums that it paid for the repair of the subject vehicle. It is unclear from the submissions of either party whether plaintiff was contemplating litigation to recover its yet-to-be calculated damages at the time of its claims representative's initial inspection so as to render plaintiff responsible for requesting of the repair shop's employees that the replaced ball joint parts be preserved by the repair shop and for notifying defendant's employees that they should inspect the subject vehicle prior to its repair. Although defendant's service manager Robert Kennedy cursorily states in his affidavit that a request to inspect the subject vehicle was denied, without stating when and to whom such a request was made, and insists that he needed an inspection of the actual component parts for proper preparation of a defense, he does not mention the color photographs taken by Christopher Butler prior to the repair of the vehicle which depict the ball joint and other components of the left front suspension or state whether or not he could use them in the preparation of a defense. Thus, the Court exercises its discretion in denying defendant's motion to dismiss the complaint pursuant to CPLR 3126 inasmuch as defendant failed to demonstrate that it would be severely prejudiced in its preparation of a defense; that plaintiff willfully, deliberately or contumaciously destroyed evidence; or that defendant could not use the photographs taken by plaintiff's claims representative to defend the negligence claims and use a similar vehicle to defend the design defect claims (*see*, ***Friel v Papa***, 36 AD3d 754, 829 NYS2d 569 [2d Dept 2007]; ***Almonte v City of New York***, 35 AD3d 772, 826 NYS2d 741 [2d Dept 2006]; ***Klein v Ford Motor Co.***, 303 AD2d 376, 756 NYS2d 271 [2d Dept 2003]).

Accordingly, the instant motion is denied.

Dated: SEP 04 2007

J.S.C.

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