Ferraro v Alltrade Tools LLC
2015 NY Slip Op 30116(U)
January 15, 2015
Supreme Court, Suffolk County
Docket Number: 13672/2009
Judge: Jr., Andrew G. Tarantino

[* 1]

ORIGINAL WHEN BLUE

COPY

At **PART 50** of the Supreme Court in and for the County of Suffolk, at One Court Street, Annex Building, Riverhead, New York, on January 15, 2015.

PRESENT
Hon. Andrew G. Tarantino, Jr.,
A.J.S.C.

Ferraro, Robert & Lisa
Plaintiff(s)

-against-

Alltrade Tools LLC
Defendant(s)

Index No: **13672/2009**

DECISION AND ORDER

Mot seq. 005 MotD
Orig. Date: 6/27/2014
Adj. Date: 9/16/2014

Mot seq. 006 MD
Orig. Date: 9/2/2014
Adj. Date: 9/16/2014

Upon consideration of the Notice of Motion for an order dismissing the complaint on the grounds of spoliation of evidence or alternatively, directing that an adverse interest charge be given at the time of trial on behalf of the defendant Alltrade Tools LLC ["Alltrade"], the supporting affirmation and exhibits A through K, (seq. 005), the affirmation and affidavit in opposition on behalf of the plaintiff Robert Ferraro ["the plaintiff"], and Alltrade's reply affirmation, and upon consideration of the Notice of Motion for an order dismissing the plaintiff's complaint based upon spoliation on behalf of the defendant Saint-Gobain Abrasives, Inc. ["Saint-Gobain"], the supporting affirmation and affidavit, and exhibits A through O (seq. 006), plaintiff's affirmation and affidavit in opposition, and Saint-Gobain's reply affirmation and exhibits A through D, it is now

ORDERED that so much of Alltrade's motion for an order dismissing the complaint is denied; and it is further

ORDERED that so much of Alltrade's motion for an order directing that the plaintiff shall be subject to an adverse interest at trial is denied, without prejudice to renew, before the trial court assigned to this matter; and it is further

ORDERED that Saint-Gobain's motion for an order dismissing the complaint is denied.

This is an action for personal injuries arising out of an accident that occurred on March 16, 2007, almost eight years ago, while the plaintiff was working in his garage at 5 Hope Court, Selden, New York. The plaintiff was using a pneumatic powered cut-off tool known as an "Air Plus" Cut-Off/Die Grinder that was manufactured by Alltrade ["the cut-off tool"]. Attached to the cut-off tool was a four (4) inch cut-off wheel manufactured by Saint-Gobain. At the time of the accident, the cut-off tool was attached to and powered by an air compressor owned by the plaintiff and located in the plaintiff's garage.

The plaintiff alleges that on the date of the accident while he was using the cut-off tool with the attached wheel, the cut-off blade fractured and one of the pieces from the fractured blade penetrated the plaintiff's neck, causing serious injury to his neck, throat and vocal chords. The action was commenced on April 8, 2009. On May 28, 2009, the attorneys for Saint-Gobain sent plaintiff's counsel a "Notice to

Preserve and Maintain" "each and every portion of the Air-Plus 2-IN-1 Cut-Off Die Grinder and cut-off blades" that plaintiff alleges were defectively designed and constructed, as well as any boxes or containers they were received in.

In February of 2010, the plaintiff attests that he was directed by the Judge presiding over his matrimonial action and by his matrimonial attorney to vacate the marital premises at 5 Hope Court and leave behind all items of personal property, except "the clothes on his back." According to the plaintiff, he was not permitted to remove any personal items, tools, or equipment including the air compressor that had powered the pneumatic powered cut-off tool involved in the accident. When the plaintiff left the marital abode, the compressor was left in the garage where it had been since the accident almost three years prior. The plaintiff understood that all of his items of personal property, including his tools and the compressor would remain at the subject premises until the couple entered into a property settlement and a final divorce decree was executed, at which time the plaintiff's property would be returned to him.

About the same time, the parties entered into a preliminary conference order on February 3, 2010. The "PC" order provided that plaintiff was to make available for inspection "the subject tool and blade as well as air compressor, 'metal clips' on which [plaintiff] was working at the time of the accident, all air hoses, air nipples, accessories other parts of tool kit including manuals and accessories, blade or bit to extent retained by [plaintiff] for inspection by [defendants] within 45 days."

In April of 2010, the attorneys for Saint-Gobain sent a letter to plaintiff's counsel to set up an inspection of "the subject tool, blade, metal clips, and all accessories". On October 14, 2010, the plaintiff, the attorneys, and the defendants' experts went to the subject premises to conduct an inspection in accordance with the preliminary conference order. According to Saint-Gobain's attorney's affirmation, plaintiff's counsel would not allow the defendants' experts to run the air compressor and/or run the Air-Plus 2-IN-1 Cut-Off Die Grinder while it was connected to the air compressor with the air hoses and related accessories. Nevertheless, plaintiff's counsel maintains that experts for both defendants inspected and photographed the compressor and attachments. There is no evidence before the Court that at any time prior to 2010 the defendants made a demand to inspect the compressor and/or attach the cut-off tool to the compressor and operate same.

On November 22, 2010, Saint-Gobain's counsel sent a letter to plaintiff's counsel addressing the limited October, 2010 inspection and, for the first time, included a Notice to Preserve and Maintain the air compressor. On March 1, 2011, the defendants moved to compel a testing and inspection and the plaintiff moved for a protective order. Ultimately, the parties entered into a stipulation wherein the plaintiff agreed, inter alia, to produce the compressor for nondestructive testing under certain parameters within 90 days of the completion of the examinations before trial.

The plaintiff's deposition was conducted on December 28, 2012. Among other things, the plaintiff testified that he had used the air compressor for many years for a variety of purposes both before and after the subject accident. At the deposition, defense counsel first learned that Lisa Ferraro and the plaintiff were separated. Counsel for Saint-Gobain sought confirmation by letter of that same date that pursuant to the two Notices to Preserve and Maintain, the compressor, air hoses and related attachments had been preserved and maintained. Between September of 2013, and February of 2014, defense counsel for Saint-Gobain sent several letters to the attorneys attempting to schedule the nondestructive testing that was the subject of the July, 2011 stipulation. The last deposition was conducted of Thomas Service, Saint-Gobain's employee and expert witness, on February 4, 2014.

According to plaintiff's counsel, in February of 2014 he began efforts to set up the anticipated inspection and nondestructive testing at the former marital residence as the parties were by this time divorced. [1] At that time counsel was told by the matrimonial attorney for Lisa Ferraro that Robert Ferraro's tools, including his compressor and hoses, were no longer at 5 Hope Court. Lisa Ferraro claimed to have no knowledge as to the whereabouts of the tools or under what circumstances they were removed from the premises.

By order dated March 27, 2014, this Court issued an order permitting the plaintiff to go to the former marital residence on a one-time basis, accompanied by any counsel to this action, and retrieve "a certain red air compressor, together with its cables and connectors on or before April 4, 2014." A second order extended the plaintiff's time to retrieve the subject compressor and hoses until on or before May 1, 2014. When the plaintiff, along with counsel, finally received admittance to the garage at the former marital residence, the compressor and hoses were no longer there. Lisa Ferraro told plaintiff's counsel that she had "no knowledge" of the whereabouts of the compressor. At a compliance conference on May 15, 2014, plaintiff's counsel advised the attorneys for the parties that the subject air compressor, hoses and related accessories were no longer available for inspection and testing.

Saint-Gobain's attorney points out several inconsistencies in Ferraro's testimony about the circumstances surrounding his divorce, when Ferraro actually left the marital residence, and the circumstances under which he left the marital residence. Counsel also faults plaintiff's counsel for not seeking an order as far back as October of 2010 when the air compressor was still in the garage, that the compressor and hoses be turned over to plaintiff's counsel.

In support of its dismissal motion, Saint-Gobain submits the 2 ½ page affidavit of its employee and expert, Thomas H. Service, PhD. dated July 14, 2014 ["the Service affidavit"]. Service is Saint-Gobain's Manager of the World Product Safety Department. The Service affidavit attests that 1) in order to test the Cut-Off Die Grinder it is necessary to connect it to the same air compressor, using the same hoses and related accessories that the plaintiff was utilizing on March 16, 2007 at the time of the accident, 2) the air compressor, hoses and related accessories are crucial items of evidence with respect to the plaintiff's claims for negligence, breach of warranty, and strict products liability, 3) the inspection is absolutely essential to the affiant's review and analysis of the plaintiff's claims and Saint-Gobain's defense thereto, 4) the abrasive wheel manufactured by Saint-Gobain will never cause injury on its own but must be evaluated as a unit, 5) one of the most important safety concerns is that the speed of the abrasive wheel (the spindle speed) must be maintained and the maximum operating speed must never be exceeded, and 6) the pneumatic tool itself provides the driving force and the power of the pneumatic tool directly depends on the supply of air from the compressor.

According to the Service affidavit, the tool has no internal speed control of its own; the final speed depends on the amount of compressed air provided to it. Small portable air compressors like that of the plaintiff can have significant changes between high and low pressure because of the limited size of the air tank and the high air consumption of the tool. Thus, "the spindle speed (operating speed) of the tool can fluctuate significantly as the compressor fluctuates; and the speed fluctuation can cause operator control problems resulting in loss of control or over speed conditions.

---

[1] About this time former plaintiff Lisa Ferraro withdrew her claim and discontinued her action.

Even crediting every assertion made in the Service affidavit, the Court is unconvinced that the loss of the air compressor and related hoses has so unduly prejudiced the defendants that a striking of the complaint is warranted. Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence (*see* CPLR 3126; *Samaroo v. Bogopa Serv. Corp.*, 106 A.D.3d 713, 713–714, 964 N.Y.S.2d 255; *Rodman v. Ardsley Radiology, P.C.*, 103 A.D.3d 871, 872, 962 N.Y.S.2d 227; *Gotto v. Eusebe–Carter*, 69 A.D.3d 566, 567, 892 N.Y.S.2d 191; *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 A.D.3d 717, 718, 872 N.Y.S.2d 166). "The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo v. Bogopa Serv. Corp.*, 106 A.D.3d at 714, 964 N.Y.S.2d 255).

The determination of the appropriate sanction for spoliation is within the broad discretion of the court (*see Ortega v. City of New York*, 9 N.Y.3d 69, 76, 845 N.Y.S.2d 773, 876 N.E.2d 1189; *Denoyelles v. Gallagher*, 40 A.D.3d 1027, 834 N.Y.S.2d 868). "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to' " prove its claim or defense (*Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 A.D.3d at 718, 872 N.Y.S.2d 166, *quoting Lawson v. Aspen Ford, Inc.*, 15 A.D.3d 628, 629, 791 N.Y.S.2d 119).

A full three-and-a-half years after the accident, in October of 2010, the subject compressor was still in the garage of the marital premises. It appears that all of the parties had the expectation that it would safely remain there as it had for a significant amount of time. That presumption is reinforced by the fact that none of the attorneys apparently thought to further safeguard the compressor by removing it from the garage pending the non-destructive testing that was to take place 90 days after the completion of the examinations before trial pursuant to the stipulation executed in July of 2011. All of the parties were aware when they executed the stipulation that the compressor was to remain where it was. All of the attorneys were aware by the end of 2012 that the plaintiff's marriage was over and he no longer resided at the subject premises. Under the circumstances, after a pain-staking review of the history of this action, the Court finds no intentional actions on the part of the plaintiff to lose or remove the compressor. As far as negligent loss of the compressor, if one were to characterize the plaintiff's presumption that the compressor would stay where it had been for three-and-a-half years, then query whether all concerned might have been better served by taking steps to better safeguard it, particularly in light of the defense expert's characterization of the compressor as "key" and "crucial". Of course, as in so many spoliation cases, hindsight is the proverbial "twenty-twenty".

Equally compelling to the decision to deny the requested relief is the conclusion by the Court that the defense will not be "fatally compromised" by the loss of the compressor. It stretches the Court's common sense beyond permissible bounds that the inability to test the range of air pressure from the subject compressor in 2014, stored in a garage for seven years after the accident, deprives the defendants from mounting an effective defense. After the lapse of time, Service's affidavit assumes, without further explanation, that the conditions surrounding the amount and flow of pressure from the compressor in 2014 can approximate those that existed on the day of the accident in 2007. This opinion is reinforced by the plaintiff's uncontradicted assertion that he used the compressor on numerous occasions after the accident.

In short the Court concludes that the defendants have failed to carry their burden of demonstrating that the plaintiff intentionally or negligently disposed of the air compressor, and 'fatally compromised its ability to' " prove its claim or defense warranting dismissal of the complaint (*Neve v. City of New York*, 117 A.D.3d 1006, 986 N.Y.S.2d 606 [2d Dept. 2014]).

Defendant Alltrade alternatively seeks the lesser sanction of an adverse inference against the plaintiff because of the loss of the compressor (*see Jennings v. Orange Regional Med. Ctr.*, 102 A.D.3d at 656, 958 N.Y.S.2d 168; *Mendez v. La Guacatala, Inc.*, 95 A.D.3d 1084, 1085, 944 N.Y.S.2d 313; *Coleman v. Putnam Hosp. Ctr.*, 74 A.D.3d 1009, 903 N.Y.S.2d 502; *Molinari v. Smith*, 39 A.D.3d 607, 834 N.Y.S.2d 269). The sanction of an adverse inference for spoliation of evidence is not warranted when the evidence destroyed is not relevant to the ultimate issues to be determined in the case (*see Matter of Eno*, 196 App.Div. 131, 162–164, 187 N.Y.S. 756). In this Court's view, the issue of whether an adverse inference is warranted is better left to the sound discretion of the trial judge who will undoubtedly rely on the expert opinions at trial for that determination.

This constitutes the Order of the Court.

ENTER

1.15.15

A.J.S.C.