Monell v Tower W. Livery Ctr.
2020 NY Slip Op 34449(U)
September 9, 2020
Supreme Court, Bronx County
Docket Number: 22657/2019E
Judge: Mary Ann Brigantti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15___

---X

BRANDON T. MONELL Index №. 22657/2019E

-against- Hon. MARY ANN BRIGANTTI

TOWER WEST LIVERY CENTER, et al. Justice Supreme Court

---X

The following papers numbered 1 to __6____ were read on this motion (Seq. No. __003____)
for ____STRIKE ANSWER_______ noticed on _March 2, 2020

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4
Replying Affidavit and Exhibits	No(s).	5,6

Motion is Respectfully Referred to Justice: ______
Dated: ______

Upon the foregoing papers, the plaintiff Brandon T. Monell ("Plaintiff") moves for an order pursuant to CPLR 3126, (1) striking the defendant's answer, or in the alternative, (2) determining the issue of liability in Plaintiffs favor, or in the alternative, (3) resolving the issue of defendant having notice of a dangerous condition in Plaintiffs favor, or in the alternative, (4) granting a negative inference charge to the jury on the issue of defendant having notice of a dangerous condition in Plaintiffs favor, and (5) such other and further relief as this Court deems just and proper. Defendants Venture Leasing LLC s/h/a Venture Leasing LLC and Venture Leasing, Inc./Tower West ("Defendants") oppose the motion.

Background

This matter arises out of an alleged motor vehicle accident that occurred on March 7, 2018. Plaintiff, who is a Taxi and Limousine Commission licensed operator, alleges that prior to that date he rented a Nissan Altima from Defendants. Plaintiff claims that from October 2016 through March 2018, he experienced various mechanical issues with the Altima, but Defendants refused to replace it. Eventually on March 2, 2018, the transmission "died" on the Altima and Plaintiff contacted "Tower Claims Department" which operates a tow truck that brings vehicles to Tower Body Shop in the Bronx. That same day Defendants provided Plaintiff with a Hyundai Sonata vehicle to replace the Altima. Plaintiff alleges that the Sonata was thereafter ticketed for having an expired inspection. On March 6, 2018, Plaintiff contacted Tower Claims Department again because the battery on the Sonata had died. On March 7, 2018, Plaintiff was transporting a passenger in the Sonata from Queens to Brooklyn. As Plaintiff was exiting the Brooklyn-Queens Expressway, he proceeded down the sloped ramp at about 15 miles per hour when he noticed a red traffic signal ahead, and a sanitation truck was slowing about 50-60 feet in front

of him. Plaintiff then tried to brake, but his vehicle would not brake. Plaintiff then "slammed" the brakes in an attempt to trigger the anti-lock braking system, but the system did not trigger and Plaintiff collided with the rear of the sanitation truck. Plaintiff states that his passenger and the sanitation truck then left the scene. Plaintiff alleges that he again contacted Tower to provide a tow truck. When the tow truck driver arrived, he said that the radiator was not leaking and used a rubber mallet to flatten the damaged hood of the vehicle. The driver then allegedly refused to tow the vehicle and forced Plaintiff to drive the Sonata to Defendants' place of business. Plaintiff alleges that the Sonata's anti-lock braking system suddenly triggered each and every time Plaintiff pressed the brakes no matter how soft or hard he pressed. Plaintiff states that through his attorney he then advised Defendants to preserve the vehicle for inspection because the anti-lock brake system never triggered, and given his bad experiences, he was convinced that there was a mechanical problem with the Sonata and he needed an expert to inspect the vehicle to confirm his beliefs.

Plaintiff alleges in an affirmation of counsel that on March 8, 2018, the day after the accident, he sent a letter to Venture Leasing LLC directing it to preserve the Sonata because it is crucial evidence, and altering the evidence would greatly prejudice Plaintiff's claims and would lead to Court sanctions. Defendants, through communication from Enea Koci, a claims representative of Tower Auto Mall, confirmed receipt of the letter. Plaintiff's counsel and Mr. Koci then corresponded via e-mail regarding setting up a vehicle inspection date. On March 27, 2018, however, Mr. Koci e-mailed Plaintiff's counsel to advise that the vehicle was "repaired" by the body shop "against [his] instructions." The inspection was therefore canceled. Plaintiff commenced this action by filing a summons and verified complaint on March 6, 2019.

Plaintiff now moves for spoliation sanctions against Defendants, alleging that Defendants destroyed critical evidence within their control when they repaired the vehicle. Plaintiff state that he has been prejudiced because the vehicle's post-accident state was crucial to the issue of liability. Plaintiff alleges that there is no innocent explanation for the failure to advise that the repair was being done in the ordinary course of business, and Defendants intentionally chose not to inform the Plaintiff about it. Plaintiff requests an order striking the pleading, or resolving issues of liability in its favor, or in the alternative, a negative inference jury charge on the issue of notice and/or negligence.

In opposition to the motion, Defendants contend, *inter alia*, that Plaintiff has failed to establish entitlement to an order striking the pleading since there is no evidence that the vehicle repair has fatally compromised his ability to prove his claim. Defendants note that no expert opinion has been provided to support Plaintiff's contentions that he will be unable to prove his claim without a post-accident inspection of the vehicle. Defendants further assert that Plaintiff may prove his claim using other evidentiary sources. Defendants also allege that there has been no showing of contumacious or willfulness on their part in destroying the subject evidence. Defendants further argue that there is no showing that the Sonata vehicle

is essential to his claims. Defendants also note that discovery in this matter is incomplete and summary judgment in favor of Plaintiff at this juncture would be premature.

Plaintiff has submitted an affirmation in reply, and his contentions will be addressed *infra* if necessary.

Applicable Law and Analysis

Under CPLR 3126, sanctions may be imposed "when a party intentionally, contumaciously, or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection" (*see Melcher v. Apollo Medical Fund Management LLC.*, 105 A.D.3d 15 [1st Dept. 2013], citing *Sage Realty Corp. v. Proskauer Rose*, 275 A.D.2d 11, 17 [1st Dept. 2000]; *lv. dism.*, 96 N.Y.2d 937 [2001]). "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense" *see Duluc v. AC & L Food Corp.*, 119 A.D.3d 450 [1st Dept. 2014][internal citations omitted]).

With respect to the first prong of the analysis, a the obligation to preserve evidence is triggered "[o]nce a party reasonably anticipates litigation" (*see VOOM HD Holdings LLC. v. EchoStar Satellite, LLC.*, 93 A.D.3d 33, 36 [1st Dept. 2012], quoting *Zubulake v. UBS Warburg, LLC.*, 220 FRD 212 [S.D.N.Y. 2003]). A party in control of the evidence is deemed to "reasonably anticipate" litigation when it is "'on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation'" (*id.* at 43, quoting *The Sedona Conference, Commentary on Legal Holds: The Trigger and the Process*, 11 Sedona Conf. J. 265, 267 [Fall 2010]). Actual notice of pending litigation is not necessary, as a party's duty to preserve evidence may be triggered where the alleged spoliator was "on notice that the [evidence] might be needed for future litigation" (*Strong v. City of New York*, 112 A.D.3d 15, 22 [1st Dept. 2013]). In this matter, it is not disputed that Defendants had actual notice of pending litigation, since they acknowledged receipt of a letter from Plaintiff's counsel to preserve the vehicle, and were actively working with counsel to set up an inspection date, before the vehicle was repaired. Accordingly, this prong of the analysis is satisfied.

With respect to the second prong of the spoliation analysis, evidence may be deemed destroyed with a "culpable state of mind" where it is destroyed either knowingly or negligently (*VOOM HD Holdings LLC. v. EchoStar Satellite, LLC.*, 93 A.D.3d at 45 [internal citations omitted]; *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 [2nd Cir. 2002]). Even where the loss or destruction of evidence is unintentional, a court may find spoliation where the record supports a finding that crucial evidence was negligently lost or destroyed, and the spoliator took no steps to assure its preservation (*see*

Standard Fire Ins. Co. v. Federal Pacific Elec. Co., 14 A.D.3d 213, 219 [1st Dept. 2004]). In addition, spoliation sanctions may be warranted even though the alleged spoliator was not the owner of the missing evidence, where the spoliator, again, "failed to take sufficient steps to assure [] preservation" of the evidence (*id.*, citing *Amaris v. Sharp Elecs. Corp.*, 304 A.D.2d 457, 758 N.Y.S.2d 637 [1st Dept. 2003]; *see also Moscione v. QPII-43-23 Ithaca St. LLC*, 156 A.D.3d 445, 446 [1st Dept. 2017][although defendant was no longer owner or manager of the premises, they undertook the coordination of the inspection of an allegedly defective elevator, and should have advised the new premises owner to preserve the elevator until an inspection was concluded]). In this matter, Defendants essentially admit in an e-mail that they negligently altered the condition vehicle when, prior to the Plaintiff's inspection date, the vehicle was "repaired against the instructions" of Defendants' insurance carrier. There is no direct evidence that Defendants - or their "shop" employees - acted knowingly or intentionally, however it is clear that Defendants were negligent in failing to preserve the vehicle before the inspection date (*see Standard Fire Ins. Co.,* 14 A.D.3d at 219).

The third and final prong on a motion for spoliation sanction is that the destroyed evidence was relevant to the moving party's claim or defense (*see Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 [2015]). In this matter the post-accident condition of the Sonata was clearly relevant as Plaintiff is alleging that Defendants' negligent maintenance of the vehicle caused the brakes to fail and led to an accident.

Since Plaintiff has established that the three elements of a spoliation claim are satisfied, the final determination is the sanction to be imposed on Defendants. The Court initially finds that Plaintiff is not entitled to the primary requested sanction: an order striking Defendants' answer, determining the issue of liability in Plaintiff's favor, or "resolving the issue of [Defendants] having notice of the dangerous condition" in Plaintiff's favor. Severe sanctions including striking the pleadings or resolving all issues of liability in favor of the movant may only be imposed "where a party destroys key physical evidence such that its opponents are 'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence'" (*Tommy Hilfiger, USA v. Commonwealth Trucking*, 300 A.D.2d 58, 60 [1st Dept. 2002], quoting *DiDomenico v. C&S Aeromatik Supplies*, 252 A.D.2d 41, 53 [2nd Dept. 1998], and *Squiteri v. City of New York*, 248 A.D.2d 201, 202 [1st Dept. 1998]). Plaintiff here has failed to demonstrate that he will endure such prejudice as a result of Defendants' repair of the subject vehicle. Specifically, Plaintiff has failed to show that his ability to set forth a prima facie case has been fatally compromised. Plaintiff does not allege that he now cannot have an expert prepare a report on his behalf indicating that the vehicle brakes were defective or that Defendants should have had notice of such a defect (*cf. Rodriguez v. 551 Realty LLC*, 35 A.D.3d 221 [1st Dept. 2006]; *see Cameron v. Nissan 112 Sales Corp.*, 10 A.D.3d 591, 592 [2d Dept. 2004]). Plaintiff may testify, as he did in his affidavit, concerning prior issues with the subject

vehicle, his experience on the date of the accident. Plaintiff does not address in the moving papers whether he has access to prior repair and maintenance records for the vehicle, and Plaintiff presumably will be able to depose the individuals who performed pre-accident inspections (*see, e.g., Chiu Ping Chung v. Caravan Coach Co.*, 285 A.D.2d 621 [2d Dept. 2001]). Plaintiff thus has not provided proof aside from his counsel's assertions that without an inspection of the Sonata, he will be unable to prove his case (*Cameron*, 10 A.D.3d at 592; *see American Intern. Ins. Co. v. A. Steinman Plumbing & Heating Corp.*, 93 A.D.3d 559 [1st Dept. 2012]).

Under the totality of the circumstances here, however, an adverse inference charge is warranted against Defendants on the issue of the condition of the vehicle at the time of the accident, and whether Defendants had notice of the allegedly malfunctioning brake condition, since it is evident that Defendants at least negligently repaired the vehicle despite express notice that Plaintiff's inspection was scheduled (*VOOM HD Holdings LLC*, 93 A.D.3d at 47, citing *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 655 [1st Dept. 2007][negative inference charge was appropriate "where the loss does not deprive the opposing party of the means of establishing a claim or defense"]; *see Palakawong v. Lalli*, 88 A.D.3d 541 [1st Dept. 2011]; *see Morales v. City of New York*, 130 A.D.3d 792, 795 [2d Dept. 2015]). An adverse inference charge would be sufficient to prevent Defendants from using the existence of a repaired vehicle to their own advantage (*Minaya v. Duane Reade Intl., Inc.*, 66 A.D.3d 402, 403 [1st Dept. 2009]).

Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion is granted only to the extent that Plaintiff is entitled to an adverse inference jury charge at the time of trial against Defendants with respect to the condition of the vehicle at the time of the accident and whether Defendants had notice of that condition, and it is further,

ORDERED, that Plaintiff's motion is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: September 9, 2020 **Hon.**

MARY ANN BRIGANTTI **J.S.C.**

1. CHECK ONE.......................... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS.......................... ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.......................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT