

Poligkeit v Colmenero
2007 NY Slip Op 34350(U)
December 27, 2007
Supreme Court, Suffolk County
Docket Number: 0006344/2005
Judge: Peter Fox Cohalan
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INDEX # 06344-05
 RETURN DATE: 2-22-07
 MOT. SEQ. # 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x

PATRICIA POLIGKEIT and PAUL POLIGKEIT,

Plaintiffs,

-against-

MANFRED COLMENERO and FORD MOTOR
 COMPANY,

Defendants.
 -----x

CALENDAR DATE: August 22, 2007
 MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

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Upon the following papers numbered 1 to 23 read on this motion to dismiss _____;
 Notice of Motion/Order to Show Cause and supporting papers 1-12; Notice of Cross-Motion and
 supporting papers _____; Answering Affidavits and supporting papers 13-20; Replying
 Affidavits and supporting papers 21-23; Other _____; and after hearing counsel in support of and
 opposed to the motion it is,

ORDERED that this motion by the defendant, Ford Motor Company, for
 dismissal of the plaintiffs' action, pursuant to CPLR §3126 (3), on the grounds of spoliation of
 evidence is, after careful consideration by the Court, granted and the plaintiffs' action as to the
 moving defendant, Ford Motor Company, is dismissed.

The plaintiff, Patricia Poligkeit, instituted this action for personal injuries
 allegedly sustained in a motor vehicle accident occurring on February 16, 2004 on Middle
 Country Road (Route 25) at or near its intersection with Paul's Path in Coram, Suffolk County
 on Long Island, New York. The plaintiff was a passenger in her vehicle being operated by her
 husband, Paul Poligkeit, on February 16, 2004, at the above described location and which
 vehicle was involved in a three (3) vehicle accident causing her to sustain an injury. The
 plaintiff has alleged as against the defendant, Ford Motor Company (hereinafter "Ford"), that
 the front passenger seatbelt was defective and equipped with a faulty seatbelt tension
 relieving device which failed to properly restrain the plaintiff during the accident, exacerbating
 her injuries. This lawsuit thereafter ensued.

Ford now moves for dismissal of the plaintiffs' action against it, pursuant to CPLR §3126(3), on the grounds of spoliation of evidence in that the plaintiffs disposed of and/or destroyed the seatbelt retraction device which she claims was defective and did not operate properly. Ford further avers that the destruction of this key piece of evidence has prejudiced Ford and would allow a jury to speculate about Patricia Poligkeit's injuries with mere testimony by her that her seatbelt failed to engage and restrain her without Ford being able to establish the seatbelt operated properly.

The plaintiffs commenced this lawsuit by summons and complaint on March 31, 2005 but the plaintiffs' counsel, Anthony J. Gulotta, Esq., in his affidavit in opposition, dated July 1, 2007, admits that when he met his clients on March 4, 2004, approximately two (2) weeks after the accident, the Ford vehicle was deemed a total loss by the plaintiffs' insurance company and the vehicle's whereabouts were unknown and/or disposed of at that time. [Defendant's aff. in opp. para. 5.] Ford says it has been severely prejudiced by its inability to inspect or test the seatbelt to see if it was defective or damaged, tampered with or made inoperative by some action on the plaintiffs' part. The loss of the seatbelt assembly, Ford contends, would allow a jury to speculate about a design or product defect unique to the plaintiffs' vehicle based simply on plaintiffs' testimony without allowing Ford the opportunity to contest the plaintiffs' claim

For the following reasons Ford's motion for dismissal of the plaintiffs' product liability action as against it, pursuant to CPLR §3126 (3), for spoliation of the key and critical evidence in this case, *i.e.* the seat belt assembly, is granted and the plaintiffs' pleading is stricken as against Ford and the action is dismissed as against it.

It is well settled law with regard to missing or lost evidence that:

"Spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence in an accident before the adversary has an opportunity to inspect them." ***Kirkland v. New York City Housing Authority***, 236 AD2d 170, 173, 666 NYS2d 609, 611 (1st Dept. 1997).

Thus, in ***Didomenico v. C & S Aeromatik Supplies***, 252 AD2d 41, 682 NYS2d 452 (2nd Dept. 1998) the Court held:

"Separate and apart from the CPLR 3126 sanctions is the evolving rule that a spoiler of key physical evidence is properly punished by the striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than

And, in *Cutroneo v. Dryer*, 12 AD3d 811, 784 NYS2d 247 (3rd Dept. 2004), the Court held:

“We have recently held that the sanction of dismissal is ‘appropriate for the negligent disposal of evidence deemed crucial to the underlying action when the adversary had not been given an opportunity for inspection’ “ [citation omitted] “This is especially true where that which is lost is ‘the very instrumentality giving rise to plaintiffs’ injuries’ “

Here in the case at bar, where the plaintiffs, through their insurance company, disposed of the critical evidence prior to its review, inspection and possible testing, and which seat belt retention system/assembly is at the center of this dispute, “dismissal is required as a matter of elementary fairness.” *Cutroneo v. Dryer*, supra, 813. The Court, being mindful of the reluctance to dismiss cases as a sanction for spoliation, [see, *Lawson v. Aspen Ford, Inc.*, 15 AD2d 628, 791 NYS2d 119 (2nd Dept. 2005)] has reviewed the nature of the evidence denied to Ford on the issue of whether or not the plaintiffs “reap an unfair advantage in the litigation”. The Court finds that the only conclusion possible is yes. Moreover, the plaintiffs have been unable to establish whether the alleged defect in the seatbelt assembly or retraction system of their vehicle was common to all 2003 Ford Explorers, thereby rendering the plaintiffs’ claim as unique to their vehicle and only making the loss of this critical piece of evidence all the more central to this case.

The plaintiff Patricia Poligkeit, at her examination before trial dated June 20, 2006, testified that not only did she try to contact Ford unsuccessfully about her concerns with regard to the seat belt assembly but within a week after the accident considered a lawsuit against Ford (plaintiff’s deposition, p. 128, line 10 and line 17); and immediately thereafter she had pictures taken of her motor vehicle to show the damage to the vehicle (plaintiff’s deposition, p. 133-135) and an interior picture taken of the console (plaintiff’s deposition, p.138, line 13-16). Yet, while complaining about the seatbelt assembly and believing it to have malfunctioned, she never took any pictures of it while taking pictures of her motor vehicle. (Plaintiff’s deposition, p. 138, line 25 and page 139, line 2).

The defendant is confronted with the allegation that the crucial seatbelt system did not restrain the plaintiff/passenger, resulting in her injuries and also with plaintiffs’ knowledge that this seat belt restraint system was central to her case. This is evidenced by her attempts to complain about the system to the dealership that sold and maintained her vehicle, yet then she allowed her insurance company to dispose of the assembly. All of this occurred long before Ford even knew it was a defendant in this lawsuit. To state that Ford can somehow defend itself from a claimed defective seatbelt assembly system without the seat belt or the assembly system means that both sides are without any evidence to substantiate testimony that the seatbelt did not restrain the passenger. The Court, looking at ways to ameliorate the destruction, could deny the plaintiffs the right to testify or complain

about the seatbelt assembly but that would eviscerate any product liability case against Ford and therefore dismissal is warranted.

In his deposition testimony, dated February 26, 2007, William Ballard, (hereinafter "Ballard"), a design analysis engineer and Ford's expert, stated that there was no design defect or problem in the 2003 Ford Explorer. Anthony J. Gulotta, Esq. the plaintiffs' counsel questioned at length about belt buckles in the 2001 design but there was no evidence of a specific design flaw in the retraction system as testified to by Ballard. In fact, Ballard testified that he was unaware of any issue with regard to retractor lock problems in the 2003 Ford Explorer (Ballard deposition, p.32, 37). The plaintiffs point to a Front Safety Belt retraction speed problem under special service message number #17419, but Ballard adequately explained in his testimony that the issue involved a "lazy seatbelt such that the seatbelt does not retract as quickly as you would like [on exiting a vehicle] so you potentially could have the seatbelt get slammed in the door or something like that." (Ballard deposition, p. 30), not a retractor lock or failure to restrain defect. Ballard also testified that if there was a retractor lock problem, that it would fall under his area of expertise with the company. (Ballard deposition, p.33, line 17). Thus Ballard's testimony established the lack of a design flaw or defect in the retraction system; and while this does not exclude a safety problem in the retraction system unique to the plaintiffs' vehicle, it does establish that the problem in the plaintiffs' vehicle with the retraction system is or was not common to all such 2003 Ford Explorers. In particular, Ballard was asked on page 37, line 11:

"Q... To the best of your recollection, there were no technical service bulletins or recalls involving the retractor locking or not locking properly?

A. That is my recollection for this particular design type for this vehicle...

Q. How about recalls, would you be aware of any recalls involving this problem?

A. I am not aware of any recalls with the retractor for this particular series of vehicles that would be applicable. In fact, I am not aware of any recall at all involving this retractor."

In this case, the seatbelt assembly system in the plaintiffs' vehicle is critical, not only to plaintiffs' case but to Ford's ability to defend itself by reviewing, testing and observing whether the device was damaged or tampered with in some manner which would prevent its normal operation to restrain the passenger on impact or whether the seatbelt assembly

retraction system was defective or failed to operate properly in the plaintiffs' vehicle.

The Court in *De Los Santos v. Polanco*, 21 AD3d 397, 799 NYS2d 776 (2nd Dept. 2005) noted that:

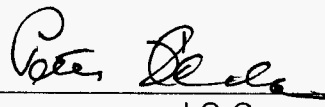
“The Supreme court has broad discretion in determining the appropriate sanction for spoliation of evidence (see *Allstate Ins. Co. v. Kearns*, 309 AD2d 776, 765 NYS2d 806). Because striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness (see *Favish v. Tepler*, 294 AD2d 396, 741 NYS2d 910). Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading “ [citations omitted]... “A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense” citations omitted.

Under this standard set forth above, the plaintiffs are clearly charged with the negligent, not wilful, loss of the critical, central and crucial piece of evidence from which Ford's liability flows, i.e. a defective seatbelt retraction system which allegedly failed to engage and restrain the plaintiff/passenger upon impact. To suggest that the defendant is not severely prejudiced or that it could continue somehow to defend itself without this “key piece of evidence” is unreasonable in light of the allegations contained in the complaint.

Under the facts and circumstances of this case, the extreme sanction of striking the plaintiffs' pleadings and dismissing the action is warranted for the spoliation and loss of the critical and key piece of evidence, i.e. the seatbelt assembly system, upon which the plaintiffs' case rests. See, *The Standard Fire Insurance Company v. Federal Pacific Electric Company*, 14 AD3d 213, 786 NYS2d 41 (1st Dept. 2004).

The foregoing constitutes the decision of the Court.

Dated: December 27, 2007



J.S.C.