Herpel v Reynolds
2010 NY Slip Op 32812(U)
October 12, 2010
Sup Ct, Greene County
Docket Number: 08-1434
Judge: Joseph C. Teresi
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[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

ERICA HERPEL,

Plaintiff,

-against-

JOSEPH J. REYNOLDS, GREENE COUNTY, GREENE COUNTY SHERIFF'S OFFICE and DEPUTY GREG STEWART,

Defendants.

DECISION and ORDER
INDEX NO. 08-1910
RJI NO. 19-09-4104

JOSEPH J. REYNOLDS,

Plaintiff,

-against-

DEPUTY GREG STEWART, GREENE COUNTY SHERIFF'S DEPARTMENT and COUNTY OF GREENE, NEW YORK

Defendants.

DECISION and ORDER
INDEX NO. 08-1434
RJI NO. 19-10-4868

Supreme Court Greene County All Purpose Term, September 13, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On September 8, 2007, Joseph Reynolds (hereinafter "Reynolds") was driving an automobile owned by Erica Herpel (hereinafter "Herpel") on State Route 145 (SR-145) in the Town of Cairo, New York. Herpel was a front seat passenger. As Reynolds was turning left, off of SR-145 and onto Lincoln Drive, a Greene County Sheriff's Department cruiser (hereinafter "cruiser") struck the driver's side of his vehicle. Deputy Gregory Stewart (hereinafter "Stewart") was driving the cruiser, attempting to pass Reynolds on the left when the collision occurred.

Reynolds and Herpel (hereinafter collectively "Plaintiffs") each commenced separate actions seeking to recover damages for the personal injuries they sustained in the accident. Issue was joined by Defendants[1] in both actions, discovery is complete and a date certain has been set for a joint trial of these actions. Plaintiffs now move to strike the Defendants' answer, pursuant to CPLR §3126, due to Defendants' alleged spoliation of evidence. Defendants oppose the motion. While Plaintiffs failed to demonstrate their entitlement to an order striking Defendants' answer, they did exhibit their right to an adverse inference charge.

On a CPLR §3216 motion the "drastic remedy of striking a pleading is appropriate only where the moving party conclusively demonstrates bad faith or willful, contumacious conduct by

[1] The term "Defendants" will refer collectively to Defendants County of Greene, New York; Greene County; Greene County Sheriff's Office; Greene County Sheriff's Department; and Deputy Greg Stewart.

the nondisclosing party." (O'Connor v. Syracuse University, 66 AD3d 1187 [3d Dept. 2009]). However, "where a litigant negligently... disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them" sanctions are appropriate. (Cummings v. Central Tractor Farm & Country, Inc., 281 AD2d 792, 793 [3d Dept. 2001][internal quotes omitted]; Lawrence v. KPMG Peat Marwick, LLP, 5 AD3d 918 [3d Dept. 2004]; Steuhl v. Home Therapy Equipment, Inc., 23 AD3d 825 [3d Dept. 2005]).

Plaintiffs' spoliation claim is based upon three items of evidence Defendants have not provided to them. First, Defendants concede that the radio communication Stewart received and was responding to when the accident at issue occurred, was recorded but destroyed. Similarly, Defendants have not retained either the cruiser involved in the accident nor the cruiser's "black box;" precluding Plaintiffs from inspecting either. Although it is undisputed that each of these items existed, not one has been disclosed.

On this record, however, because Plaintiffs did not demonstrate Defendants' specific knowledge of Plaintiffs' lawsuits prior to their disposal of these items of evidence, Plaintiffs failed to "conclusively" demonstrate Defendants' "bad faith or willful, contumacious conduct." Defendants first received notice of Plaintiffs' actions by their respective Notices of Claim. Defendants received Herpel's Notice of Claim on November 29, 2007; and Reynolds' on December 10, 2007. While it is uncontested that Defendants received such notices approximately two months after the accident occurred, Plaintiffs failed to demonstrate that the disputed items of evidence were still in existence at that time.

Relative to the radio communication recording, in support of their motion Plaintiffs

submit the affidavit of Randy Ormerod (hereinafter "Ormerod"), the current Deputy Director of Emergency Services in Greene County. He alleges that the recording Plaintiffs seek would have been made at the Greene County 911 Call Center (hereinafter "Call Center"); he currently oversees the "creation, storing and maintenance of recordings" for the Call Center. While Ormerod was not the Deputy Director in 2007, at that time he was an employee at the call center. He alleges that "[i]n 2007, any recordings made at the Greene County 911 Call Center were kept for a period of thirty days. When that period expired, the recordings were erased as a matter of standard procedure." Omerod's affidavit is the only evidence Plaintiffs submit to establish when the recording was destroyed. As such, on this record, Plaintiffs demonstrated that the recording was destroyed approximately one month prior to Plaintiffs formally notifying Defendants of their intended suit. This showing fails to establish that Defendants disposed of the recordings willfully or in bad faith.

Turning next to Defendants' disposal of the cruiser and its "black box," again Plaintiffs failed to demonstrate that the disposal was willful or in bad faith. Plaintiffs submit the deposition testimony and affidavit of Richard Brandt (hereinafter "Brandt"), the Sergeant with the Greene County Sheriff's Office who "was responsible for the oversight of the Greene County Sheriff['s] Office motor pool which would have included [the cruiser] as of the date of the subject accident." His affidavit alleged that, following the accident, the cruiser was "immediately" turned over to the New York State Police. Brandt's deposition testimony similarly alleges that he "believed" it was towed to the New York State Police in Catskill, New York. However, Brandt admitted at his deposition that "[t]he only reason I'm saying SP [State Police] Catskill is because that's where my vehicle ended up when I had my accident back in

2005." As Brandt failed to disclose the basis of his knowledge for his affidavit's statement and the disclosed basis of his knowledge for his deposition demonstrates that his statement is purely speculation, Brandt's deposition and testimony do not demonstrate where the cruiser was transported after the accident. Similarly unavailing are Brand's statements, in his affidavit, that the cruiser "was totaled" by Defendants insurance company. For such statements, Brandt's disclosed basis of knowledge is "my understanding." Brandt does not disclose, however, the genesis of such understanding. Again, causing Brandt's statements to be speculative and inadmissible. As Plaintiffs submit no other admissible evidence establishing when or where the cruiser and its "black box" were destroyed, they failed to demonstrate that Defendants had knowledge of their suit prior to their loss of the cruiser and its "black box." Precluding a finding of willfulness or bad faith.

Because Plaintiffs failed to demonstrate Defendants' "bad faith or willful, contumacious conduct" they failed to establish their entitlement to an order striking the Defendants' answers. (O'Connor, supra). However, Plaintiffs established the necessity for a less severe spoliation sanction.

Plaintiff Herpel submitted the "FOIL REQUEST" her attorneys served on the Greene County Sheriff's Office less than one month after the accident. Although such request does not specifically state that a civil action was to be commenced, it did request the Sheriff's Office's entire file for the accident at issue, specifying the date and location of the accident. Reasonably inferred from such attorney's letter request, was the likelihood of future litigation. Likewise, as Brandt stated at his deposition, when he was memorializing his investigation of this accident he titled his memorandum "PIAA, Personal Injury Auto Accident." Such title acknowledges the

possibility of this civil litigation. While not overwhelming, such proof demonstrates that Defendants "should have known" of the accident's potential for litigation. (McMahon v. Ford Motor Co., 34 AD3d 263 [1st Dept. 2006]).

Moreover, despite Plaintiffs' numerous requests, Defendants have still failed to produce a sufficient explanation for their loss of the cruiser and "black box." As noted above, the affidavit Defendants provided to explain the loss was speculative, provided no details or dates and was wholly unsupported. Similarly, the unsworn hearsay letter Defendants' counsel submitted to explain the loss offered no probative proof. Rather, the Defendants attorneys representations and discovery responses have been contradictory, based upon inconclusive, unidentified and unverified information. It is readily apparent from such submissions that the Defendant had insufficient policies and procedures in place to prevent the destruction of highly relevant and material evidence.

Plaintiffs also demonstrated prejudice arising from the Defendants' loss of the recording, cruiser and its "black box."

Plaintiffs have been prejudiced by the loss of the recording, because it would have established what type of call Stewart was responding to. While Stewart testified at his deposition that he was responding to "a home invasion with an assault, ongoing", the Call Center's written record notes that Stewart was responding to a call for a victim "assaulted by '2 drunks'... driving a car on route 20..." and apparently not in progress. As the type of call Stewart was responding to is highly relevant and necessary in determining whether Stewart's conduct was reckless (Flack v. State, 57 AD3d 1199 [3d Dept. 2008]) and the recording Defendants destroyed would have

provided nearly conclusively proof on such issue, Plaintiffs are entitled to an adverse inference instruction at trial on this issue. (Marotta v. Hoy, 866 NYS2d 415 [3d Dept. 2008]; Allain v. Les Industries Portes Mackie, Inc., 16 AD3d 863 [3d Dept. 2005]; Scarano v. Bribitzer, 56 AD3d 750 [2d Dept. 2008]; 1 NY PJI 1:77 [2009]).

Similarly, Plaintiffs were prejudiced by Defendants' loss of the cruiser and its "black box." Defendants acknowledge, by Brandt, that the "black box" would have kept a detailed record of Stewart's speed prior to and upon impact with Herpel's vehicle. The speed of Stewart's cruiser is highly relevant and material to Stewart's alleged recklessness (Flack, supra), and could have been established by the lost cruiser and "black box." Without such evidence Plaintiffs will only have their experts' opinions based upon the accident reconstruction measurements taken by a State Trooper, without access to the vehicle. Clearly a far less reliable measure than the "black box" speed recording that Defendants have lost. As such, Plaintiffs are entitled to an adverse inference instruction on the issue of Stewart's speed. (Marotta, supra; 1 NY PJI 1:77 [2009]).

These adverse inference instructions strikes a balance between the severity of defendants' loss/destruction of material evidence with the importance of the evidence to plaintiff's case.

Accordingly, Plaintiffs motions are granted only to the extent that an adverse inference instruction (1 NY PJI 1:77 [2009]) will be given at trial on the issues of the content of the dispatch call Stewart was responding to and the speed of Stewart's cruiser prior to and upon impact with Herpel's vehicle.

This Decision and Order is being returned to the attorneys for Herpel. A copy of this

Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 12, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 25, 2010, Affirmation of Nancy Stroud, dated August 25, 2010, with attached Exhibits A-Q.
2. Notice of Motion, dated August 27, 2010, Affidavit of Kimberly Furnish, dated August 27, 2010, with attached Exhibits A-AA.
3. Affirmation of Todd Roberts, dated September 3, 2010, with attached Exhibits A-O.
4. Affidavit of Kimberly Furnish, dated September 10, 2010, with attached Exhibits A-C.