NEW YORK SUPREME COURT - COUNTY OF BRONX

STP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: STP

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NANCY ESPERANZA MANN, individually and as Administratrix of the Estate of Chamkaur Singh Mann,

Plaintiff(s),

-against-

THE COOPER TIRE COMPANY and THE TBC CORPORATION,

Defendant(s).

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INDEX №. 21426/02

RAMAN MANN, an infant, by his guardian and litem, GEORGE S. AKST, SUNDEEP SINGH and SUKHJIT KAUR,

Plaintiffs,

-against-

THE COOPER TIRE COMPANY, THE TBC CORPORATION, NANCY ESPERANZA MANN, as Administratrix of the Estate of Chamkaur Singh Mann, and NANCY ESPERANZA, MANN,

Defendants.

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INDEX NO: 21427/02

Present:
HON. STANLEY GREEN
J.S.C.

The following papers numbered 1 to 8 read on this motion No. on the Calendar of October 19, 2009

	PAPERS NUMBERED
Notice of Motion -Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	3,4
Replying Affidavit and Exhibits	5
Sur-reply Affidavits and Exhibits	6,7,8
Stipulation(s) - Referee's Report - Minutes	
Memoranda of Law	2

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision

Dated: January 7, 2009

STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: STP

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NANCY ESPERANZA MANN, individually and as Administratrix of the Estate of Chamkaur Singh Mann,

Plaintiff(s),

-against-

THE COOPER TIRE COMPANY and THE TBC CORPORATION,

Defendant(s).

INDEX №. 21426/02

DECISION

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RAMAN MANN, an infant, by his guardian and litem, GEORGE S. AKST, SUNDEEP SINGH and SUKHJIT KAUR,

Plaintiffs,

-against-

THE COOPER TIRE COMPANY, THE TBC CORPORATION, NANCY ESPERANZA MANN, as Administratrix of the Estate of Chamkaur Singh Mann, and NANCY ESPERANZA, MANN,

Defendants.

INDEX NO: 21427/02

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HON. STANLEY GREEN:

The motion by defendants The Cooper Tire Company and The TBC Corporation for an order dismissing plaintiffs' complaint as a sanction for spoliation of evidence resulting from plaintiffs' failure to preserve the vehicle, wheels and two front tires of the vehicle involved in the accident at issue in this litigation is denied.

Plaintiffs commenced this action to recover damages for personal injuries and wrongful deaths that resulted from a one-car accident on March 4, 2001 on Highway 15, near Montreal, Canada. According to police, the right rear tire of the 1993 Nissan Pathfinder owned by Nancy Mann and operated by Chamkaur Mann suffered a blow-out, causing the vehicle to go off the

highway and onto the center median, where it rolled over several times. The tire which exploded was a Cordovan tire manufactured by Cooper.

After the accident, the Surete du Quebec (Quebec provincial police) conducted an investigation of the accident, making a videotape and taking photographs of the accident location, vehicle and other evidence. A police accident reconstructionist took measurements and prepared a sketch of the accident. After the police completed their investigation, the vehicle was towed by Remorquage St.-Michel (RSM) to its storage yard and a mechanical inspection of the vehicle was performed. The subject tire was sent for analysis to Canada Transport (the Canadian equivalent to the National Highway Traffic Safety Administration in the US). All police investigators concluded that the right rear tire was the cause of the accident.

On March 19, 2001, Nancy Mann executed a document authorizing Mr. Manoharsingh Seyan to act on her behalf concerning matters involving the accident. The Quebec police released the vehicle to Mr. Seyan and it was transferred from RSM's storage yard to Pieces D'Automobile Gagnon, Inc.(Gagnon Auto Parts).

In June 2001, plaintiffs' counsel and his tire expert, Dennis Carlson, went to Quebec, and inspected the right rear tire of the vehicle, which was in the custody of the Surete du Quebec. Plaintiff's accident reconstruction expert, Mark Arndt, inspected and photographed the vehicle. According to Arndt, at the time he inspected the vehicle, the tires and rims had been removed from the front wheels and the tire on the right rear was not the same one that was involved in accident. Shortly thereafter, plaintiff's counsel arranged to have the left rear tire, which was the only other tire on the vehicle manufactured by Cooper, shipped to Carlson.

According to Alain Bayeur, the President of Gagnon, in June 2001, he gave plaintiffs'

counsel a bill for storage of the vehicle up to June 20, 2001 and offered to continue to store the vehicle for a fee, but the fee was never paid and plaintiffs did not take any steps to preserve the vehicle. Bayeur testified that he kept the vehicle at his premises for at least two years before it was disposed of for scrap, but he did not have any record of when he disposed of the vehicle.

In June 2002, plaintiffs commenced the instant actions sounding in products liability and negligence. On March 12, 2003, defendants served a notice for Discovery and Inspection of the vehicle and its tires on plaintiffs. They did not receive a response.

On November 7, 2003, Canadian Authorities wrote to plaintiff's counsel indicating that they would release the confiscated tire to its lawful owner. Plaintiff's counsel obtained an order from the court declaring Nancy Mann to be the lawful owner of the tire and arranged to take possession of the tire.

On August 10, 2005, the Raman Mann plaintiffs responded to another inquiry by defendants about the location of the vehicle, stating that the whereabouts of the vehicle were unknown. On May 2, 2007, Nancy Mann testified that she did not know what happened to the vehicle.

Defendants inspected the left and right rear tires that were on the vehicle at the time of the accident, but contend that they are severely prejudiced by plaintiff's failure to preserve the vehicle and seek dismissal of the complaint as a sanction for spoliation of key evidence.

In support of the motion, defendants submit copies of the police investigative reports, transcripts of the deposition testimony of the police accident reconstructionist, responses to discovery demands, a Vehicle History Report, the Coroner's Report and copies of 175 photographs produced by plaintiffs, which they contend show, inter alia, that the mechanical

inspection of the vehicle at RSM was inadequate, no comprehensive or detailed photographs of any of the seatbelts, suspension or steering components exist and no detailed photographs of the interior portion of the vehicle adequately document the vehicle's condition or the seat belts. Defendants also submit the affidavit of Robert Rucoba, a mechanical engineer retained as an expert witness with regard to "technical aspects of the vehicle" and the affidavit of Joseph Grant, who was retained as defendant's tire expert.

According to Mr. Rocuba, an inspection of the vehicle would provide relevant evidence relative to the underlying causes of the accident and the injury causing forces involved during its sequence, and a detailed inspection of the restraint system (seat belts) is critical in determining both individual movement and occupant interaction and to confirm the use or non-use of the available restraints.

Mr. Grant opines that inspection of the wheel on which the subject tire was mounted would be beneficial in determining the extent of pre-existing impact damage, that inspection of the vehicle "could give valuable information regarding the condition of the suspension and the alignment of the vehicle" and that analysis of the companion tires and wheels would give further insight into the overall maintenance practices of the tires.

Plaintiffs oppose the motion on the grounds that: (1) all of the police who investigated the accident found that the exploding tire was the only cause of the accident and that tire was inspected and tested by Cooper and remains in existence; (2) no investigating police officer found that the car had anything to do with the accident; (3) if inspection of the car had been relevant to its analysis, Cooper had between two and five years after the accident to request to inspect it; (4) Cooper has never submitted an expert affidavit disputing that the tire exploded and

caused the accident; (5) an expert mechanical inspection was performed on the car immediately after the accident which analyzed each system of the car in detail; and (6) there is a multitude of information regarding this accident, including the tire and the companion to the tire which failed, photographs and videotape depicting the inside and outside of the vehicle, tires and portions of the tire found on the ground, the marks on the pavement from the location where the tire blew out until the vehicle reached the median of the road, and marks in the median showing where the vehicle turned over. Plaintiffs also point out that by the time they inspected the vehicle, it had already been inspected by police and a mechanic for the police and they note that the affidavits of defendants' experts ignore the existence of the tires and speak in general terms about the desirability of inspecting a car in an automobile accident.

In opposition to the motion, plaintiffs submit copies of the police investigative reports and deposition testimony of the police officers who investigated the accident, the Expert Mechanical report by Remorquage St.-Michel, plaintiff's responses to interrogatories and photographs of the vehicle, tires and accident scene.

Plaintiffs also submit the affidavit of their tire expert, Dennis Carlson, who opines, inter alia, that the tread separation that occurred to the tire was the result of various manufacturing and design defects that are evident from an examination of the tire alone and that examination of the car is not necessary to determine whether "overdeflection"- either under inflation of the tire or too heavy loading of the vehicle - resulted in the tire separation. Carlson also opines that it is not necessary to examine the vehicle to determine whether or not there was pre-existing damage as evidence of prior impact damage or puncture to the tire can be determined through the use of x-rays and examination of the tire.

In reply, defendants submit a copy of the report of Eric Bergevin, a Senior Defect Investigator of the Motor Vehicle Safety Enforcement Division of Transport Canada (the Canadian equivalent of the National Highway Traffic Safety Administration in the United States), which describes "unusual wear patterns on all four of the tires" that is "generally the result of a prior vehicle wheel alignment," thus connecting the condition of all of the tires to the vehicle's pre-accident condition, including the alignment, worn or damaged suspension and establishing the necessity of an inspection of the vehicle.

After the instant motion was submitted, Justice Tuitt decided a motion that defendants had made prior to the instant motion, in which they sought to depose plaintiff's experts in lieu of an actual inspection of the vehicle. By order dated July 9, 2009, Justice Tuitt directed plaintiffs' experts to appear for a limited deposition and to produce any notes made contemporaneous to their inspection of the vehicle. However, she did not grant any further relief, stating that: "Dismissal is denied as unduly harsh."

After the deposition of plaintiff's expert who inspected the vehicle was conducted, this court granted the parties permission to submit additional papers in support and opposition to the instant motion.

Defendants submitted a transcript of the testimony of plaintiff's expert, Mr. Arndt, and a copy of his notes, which had been dictated and transcribed and then redacted by plaintiff's counsel. Defendants contend that this evidence shows that the loss of the vehicle has caused irreparable harm to Cooper because Arndt's examination of the vehicle's condition was "cursory," his testimony was "evasive" and he failed to preserve data, such as measurements of the interior of the A-pillars and seatback angles, which would have permitted an accurate

reconstruction of the accident and provide "decisive and corroborative physical evidence" relative to the underlying causes of the crash and the use or non-use of the available restraints.

Plaintiffs respond that Cooper's claims regarding the importance of an inspection of the vehicle are unfounded and a litigation ploy. They also point out that Bayeur's testimony shows that the vehicle was not destroyed until at least two years after the accident and that Bergevin's report shows that he inspected the tire and had repeated communications with Patrick Fitzmaurice, Esq. (one of Cooper's attorneys) on September 11, 2003, but he did not recall anyone from Cooper ever asking about the location of the vehicle.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of key pieces of evidence involved in an accident before the adversary has an opportunity to inspect them (Kirkland v. NYCHA, 236 AD2d 170). However, the harsh sanction of dismissal is warranted only where the destruction or loss of evidence leaves the offended party prejudicially bereft of appropriate means to confront a claim with incisive evidence (Id)

In this case, it is plaintiffs' claim that the right rear tire was defectively designed and manufactured and they preserved the subject tire, as well as the left rear companion tire, which was the only other tire on the vehicle that was manufactured by Cooper. While plaintiffs should have anticipated that defendants would seek to inspect the vehicle and taken steps to preserve it (McMahon v. Ford Motor Co., 34 AD3d 263), defendants are clearly not "entirely bereft of evidence tending to establish their position" (Id, citing Cohen Bros. Realty v. Rosenberg Elec. Contrs., 265 AD2d 2424). They have inspected the subject tire and are in possession of the police investigation reports, particularly Bergevin's report, which describes in detail his findings

with respect to the wear on all of the tires. He states his opinion that: (1) the severely worn condition of the right rear tire was probably a significant factor with respect to its failure; (2) there was no evidence to indicate the existence of a safety-related defect; and (3) "Had the occupants been properly belted in the vehicle, it is expected that they would probably not have been ejected and likely would not have been fatally or severely injured."

While defendants' experts opine that an inspection of the vehicle would provide important evidence regarding the condition of the vehicle and the use or non-use of seatbelts, they do not address the opinion of plaintiffs' expert that an x-ray examination of the tire would reveal a pre-existing defect or prior impact damage to the tire or explain why poor alignment and maintenance of the vehicle could not be established by examination of the tires that were preserved.

This case is distinguishable from the cases cited by defendants in that the tire, the alleged injury-producing item, was preserved and defendants experts have inspected it (cf. Kirkland v. NYCHA, 236 AD2d 170; Standard Fire Ins. Co. v. Federal Pacific Electric Co., 14 AD3d 213).

Under the circumstances, this court agrees with Justice Tuitt, that dismissal of the complaint would be too harsh. Accordingly, the motion to dismiss this action as a sanction for spoliation is denied. This constitutes the decision and order of the court.

Dated: January 8, 2010

STANLEY GREEN, J.S.C.