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SHORT FORM ORDER

INDEX No. 11-2212

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 4-10-13 (#001)
MOTION DATE 7-17-13 (#002)
MOTION DATE 9-25-13 (#003)
ADJ. DATE 11-20-13
Mot. Seq. # 001 - MD
002 - MD
003 - MD

ILEANA BENAVIDES,

Plaintiff,

- against -

J.J.R. HORT SERVICES, INC., JOHN A. MASCITELLI and CPR ENTERPRISES, LLC,

Defendants.

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Upon the following papers numbered 1 to 36 read on these motions for discovery sanctions and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12, 13 - 26, 29 - 30 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 28 ; Replying Affidavits and supporting papers 31 - 32, 33- 34, 35 - 36 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3126 directing a negative inference charge against the defendants at the time of trial and precluding the defendants from introducing any evidence at trial that is contrary to said negative inference, is denied, without prejudice to renewal at trial.

JH

ORDERED that this motion (incorrectly denominated as a cross motion) by the defendant CPR Enterprises, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint is denied, and it is further

ORDERED that this motion (incorrectly denominated as a cross motion) by the defendants J.J.R. Hort Services Inc. and John A. Mascitelli for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

The instant action was commenced by the plaintiff to recover damages for personal injuries she allegedly sustained in a motor vehicle accident that occurred on November 11, 2010 on the Northern State Parkway near the exit for Route 110 in the Town of Huntington, New York. The accident allegedly happened when the vehicle in which the plaintiff was riding as a passenger was struck by a wheel which had detached from a motor vehicle (van) owned by the defendant J.J.R. Hort Services Inc. (Hort) and operated by the defendant John A. Mascitelli (Mascitelli). It is undisputed that the defendant CPR Enterprises, LLC (CPR) performed automotive repair services on the van the day before this accident. In her complaint, the plaintiff alleges, among other things, that the defendants operated the van in an unsafe manner, and failed to properly maintain, service, and/or repair the van. The plaintiff further alleges that "one of the tires on the [van] ... became detached from said vehicle, traveled across the westbound and eastbound lanes of Northern State Parkway, and struck the vehicle in which the plaintiff was a passenger."

It is undisputed that the wheel detached from the subject van, and that the van and the detached wheel ended up at the CPR's repair shop. It is also undisputed that CPR discarded the wheel with permission of Hort's owner, Joseph J. Reider (Reider) approximately four to five weeks after the plaintiff's accident. The plaintiff now moves for an order pursuant to CPLR 3126 directing a "negative inference charge" against Hort and CPR at the time of trial due to said defendants spoliation of crucial evidence in this action. In support of her motion, the plaintiff submits the pleadings, an affidavit from her expert witness, and the transcripts of her deposition and those of the other parties to this action.

At his deposition, Reider testified that he conducts Hort's business under the name San Giorgio Florist, and that Hort owns the 1993 Ford van involved in this incident. On November 11, 2010, Mascitelli notified him by cell phone that a wheel had come off the van, and he went to the site of this incident. When he arrived at the site, he observed that the van was missing its left front wheel, and that several state police cars and a number of ambulances were nearby. Reider further testified that he retrieved the wheel about 50 feet away from where the van was located and placed it into the rear of the van. He indicated that a representative from CPR, Christopher Mancz (Mancz), came to the scene and told him that "they really couldn't tell me anything until they were able to examine the vehicle." The next day he asked CPR to tow the van to its shop for repairs. Reider further testified that CPR saved the subject wheel and "whole brake assembly" after the repairs to the van, and that, a few weeks after the incident, Mancz asked him what he wanted to do with them. He stated that, although he knew that people had been injured in the incident, he told Mancz to get rid of them because "I had not heard anything from any insurance company at all ... I assumed that if they want to see the parts ... that they would have contacted us by that point."

At his deposition, Mancz testified that he is one of the owners of CPR, and that he performed repair services on the van the day before this incident that did not include work on the left front wheel. On the day of the incident, he received a call from Reider informing him that a wheel had fallen off of the van, and he went to the accident site. He indicated that he and Reider overheard one of the state troopers saying that a girl on the other side of the highway was being taken "to the hospital, but that she was okay, she just had some minor scratches on her face." He stated that he picked up the van the next day, that the wheel was in the back of the van, and that he repaired the van within 24 to 48 hours. Mancz further testified that he saved the wheel parts for "four to six weeks then I spoke to Joseph Reider and he told me I could [discard] them." He indicated that he told Reider that CPR was having a Christmas party and that he needed to clean up. He stated that "I was saving them there, he asked me to save them for insurance reasons I guess, and he says, 'I haven't heard anything. I guess throw them out.'" Mancz further testified that his father is married to Reider's sister.

In support of her motion, the plaintiff submits an affidavit from Lowell L. Baker (Baker) in which he swears that he is a professional engineer licensed in Connecticut, that he is employed as a forensic engineer at Technology Associates in Stamford, Connecticut, and that he was retained to investigate the cause of the plaintiff's accident. He states that he reviewed the deposition transcripts of Mascitelli and Mancz. However, he was unable to examine the van's left front wheel, tire, hub, and rotor because they were discarded by Mancz. He indicates that, based on his review of the depositions, he can "state with a reasonable degree of engineering certainty that the most likely precipitating cause of the detachment of the van's left-front wheel was a failure to properly secure all of the left-front wheel's lug nuts ..." Baker further swears that there are two other "remote" possible causes for the accident that he cannot rule out with certainty because the tire, wheel hub and rotor were not properly preserved.

In an affidavit submitted by CPR in opposition to the plaintiff's motion for sanctions, Jeffrey Lange (Lange) swears that he is a professional engineer licensed in New York State, and the president of Lange Technical Services, Ltd. working as a forensic engineer. He states that he was retained by CPR to investigate the plaintiff's accident, and that he reviewed the depositions of the parties and the service invoices of CPR for the year before the accident and the day after. Lange further swears that "it is my professional opinion with a reasonable degree of engineering certainty ... that the documentation is clear that CPR had not performed service on the front of the vehicle," that "CPR did its due diligence in maintaining the parts at issue for a time period well beyond that which is normally accepted in the industry," and that "the repairs by CPR "did not cause or contribute to [the] detachment of the wheel on November 11, 2010."

The determination of spoliation sanctions lies within the broad discretion of the court (***Lentz v Nic's Gym, Inc.***, 90 AD3d 618, 933 NYS2d 875 [2 Dept 2011]; ***Gotto v Eusebe-Carter***, 69 AD3d 566, 892 NYS2d 191 [2d Dept 2010]; ***Holland v W.M. Realty Mgt., Inc.***, 64 AD3d 627, 883 NYS2d 555 [2d Dept 2009]; ***Dennis v City of New York***, 18 AD3d 599, 795 NYS2d 615 [2d Dept 2005]). A court may "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" (***Samaroo v Bogopa Serv. Corp.***, 106 AD3d 713, 964 NYS2d 255 [2d Dept 2013]; ***Iannucci v Rose***, 8 AD3d 437, 778 NYS2d 525 [2d Dept 2004]; ***DiDomenico v C & S Aeromatik Supplies***, 252 AD2d 41, 682 NYS2d 452 [2d Dept 1998]). Under the

particular circumstances of this action, the Court finds the instant motion is premature. There are issues of credibility regarding the actions of the defendants in discarding the wheel parts, as well as questions of fact whether they were on "notice of a credible probability" that they would become involved in litigation as a result of the accident (*see* ***Suazo v Linden Plaza Assoc.***, 102 AD3d 570, 958 NYS2d 389 [1st Dept 2013]; ***Voom HD Holdings LLC v EchoStar Satellite L.L.C.***, 93 AD3d 33, 939 NYS2d 321 [1st Dept 2012]). A ruling as to the admissibility of evidence offered and the wisdom of delivering an adverse inference charge to the jury at trial should be made at the time of trial, when a determination as to the relevance of such evidence and such charge may be made in context (*see* ***Grant v Richard***, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; ***Speed v Avis Rent-A-Car***, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]). Accordingly, the motion is denied, without prejudice to renewal at the time of trial.

CPR now moves for summary judgment on the ground that it did not perform any repair services involving the left front wheel of the van, and that it did not owe a duty to the plaintiff. In support of their motion, CPR submits the pleadings, Lange's affidavit, the deposition transcripts of the parties, certain invoices regarding its repair services for the van, and an unauthenticated copy of the police accident report, Form MV-104A. The police accident report record relied on by CPR is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]). ***Mooney v Osowiecky***, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; ***Szymanski v Robinson***, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; ***Aetna Cas. & Sur. Co. v Island Transp. Corp.***, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; ***Cadieux v D.B. Interiors***, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]).

At his deposition, Mascitelli testified that he worked part-time as a driver for San Giorgio Florist on the day of this accident, and that while he was entering the Northern State Parkway at the Deer Park exit, he felt a "bump." He indicated that he headed westbound at approximately 50 miles per hour, and that he then saw a tire flying over the highway divider. He stated that he did not feel the wheel "shimmy," that the van "dropped" on the left side, and that he pulled to the right, off of the parkway. He got out of the van and saw that the "tire and rim" were missing. Mascitelli further testified that he called Reider to tell him of the incident, that a state trooper arrived after Reider reached the site, and that the trooper said that the tire had hit other vehicles. He stated that the van was old and had a lot of issues before this accident. On the day of the accident, he did not inspect the van before he took it out, and he did not have any trouble with the van earlier in the day. Mascitelli further testified that he did not know why the wheel came off of the van.

At her deposition, the plaintiff testified that she was in the passenger seat of the vehicle driven by her husband on the day of this accident. They were traveling eastbound on Northern State Parkway in the right lane, approaching the exit for Route 110. Her husband slowed to approximately 45 miles per hour in order to take the exit. She saw the tire "jumping from one lane to another," and her husband tried to move into the left lane but other cars prevented him from doing so. The plaintiff further testified that the tire hit the windshield and roof of her vehicle, that she lost consciousness, and that she does not know where the tire came from.

In addition to the testimony summarized above, at his deposition Mancz testified that he reviewed the repair orders for the van for the six-month period prior to the plaintiff's accident, and that the van was in for servicing the day before. He indicated that, although the invoice for the service on November 10, 2010 is in his brother's handwriting, he performed the service work that day, including flushing the cooling system and putting used tires on the two rear wheels. Mancz further testified that, after the van was towed to his shop, he observed that two or three wheel studs were missing from the wheel, that "the lug nuts were probably still on those studs," and that the two remaining studs were missing their lug nuts. He stated that all the wheel rims on the van were "rotted," that the rims had excessive rust, and that Reider saw the condition of the rims when he visited CPR's shop. He indicated that he had told Reider several times to get rid of the van because of its condition. Mancz further testified that the invoice dated June 30, 2010 included the notation in his handwriting "[left front] and [right rear] tires are getting thin," and that the invoice dated May 26, 2010 indicates that his shop fixed a flat tire and balanced it. He indicated that he did not know which tire was fixed on that date.

In addition to the testimony summarized above, at his deposition Reider testified that he observed the subject wheel and left front of the van on the day of this incident and all five wheel studs were stripped with the lug nuts missing. He stated that, when he retrieved the detached wheel, it was still inflated and looked "fine." He indicated that Mancz never told him that the van was old, that he needed to get rid of it, that the wheels were rotted, or that the wheel rims needed to be replaced. Reider further testified that the replacement of the left front and right rear tires, as suggested in CPR's June 30, 2010 invoice, would have been done at CPR, that the left front tire was not replaced by CPR between June 30, and November 10, 2010, and that he did not know why Mancz did not recommend that the left front tire be replaced on November 10, 2010. He indicated that he drove the van back to his store after it was serviced on November 10, 2010, and that he did not have any mechanical difficulties with the van. He did not recall if he looked at all four tires of the van before he drove it that day. He stated that he saw a box of "parts" at CPR's shop the day after the accident, and that he observed that the lug nuts had stripped off of the studs. He indicated that the wheel and tire were not in the box of parts on that day.

Summary judgment is drastic remedy and should only be granted when it clearly appears that no material question of fact is presented (***Sillman v Twentieth Century Fox Film Corp.,*** 3 NY2d 395, 165 NYS2d 498 [1957]). Since it is the procedural equivalent of a trial, any doubt as to the existence of a triable issue, or where the existence of a material issue of fact is arguable, the motion should be denied (***Peerless Insurance Company v Allied Building Products*** Corp., 15 AD3d 373, 790 NYS2d 474 [2d Dept 2005]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v N.Y. Univ. Med. Ctr.***, *supra*; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, as such party must affirmatively demonstrate the merit of his or her claim or defense as a matter of law (***Velasquez v Gomez***, 44 Ad3d 649, 843 NYS2d 368 [2d Dept 2007]).

Here, CPR has failed to establish its entitlement to judgment as a matter of law. There are issues of fact requiring a trial in this action including, but not limited to, whether CPR performed any work on the left front tire on June 30, 2010 or November 10, 2010, whether some or all of the wheel studs were stripped and missing their lug nuts, and whether CPR should be sanctioned for its part in discarding the

wheel prior to its inspection by the plaintiff. In addition, CPR's expert, Lange, does not dispute Baker's expert opinion that the most likely cause of this accident is the failure of CPR to tighten the lug nuts on the left front wheel. Moreover, Lange does not offer an opinion as to the cause of the wheel's detachment from the van. Rather, he opines that CPR did not perform any work on the left front tire; a question of fact that does not require an expert's explanation. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; *see also* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***Bozza v O'Neill***, 43 AD3d 1094, 842 NYS2d 88 [2d Dept 2007]).

However, CPR also contends that it did not owe a duty to the plaintiff under any circumstances. Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see* ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731[2001]; ***Pulka v Edelman***, 40 NY2d 781, 782, 390 NYS2d 393 [1976]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (*see* ***Espinal v Melville Snow Contractors, Inc.***, *supra*). As a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract (*see* ***Church v Callanan Industries***, 99 NY2d 104, 111, 752 NYS2d 254 [2002]; ***Espinal v Melville Snow Contractors***, *supra*).

Here, CPR, a company retained to service the subject van including its wheels and the replacement of its tires, failed to establish its entitlement to summary judgment regarding the issue of its duty to the plaintiff. There is an issue of fact whether Mancz or one of CPR's employees negligently created a dangerous condition – thereby "launch[ing] a force or instrument of harm" – when they serviced the van on the day before this accident (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]; ***Ragone v Spring Scaffolding, Inc.***, 46 AD3d 652, 848 NYS2d 230 [2d Dept 2007]; ***Bienaime v Reyer***, 41 AD3d 400, 837 NYS2d 737 [2d Dept 2007]). Accordingly, CPR's motion for summary judgment is denied.

Hort and Mascitelli (collectively movants) now move for summary judgment on the ground that the plaintiff has failed to establish that they had actual or constructive notice of the alleged defective condition in the subject wheel. In support of their motion, the movants incorporate by reference the pleadings and the deposition transcripts submitted in CPR's motion for summary judgment. Here, there are issues of fact regarding Hort's actual or constructive notice regarding the condition of the van's wheels. Mancz testified that he informed Reider that the wheel rims were "rotted" and excessively rusty, and that the van should be sold. Reider denies that Mancz made those statements.

The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, *supra*; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]).

In addition, there are issues of fact whether Mascitelli owed a duty to the plaintiff and had actual or constructive notice of the defective wheel. The operator of a motor vehicle has a duty to himself and others to inspect a vehicle and its equipment prior to their use, and is negligent for failure to discover patent defects (***Fried v Korn***, 286 AD 107, 141 NYS2d 529 [1st Dept 1955], *affd* 1 NY2d 691, 150 NYS2d 798 [1956]; *see also* ***Eum v Stephens***, 29 Misc 3d 1225[A], 918 NYS2d 400 [Sup Ct, Kings County 2010]). Mascitelli testified that he did not inspect the van before he took it out on the day of the accident. However, he has not established whether or not the alleged defective condition was or was not a patent defect.

Accordingly, Hort and Mascitelli's motion for summary judgment is denied.

Dated: 1/2/14

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION