

Agro v Ortega

2015 NY Slip Op 32631(U)

September 25, 2015

Supreme Court, Nassau County

Docket Number: 601250-12

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

SALVATORE AGRO,

Plaintiff,

- against -

**TRIAL/IAS PART 22
Index No.: 601250-12
Motion Date: 7/14/15
Sequence No.: 002, 003**

DECISION AND ORDER

**JOSEPH ORTEGA, VIRGILIO TRAILER CORP.
and MODULAR SPACE CORPORATION,**

Defendants.

JOSEPH ORTEGA and VIRGILIO TRAILER CORP.,

Third-Party Plaintiffs,

- against -

MODULAR SPACE CORPORATION,

Third-Party Defendant.

JOSEPH ORTEGA and VIRGILIO TRAILER CORP.,

Second Third-Party Plaintiffs,

- against -

LANDS END CONTRACTING CORP.,

Second Third-Party Defendant.

The following papers were read on this motion:

Sequence No. 2:

Notice of Motion, Affirmation and Exhibits (2 Volumes).....	1
Memorandum of Law of Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff	

Sequence No. 3:

Notice of Motion, Affirmation and Exhibits (2 Volumes).....	2
Reply Affirmation of Defendant/Third-Party Plaintiff/Second-Party Plaintiff.....	3
Affirmation in Opposition of Defendant.....	4

PRELIMINARY STATEMENT

In Sequence No. 2, defendant/third-party plaintiff/second third-party plaintiff, Virgilio Trailer Corp. (“Virgilio”), brings this application for an order pursuant to CPLR § 3126, (1) striking that portion of Modular Space Corporation’s (“Mod Space”) answer denying the cross-claims asserted against it by Virgilio, as well as Mod Space’s cross-claims against Virgilio for spoliation of crucial evidence; or, at the very least; (2) precluding Mod Space from offering any evidence regarding Virgilio’s alleged negligence at the time of trial and that Mod Space be given any adverse inference to the effect that by virtue of its failure to preserve evidence, the jury may, but is not required to infer that the evidence would have supported Virgilio’s defense, together with such other and further relief as this Court deems just and proper.

In Sequence No. 3, second third-party defendant, Lands End Contracting Corp. (“Lands End”), brings this application for an order pursuant to CPLR § 3126: (1) striking defendant/third-party defendant, Mod Space’s spoliation of crucial evidence; or in the alternative; (2) precluding Mod Space from offering any evidence regarding Lands End’s alleged negligence at the time of trial and that Mod Space be given an adverse inference to the effect that by virtue of its failure to preserve evidence, the jury may but is not required to infer that the evidence would have supported Lands End’s defense; and

(3) for such other and further relief as this Court deems just and proper. Opposition to this application has been submitted.

BACKGROUND

Plaintiff brings this action for personal injuries sustained when a wheel became disconnected from a mobile office trailer owned by Modular Space Corporation was being towed by Joseph Ortega, an employee of Virgilio Trailer Corp., and crashed through the windshield of his vehicle. The incident occurred on March 8, 2012 on the Long Island Expressway at or near Exit 33, North Hills. A copy of the Verified Complaint, naming Joseph Ortega and Virgilio Trailer Corp. as defendants is annexed as Exh. "A". Defendants Ortega and Virgilio served a Verified Answer (Exh. "B") and served a Third-party Summons and Complaint upon Modular Space Corporation ("Modular"), the owner of the trailer. The parties then stipulated to a Supplemental Summons and Amended Complaint naming Modular as a direct defendant (Exh. "D").

Plaintiff served the Supplemental Summons and Amended Complaint, which defendants Ortega and Virgilio served an Answer dated December 3, 2013, and defendant Modular served an Answer dated November 25, 2013 (Exh. "E"). Ortega and Virgilio cross-claimed against Modular, and Modular cross-claimed against Ortega and Virgilio.

By Second Third-party Summons and Complaint dated May 29, 2014, Ortega and Virgilio impleaded Lands End Contracting Corp. ("Lands End"), (Exh. "M"). The Complaint alleges that prior to March 8, 2012, Virgilio contracted with Lands End to perform a "tear down" of the subject trailer to make it ready to be hauled away from the worksite at which it had been located. The Complaint alleges that if plaintiff was injured as alleged, it was as a result of the negligence of Lands End.

Virgilio seeks an Order striking that portion of Mod Space's Answer which denies the cross-claims asserted against it by Virgilio, and Mod Space's cross-claims against Virgilio based upon claims of spoliation of evidence, precluding Mod Space from offering evidence regarding Virgilio's alleged negligence at time of trial, and that the Court direct that Mod Space be given an adverse inference as a result of their failure to preserve evidence.

Similarly, Lands End moves to strike Modular's cross-claims against it because of their

spoliation of crucial evidence, or, alternatively, precluding Modular from offering evidence of Lands End's alleged negligence at the time of trial, and that an adverse inference be drawn against Modular at the time of trial based upon their failure to preserve evidence, and that the jury may infer that the missing evidence would have supported Lands Ends defense.

In opposition to the motions, Modular cites the deposition testimony of Joseph Ortega, that prior to transporting the trailer, he checked the tires, and checked the tightness of the lug nuts. Following the incident, he inspected the trailer and found that one of the lug nut had snapped inside of the hub; that there was no damage to the hub itself; that a bolt head snapped; that one of the lugs was broken off in the hub; and that the other four lugs were intact, although one was bent. He also described the manner in which he believed that the rim had come off at the hub, without breaking the other four bolts. He claims that a representative of Modular came to the scene with new tires, but he does not believe that this individual removed the old tires.

DISCUSSION

“ ‘ 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 ‘ ‘ ‘ its claim or defense (*Morales v. City of New York*, 130 A.D.3d 792 [2d Dept. 2015], citing *Utica Mut. Ins. Co. v. Berkoski*, 58 A.D.3d 717, 718 [2d Dept. 2009], quoting *Lawson v. Aspen Ford, Inc.* 15 A.D. 3d 628, 629 [2d Dept. 2005]).

In *VOOM HD Holdings, LLC v. EchoStar Satellite, LLC*, 93 A.D.3d 33, 45 (1st Dept. 2012), the Court specifically adopted the standards set forth in *Zubulake v. Warburg, LLC* 220 FRD 212, 218 (SDNY 2003) that (a) party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind’; and finally, (3) that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense.”

In this case there is no evidence that Modular ever obtained custody of the first wheel which became dislodged from their trailer. Ortega testified that one of the lug nuts had snapped off, and

another was bent. It appears that the police who investigated the accident took control at least of the wheel which struck plaintiff's vehicle, while the other two, which blew out as a result of friction after the loss of the first wheel, appear to have been taken by occupants of the two wrecking trucks which were called to the scene. There is no evidence that these were ever returned to Modular. When the trailer was returned by the police, it was sent to an independent contractor, Lanz Trur, which made necessary repairs to the axle. Thus, movants have not established that Modular ever had control of any of the three dislodged wheels, including the wheel which made contact with plaintiff's vehicle.

There is no general duty to preserve evidence before litigation is filed, threatened, or reasonably foreseeable. The last time Modular saw the wheels was contemporaneously with the incident, when an employee delivered replacement wheels. The new wheels were installed by the wreckers who had been called to the scene. Certainly, the concept of litigation, and the importance of retaining the wheels, were not serious considerations at that moment. The obligation to secure and retain the wheels had not been triggered as of Modular's last contact with them.

Nor is there any evidence that evidence was destroyed with a culpable state of mind. The only evidence is somewhat speculative, that the wheel which struck plaintiff's car was removed by the investigating officers from the police department, and the two others were taken into custody by the wreckers. In fact, defendant Modular neither destroyed, nor disposed of the wheels.

Neither Virgilio nor Lands End have established that the absence of the wheel which struck plaintiff's vehicle, or the other two wheels, fatally compromised their ability to defend or prosecute cross claims. Ortega, who did not inspect any of the wheels, nevertheless testified that one of the lugs had snapped off, and another was bent. An inspection of the wheel itself may well have produced no further evidence of the cause for its dislodgement.

It is also relevant that Modular faces similar evidentiary difficulties as a consequence of the unavailability of the wheel. Their ability to defend the action against them, and prosecute their claims against Virgilio and Lands End are equally as affected by the absence of the wheels. No sanction should be opposed against them for the disappearance of the wheels from the scene of the accident, as the moving parties have not established custody, negligent or intentional destruction, that their ability to

defend or prosecute cross-claims has been fatally compromised, or that Modular has gained an improper advantage as a result any conduct on its part.

The motions on behalf of defendants Ortega and Virgilio and second third-party defendant to strike portions of defendant Modular's Answers, preclude Modular from producing evidence of negligence on the part of movants, and directing that an adverse interest charge by given against Modular are denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 25, 2015

ENTER:



JEROME C. MURPHY
J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE