John v CC Cyclery
2017 NY Slip Op 31810(U)
August 22, 2017
Supreme Court, Kings County
Docket Number: 501255/15
Judge: Larry D. Martin

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 22nd day of August, 2017.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

HYWEL JOHN,

PLAINTIFF,

-VS-

INDEX No. 501255/15

CC CYCLERY and CO LLC and WILLIAM SVENSTRUP,

DEFENDANTS.

The following papers numbered 1 to 3 read on this motion	Papers Numbered
Notice of Motion and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	

Upon the foregoing papers, plaintiff Hywel John ("plaintiff") moves for an order: (1) pursuant to CPLR § 3126, striking the Answer of defendants CC Cyclery and Co LLC and William Svenstrup (collectively, "defendants") on the grounds of negligent and/or intentional spoliation of material evidence; and (2) extending the time to file a Note of Issue (NOI).

Brief Facts & Procedural History

Plaintiff commenced the instant action to recover compensatory damages for personal injuries he allegedly sustained on November 28, 2014, when the front wheel of a bicycle (the "subject bicycle") he was riding dislodged, causing him to be flung from the bicycle onto the ground (the "subject accident"). In the verified bill of particulars, plaintiff alleges, among other things, that defendants "negligently repaired and maintained" (Bill of Particulars, ¶ 13) the subject bicycle.

At his January 11, 2016 deposition, plaintiff testified that he initially went to defendants' repair shop, CC Cyclery and Co. LLC ("Cyclery"), to have guards placed on the subject bicycle's wheels and a rack fitted onto the back (Plaintiff's Affirmation, exhibit E, Hywel Deposition, 26: 24-25; 27: 13-14; 22-23). Plaintiff returned to Cyclery on the date of the subject accident to pick up his bicycle, and was riding along Avenue A, in Brooklyn, New York, when the subject accident occurred

(*id.* at 31: 22-25; 32: 2-11). Plaintiff testified that immediately after his accident, he returned to Cyclery, informed an individual named Mr. Jeff Underwood ("Mr. Underwood") of what transpired and left the bicycle in the shop's possession for further repairs to be performed (*id.* at 64: 7-12).

Thereafter, plaintiff emailed Mr. Underwood on December 3, 2014 asking for the company's insurance information, claiming that he was "pretty concerned about [his] healthcare contribution going forward" as well as his "lack of ability to work properly over the next couple of months" due to his injuries (*id.* at exhibit M). Mr. Underwood responded to plaintiff in an email dated December 9, 2014 stating, among other things, "your front wheel had to be straightened and the tire had to be replaced . . ." and "I also switched out the quick release on the front to a Allen bolt . . ." (*id.* at exhibit L). Mr. Underwood did not address plaintiff's request for insurance information in his email. According to plaintiff, he returned to Cyclery on January 23, 2015 to pick up his bike and, once again, asked Mr. Underwood for the company's insurance information (*id.* at 68: 15-17). However, plaintiff claims that Mr. Underwood refused to comply with plaintiff's request for insurance information (*id.* at 68: 18-20).

At Mr. Underwood's deposition on July 26, 2016, he stated that he is the former owner of Cyclery and, among other things, was working as a mechanic for the company at the time of the subject accident (*id.* at exhibit H, Underwood Deposition, 17: 5-9; 18: 12-14). Mr. Underwood confirmed that he made repairs to plaintiff's bicycle both before and after the subject accident. Moreover, during his deposition, Mr. Underwood identified a photo of the subject bicycle (previously marked as Defendants' exhibit A) and confirmed that it accurately depicted the condition of the bike on the date of the accident (*id.* at 53: 23-25; 54: 2-3; *see* exhibit K).

In his post-accident repair of plaintiff's bicycle, Mr. Underwood stated that he replaced several of the parts, including a device called a quick release (*id.* at 60: 5-22). Mr. Underwood further admitted that upon showing plaintiff which bicycle parts he fixed, he threw away the broken parts including the quick release (*id.* at 61: 15-23). Additionally, Mr. Underwood testified that he held onto the defective parts "until the trash came" on the week that plaintiff picked up his bicycle

(*id.* at 64: 5-9).

According to Mr. Underwood, plaintiff asked him to talk to the shop owner about submitting an insurance claim on plaintiff's behalf, and Mr. Underwood replied that the company could not do so (*id.* at 63: 16-19). Mr. Underwood asserted that he never touched the quick release device prior to the subject accident, and, therefore, defendants could not be at fault for plaintiff's accident (*id.* at exhibit H, 52: 3-5; 8; 19-21).

Plaintiff thereafter commenced the instant action on February 4, 2015. On March 1, 2016, plaintiff served defendants with a notice to "preserve and retain any and all parts and equipment f[ro]m the plaintiff's bicycle . . ." (*see id.* at exhibit F). On May 5, 2016, a compliance conference was held and an order was issued directing, among other things, for plaintiff to "preserve the bicycle at issue for inspection by defendants" (*id.* at exhibit G).

Discussion

Plaintiff contends that defendants' Answer should be stricken pursuant to CPLR § 3126 because Mr. Underwood disposed of the bicycle parts without first "advis[ing] plaintiff or anyone else that he intended to throw out or destroy the purportedly defective parts" (Plaintiff's Affirmation, ¶ 45). Plaintiff asserts that "Mr. Underwood threw out these parts in spite of having preserved and retained exclusive possession and control over these parts at CC Cyclery from November 28, 2014 (DOA) and continuing until sometime after the plaintiff returned to the shop to pick up his bicycle on January 23, 2015" (*id.*). According to plaintiff, defendants "knew or should have known that the parts removed and replaced from plaintiff's bicycle were significant and material evidence in a reasonably foreseeable litigation, based upon plaintiff's repeated requests for insurance information in order for him to effectuate a claim for the damages he sustained in this accident" (*id.* at ¶ 54).

In response, defendants assert that they did not act in a willful or contumacious manner in discarding the bicycle parts. Rather, defendants contend that plaintiff's act in asking Mr. Underwood about insurance was "merely a request for insurance information that [plaintiff] could use to obtain additional health care contributions" and did not constitute notice "that the accident would result in

litigation with claims of negligence on the part of the defendants" (*see* Defendants' Affirmation in Opp, ¶ 4). Additionally, defendants aver that Mr. Underwood–an unrepresented layperson at the time– would not have interpreted plaintiff's request for insurance as notice that he was required to preserve the replaced bicycle parts (*see* Defendants' Affirmation in Opp, ¶ 4). In any event, defendants argue that striking their Answer is not an appropriate sanction in this instance because the missing bicycle parts do not prejudice or impede plaintiff's ability to make out his prima facie case (*id.* at ¶ 5). In fact, defendants assert that the loss of such evidence is more prejudicial to them, "as it will be evidence that they now lack to show that plaintiff failed to keep his bicycle in proper condition and failed to request a proper maintenance from defendants at the time that he [initially] brought the bicycle in to be repaired" (*id.* at ¶ 6).

Based upon a review of the record submitted by the parties and the relevant law, the Court denies plaintiff's motion. CPLR § 3126 provides for the striking out of a party's pleadings when that party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . ." (CPLR § 3126 [3]). However, such a drastic remedy is "unwarranted absent a 'clear showing that the failure to comply with discovery demands was willful, contumacious or in bad faith' " (*Foncette v LA Express*, 295 AD2d 471, 472 [2d Dept 2002]). Moreover, under the common law, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading" (*Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342 [2d Dept 2003]). Additionally, a pleading may be stricken where the evidence lost or destroyed is so central to the case that it renders the party seeking the evidence "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (*Foncette*, 295 AD2d at 472; *see Awon v Harran Transp. Co., Inc.*, 69 AD3d 889, 890 [2d Dept 2010]). Notably, "even if the evidence was destroyed before the spoliator became a party, [the pleading may nonetheless be stricken] provided [the party] was on notice that the evidence might be needed for future litigation" (*Baglio,* 303 AD2d at 342).

As an initial matter, the Court notes that a Notice to Preserve Evidence was not served on defendants until more than one year after the subject accident occurred and the instant action was commenced (*see MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 484 [2004]). Absent such notice, the Court finds that plaintiff's act in requesting insurance information was insufficient to put a layperson such as Mr. Underwood on notice that litigation was contemplated.

Moreover, the Court finds that plaintiff has failed to demonstrate that Mr. Underwood's act in discarding the removed bicycle parts was willful and contumacious (*see Di Domenico v C & S Aeromatik Supplies*, 252 AD2d 41, 52 [2d Dept 1998]). Plaintiff also fails to establish that Mr. Underwood's actions have completely deprived him of the ability to prove his prima facie case (*cf. Baglio*, 303 AD2d at 342). As defendants note, plaintiff still has at his disposal the photograph reflecting the defective condition of the bicycle at the time of the accident, as well as Mr. Underwood's undisputed deposition testimony detailing which portions of the bicycle he fixed and which portions he discarded. Thus, while it cannot be said that plaintiff is not adversely affected by the loss of the defective bicycle parts, the Court finds that plaintiff has failed to demonstrate that he is prejudiced by this loss (*see Awon,* 69 AD3d at 890; *Foncette*, 295 AD2d at 472).

Conclusion

Accordingly, that portion of plaintiff's motion seeking to strike defendants' Answer is denied. That portion of plaintiff's motion seeking an order providing for the filing of the NOI is denied as moot. A review of the court's record indicates that plaintiff filed the NOI herein on October 14, 2016. The parties are reminded of their September 6, 2017 appearance in JCP.

The foregoing constitutes the decision and order of the Court.

For Clerks use only
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Motion Seq. #
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AUG 22 2017

ENTER,

HON. LARRY D. MARTIN
J.S.C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT