

Chawki v General Motors, Inc.

2008 NY Slip Op 30832(U)

March 10, 2008

Supreme Court, Kings County

Docket Number: 0038262/2001

Judge: Bernadette Bayne

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At an IAS Term, Part CCP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 10th day of March 2008.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

MICHAEL CHAWKI and HWEIDA CHAWKI,

Plaintiffs,

- against -

GENERAL MOTORS, INC., and
A & F COLLISION CO.,

Defendants.

DECISION AND ORDER

Index No. 38262/01

The following papers numbered 1 to 3 read on this motion:

Papers Numbered

Notice of Motion/
Affidavits (Affirmations) Annexed _____

_____ 1 _____

Affirmation in Opposition _____

_____ 2 _____

Affirmation in Reply _____

_____ 3 _____

Plaintiff MICHAEL CHAWKI (hereinafter M.CHAWKI) was allegedly involved in a "one-car" motor vehicle accident wherein the motor vehicle that he was driving struck a tree. Plaintiff M.CHAWKI claims that, despite the fact that it was the front end of his vehicle that

struck the tree, the front air bag on the driver's side did not deploy and, as a result, he sustained serious injuries. In or about October of 2001, the plaintiffs commenced suit against the within defendants, GENERAL MOTORS, INC. (hereinafer G.M.) and A & F COLLISION, CO., (hereinafter A & F) with causes of action sounding in negligence, breach of implied and express warranties, and defective design, and a separate cause of action for loss of services on behalf of plaintiff HWEIDA CHAWKI (hereinafter H.CHAWKI). Defendant G.M. appeared by service of a verified answer on or about April of 2002. To date, defendant A & F has not appeared in the action, and as no default judgement was ever take against them, the complaint, as against defendant A & F is dismissed. *See* CPLR 3215(c).

Defendant G.M. now moves this Court for an Order, pursuant to CPLR §3126, striking the plaintiff's complaint, or in the alternative, precluding the plaintiff from offering any testimony regarding the vehicle that is the subject of the lawsuit, on the grounds that, despite multiple requests and a Court Order, the plaintiffs failed to maintain and preserve the subject motor vehicle so as to permit the defendants to have an opportunity to inspect the vehicle, and more particularly, the driver's front air bag and its associated systems.

In opposition to the motion, the plaintiffs argue that any failure to inspect the subject automobile was the sole fault of defendant G.M., as they had ample opportunity to inspect the car before it's disposal. The plaintiffs additionally argue that the disposal of the subject vehicle does not and should not prejudice defendant G.M.'s defense of this case, due to the fact that defendant G.M. can utilize the expert report prepared by the plaintiffs' expert, and because "common sense" is all that is required to determine this case and that expert opinion is not necessary.

Discussion

CPLR §3126 affords the Court a host of remedies to choose from when deciding the appropriate sanction for a party that has failed to obey a Court Order regarding disclosure.

Indeed, §3126, entitled “Penalties for refusal to comply with order or to disclose” provides that:

“If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Although the particular sanction that a Court chooses is completely within the discretion of that Court, there is a strong sentiment that the sanction should be proportionate to the wrongdoing, or in the words of Gilbert and Sullivan, “the punishment should fit the crime”. “Courts will look to the extent that the spoliation of evidence may prejudice a party and whether

a dismissal will be necessary as a matter of elementary fairness in determining whether to impose sanctions for spoliation of evidence.”, Miller v. Weyerhaeuser Co., 3 A.D.3d 627, 771 N.Y.S.2d 200, (3rd Dept., 2004), leave to appeal dismissed 3 N.Y.3d 701, 785 N.Y.S.2d 28, 818 N.E.2d 670, appeal dismissed 5 N.Y.3d 822, 804 N.Y.S.2d 32, 837 N.E.2d 732. “Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction of preclusion may be appropriate.”, Foncette v. LA Express, 295 A.D.2d 471, 744 N.Y.S.2d 429, (2nd Dept., 2002). “Generally, the nature and degree of the penalty to be imposed against a party who refuses to comply with court-ordered discovery is a matter within the discretion of the court.”, Mahopac Ophthalmology, P.C. v. Tarasevich, 21 A.D.3d 351, 799 N.Y.S.2d 568, (2nd Dept., 2005). “The trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent a clear abuse of that discretion.”, Jessmer v. Martin, 46 A.D.3d 1059, 847 N.Y.S.2d 288, (3rd Dept., 2007).

While this approach might seem to be the most fair or even axiomatic to some, this Court cannot ignore the guidance provided by the Court of Appeals in these situations. In Kihl v. Pfeffer, 94 N.Y.2d 118, 700 N.Y.S.2d 87, (1999), the Court, while hearing an appeal on a disclosure motion, took the appeal as an occasion to “put the writing on the wall”, with the desire that it would be read not only by the litigants, but by the lower courts as well, hopefully generating a less indulgent attitude about a party’s recalcitrance in disclosure proceedings in the future. Writing for the court in a unanimous opinion, Chief Judge Kaye declared that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” With specific reference to disclosure orders, the Court added that “we underscore that compliance with a disclosure order requires both a timely

response and one that evinces a good-faith effort to address the requests meaningfully.”

It is undisputed that the motor vehicle that is the subject of this lawsuit was disposed of by the plaintiffs prior to defendant G.M. having an opportunity to inspect it. Now the Court must determine if the disposal and/or destruction of the subject motor vehicle was in violation of a Court Order, or if it was done despite the fact that notices had been sent to the plaintiffs’ counsel by defendant G.M. requesting an inspection, or both. The Court must also determine who knew that the car had been disposed of and when, as well as who was responsible for actually disposing of the car. Lastly, the Court must examine the prejudice, if any, to the defendant when determining the appropriate sanction.

The relevant facts, from the Court’s perspective, are as follows:

On October 13, 1998, the front end of the motor vehicle that plaintiff M.CHAWKI was driving struck a tree. The driver’s side front air bag did not deploy as a result of the impact.

At some point soon after the accident occurred, the plaintiff sought counsel from Dominic Sorrentino, Esq. While it is unclear if the plaintiff ever actually retained Mr. Sorrentino, the record reveals that on or about November 12, 1998, Mr. Sorrentino had the subject motor vehicle inspected by an engineer that he had retained.

Despite the fact that attorney Sorrentino had the car inspected by an engineer shortly after the accident, attorney GEORGE STATFELD (hereinafter STATFELD) claims that, in November of 1998, he was retained by the plaintiffs to represent them for their claims resulting from the subject accident.

On October 11, 2001, three days before the statute of limitations ran on their claim, the

plaintiffs, by attorney STATFELD, filed a summons and complaint.

On April 30, 2002, defendant G.M. appeared by service of a verified answer.

On August 20, 2002, plaintiff M.CHAWKI sent a letter to attorney STATFELD stating, amongst other things, that the motor vehicle was still in his possession.

On September 17, 2002, plaintiff M.CHAWKI disposed of the subject motor vehicle.

On September 25, 2002, eight days after the plaintiffs disposed of the car, attorney STATFELD sent a letter to defendant G.M. *inquiring* if the plaintiff could dispose of the vehicle.

By letter dated October 15, 2002, defendant G.M. responded to attorney STATFELD's September 25, 2002 letter by requesting that the plaintiffs enter into a stipulation agreeing to preserve the subject motor vehicle and requesting that arrangements be made so that their expert engineer could inspect the car.

Defendant G.M. sent similar letters requesting that the plaintiffs stipulate to preserve the subject motor vehicle on June 26, 2003 and again on August 28, 2003. It appears that defendant G.M. never received any response from the plaintiffs regarding the proposed stipulation to preserve the subject automobile.

On November 14, 2003, the parties entered into a preliminary conference Order that, amongst other things, directed that the motor vehicle in question would not be subject to any "destructive testing, disassembly or alteration", and that if "destructive testing, disassembly or alteration" was necessary, none would be conducted unless previously agreed to by the parties in writing, or by a separate order of the Court. In addition, the preliminary conference Order also provided that the "plaintiff will make the subject vehicle available for an initial inspection, having the limited purpose of downloading information from the subject vehicle concerning the

air bag system”, and that “any further inspection will be conducted as agreed upon by the parties and if no agreement can be reached, as Ordered by the Court.”

On January 14, 2004 and on February 6, 2004, defendant G.M. wrote letters to plaintiffs’ counsel regarding the inspection of the subject motor vehicle.

On or about October 4, 2004, during a telephone call, plaintiffs’ counsel informed defendant G.M. that the plaintiffs had disposed of the subject motor vehicle.

In an affidavit dated December 20, 2004, plaintiff M.CHAWKI states that he disposed of the subject motor vehicle on September 17, 2002 because he was in an “adverse” financial situation.

-On March 28, 2005, the plaintiffs served a copy of their “expert report”, from the inspection conducted on November 20, 1998, on the defendants. It should be noted that although the cover page of the report is dated March 28, 2005, the report itself states that the inspection was conducted on November 20, 1998, and there is also an unexplained “code” that appears throughout the papers: “SC[p]-98-11.12”. While it is unclear what the code means, and no explanation is offered, the Court surmises that “98” is the year and that “11.12” represent a day and month. It may be that the plaintiffs’ expert was retained on November 12, 1998, or it may be that the report was written on December 11, 1998. Regardless of what the code means, it is clear that despite the fact that the plaintiffs’ engineer had completed his inspection of the subject motor vehicle in November of 1998, the plaintiffs waited until March of 2005 before exchanging a copy of the report from that inspection with the defendant.

Based on the facts as related by the parties, the Court finds that the plaintiffs wrongfully disposed of the motor vehicle that is the subject of this lawsuit, in blatant violation of a Court

Order directing them to maintain and preserve the car, as well as several notices from defendant G.M. requesting that the plaintiffs maintain and preserve the subject automobile.

While the proof seems to indicate that the plaintiffs were solely responsible for the disposal of the car, questions still remain regarding the extent of attorney STATFELD's knowledge that the car had been disposed of, as well as whether he directed or gave permission to the plaintiffs to dispose of the car. There is something ironically disturbing about the fact that the plaintiffs disposed of the subject vehicle on September 17, 2002, and that approximately one week later, on September 25, 2002, attorney STATFELD wrote a letter to the defendants inquiring as to whether or not the plaintiffs could dispose of the car. Based on correspondence between the plaintiffs and attorney STATFELD that preceded the disposal of the subject motor vehicle, it seems unlikely that the plaintiffs would have disposed of the car without checking with their attorney first. The fact that attorney STATFELD continuously ignored the defendants requests that he enter into a stipulation to maintain and preserve the subject motor vehicle, makes the issue of attorney STATFELD's knowledge that much more vexing. To confuse matters further, on November 14, 2003, all parties entered into a preliminary conference Order wherein the plaintiffs were directed to maintain and preserve the automobile in question. It is difficult for this Court to reconcile the apparent fact that attorney STATFELD knew that the plaintiffs' car had been disposed of, with the fact that he entered into a preliminary conference Order wherein he agreed not to dispose of the subject automobile. However, as there is no direct evidence that attorney STATFELD knew of or instructed the plaintiffs to dispose of the subject vehicle prior to his entering into the preliminary conference Order, the Court is hesitant to sanction him personally without further proof of his complicity.

Plaintiffs' counsel's attempt to attribute defendant G.M.'s failure to have the car inspected to the "defendant's outlandish procrastination" is far from persuasive, and is clearly disingenuous. The plaintiffs base their allegation of "outlandish procrastination" on their claim that, shortly after he was retained, attorney STATFELD sent a letter to defendant G.M. putting the defendant on notice of the alleged accident and inviting them to conduct an inspection of the subject vehicle. The plaintiffs argue that since the defendant was given an opportunity to inspect the vehicle one month after the accident occurred, it is inappropriate for them to complain nine years after the accident that they never had an inspection of the car.

This Court completely disagrees with the plaintiffs on this point. When plaintiffs' counsel purportedly sent the letter to defendant G.M., the summons and complaint had not been filed and there was no lawsuit between the parties. The mere fact that plaintiffs' counsel sent a "claim letter" to a potential defendant, years before an action was even commenced, did not obligate that defendant to conduct any investigation at all, much less, actual court-related discovery. It is absurd to suggest that defendant G.M. should have conducted an inspection of the subject motor vehicle based only on a claim letter, and their failure to conduct said inspection prior to the commencement of the lawsuit is not proof of lack of diligence on the part of defendant G.M.

Defendant G.M. has issues with the purported claim letter, and so does the Court. Defendant G.M. not only disputes receiving the aforementioned letter, but disputes its' authenticity as well. Defendant G.M. claims that they keep all records and correspondence and that upon reviewing their entire file, they were unable to locate the letter in question, and further claim that the first time that they saw the November 10, 1998 letter, was in the plaintiffs'

opposition papers to this motion. Defendant G.M. points out that in addition to it being highly unusual or unlikely that they could have lost the letter, the letter in question was not sent by certified mail, that there is no affirmation or affidavit of service, and most importantly, that the content of the letter contradicts all of the correspondence and events that occurred after the letter was allegedly mailed to the defendants. While the Court recognizes that most letters do not have affidavits of service, it is, nevertheless, curious that the letter from attorney STATFELD to defendant G.M. is not on his law firm's letterhead and was not sent by certified mail. While this is not determinative by itself, the Court finds it, at the very least, to be highly unusual and perhaps irregular, that an attorney, faced with a possible products liability claim against a major automobile manufacturer, would not mail his initial claim letter on his company's letterhead, and by a method wherein he could prove not only that he sent the letter, but that the defendant received the letter.

The plaintiffs' claim that they disposed of the subject car because of the "dire financial situation" that they were in, is equally unpersuasive. The only proof that has been offered to demonstrate or verify the plaintiffs' "dire financial situation" is an "Order of Discharge of Debtor". The only thing that the aforementioned Order demonstrates or proves to this Court is that the plaintiffs were relieved of their debts. If the Bankruptcy Court was aware that the plaintiffs had a personal injury lawsuit pending, and that the subject motor vehicle was a crucial piece of evidence in that case, it seems highly unusual and highly unlikely that the bankruptcy Court would Order the plaintiffs to dispose of the car. Without proof that the Bankruptcy Court specifically Ordered the plaintiffs to dispose of the subject motor vehicle, the plaintiffs' excuse of being in a "dire financial situation" is rejected. Regardless of the excuse, it is clear that the

plaintiffs purposefully and intentionally disposed of the subject motor vehicle.

As the subject motor vehicle, its' air bags and associated systems are at the crux of this case, the disposal of the car by the plaintiffs severely prejudices defendant G.M. and prevents them from being able to mount a proper defense. Defendant G.M. has adequately demonstrated that they were not dilatory in conducting, or attempting to conduct, an inspection of the subject automobile, and that they will be severely prejudiced if this action is permitted to continue to trial. As testified to by their witness, Kathryn Francis Anderson, the inability of defendant G.M. to access the subject vehicle's computer system, which would have enabled the defendant to download data specific to the air bag in question, effectively prevents the defendant from being able to properly defend any and all of the plaintiffs' causes of action. The proof shows that the plaintiffs knowingly, wilfully and intentionally disposed of the car that is the subject of this lawsuit, and as such, their complaint is stricken and the case is dismissed, with prejudice.

“When a party destroys essential physical evidence such that its opponents are prejudicially bereft of appropriate means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of its pleadings.”, Deveau v. CF Galleria at White Plains, LP., 18 A.D.3d 695, 796 N.Y.S.2d 119, (2nd Dept., 2005). “Where a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading.”, Barahona v. Trustees of Columbia University in City of New York, 16 A.D.3d 445, 792 N.Y.S.2d 113, (2nd Dept., 2005). “Sanctions may be imposed where critical items of evidence are negligently disposed of by a litigant before the opposing party has an opportunity to properly review and inspect them.”, Miller v. Weyerhaeuser Co., supra. “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; this is especially true where that which is lost is the very instrumentality giving rise to plaintiff's injuries.”, Cutroneo v. Dryer, 12 A.D.3d 811, 784 N.Y.S.2d 247, (3rd Dept., 2004).

Conclusion

Accordingly, it is

ORDERED, that the defendant's motion for a Order striking the plaintiffs complaint and dismissing the plaintiffs action pursuant to CPLR §3126, is granted, with prejudice, and it is further

ORDERED, that pursuant to CPLR §3215, the plaintiffs' action against defendant A & F COLLISION is dismissed.

This constitutes the Decision and Order of the Court.

E N T E R


HON. BERNADETTE BAYNE
J. S. C.