[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Kumar

INDEX NO. 105010/05

MOTION DATE

- v -

MOTION SEQ. NO. 004

Mercedes Benz

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.**

FILED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/17/09

JUDITH J. GISCHE, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

VARENDER KUMAR and RUPA KUMAR,

Plaintiff,

-against-

MERCEDES-BENZ USA, LLC and RALLYE MOTORS, INC.,

Defendants.

----------x

**Decision/Order**
Index No.: 105010/05
Seq. No. : 004

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

| **Papers** | **Numbered** |
|---|---|
| Def's n/motion w/ELB affid, exhs | 1 |
| Pltf's SS affirm in opp, exhs | 2 |
| Def's ELB reply affid, exh | 3 |
| 2/13/09 Transcript from Oral Argument | 4 |
| Deposition of Isabel Barata, M.D. Transcript dated 2/27/08 | 5 |
| Deposition of Baruch Toledano, M.D. Transcript dated 3/7/07 | 6 |
| Deposition of Millie Rosado Transcript dated 3/7/07 | 7 |
| Deposition of Jeffrey Shoemaker Transcript dated 1/29/08 | 8 |
| Deposition of Jeffrey Ketchman Transcript dated 3/28/07 | 9 |
| Deposition of Rupa Kumar Transcript dated 5/9/06 | 10 |
| Deposition of Charles Ludemann Transcript dated 5/15/07 | 11 |
| Deposition of R. Thomas Brunner Transcript dated 5/15/07 | 12 |
| Deposition of Virendar Kumar Transcript dated 1/18/07 | 13 |



*Upon the foregoing papers, the decision and order of the court is as follows:*

This is a personal injury and product liability action arising from an alleged defective condition in a 2003 model year Mercedes-Benz E500 automobile (the "Vehicle"). Defendant Mercedes-Benz USA, LLC ("MBUSA") is the sole authorized wholesale distributor of Mercedes-Benz brand vehicles in the United States. Defendant Rallye Motors, Inc. ("Rallye") is the car dealer that leased the Vehicle to plaintiffs.

Defendants now move, pursuant to CPLR § 3126 and 3212, to dismiss the complaint on the grounds that plaintiffs Varender Kumar ("Mr. Kumar") and Rupa Kumar ("Mrs. Kumar") spoliated evidence, thereby prejudicing defendants' ability to defend this lawsuit. Defendants, alternatively move to dismiss the claim for punitive damages. Mrs. Kumar has discontinued her claims in this action; the only claims remaining are those asserted by Mr. Kumar.[1] Mr. Kumar opposes the motion.

Summary judgment relief is available since issue has been joined and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The Vehicle and the accident

Plaintiff leased and took possession of the Vehicle on or about January 22, 2003 from Rallye pursuant to a Lease also dated January 22, 2003. On the same date, Rallye assigned the lease to DCFS Trust.

On February 21, 2004, plaintiff was catering a wedding reception at the Crest Hollow Country Club ("Crest Hollow") in Syosset, New York. Plaintiff arrived at Crest Hollow at approximate 6-6:30 p.m. and stayed until approximately 12 -12:30 a.m. Plaintiff testified that he consumed two or three glasses of red wine beginning at 11:30 p.m. - 12:00 a.m. At approximately 1:05 a.m. that night, plaintiff was driving the Vehicle home from Crest Hollow when he crashed into a utility pole and tree off of Route 107 in Old Brookville, New York. Plaintiff alleges that the Vehicle's sensotronic brake control ("SBC") system was defective in design and manufacture and that the defendants were aware of this defect but failed to take the appropriate steps to recall the Vehicle or warn plaintiff and the public of the associated risks.

[1] For clarification, further references to plaintiff herein are meant to indicate Mr. Kumar, only.

Mr. Kumar testified at his deposition that when he pressed the brake pedal, it went down to the floor with no resistence. He testified that he pumped the brake pedal "maybe two or three times, and then [he] hit the pole and tree." However, immediately after the accident, Critical Care Technician Jeffrey Shoemaker of the East Norwich Fire Company, a first responder, testified that plaintiff told him at the scene that plaintiff was "getting sleepy" and "fell asleep" while driving the car. Mr. Shoemaker did not recall plaintiff making any statements about the brakes or any other malfunction of the Vehicle. These statements were recorded in the Ambulance Call Report, which has been provided to the court.

After the accident, plaintiff was transported to North Shore University Hospital. During the course of plaintiff's treatment, it was noted that plaintiff had "ETOH on breath."[2] A blood test was done at that time, and plaintiff's blood alcohol level was reported at 2:34 a.m. as 224 milligrams per decileter. The legally permitted blood alcohol level while operating a vehicle in New York State is less than 80 milligrams per decileter.

The recalls

In October 2004, MBUSA initiated a recall of certain vehicles, Safety Recall #2004-050014, which included the Vehicle, in connection with the SBC system ("Recall #1"). Recall #1 provided that dealers would update the software for the SBC system to prevent a situation where the SBC pump motor may run out of permissible tolerances, thereby triggering the hydraulic back up function mode. Another safety recall was initiated in December 2005, Safety Recall #2005-110001, which also included the Vehicle and the SBC system ("Recall #2"). Under Recall #2, dealers were to install a bracket and replace

[2] ETOH is a shorthand abbreviation for ethanol, the type of alcohol found in alcoholic beverages

ground wire to prevent the SBC system from shifting to hydraulic back up mode.

Defendants have provided the affidavit of R. Thomas Brunner ("Brunner"), a Product Analysis Engineer for MBUSA. Brunner claims that in 2004, DaimlerChrysler AG ("DCAG"), the manufacturer of Mercedes-Benz vehicles, had determined that the SBC system would malfunction in certain Mercedes-Benz vehicles not routinely serviced and having an "extremely high mileage combined with a high number of brake actuations" or a "high brake actuation frequency". According to Brunner, in March 2004, DCAG initiated service measures related to the SBC system in Mercedes-Benz E-Class European taxi cab fleets. Brunner opines that the SBC system defect was unlikely to occur in vehicles not subject to the "extraordinary use and maintenance circumstance presented by the E-Class European taxi cab fleet."

Plaintiff claims that the defendants had knowledge of the dangerous defect before the recalls were made due to complaints in European markets about the same or similar defects. Plaintiff also maintains that the defendants failed to take corrective measures with respect to the alleged defect in the Vehicle when the Vehicle was brought in for service prior to the accident.

The motion

The principal issue on this motion arises from the fact that the Vehicle no longer exists. After the accident, the Vehicle was towed from the scene by Martino Auto Body, a collision shop, and kept on site. Mrs. Kumar testifed at her deposition that they did not retain counsel, specifically Attorney Solny, until several months after the accident. Mr. Kumar testified that he did not retain an attorney or consider bringing this lawsuit until "the end of year 2004." However, documentary evidence submitted on this motion shows that

plaintiff retained Attorney Solny, who in turn retained an expert to inspect the vehicle, shortly after the accident occurred and before the Vehicle was destroyed. Dr. Jeffrey Ketchman, a professional engineer, testified he was retained by plaintiff's attorney, Sanford Solny, Esq., to serve as an expert and inspect the vehicle as early as February 22, 2004 and no later than March 3, 2004. Defendants provide a copy of a message dated March 3, 2004 which indicates that Attorney Solny contacted Dr. Ketchman "Re: Kumar" asking Dr. Ketchman to "inspect the car." Defendants also provide a copy of an invoice dated 5/11/04 from Intercity Testing and Consulting ("Intercity"), Dr. Ketchman's employer, and addressed to Attorney Solny, which bills for services from February 22, 2004 through March 25, 2004. According to the invoice, Dr. Kethman charged for the following services from 2/22/04 through 3/14/08: "Review police report; telcon with attorney and Mr. Kumar; Inspection arrangement." A copy of a check dated 3/12/04 and made payable to Intercity from Attorney Solny has been provided to the court. This check references in the memo line: "Kumar vs. Mercedes."

On March 22, 2004, Dr. Ketchman conducted an initial inspection of the Vehicle. Dr. Ketchman testified that Attorney Solny instructed him "to see if [he] could determine anything wrong with the [Vehicle] that would have caused it to lose control." Dr. Ketchman's inspection of the Vehicle was limited because the Vehicle was being stored "in a tight space" and there was no ability to elevate the Vehicle to inspect the underside thereof. During this inspection, Dr. Ketchman was unable to examine the foot controls including the brake pedals, unable to determine whether certain broken components exhibited damage caused by the accident, or was already damaged, or inspect the braking system and the tires. Mr. Ketchman's notes and photographs taken during the inspection

have been provided to the court.

Meanwhile, Mrs. Kumar notified MetLife, the insurer of the Vehicle, of the accident and handled all communications with MetLife. Mrs. Kumar testified at her deposition as follows:

> Q. O.K. Now, what was the sum and substance of what you told the MetLife representatives when you spoke to them?
>
> A. Well, basically they called me up because they wanted to send me some paperwork regarding the [Vehicle], the report, and I needed to fill, you know, all that out. I needed to enclose the police report. So I basically had to write about the [Vehicle], the accident; basically it was all about that.
>
> ...
>
> Q. An that was all done, would you say, within two weeks of the accident?
>
> A. No. It took a few weeks.
>
> ...
>
> Q. ... Now, at any time before you reported –
>
> A. Uh-huh.
>
> Q. ... the accident to MetLife, did you talk to a lawyer about what happened?
>
> A. No.
>
> Q. When for the first time did you speak to a lawyer with regard to what happened?
>
> A. After maybe five or – I don't exactly remember. My guess would be four to five months.
>
> ...
>
> Q. Well, did you release the [Vehicle] to Mercedes-Benz?

A. Whatever paperwork they gave me, I signed. I –

Q. Who is "they"?

A. MetLife sent me. I have no idea what I did. I may have release. I really do not know.

Q. Did you ever tell MetLife that you saw Mr. Solny and you were going to bring a lawsuit?

A. No.

Q. Never told MetLife that they should preserve the [Vehicle]?

A. I've never told Metlife anything, no.

On April 5, 2004, MetLife "purchased" the Vehicle for $46,500 from DCFS Trust. This payment from MetLife was made out to Mercedes-Benz Credit on March 31, 2004. The Vehicle was eventually auctioned off to a foreign company and sold for parts. There is no dispute that neither Mr. or Mrs. Kumar ever notified the defendants, DCFS Trust or MetLife that they may potentially commence a lawsuit arising from an alleged defect in the Vehicle before the commencement of this action on or about April 12, 2005.

Arguments of the parties

Defendants argue that plaintiff's failure to preserve the Vehicle for this action so that they could at least inspect and investigate, whether willful or negligent, constitutes spoliation mandating dismissal of the complaint. Without the Vehicle, defendants contend that their defense to plaintiff's products liability claims is severely prejudiced. Defendants also seek dismissal of plaintiff's claims for punitive damages as a matter of law and because the facts in this case do not support an award of punitive damages against either of the defendants.

Plaintiff argues that since it was not the owner of the Vehicle, but rather a lessee, it

had no control over the vehicle and therefore could not commit spoliation. Plaintiff contends that the defendants had and have knowledge of the alleged dangerous defect with respect to the SBC system because the vehicle was subject to a recall campaign in the United States and complaint about the defect were made and addressed in European markets. Plaintiff also contends that since he is deprived of the same evidence to support his claims as the defendants need for their defense, dismissal is not warranted. Finally, plaintiff argues that if his wife, Mrs. Kumar, was found to be the "despoiler", that such a determination should not demand that his complaint be stricken since he had no hand in the "release" of the vehicle.

**Discussion**

Spoliation is the destruction of evidence. Kirkland v. New York City Hous. Auth, 236 AD2d 170 (1st Dept 1997). It is well established that spoliation of a key piece of evidence, whether negligent or intentional, may warrant dismissal of an action or the striking responsive pleadings. Standard Fire Ins. Co. v. Federal Pac. Elec. Co., 14 AD3d 213 (1st Dept 2004). Only where destroyed or lost evidence is key to support a claim or defense is the drastic remedy of the striking of a pleading appropriate. Id.

Otherwise, the court has broad discretion in providing relief to the party deprived of lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action. Ortega v. City of New York, 9 NY3d 69 (2007). In determining the sanction to be imposed on a spoliator, the court must examine the extent that the non-spoliating party is prejudiced by the destruction of the evidence and whether dismissal

is warranted as "a matter of elementary fairness" (Kirkland, *supra*). Dismissal of a pleading is warranted only where the loss of the evidence leaves the affected party without the means to prosecute or defend the action (see Squitieri, 248 AD2d at 203; see also Tommy Hilfiger, USA v Commonwealth Trucking, 300 AD2d 58, 60 [1st Dept 2002], quoting DiDomenico v C & S Aeromatik Supplies, 252 AD2d 41, 53 [2d Dept 1998].

Plaintiffs testified at their depositions that they did not retain an attorney to prosecute these claims until after the car was destroyed. Yet this testimony is completely refuted by documentary evidence, which shows that plaintiffs retained legal counsel, who in turn retained an expert to inspect the Vehicle, by at least March 22, 2004. Even though Mr. and Mrs. Kumar did not own the vehicle, but were mere lessees, they were certainly the only persons aware that a potential claim existed arising from the SBC system in the Vehicle, before the vehicle was destroyed. Plaintiff's failure to contemplate that the Vehicle would be a vital piece of evidence in connection with such a claim is entirely unreasonable under the facts in this case. Therefore, plaintiffs refusal to notify the defendants that a potential claim existed or otherwise take any steps to preserve the Vehicle constitutes, at the very least, negligent spoliation.

Plaintiff's argument that it was the defendants' responsibility to preserve the car is rejected. The defendants did not have control over the car. Rather, Mercedes-Benz Credit, the leasing company, and/or DCFS Trust, the seller of the Vehicle to MetLife, had control. Moreover, the defendants had no reason to believe that preservation of the Vehicle would be necessary because they were not on notice that plaintiffs had a potential claim arising from an alleged defect in the Vehicle. As the Court of Appeals noted in Metlife Auto & Home v. Joe Basil Chevrolet (1 NY3d 478 [2004]), if plaintiff had given notice to the

defendants, the defendants could have attempted to preserve the Vehicle by court order or written agreement, or at least could have sought that the Vehicle be inspected prior to disassemblage.

The unavailability of the Vehicle, contrary to any of the arguments and excuses offered by plaintiffs' counsel, is highly prejudicial to defendants (see, Standard Fire Insurance Company v. Federal Pacific Electric Company, *supra*). The best defense to plaintiff's products liability, negligence and breach of warranty claims is that there was no defect, and defendants are unable to establish this most basic defense, without at least the opportunity to inspect the Vehicle. The recalls indicate that not all affected vehicles had a defective SBC system. In fact, the Vehicle was destroyed before plaintiff's own expert could conduct a thorough inspection to ascertain whether the alleged defect existed, and if so, whether the defect contributed to the accident. In this case, at best, defendants are limited to the argument that plaintiffs cannot establish that a defect existed in this particular vehicle. Such prejudice warrants the drastic remedy of dismissal of the complaint. It bears noting that there is no lesser remedy available because an adverse inference or preclusion would effectively prevent plaintiff from proving the crux of his *prima facie* case, the existence of the alleged defect.

Plaintiff's argument that the court should overlook the spoliation because both plaintiff and defendant are equally prejudiced is rejected as a matter of law. Such reasoning is not a basis for determining the appropriate remedy for spoliation of a crucial piece of evidence. Plaintiff's argument that Mrs. Kumar was the sole "despoiler" and Mr Kumar should not be punished for her actions is also devoid of merit. Clearly the spouses were operating in tandem and with a continuity of interest. The drastic remedy imposed

here is not based upon who destroyed evidence, but rather, who is prejudiced by the spoliation.

Accordingly, defendant's motion to dismiss the complaint is granted. As a result, defendant's motion for summary judgment dismissing plaintiff's punitive damages claims is moot.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion to dismiss the complaint on grounds of spoliation is granted and that branch of the motion for summary judgment dismissing plaintiff's punitive damages claims is denied as moot; and it is further

**ORDERED** that the complaint is hereby dismissed in its entirety; and it is further

**ORDERED** that the Clerk is directed to enter judgment in accordance herewith.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 17, 2009

So Ordered:

**HON. JUDITH J. GISCHE, J.S.C.**