

**Nearchou v Sears Roebuck & Co.**

2008 NY Slip Op 30692(U)

February 29, 2008

Supreme Court, Nassau County

Docket Number: 0159-06/

Judge: Daniel R. Palmieri

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*Sum*

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**MARINOS NEARCHOU and EUGENIA NEARCHOU,**

**TRIAL TERM PART 48**

**Plaintiff,**

**INDEX NO.:159/06**

**-against-**

**MOTION DATE:9-26-07  
SUBMIT DATE: 2-6-08  
SEQ. NUMBER - 002**

**SEARS ROEBUCK & CO.,**

**MOTION DATE: 11-29-07  
SUBMIT DATE: 2-6-08  
SEQ. NUMBER - 003 &  
004**

**Defendant.**

-----X

**The following papers have been read on this motion:**

- Notice of Motion, dated 9-4-07.....1**
- Supplemental Affirmation, dated 9-12-07.....2**
- Supplemental Affirmation in Support of Dismissal,  
dated 10-30-07.....3**
- Amended Notice of Motion, dated 11-5-07.....4**
- Affirmation, dated 11-16-07.....5**
- Notice of Cross Motion, dated 11-20-07.....6**
- Affirmation in Opposition, dated 11-27-07.....7**
- Affirmation in Reply, dated 12-12-07.....8**
- Affidavit of Ketchman, dated 12-27-07.....9**
- Correspondence from Pltf. Atty., dated 1-7-08.....10**
- Correspondence from Def. Atty., dated 1-9-08.....11**
- Court's correspondence in response, dated 1-23-08.....12**
- Supplemental Reply, dated 2-4-08.....13**

The motion by defendant to dismiss pursuant to CPLR §3126, as amended and supplemented from time to time, is granted to the limited extent set forth herein and in all other respects is denied. The cross motion by plaintiff pursuant to CPLR §3124, to compel certain discovery is granted as set forth herein and in all other respects is denied.

This is an action for personal injuries, sounding in products liability, resulting from the use by plaintiff of a table saw purchased by plaintiff from defendant.

The original motion was to dismiss based on the failure of plaintiff Eugenia Nearchou to attend a deposition and the failure of plaintiffs to make the saw and its accessories available for inspection by defendant's expert. Those items having been satisfied before submission for decision, the motion was amended to seek dismissal based on plaintiff's failure to produce for inspection by defendant, the saw blade that was in the saw at the time of the injury. Plaintiff has submitted an affidavit that he did not intentionally make the blade unavailable, that it had been stored in his garage to which others also had access, counters that his dispute is not with the blade but with the "push stick" and requests that defendant provide a duplicate blade. Defendant in response submits an affidavit to the effect that defendant no longer sells the model of the subject saw. Both parties have submitted affidavits from experts, defendant's contending that the missing blade is necessary in order for him to reconstruct the accident and plaintiff's contending that it is not. Numerous photographs of the saw were taken by plaintiff shortly after the accident and by defendants

pursuant to a preliminary inspection in 2006. All photographs were identified by plaintiff at his deposition. At his deposition, plaintiff claimed that the blade that injured him was the blade that came in the box with the saw.

Defendant does not claim that the photographs are inadequate but does object to the submission by plaintiff of an expert affidavit in January 2008. With the Court's permission, defendant submitted a supplemental reply to the expert affidavit. For the reasons set forth in the Court's letter identified above and for the additional reason that defendant changed the direction of this motion two months after it was initially served, the Court has considered the affidavit of plaintiff's expert.

The plaintiff's cross motion seeks to compel defendant to attend a previously agreed upon deposition and to compel defendant to produce a duplicate saw blade of the kind which originally came with the saw. Defendant argues that plaintiff has waived the right to take a deposition by reason of the failure to conduct same in compliance with previously established time limits and plaintiff gives no explanation as to the reason for the delay. Since the deposition is to be in Chicago, Illinois, for defendant's convenience (albeit with plaintiff's travel expenses to be borne by defendant) and defendant has not demonstrated any prejudice by reason of the delay, the Court will grant plaintiff the opportunity to notice a deposition in the original location, such notice to be served no later than 15 days after the date hereof for a date not later than 15 days thereafter. In the event plaintiff fails to comply with the above, plaintiff shall, without further order, be deemed to have waived the request. The parties may alter the above time limits by stipulation but in no event shall defendant's

deposition take place later than 60 days following the date of this Decision and Order. Expenses shall be as set forth in this Court's prior conference order dated January 25, 2007..

Defendant's affidavit in opposition to producing a substitute saw blade says that defendant no longer sells the saw model in this case but does not state that similar blades are not available from existing inventory. Defendant shall within 30 days following the date of this Decision and Order give to plaintiff a saw blade comparable to the blade that came with the saw or an affidavit by a person with actual knowledge who performed an inventory search that comparable blades are no longer stocked by defendant. In the event of the latter, the affidavit shall state the name and address of the supplier of the blades used in plaintiff's saw.

Defendant's request for dismissal based on the loss of the original blade is denied.

The drastic sanction of striking a responsive pleading and/or dismissal may be imposed on a party who negligently destroys key evidence absent the commonly required willful or contumacious conduct, (*See E.N. Howell Co. v. S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2d Dept. 2007]), where the opposing party is deprived of the ability to establish a claim or defense. *Enstrom v. Garden Place Hotel*, 27 AD3d 1084, 1086 (4th Dept. 2006) (quoting *Iannucci v. Rose*, 8 AD3d 437, 438 (2d Dept. 2004); *see also, DiDomenico v. C&S Aeromatik Supplies*, 252 AD2d 41, 53 (2d Dept. 1998)). In consideration of fundamental fairness, (*De Los Santos v. Polanco*, 21 AD3d 397, 398 [2d Dept. 2005]), where the opposing party's ability to bring a claim or raise a defense is preserved through other evidence, such a drastic sanction as dismissal and/or striking the pleading entirely is unfitting.

The court possesses broad discretion in determining suitable sanctions for spoliation of evidence. *See Iannucci v. Rose*, 8 AD3d 437, *supra*. In the alternative to striking a pleading, less severe sanctions may be appropriate. *Molinari v. Smith*, 39 AD3d 607 (2d Dept. 2007); *De Los Santos v. Polanco*, 21 AD3d at 398. Courts have allowed a negative inference charge at trial in regard to the destruction of evidence. *See generally, Molinari v. Smith*, 39 AD3d 607, *supra.*; *see generally, Enstrom v. Garden Place Hotel*, 27 AD3d 1084, *supra.*; *see De Los Santos v. Polanco*, 21 AD3d 397, *supra.*

Here, it can not be said that the reason for the loss was to secret evidence or that the loss thereof will impede the defendant's ability to present its case. Although a party's destruction of, "key evidence before it can be examined by the other party's expert," can warrant dismissal and/or striking of the pleadings, (*Squiteri v. City of New York*, 248 AD2d 201 [1st Dept. 1998]), defendant has not established that its expert witness would be so substantially impeded based on the absence thereof. Without adequate proof, the draconian remedy in effect granting judgment to the defendant, is denied. It is especially noted that defendant's expert fails to refer to at all the photographs that were previously taken and fails to mention that for the purposes of his own testing, a duplicate blade is not obtainable.

The Court finds three alternative sanctions appropriate. Based on the conceded loss of the original blade, at trial, defendant will be entitled to a jury instruction that a negative inference may be drawn that the loss was deliberate. *DiDomenico v. C& S Aeromatik Supplies*, 252 AD2d at 52; PJI3d 1:77.

“Where a crucial item of evidence is lost... negligently, the party responsible should be precluded from offering evidence as to its condition.” *Ren v. Professional Steam-Cleaning, Inc.*, 271 AD2d 602 (2d Dept. 2000). Plaintiffs are, likewise, estopped from disputing the use at trial of the photographic evidence and inferences drawn from such depictions or from offering any evidence that the condition of the blade was other than as shown in the photographs.

A party’s conduct may, at times, constitute evidence of admission of fault or by parity of reasoning lack thereof. *Nantasket, Inc. v. E. F. Raboy & Co.*, 31 AD2d 804 (1st Dept. 1969); *see* PJI3d 1:56. Here, the failure to preserve the blade constitutes an admission that the blade played no role in causing the accident other than being the direct cause of the injury. Testimony regarding the failure by plaintiff to preserve the blade shall be permitted as an adverse admission of the above by plaintiffs through their conduct. *Conderman v. Rochester Gas & Electric*, 180 Misc2d 8 (1998).

The trial judge shall determine the precise wording of all jury instructions ordered by this Court.

The attorneys are reminded that absent Court approval, motion papers shall comport with CPLR §2214 and that all other papers submitted for or against a motion shall be disregarded. *See e.g. Rubens v. Fund*, 23 AD2d 636 (2d Dept. 2005). Further, it is well established that affirmations of attorneys who lack personal knowledge are of no probative or evidentiary value and that submissions which do not so comply shall be similarly

disregarded. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 (2d Dept. 2006). The same rule will apply to any photograph evidence that is not properly authenticated *Morales v. City of New York*, 278 AD2d 293 (2d Dept. 2000).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 29, 2008



HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Law Offices of Jeffrey S. Lisabeth  
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**ENTERED**

MAR 04 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**