| **Changhun Lee v Almar Supplies, Inc.** |
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| 2023 NY Slip Op 35098(U) |
| August 7, 2023 |
| Supreme Court, Queens County |
| Docket Number: Index No. 713316/20 |
| Judge: Timothy J. Dufficy |
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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**



**PRESENT: HON. TIMOTHY J. DUFFICY** **PART 35**
**Justice**

**----------x**

**CHANGHUN LEE,**

**Plaintiff,**

**-against-**

**ALMAR SUPPLIES, INC. and DONALD FRAZER,**

**Defendants.**

**----------x**

**Index No.: 713316/20**
**Mot. Date: 5/9/23**
**Mot. Seq.: 2**

The following papers were read on this motion by defendants Almar Supplies Inc. and Donald Frazer (defendants) for an order, pursuant to CPLR 3212, granting summary judgment in their favor on the issue of liability and dismissing plaintiff's complaint against them, or, in the alternative, an order, pursuant to CPLR 3126 granting spoliation sanctions against the plaintiff.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affidavits-Exhibits..... | EF 57-66 |
| Answering Affidavits-Exhibits..... | EF 69-80 |
| Replying Affidavits-Exhibits..... | EF 86 |

Upon the foregoing papers, the motion by defendants Almar Supplies Inc. and Donald Frazer is granted in part and denied, in part; in that summary judgment is denied and spoliation sanctions are granted, to the extent indicated below.

This action arises out of an alleged motor vehicle accident, that occurred on October 25, 2019, on Prince Street, at or near 35th Avenue, in Queens, New York. Plaintiff testified that his accident occurred between 11:00 a.m. and 11:15 am. Plaintiff alleges that he was stopped for a traffic control device when his vehicle was rear-ended by a truck owed by Almar Supplies, Inc. (Almar) and operated by Donald Frazer (Frazer). Plaintiff alleges that after the accident, the driver of the truck fled the scene. Plaintiff testified that he was able to use his cellphone to take photographs of the rear of the truck as it drove away.

Defendants admit that Almar owned the truck depicted in the plaintiff's photographs and that Frazer was operating the vehicle in the area on the morning of the accident, but deny that the vehicle was involved in an accident.

Defendants move for summary judgment, submitting, *inter alia*, the deposition testimony of defendant Almar's managing member, Rossana Bortone. Ms. Barone testified that she was notified of the alleged accident, approximately one month later, and by then, the video footage from the truck's onboard system was no longer available because the system only stored the footage for a few days before overwriting it with newer footage.

Defendants also submit the deposition testimony of Mark Ross of Spin Fleet Solutions, Almar's GPS/dashboard camera vendor. Mr. Ross testified, in sum and substance, that the GPS data revealed that the Almar truck was on College Point Blvd. during the time of the alleged accident. He also testified that his search of the cloud system revealed that there were no accidents or "harsh driving" incidents involving the Almar Truck on the accident date.

Frazer testified that he was driving the truck shown in plaintiff's photographs on the day of the accident. He denied being involved in the accident. He had no independent recollection of the routes he drove that day. He admitted that on occasions, he would operate the truck on Prince Street between Northern Boulevard and 35th Avenue.

In opposition, plaintiff submits, *inter alia*, his affidavit and deposition testimony that while he was stopped for traffic light, his vehicle was struck from the rear. He looked in his rear view mirror and saw a large gray truck. He exited his vehicle and saw a male driver inside the truck. The driver gestured to plaintiff to move his car. Plaintiff testified that as he went to do so, the truck left the scene. As the truck was leaving, he took a picture of the truck with his cell phone. As stated above, Fraser identified this photographs as showing the vehicle he was driving on the day of the accident.

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]. The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Rodriguez v Parkchester South Condominium, Inc*., 178 AD2d 231 [1st Dept. 1991]). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A party seeking summary judgment may not merely point to gaps in the opponent's proof to obtain relief. Rather, the movant must adduce affirmative evidence of its entitlement to summary judgment (*Torres v Industrial Container*, 305 AD2d 136 [1st Dept. 2003]).

On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, [2011]). Summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324, [1986]) and then only if, upon the moving party's meeting of this burden, the non-moving party fails "to establish the existence of material issues of fact which require a trial of the action" (*Id*.). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Id). However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hospital*, *supra*).

The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues. (*see Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *Doyle v Wieber*, 194 AD3d 785 [2d Dept. 2021].) Summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility. (*see Kaziu v Human Care Servs. for Families & Children, Inc*., 167 AD3d 588, 588 [2d Dept. 2018], quoting *Ruggiero v DePalo*, 153 AD3d 870, 872 [2d Dept. 2017].).

Viewing the evidence in a light most favorable to the plaintiff, there are triable issues of fact regarding whether the defendants' truck struck the plaintiff's vehicle on the day of the accident. Accordingly, the application seeking summary judgment on the issue of liability is denied.

In the alternative, the defendants seek to dismiss plaintiff's complaint on the grounds of spoilation. Defendants argue, that within one week after the accident, the plaintiff spoke to an attorney about suing the defendants, However, several months after the accident, he disposed of the vehicle by giving it to a friend, although the vehicle was drivable. Defendants note that while the plaintiff testified that he took photographs of the

defendants' vehicle after the accident, he did not take any photographs at the scene that would have memorialized the alleged damage to his own vehicle. Plaintiff did not take any photographs of the vehicle before he gave it away. The record reflects, that on the day of the accident, the plaintiff called 911 and reported the accident to the police. The police made a report, based on the plaintiff's statements, which included the allegation that the defendant's truck left the scene.

Pursuant to the common-law doctrine of spoliation, the imposition of a sanction may be appropriate where a party negligently loses or intentionally destroys key evidence (*see Neve v City of New York*, 117 AD3d 1006, 1008 [2d Dept. 2014]; *Rodman v Ardsley Radiology, P.C.*, 103 AD3d 871, 872 [2d Dept 2013]). The Supreme Court has broad discretion in determining the appropriate sanction for spoliation (*see Biniachvili v Yeshivat Shaare Torah, Inc*., 120 AD3d 605, 606 [2d Dept. 2014]), and "[t]he 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 AD3d 713, 714 [2d Dept. 2013].) The focus of spoliation sanctions is generally to preclude one party from obtaining an unfair advantage against another due to the spoliation of evidence (*see Ortiz v Bajwa Dev. Corp*., 89 AD3d 999 [2d Dept. 2011]).

The party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to defend [the] action (*Lawson v Aspen Ford, Inc.,* 15 AD3d 628, 629 [2005]; *see Kirschen v Marino,* 16 AD3d 555, 555-556 [2005]).

In the instant case, the defendants sustained their burden of establishing that spoliation occurred, given that the plaintiff failed to preserve the vehicle or take photographs of it before disposing of the vehicle, despite his knowledge of a reasonable likelihood of litigation regarding the incident, and the highly relevant nature of the condition of the plaintiff's vehicle to that litigation (*see e.g. Strong v City of New York*, 112 AD3d 15 [1st Dept 2013]; *Ortiz v Bajwa Dev. Corp*., *supra*.).

The Court finds that in the instant case, although the plaintiff's disposal of the vehicle did not deprive the defendants of their its ability to defend against the case (*see Cataudella v 17 John St. Assoc., LLC*, 140 AD3d 508 [1st Dept 2016]) and that the absence of the vehicle does not leave the defendants "prejudicially bereft" of a means of defending the claim (*see Jenkins v Proto Prop. Servs., LLC*, 54 AD3d at 727; *see Barnes*

*v Paulin*, 52 AD3d at 755; *Denoyelles v Gallagher*, 40 AD3d at 1027; *Dennis v City of New York*, 18 AD3d 599 [2005]; *cf. Velasquez v Brocorp., Inc.*, 283 AD2d 423 [2001]; *Yi Min Ren v Professional Steam-Cleaning*, 271 AD2d 602, 602-603 [2000]. Thus, the Court finds that sanctions are appropriate. However, the application seeking sanctions, is granted solely to the extent that an adverse jury inference is to be issued at trial, and is otherwise denied. Thus, under the circumstances of the instant case, the Court finds that an adverse inference charge at trial, pursuant to Pattern Jury Instruction 1:77.1, is appropriate (*See Merrill v Elmira Heights Central School District*, 77 AD3d 1165 [3d Dept 2010]).

Accordingly, it is

**ORDERED** that the motion by defendants Almar Supplies Inc. and Donald Frazer is granted in part and denied, in part, to the extent set forth above; in that: it is

**ORDERED** that summary judgment on the issue of liability dismissing plaintiff's complaint is denied; and it is further

**ORDERED** that the part of the motion, pursuant to CPLR 3126, granting spoliation sanctions is granted solely to the extent that an adverse inference charge, pursuant to Pattern Jury Instruction 1:77.1, is to be issued at trial, and is otherwise denied; and it is further

**ORDERED** that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

**Dated: August 7, 2023**

**TIMOTHY J. DUFFICY, J.S.C.**

FILED
8/7/2023 TA
COUNTY CLERK
QUEENS COUNTY