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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

ENCOMPASS INDEMNITY COMPANY a/s/o JOSEPH CIONE,

Plaintiff,

-against-

THEODOR O. FROBIN,

Defendant.

Motion Sequence #1
Submitted January 18, 2008

INDEX NO: 18839/07

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3
Supplemental Reply Affirmation.....4
Plaintiff letter, date January 23, 2008.....5

Requested Relief

Defendant, THEODOR O. FROBIN, (hereinafter referred to as "FROBIN"), moves for an order, pursuant to CPLR §3126, striking the complaint and dismissing the action as a sanction for spoliation of material evidence. Plaintiff, ENCOMPASS INDEMNITY COMPANY (hereinafter referred to as "ENCOMPASS") a/s/o JOSEPH CIONE, opposes the motion, which is determined as follows:

Initially, the Court notes that, in this litigation, in which three (3) actions have been joined for trial by Short Form Order dated September 11, 2007, the instant motion was previously submitted to the Supreme Court, New York County, for consideration, however, before the motion could be heard for oral argument, venue was transferred to the Supreme Court, Nassau County. With few changes, the motion is now submitted to the undersigned for determination.

Background

All three (3) actions arise from the same incident which took place on January 24, 2006, on Marcus Avenue in the Village of Lake Success, County of Nassau, State of New York. It is alleged that JOSEPH CIONE was operating his motor vehicle, a 1957 Dual Ghia, with his wife, PATRICIA CIONE, as a passenger, when it was struck in the rear by a vehicle owned and operated by defendant, THEODOR O. FROBIN. CIONE commenced Action #1 for personal injuries on October 31, 2006, and FROBIN commenced Action #2 on January 17, 2007, alleging an assault and battery by Mr. CIONE after the motor vehicle collision. Action #3 is a subrogation action for property damage arising from the accident, which was commenced by ENCOMPASS on July 19, 2006, the action which is actually first in time.

On the instant motion to dismiss, counsel for FROBIN asserts that it served ENCOMPASS a Notice for Discovery and Inspection, requesting a physical inspection of the 1957 Dual Ghia automobile involved in the January 24, 2006 accident. The Notice was dated September 15, 2006, almost eight (8) months after the accident. In its response, ENCOMPASS advised that it was unable to provide a physical inspection of the vehicle which was stored at Maple Place Garage, from January 24,2006 until March 7, 2006, and

then transferred to CoPart Access and later sold, on May 10, 2006, to Classic Used Auto Parts. It is counsel for defendant's position that FROBIN will suffer extreme prejudice as a result of the impossibility of an examination of the subject vehicle by his expert because said vehicle is a "one of a kind" classic car which should have been retained by ENCOMPASS to allow potential defendants discovery. Counsel for FROBIN asserts that ENCOMPASS intentionally and/or negligently sold the car for salvage without permitting defendant to inspect said vehicle, despite defendant's request to do so, and therefore spoiled crucial evidence for which its subrogation action should be dismissed.

In opposition to the motion, counsel for ENCOMPASS points out that while State Farm, defendant's insurance carrier, claims to have contacted "plaintiff" in January and February of 2006 to view the vehicle, it is clear that defendant is referring to subrogor, JOSEPH CIONE and not to plaintiff, ENCOMPASS. By affidavits of JOSEPH CIONE and Elke Levanites, the adjuster for ENCOMPASS, it is asserted that neither JOSEPH CIONE nor ENCOMPASS were ever contacted by State Farm requesting a physical inspection of the vehicle. Counsel for ENCOMPASS states that, contrary to State Farms' contention that the subject vehicle was on the subrogor's property on January 30 and February 1, 2006 and that they were denied access to view the vehicle, in reality the vehicle was being stored at the Maple Place Garage, where it was available for inspection, and, thereafter, at CoPart Access from March 7 through May 10, 2006, where a physical inspection could have been arranged had defendant contacted ENCOMPASS and requested same. Counsel for ENCOMPASS asserts that it retained possession of the automobile for more than fifteen (15) weeks after the accident, without any request for inspection, and that it afforded defendant a reasonable opportunity to inspect the vehicle and defendant failed

to act. Counsel states that Ed Henrich, an adjuster for ENCOMPASS, inspected the vehicle and determined it to be a total loss, and subrogor was paid the amount of $250,000.00, the full amount of the policy, based upon the reasonable value of the vehicle. On May 10, 2006, more than three (3) months after the accident, ENCOMPASS sold the vehicle for salvage through CoPart Access to Classic Used Auto Parts for $50,997.10, and now seeks to recover $199,002.10, the amount paid to the subrogor less the amount obtained through salvage. ENCOMPASS claims it is not its duty to track down and contact other insurance companies to notify them of their right to inspection, but rather it is the responsibility of the other parties to the accident to seek inspection within a reasonable period of time.

In reply, counsel for FROBIN contends that plaintiff is attempting to switch the burden of preserving evidence by asserting that defendant did not timely demand inspection, when it is the duty of plaintiff to preserve evidence that will be used in pending litigation. While counsel acknowledges that the litigation was not commenced until July 2006, after the vehicle was sold for salvage, it is counsel's position that when a claims representative determines that a reported accident is not the fault of its insured, they begin almost immediately to prepare the claim for a future lawsuit or intercompany arbitration based on the theory of subrogation. Therefore, counsel concludes that ENCOMPASS anticipated pending litigation and spoiled critical evidence, the rare motor vehicle in this case.

The Law

Sanctions for the spoliation of evidence are within the broad discretion of the courts. *Iannucci v Rose*, 8 AD3d 437, 778 NYS2d 525 (2nd Dept. 2004). The Court "may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation'". *Iannucci v Rose, supra,* quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 682 NYS2d 452 (2nd Dept. 1998), and citing *Favish v Tepler*, 294 AD2d 396, 741 NYS2d 910 (2nd Dept. 2002) and *Baglio v St. John's Queens Hosp*, 303 AD2d 341, 755 NYS2d 427 (2nd Dept. 2003). Nevertheless, "[r]ecognizing that striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." *Iannucci v Rose, supra*, citing *Favish v Tepler, supra*. Where the moving party is not deprived of their ability to establish their claim or defense, a sanction less severe than striking a pleading is appropriate. *Iannucci v Rose, supra*, citing *Chiu Ping Chung v Caravan Coach Co.*, 285 AD2d 621, 728 NYS2d 767 (2nd Dept. 2001) and *Klein v Ford Motor Co.*, 303 AD2d 376, 756 NYS2d 271 (2nd Dept. 2003).

The Court requires the showing of "severe" prejudice to defendant in order to merit dismissal for spoliation of evidence. *Kirschen v Marino*, 16 AD2d 555, 792 NYS2d 171 (2nd Dept. 2002); *Kirkland v New York City Housing Authority*, 236 AD2d 170, 666 NYS2d 609 (1st Dept. 1997). In *Klein v Ford Motor Company*, 303 AD2d 376, 756 NYS2d 271 (2nd

Dept. 2003), Second Department found that dismissal was an inappropriate sanction given the availability of other evidence and the existence of numerous photos depicting the spoiled evidence.

Discussion

The defendants' application to strike the pleading based upon the salvage of the subrogor's vehicle is denied. It is undisputed that FROBIN rear ended subrogor's vehicle and an inspection of the vehicle to prove liability is not required. With respect to damages, plaintiff has provided numerous phonographs depicting subrogor's vehicle and defendant may depose both the subrogor and plaintiff's adjuster. The subrogor is familiar with the value of the 1957 Dual Ghias as a classic car and the adjuster, Ed Henrich, inspected and investigated the car and can testify to the basis for finding the car a total loss and recommending a settlement value of $250,000.000. Additionally, defendant has the police report and estimates and an expert witnesses can testify to the value of similar 1957 Dual Ghias, which counsel for ENCOMPASS asserts are worth over the $250,000.00 settlement value in this case.

After a careful reading of the submissions herein, It is the judgment of the Court that "[t]he [defendant] failed to demonstrate that the [plaintiff] intentionally attempted to hide or destroy evidence or that they 'negligently disposed of any key physical evidence after being placed on notice that it might be needed for future litigation.'" *Goll v American Broadcasting Companies, Inc.*, 10 AD3d 672, 783 NYS2d 599 (2nd Dept. 2004) citing *Popfinger v Terminix Intl. Co. Ltd. Partnership,* 251 AD2d 564, 674 NYS2d 769 (2nd Dept. 1998) and *Andretta v Lenahan*, 303 AD2d 527, 756 NYS2d 454 (2nd Dept. 2003). The

Court finds that ENCOMPASS waited a reasonable amount of time without contact from defendant before salvaging the vehicle and that defendant has not suffered the "severe prejudice" required for dismissal of the action. It is therefore

ORDERED, that defendant, THEODOR O. FROBIN's motion for an order striking the complaint and dismissing the action as a sanction for spoliation of material evidence is denied.; and it is further

ORDERED, that the parties are to appear for a previously scheduled Certification Conference before the undersigned on April 17, 2008 at 9:30 A.M.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 26, 2008

WILLIAM R. LaMARCA, J.S.C.

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