

**NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

JOHN SIMEONE, II Plaintiff	:	SUPERIOR COURT OF NEW JERSEY
	:	
	:	
	:	
v.	:	ESSEX COUNTY
	:	DOCKET NO.: ESX-L-4056-15
	:	
	:	
MOTORCYCLE MALL, INC., et. als,	:	
	:	
Defendants	:	
	:	
	:	OPINION

:

October 13, 2017

Hon. Stephanie Ann Mitterhoff, JSC

Sophia Soraya, Esq.
Varcadipane & Pinnisi, PC
Attorney for Plaintiff John Simeone, II

Kenneth Ho, Esq, Esq.
Sweet Pasquarelli, PC
Attorney for Defendant Motorcycle Mall, Inc.

THIS MATTER comes before the court on Plaintiff John Simeone, II 's (Plaintiff) motion to strike Defendant, Motorcycle Mall Inc.'s (Motorcycle Mall) answer and affirmative defenses based upon spoliation of evidence. For the reasons stated herein, Plaintiff's motion is DENIED.

II. Statement of Facts

This case arises from a June 19, 2014 motorcycle accident that occurred on Interstate 81 in Virginia. At the time Plaintiff was operating a 2013 Ducati Multistrada motorcycle (the motorcycle) that was rented from Defendant Motorcycle Mall and distributed by Defendant Ducati North America (Ducati). While operating the motorcycle and without warning, the motorcycle malfunctioned and caused Plaintiff to sustain severe and permanent injuries. Plaintiff recalls the bike shaking side to side and the tank going back and forth moments before the crash. An eyewitness who was riding alongside Plaintiff observed the front end of the motorcycle shaking and the steering wheel going back and forth prior to the motorcycle leaving the roadway.

In or around July 2014, Plaintiff retained Dr. George M. Lear, Jr., a motorcycle mechanics and safety training expert, to inspect the motorcycle and determine the cause of the crash. On August 1, 2014, an initial brief inspection of the motorcycle took place at Motorcycle Mall. Plaintiff alleges that during the first inspection in August 2014, all parties were present but Plaintiff's expert was not permitted to perform a comprehensive technical inspection or any physical disassembly of the motorcycle. At a subsequent inspection on February 12, 2015, Dr. Lear performed a disassembly and inspection of the motorcycle. Representatives from all parties, including but not limited to, Plaintiff's

expert Dr. George Lear (a motorcycle mechanics and safety training expert), John Resciniti (Motorcycle Mall), Kenneth Ho, Esq. (counsel for Motorcycle Mall), Antonio Munoz (Ducati), along with other representatives of the defense team, witnessed and performed the inspection and disassembly of the Motorcycle. Upon manual inspection of the steering components, Dr. Lear appreciated a major defect in the steering head area of the motorcycle, namely, the ball bearing steering head bearings had Brinnell damage.¹ Plaintiff alleges that the inspection process was again streamlined and not all parts could be thoroughly inspected. Specifically, Dr. Lear was not permitted to conduct a comprehensive technical evaluation, nor was he allowed to take the parts with him.

Accordingly, at the conclusion of the inspection, the damaged upper and lower bearing assemblies, steering stem, and lower “triple tree” were bagged, labeled, boxed, and placed in the custody, care, and control of DeWayne Tynes, Motorcycle Mall’s service manager, with the specific understanding by all parties that the parts were to be preserved in the same condition they were discovered for the remainder of the litigation and produced again at a later time so that Dr. Lear could finish his inspection and testing. See Cert. at Ex. F.

In order to memorialize the agreement to preserve parts, on February 12, 2015 Plaintiff’s former counsel, Andrew Sfougataakis, Esq., corresponded by e-mail with counsel for Motorcycle Mall, Ken Ho, Esq. and advised that certain parts from the inspection and disassembly of the Motorcycle needed to be preserved. (“It has become apparent during the inspection that the upper steering head ball bearing race-upper and lower- need to be preserved.”). See Cert. at Ex. H. That same day, Mr. Ho responded saying, “Motorcycle Mall will preserve the piece. I will advise Mr. Resciniti. . .I spoke to

¹ Brinnell damage is the permanent indentation of a hard surface, here the steering head bearings.

John, and he said that it will be done. And he will preserve whatever parts that will require preserving.” Id. Plaintiff’s counsel responded by providing a specific list of items that needed to be preserved.

Here is a list of parts that need to be preserved:

1. Upper steering stem bearings, races and seals
2. Lower steering stem bearings, races and seals
3. Front and rear wheel bearings, races and seals
4. Front and rear axle shafts
5. Swing arm bearings and shaft

See Cert. at Ex. H.

On or about November 04, 2016, Plaintiff requested that Motorcycle Mall confirm that the subject parts were properly being preserved. Id. at Ex. I. On November 07, 2016, Motorcycle Mall advised that the subject parts could not be located. When this information was conveyed to Dr. Lear, he advised Plaintiff that the subject parts were necessary in order to make his final findings regarding the Brinnell damage. See Cert. at Ex. G. Without further testing on the subject parts, Dr. Lear advised Plaintiff that he could not opine as to what caused the Brinnell damage and that while a manufacturing defect is a potential cause of such a defect, Dr. Lear could not possibly make that opinion in this case without confirming same through further testing on the subject parts. Id. In Dr. Lear’s certification he states:

On February 12, 2015, I was permitted to conduct an inspection and disassembly of the subject motorcycle at issue in this litigation at Motorcycle Mall, along with representatives from Ducati and Motorcycle Mall, the Defendants in this matter. Time constraints were placed upon me by the Defendants’ representatives which limited my inspection. My inspection revealed a major defect in the steering head area of the motorcycle, namely, the ball bearing steering head bearings had Brinnell damage. . . . At the conclusion of the February 12, 2015 inspection, the damaged upper and lower bearing assemblies were placed into plastic bags and labeled. The steering stem and lower “triple tree” were placed in a box with the bagged components. The box with these retained parts was provided to Dewayne Tynes, Motorcycle Mall’s Service Manager.

Mr. Tynes was instructed by Mr. John Resciniti, the owner of Motorcycle Mall, to retain and preserve these parts in the same condition throughout the course of this litigation. Prior to issuing my written findings, I advised Plaintiff's counsel that I needed to perform a further, more detailed inspection and testing of the parts that were given to Motorcycle Mall on February 12, 2015, that were to be retained and preserved for this litigation. A further, more detailed inspection and testing of these parts was not accomplished during the February 12, 2015 inspection due to the time constraints placed upon me at the time. My further inspection of these parts would have taken place under magnification in order to further analyze the severity of the Brinnell damage.

The testing I would have arranged on these parts would have included laboratory analysis at a qualified testing laboratory to determine the compliance of the bearing's characteristics and attributes to the appropriate manufacturing and design standards. Specifically, the testing would have included an analysis of the steel to make sure it contained the right amounts of the alloy metals in it as well as testing to measure the hardness and toughness of the steel and testing to ensure the sizes and shapes were accurate. Since the manufacturing and design of ball bearings is extremely precise, for illustrative purposes, I've attached a copy of a publication that explains the different parts that make up the ball bearing and some of the required specifications. Without the opportunity to perform this further inspection and testing, I am unable to rule out a manufacturing defect as a substantial contributing factor to the origin of the Brinnell damage, and as such, a cause of Plaintiff's accident.

See Cert. at Ex. G.

On or about July 7, 2017, Ducati filed a Motion for Summary Judgment based on the lack of evidence as to a design and/or manufacturing defect. This court ruled that Motorcycle Mall had a duty to preserve the subject parts, as there was a written agreement to do so, and that Motorcycle Mall had discarded some of the subject parts and utilized others in another motorcycle. The court further found that Plaintiff's inability to conduct further testing of the parts made it impossible for Plaintiff to establish to a reasonable degree of scientific probability whether a manufacturing defect existed, and granted the motion.

Plaintiff now seeks to strike Motorcycle Mall's answer and proceed to a trial on damages based on Motorcycle Mall's spoliation of material evidence. In the alternative, Plaintiff requests a brief extension of discovery for expert depositions concerning the issue of spoliation. See Plaintiff's Brief.

In Defendant's response letter, Defendant Motorcycle Mall states, "we will eschew the filing of the [sic] our Opposition. Instead, [D]efendants Motorcycle Mall reserve the right to object to [P]laintiff's amended complaint . . ." See Defendant's Letter dated October 11, 2017.

II. Discussion

According to Black's Law Dictionary, "spoliation" is defined as "[t]he destruction of evidence . . . The destruction, or the significant alteration of a document or instrument." Spoliation of evidence in a prospective civil action occurs when evidence germane to the action is destroyed, thereby interfering with the action's proper administration and disposition. Hirsch v. General Motors Corp., 266 N.J. Super. 222, 234, 628 (Law Div.1993). A party who destroys evidence interferes with his or her adversary's ability to defend a lawsuit and right to discovery. Id. at 245, 628.

The courts have established that the existence of a duty is a question of law. Hirsch, supra, 266 N.J. Super. at 249. A duty to preserve evidence by a potential tortfeasor arises when:

"(1) litigation is pending or likely, (2) the alleged spoliator has knowledge of such litigation, (3) the evidence is relevant, and (4) the non-spoliating party is prejudiced by the concealment or destruction of the evidence." Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 361 (App. Div. 1998)

(quoting Hirsch v. General Motors Corp., 266 N.J. Super. 222, 234, 628 (Law Div.1993).

In Aetna Life, supra, 309 N.J. Super. 358, Plaintiff Aetna was the insurance carrier for Baker Companies, Inc. (Baker), the general contractor for a construction project in Whippany, New Jersey. On October 23, 1993, a 1986 Ford Econoline van, which was owned by Imet Mason contractors (Imet) and operated by an employee of JMR Construction Company, caught fire, which fire spread to three condominium units under construction by Baker. The van was sold to Imet by Barnes Chevrolet. As a result of the fire, Aetna paid Baker \$99,553.00, the cost to rebuild, repair and reconstruct the damaged units. At the time of the fire, the van was eight years old and had in excess of 137,000 miles on its odometer. The van had been serviced by both Pardy Farms Center and Simon Motors. An officer from the Whippany Fire Department reported that the fire originated in the van and that the exact cause could not be determined due to the extensive fire damage.

State Farm Insurance Company, the insurer of the van, retained Peter Valles Associates, Inc. (Vallas) to ascertain the cause of the fire. On October 29, 2003, Vallas inspected the van and issued a report concluding that a fuel line failure in the engine compartment was the likely cause of the fire. In supplemental reports, Vallas noted that Simon Motors had rebuilt the engine of the van seventeen months prior to the incident and that Simons' policy was to use pre-existing fuel lines. Vallas further noted that there was an open recall issued in 1987 for a fuel line failure and that the repairs and corrections concerning the recall notification were not performed. On July 26, 1994, Vallas concluded that the fire was caused by one of two scenarios: either fuel failure at

the fuel line that may or may not have related to the 1987 recall, or a design defect in the carburetor that may have allowed a foreign particle or contaminate to infiltrate causing the needle valve to get stuck in the open position. After Vallas issued its last report, the van was destroyed.

Before the van was destroyed, another investigation was conducted by A.C. James Associates (A.C. James) at Aetna's request. In a report dated December 13, 1993, A.C. James concluded that the fire was caused by the engine fire in a vehicle owned by Imet Bajrami that was parked too close to the structure. The report further indicated that the subject vehicle had been removed by State Farm.

Subsequently, Aetna put Ford Motor Company on notice of its intent to pursue subrogation for the loss. In response, Ford instructed Aetna to preserve the vehicle by letter dated October 26, 1994. The van was destroyed, however, before Ford had an opportunity to inspect it. Simon Motors did not received notice of the fire until Aetna, as subrogee of Baker Companies, Inc., filed suit on May 25, 1995. Thus, Simon also did not have an opportunity to inspect the van before it was destroyed. Before trial, Ford and Simons were granted summary judgment based on Aetna's failure to preserve the van, and the Appellate Division affirmed.

In that regard, the Appellate Division rejected Plaintiff's argument that spoliation of evidence required a showing that it acted willfully or deliberately. The court held that once plaintiff was aware of the central importance of the van to the suit, it was under an obligation to defendants to preserve it for their examination. Willfulness or intent, the court held, were not relevant to plaintiff's duty to preserve the evidence. The court stopped short of concluding that the ultimate dismissal sanction of dismissal was

warranted, holding instead that barring any evidence of the Vallas report was sufficient to cure the prejudice to the defendants.

Similarly, in this case, it is clear that Defendant Motorcycle Mall was aware of the central importance of the parts in question to Plaintiff's products liability claim against Ducati. At the February 12, 2015 inspection, although Dr. Lear performed a disassembly and inspection of the Motorcycle at Motorcycle Mall, time constraints did not allow for a complete technical inspection and Dr. Lear was able to perform only a manual inspection. Nor was Dr. Lear allowed to take the parts with him to perform testing under laboratory conditions. Accordingly, at the conclusion of the inspection, the damaged upper and lower bearing assemblies, steering stem, and lower "triple tree" were bagged, labeled, boxed, and placed in the custody, care, and control of DeWayne Tynes, Motorcycle Mall's service manager, with the specific understanding by all parties that the parts were to be preserved in the same condition they were discovered for the remainder of the litigation and produced again at a later time so that Dr. Lear could finish his inspection and testing. See Cert. at Ex. F.

On February 12, 2015 emails were exchanged between Plaintiff's former counsel and counsel for Motorcycle Mall, in which Plaintiff's counsel advised that certain specified parts from the inspection and disassembly of the motorcycle needed to be preserved. Motorcycle Mall's counsel confirmed that he had advised his clients that they must preserve the parts, and that they had agreed to do so. On November 07, 2016, Plaintiff learned that Motorcycle Mall had failed to preserve the evidence. When this information was conveyed to Dr. Lear, he advised Plaintiff that the subject parts were necessary in order to make his final findings regarding the Brinnell damage. See Cert. at

Ex. G. Without further testing on the subject parts, Dr. Lear advised Plaintiff that he could not opine as to what caused the Brinnell damage and that while a manufacturing defect is a potential cause of such a defect, Dr. Lear could not possibly make that opinion in this case to a reasonable degree of scientific certainty without testing on the subject parts. Id.

Under these facts, the court finds that Motorcycle Mall had a duty to preserve the evidence. Specifically, under the circumstances of the accident, and the fact that an attorney representing the injured party requested an inspection of the motorcycle by an expert, not once but twice, there is no question Defendant Motorcycle Mall was aware that litigation was pending or likely. There is no question that the evidence was relevant if not critical to Plaintiff's products liability claim. Finally, Plaintiff was unquestionably prejudiced by the concealment or destruction of the evidence. Accordingly, the court finds that Motorcycle Mall had a duty to preserve the subject parts. See Aetna Life, supra, 309 N.J. Super. 358; Hirsch, supra, 266 N.J. Super. 222. This conclusion is buttressed by the fact that there was a written agreement acknowledging Motorcycle Mall's understanding that they had a duty to preserve the evidence. Moreover, the fact that the parts were bagged and labelled is strong circumstantial evidence that all parties, including Motorcycle Mall, understood the need to preserve the evidence. At all times the parts were in the exclusive custody of Motorcycle Mall. Thus, Defendant Motorcycle Mall's duty to preserve evidence was triggered, at the very latest, in February 2015 when, upon disassembly, Motorcycle Mall acknowledged their duty to preserve the subject parts.

The next question is what is the appropriate sanction for Motorcycle Malls failure to preserve the evidence. In that regard, a trial court has the “inherent discretionary power to impose sanctions for failure to make discovery.” Hirsch, supra, 266 N.J. Super. at 260 (quoting Calabrese v. Trenton State College, 162 N.J. Super. 145, 151-52, 392 (App.Div.1978), aff'd, 82 N.J. 321, (1980)). Sanctions imposed by a trial court will not be disturbed on appeal if they are just and reasonable under the circumstances. Id. at 261, 628. However, “[s]ince dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.” Id. at 261, 628 (quoting Johnson v. Mountainside Hosp., Respiratory Disease Assocs., 199 N.J. Super. 114, 119 (App.Div.1985), certif. denied, 122 N.J. 188 (1990)).

In this case, on or about July 7, 2017, Ducati filed a Motion for Summary Judgment based on the lack of evidence as to a design and/or manufacturing defect. This court ruled that Motorcycle Mall had a duty to preserve the subject parts and that Motorcycle Mall had discarded some of the subject parts and utilized others in another motorcycle. The court further found that Plaintiff’s inability to conduct further testing of the parts made it impossible for Plaintiff to establish to a reasonable degree of scientific probability whether a manufacturing defect existed, and granted the motion.

Plaintiff argues that the only appropriate remedy for Defendant’s breach of duty to preserve is to strike Motorcycle Mall’s answer. Pursuant to the New Jersey Supreme Court,

If [spoliation] is revealed in time for the underlying litigation, the spoliation inference may be invoked. In addition, the injured party may amend his or her complaint to add a count for fraudulent concealment. . . .those counts will require bifurcation because the fraudulent concealment remedy

depends on the jury's assessment of the underlying cause of action. In that instance, after the jury has returned a verdict in the bifurcated underlying action, it will be required to determine whether the elements of the tort of fraudulent concealment have been established, and, if so, whether damages are warranted.

Rosenblit v. Zimmerman, 166 N.J. 391, 407-08 (2001).

Unlike Rosenblit, *supra*, in the instant matter, there is no underlying claim to bifurcate since the products liability claim was dismissed on summary judgment. Without the subject parts, Plaintiff was unable to establish whether there was a products defect, leading to Dr. Lear's affidavit indicating that without more conclusive testing a defect was only a possibility. This resulted in the dismissal of Ducati as a defendant.

Nonetheless, as in Aetna, the court concludes that the ultimate sanction of dismissal is not warranted. Rather, the court finds that the prejudice to Plaintiff is adequately addressed by allowing Plaintiff to amend the complaint to include a count for destruction of material evidence. The court finds this lesser sanction appropriate because the spoliation did not obviate the claim against Motorcycle Mall; rather, it rendered irretrievable any case against Ducati for products liability. Had Ducati failed to preserve the evidence, the court would have no difficulty concluding that its answer should be stricken and a trial on damages should ensue. Where, as here, the spoliation rendered unprovable a case against a codefendant, the court finds it more appropriate to have the case tried directly as a claim for destruction or concealment of material evidence. As the court has already found that Motorcycle Mall breached its duty to preserve material evidence, the issues at trial will be limited to whether the breach was a proximate cause of Plaintiff's loss of opportunity to prove a product defect and damages.

Plaintiff request for a brief extension of discovery for expert depositions is granted. Accordingly, discovery is hereby reopened and extended until November 24th, 2017.

IV. Conclusion

For the reasons stated herein, Plaintiff's motion to strike Defendant's answer and affirmative defenses is DENIED. Discovery is hereby reopened and extended until November 24th, 2017 to allow Plaintiff time to amend his Complaint and conduct limited discovery on the new count of intentional destruction of material evidence.