

Drake v City of New York

2009 NY Slip Op 31227(U)

June 3, 2009

Supreme Court, New York County

Docket Number: 103748/00

Judge: Eileen A. Rakower

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

Part 5

PRESENT: **HON. EILEEN A. RAKOWER**

PART _____

Justice

Index Number : 117678/2006

DRAKE, CHRISTINA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motlon to/for _____

PAPERS NUMBERED

1

2

3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 08 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/3/09

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
CHRISTINA DRAKE,

Index No.
103748/00

Plaintiff,
-against-

DECISION
and ORDER

THE CITY OF NEW YORK,

FILED
JUN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Not. Seq. 001

Defendant.
-----X

HON. EILEEN A. RAKOWER:

Plaintiff Police Officer Christina Drake ("Plaintiff") brings this action for personal injuries sustained during an automobile accident on June 4, 2006 ("accident"), while she was on duty. Specifically, Plaintiff was a passenger in a New York Police Department ("NYPD") Radio Motor Patrol ("RMP" or "police car") that spun out of control after a car turned in front of the RMP while Plaintiff and the driver were responding to an emergency call. Plaintiff alleges that her injuries were caused and/or compounded by the failure of the airbags within the RMP to deploy upon impact. Plaintiff alleges that this failure was caused by Defendant City of New York's ("City") negligent maintenance of the RMP.

Currently before the court is Plaintiff's motion to strike the City's Answer based upon the City's alleged spoliation of evidence. Plaintiff claims that the City wrongfully demolished the RMP when it was on notice of impending litigation in connection with the accident. The record establishes that, on July 13, 2006, Plaintiff filed a Notice of Claim with the City in connection with the accident, wherein Plaintiff specifically alleged that the City "fail[ed] to repair and maintain [the] vehicle's air bags," among other things. On July 21, 2006 - eight days after Plaintiff served her Notice of Claim and six weeks after the accident - the RMP was demolished by the NYPD. Plaintiff subsequently commenced this action by filing a Summons and Complaint on November 28, 2006. The City served its Answer on January 25, 2007.

Plaintiff claims that the City's destruction of the RMP deprives Plaintiff of the key piece of evidence required to make out her case against the City, and that

striking the City's Answer on the grounds of spoliation is warranted since the City destroyed the car (1) despite the fact that the City either knew, or reasonably should have known that litigation was likely, given the nature and severity of the accident; and (2) that the City was in fact aware of impending litigation, based upon Plaintiff's serving a Notice of Claim upon the City prior to the RMP's destruction. Plaintiff submits an Affirmation in Support. Annexed to the Affirmation as exhibits are portions of Plaintiff's 50-h transcript; the NYPD's accident report; portions of Plaintiff's deposition transcript; Plaintiff's Notice of Claim; copies of the pleadings; an Affidavit of Plaintiff's expert, Terrence Fischer, wherein Mr. Fischer states that "it is impossible to determine why the airbags did not deploy," based upon the City's destruction of the RMP before Plaintiff had the opportunity to perform an inspection; and what Plaintiff states is the sole photograph of the RMP taken after the accident.

The City has submitted an Affirmation in Opposition. In it the City argues that the drastic sanction of striking the City's Answer is unwarranted because (1) the City's destruction of the RMP took place prior to the commencement of litigation and was not a willful attempt to destroy evidence; and (2) contrary to Plaintiff's assertions, the RMP is not essential to proving her case, reasoning that Plaintiff can rely on maintenance and repair records, photographs, testimony, and vehicle specifications of the make and model of the RMP. Annexed to the City's Affirmation as exhibits are the City's response to the Case Scheduling Order; the deposition transcript of Melissa Clark, the police officer who was driving the RMP at the time of the accident; and Plaintiff's expert witness disclosure.

Dismissal against a party on the grounds of spoliation of evidence is appropriate when "a party alters, loses or destroys key evidence before it can be examined by the other party's expert." The loss or destruction of evidence need not be the result of willful conduct or bad faith on the part of the spoliating party, as courts have recognized that a party's mere negligence can cause equally fatal results to a party's prosecution or defense of an action. Further, the sanction of striking a pleading can be warranted in cases where the destruction or loss of key evidence occurred prior to litigation, if the spoliator was on notice that the evidence might be necessary in future litigation (*Std. Fire Ins. Co. v. Fed. Pac. Elec. Co.*, 14 A.D.3d 213, 218-20 [1st Dept. 2004]).

City urges that the drastic sanction of striking the City's Answer based upon its destruction of the RMP is unwarranted, citing *Mangiaracina v. City of New*

York (2007 NY Slip Op 50298U [Sup. Ct. Queens Cty. 2007], *aff'd* 55 A.D.3d 569 [2nd Dept. 2008]), for support. In that case, the plaintiff, a police officer, had commenced a lawsuit alleging personal injuries sustained from an automobile accident involving a police car in which he was a passenger. Like Plaintiff in this matter, the plaintiff in *Mangiaracina* alleged, *inter alia*, that the police car's air bags failed to deploy due to a defect. The plaintiff served a Notice of Claim approximately three months after the accident. Approximately seven weeks after plaintiff filed his notice of claim, the City sold the damaged vehicle in an auction. The purchaser subsequently sold the vehicle to a salvage company after using it for parts, depriving the parties of an opportunity to inspect the vehicle. General Motors ("GM"), a co-defendant, moved for dismissal of the plaintiff's complaint, or for summary judgment dismissing the City's cross-claims against GM based upon the spoliation of evidence.

In denying the plaintiff's motion, the Hon. Phyllis Orlikoff Flug found that dismissal on the grounds of spoliation was unwarranted because (1) there was no evidence that the City sold the police car with ill intent; and (2) GM failed to establish that the City's conduct "fatally compromised its defense or left it without the means to defend the action" (*id.* at *2) (citations omitted). With regard to the second point, Justice Flug noted that GM could pursue its defense by inspecting vehicles of the same make and model, inspection of photographs provided by the plaintiff, and inspection of maintenance and repair records of the vehicle provided by the City (*id.*). The court also noted that the City was equally prejudiced by the loss of the police car - another factor weighing against dismissing its cross-claims against GM (*id.* at *2-3) (citations omitted).

Based upon the foregoing, Justice Flug denied GM's motion without prejudice to GM potentially moving for a "lesser sanction at the time of trial upon a showing of genuine prejudice" (*id.* at *3) (citations omitted).

Here, there is nothing in the record to suggest that the destruction of the RMP was commissioned in bad faith in a willful attempt to destroy valuable evidence. The destruction of the RMP does not strike a fatal blow to Plaintiff's lawsuit, as Plaintiff's expert has alternate and reasonable means by which to conduct his analysis (*e.g.*, other cars of the same make and model; NYPD maintenance and inspection reports, and at least one photograph of the RMP, taken after the accident). Nevertheless, Plaintiff should not be denied the opportunity to move for lesser sanctions at the time of trial, such as requesting that the trial court

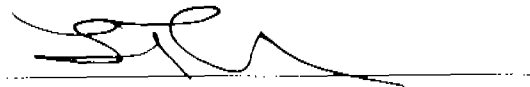
[* 5]
instruct the jury that it may draw an adverse inference against the City based upon its destruction of the RMP. (*See*, PJI2d 1:77.1).

Wherefore, it is hereby

ORDERED that Plaintiff's motion to strike the City's Answer is denied without prejudice to move for lesser sanctions against the City at trial.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: June 3, 2009



EILEEN A. RAKOWER, J.S.C.

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