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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES Justice — PART 59

PRAETORIAN INSURANCE COMPANY A/S/O BLT FISH, LLC,

Plaintiff,

- v -

IMI CORNELIUS, INC., AMERICOLD, INC., BARON INTERNATIONAL, INC.,

Defendants.

Index No.: 109011/10

Motion Date: 7/28/11

Motion Seq. No.: 002

Motion Cal. No.: 109

The following papers, numbered 1 to 6 were read on this motion for a summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Order to Show Cause -Affidavits -Exhibits | 1 |
| Notice of Cross Motion/Answering Affidavits - Exhibits | 2, 3, 4 |
| Replying Affidavits - Exhibits | 5, 6 |

FILED
OCT 26 2012
COUNTY CLERK'S OFFICE
NEW YORK

**Cross-Motion:** ☒ Yes ☐ No

Defendant IMI Cornelius, Inc. (IMI) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as asserted against it, stating that: (1) the causes of action sounding in negligence, gross negligence and strict liability are barred by the pure economic loss doctrine; (2) the causes of action sounding in breach of implied warranties of merchantability and fitness and breach of contract are time-barred, pursuant to the Uniform Commercial Code (UCC); (3) plaintiff lacks privity to maintain all of its breach causes of action; (4) all causes of action should be dismissed because of material product alteration or misuse, and the parties cannot establish the existence of a material or design defect; (5) the cause of action for gross negligence is unsupported as a matter of law; (6) plaintiff fails

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

to state a cause of action for which relief can be granted; (7) all causes of action should be dismissed because of plaintiff's spoliation of evidence; and (8) IMI should be granted leave to renew and reargue in the event that the court finds that any issue herein is premature.

Defendant Americold, Inc. (Americold) cross-moves, pursuant to CPLR 3212, to dismiss the complaint as asserted against it based on Plaintiff's spoliation of evidence or, in the alternative, pursuant to CPLR 3101 (d) (1) (iii), for an order allowing the deposition of Plaintiff's expert. Plaintiff cross-moves, pursuant to CPLR 3126, to strike defendants' answers for failure to respond to discovery demands or, in the alternative, to compel defendants to respond to various discovery demands.

Defendant Baron International, Inc. (Baron) has submitted an answer to the complaint but has otherwise failed to appear.

This is an action for economic loss resulting from a fire that occurred on July 29, 2009, at a restaurant owned by BLT Fish, LLC (BLT). The complaint alleges that the fire originated in an ice making machine manufactured by IMI, sold to BLT by Baron, the distributor, in June 2005, and installed on July 1, 2005. Plaintiff Praetorian Insurance Company ("Praetorian"), BLT's assignor, claims that there was some type of failure in the unit's motor or compressor, and asserts six causes of action: (1) negligence; (2) gross negligence, reckless and/or willful and

wanton misconduct; (3) breach of implied warranty of merchantability; (4) breach of implied warranty of fitness; (5) breach of contract; and (6) strict liability.

The location of the fire was a three-story restaurant owned by BLT. According to the Fire Department report, although the fire was concentrated in one confined location, the smoke from the fire set off the building's sprinkler system, which resulted in water and smoke damage to several rooms in the building. Praetorian is seeking damages in the amount of $88,313.57, plus interest, for the cost of repairing the premises. BLT's interest was subrogated to Praetorian.

Praetorian retained the services of Decker Associates (Decker), an insurance company adjuster, who issued a report stating that "the fire was the result of some type of malfunction within the ice maker machine." Decker confirmed that the equipment "was secured, transported and delivered to the F.E.R.A.S.C.O. LLC facility located ... [in] Bound Brook, NJ." In addition, the Decker report says:

> "The fire is being investigated by Plankey LeBow Associates. Jon LeBow [LeBow] believes the fire was the result of some type of failure within the ice machine compressor or motor. In view of the fact that the repairs to the kitchen area needed to be completed in order to mitigate the insured's lost business income, the ice machine has been removed. The area was photographed, evidence secured and the equipment all taken by F.E.R.A.S.C.O. LLC. It will be stored and preserved at this location for further investigative activities."

IMI maintains that neither the complaint, the bill of particulars nor the responses to written interrogatories contain any allegation of a specific defect with the design or manufacture of the ice making unit.

According to the affidavit of David Briggs (Briggs), the director of engineering for IMI, the unit was an air-cooled unit ice making machine. Briggs says that in this type of machine, the condenser is cooled by the flow of air over the condenser. Air is forced to flow over the condenser coil by the condenser fan to remove heat. Briggs averred that IMI did not contract directly with BLT, it did not play any role in the installation, wiring or operation of the unit, nor was it ever contacted about any problems with the unit.

IMI states that the subject machine was sold to BLT by Baron on June 15, 2005, pursuant to a written proposal, and, thereafter, sometime between June 20 and July 20, 2005, Geharz Equipment, Inc. (Geharz), a distributor, purchased the unit from IMI, who directed that the unit be shipped to Baron. The unit was installed at BLT's location on July 1, 2005.

After the fire, the measurements of the machine were taken by experts representing each of the parties, and were found to be consistent with the type of machine sold to BLT.

In support of its motion, BLT has provided the affidavit of James E, Crabtree, P.E., C.F.F.I. (Crabtree), a licensed

professional engineer, who reviewed Praetorian's responses to written interrogatories, work orders, specifications and instructions for the machine, and personally inspected the machine on October 4, 2011. Crabtree states that LeBow, the insurance adjuster investigator, has not issued any written report, and that his ability to determine a precise fire pattern was hindered by the fact that not all parts of the machine were preserved, specifically, the right plastic panel, front metal panel and top metal panel. Crabtree asserts that, along with the machine, some electrical extension cords were preserved, and that these cords appeared to have been overloaded.

Crabtree contends that, based on his visual inspection, the machine had been substantially altered from the state in which it was sold by IMI, specifically, the machine was changed from an air-cooled ice machine to a water-cooled machine. Crabtree states that such changes would have required substantial modifications and rewiring. Based on his inspection, Crabtree ruled out, as a source of the origin of the fire, the compressor or the motor, which are the only alleged sources of the ignition. Crabtree concluded by opining that

> "there is no evidence that the subject fire was caused by a manufacturing or design defect, and any action or inaction of IMI or the negligence of IMI. Further, it would not have been possible for IMI to warn against the dangers created by the unauthorized modifications of the machine."

IMI also points out that, three days before the fire, the

ice machine was serviced by Americold, because the machine had stopped working properly.

IMI argues that the probable cause of the fire was the misuse of the machine and its unauthorized modifications. Further, IMI states that a complete analysis of the machine cannot be made because of the spoliation of some of its parts, as well as the spoliation of a videotape of the removal of the machine, made by F.E.R.A.S.C.O. at the request of Praetorian, which cannot be found.

Specifically, IMI contends that: (1) Praetorian's causes of action for negligence, gross negligence and strict product liability must be dismissed because Praetorian is only seeking economic damages; (2) Praetorian's causes of action for breach of contract and breach of implied warranties is barred by the statute of limitations or, in the alternative, that these claims should be dismissed because of a lack of privity; (3) the complaint should be dismissed because product alteration and/or misuse is a defense to the product liability cause of action; (4) Praetorian cannot establish the elements of a design or manufacturing defect; (5) the cause of action for gross negligence improperly seeks punitive damages; and (6) the complaint should be dismissed because of Praetorian's spoliation of evidence.

In opposition to IMI's motion, Praetorian states that: (1)

its claims are not barred by the economic loss doctrine because that doctrine only bars product liability claims when the product fails to perform and the loss relates to the cost of the product itself and not when there is a sudden or catastrophic accident; (2) the claims are not barred by the UCC four-year statutory period, because the statute does not begin to run until the breach of warranty or breach of contract is discovered, and because Praetorian may assert such a claim as the subrogee of BLT, a third-party beneficiary of the sales contract for the ice machine; (3) questions of fact remain regarding misuse and/or modification of the machine; (4) design or manufacturing defects may be established by testimony and expert opinion; (5) punitive damages are proper for gross negligence claims; (6) the motion is premature because no depositions have taken place; (7) dismissal based on spoliation is inappropriate because IMI had the opportunity to inspect the ice machine; and (8) it has stated valid causes of action.

In its cross motion, Americold seeks dismissal of the complaint as asserted against it based on Praetorian's spoliation of the evidence or, in the alternative, an order allowing Americold to depose Praetorian's expert. In sum and substance, Americold incorporates IMI's arguments with respect to the spoliation of evidence; however, Americold has attached a letter from Praetorian's counsel in which counsel states that Praetorian

inadvertently said that a videotape of the removal of the ice machine was made but, in fact, no such videotaping took place.

In support of its cross motion, Americold has provided the affidavit of Steven Pietropaolo, P.S., C.F.E.I. (Pietropaolo), a licensed professional engineer and certified fire and explosion investigator, who states that, at the time of his inspection of the ice machine, October 4, 2011, the machine did not have all of its component parts and the serial number of the machine could not be identified. In addition, Pietropaolo said that there were no photographs or field notes provided by Praetorian that depict the exact location of where the ice machine was located in the restaurant, and the fire scene was not made available for his inspection. Pietropaolo averred that, without the missing parts, "there is no way to know whether the machine that I inspected is the same machine as Praetorian alleges is at issue in the case or that which Americold worked on a few days before the fire." It is Pietropaolo's opinion that, without the missing parts of the ice machine, "it is impossible to determine fire patterns or rule out an external fire source ... ." Further, Pietropaolo averred that, without photographs or field notes indicating the exact position of the ice machine and how it was attached to the wall, it is impossible "to make a proper identification of the machine and to help me determine causation of the subject loss."

In opposition to Americold's cross motion, Praetorian argues

that the items missing from the ice machine are not crucial to the determination of the causation of the fire, and that it has produced a handwritten diagram from LeBow depicting the exact location of the machine and LeBow, in his affidavit, indicated how the machine was attached to the wall.

In his affidavit, LeBow, who identifies himself as a principal of Plankey/LeBow Associates and an investigator, affirms that he examined the loss location two days after the date of the fire; that there was no evidence of any external damage to the extension cord; that fire patterns "suggested" that the fire originated inside the condenser of the machine; that, in his opinion, "the most probable cause of the fire was heat due to electrical failure within the ice machine." LeBow also states that the top and side panels were not affixed to the ice machine on the day that he made his examination.

Praetorian contends that it should not be sanctioned for discarding items in good faith and pursuant to proper business procedures. In addition, Praetorian maintains that Americold is not entitled to discovery from its expert just because the panels were not attached to the ice machine when Americold's expert inspected the unit.

In support of its cross motion, Praetorian asserts that defendants' answers should be stricken for their failure to provide responses to Praetorian's discovery requests.

In opposition to Praetorian's cross motion, Americold contends that Praetorian's cross motion is without merit since it has responded to Praetorian's discovery demands, which disclosure Americold describes as "voluminous."

In opposition to Praetorian's cross motion, IMI points out that the pending two motions for summary judgment stay discovery, pursuant to CPLR 3214.[1]

That branch of IMI's motion seeking to dismiss the first, second and sixth cause of action as asserted against it shall be granted.

The economic loss rule, as enunciated in Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.) (84 NY2d 685, 694 [1995]), states that "tort recovery in strict products liability and negligence against a manufacturer should not be available to a down-stream purchaser where the claimed losses flow from damage to the property that is the subject of the contract."[2] "This rule applies both to economic losses with respect to the product itself and consequential damages resulting from the alleged defect." New York Methodist Hospital v Carrier

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[1]The court notes that, to date, there has only been a preliminary conference order, dated November 15, 2011, and further judicial supervision via a status conference would be the proper course to navigate the nature and extent of any noncompliance.

[2] The court indicates that the result would be different if a person were to be injured, but there is no allegation of personal injury in the case at bar.

Corp., 68 AD3d 830, 831 (2d Dept 2009); Weiss v Polymer Plastics Corp., 21 AD3d 1095 (2d Dept 2005)(alleged defective stucco on a home caused damage to the plywood substrate, which resulted in water infiltration into the home, deemed by the court to be an economic loss precluding recovery in tort); Hemming v Certainteed Corp., 97 AD2d 976 (4th Dept 1983)(defective shingles caused damage to the home's siding and consequential damages to the home deemed economic loss precluding recovery in tort).

In opposition to this argument, Praetorian relies on Syracuse Cablesystems, Inc. v Niagara Mohawk Power Corp. (173 AD2d 138 [4th Dept 1991]). In Syracuse Cablesystems, the Plaintiffs were tenants in a building adjacent to the defendant. The plaintiffs suffered injury after an explosion in the defendant's plant caused contamination in the plaintiffs' building, resulting in the temporary closure of that building. The plaintiffs did not allege that the transformer that caused the explosion was defective; rather, they asserted that the transformer was negligently maintained, such negligence resulting in their damages. Syracuse Cablesystem is distinguishable on its facts from the case at bar wherein Praetorian alleges causes of action concerning a problem with the ice machine itself.

Even if the court were to conclude that the economic loss doctrine does not pertain, Praetorian claims sounding in tort must still be dismissed based on the alteration of the ice

machine from an air cooled machine to a water cooled machine after the unit left the hands of IMI.

> "'[A] manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries' [internal citation omitted]."

Bauerlein v Salvation Army, 74 AD3d 851, 854 (2d Dept 2010); see also Amatulli v Dehli Construction Corp., 77 NY2d 525 (1991); Robinson v Reed-Prentice Division of Package Machinery Co., 49 NY2d 471 (1980); Fogelman v Spring Swings, Inc., 279 AD2d 504 (2d Dept 2001).

IMI has provided the affidavits of Briggs and Crabtree, both of whom opine, with a reasonable degree of engineering certainty, that the ice machine that is the subject of this litigation had been altered from an air cooled machine to a water cooled machine.

In opposition to these expert opinions, Praetorian has only provided the opinion of BLT's chef, Emilie C. Walsh (Walsh), who is not an expert, that the machine had not been altered by BLT or, if it had been altered, Americold was the entity that made the alteration. Walsh fails to state the source of her opinion. It is significant that Praetorian's own expert, LeBow, does not even address this contention.

Since IMI's experts' opinions have not been contradicted by

any other expert, these causes of action should be dismissed based on the material alteration of the unit after it left IMI's possession.

Further, as discussed below, these causes of action are also dismissible because of the spoliation of evidence.

Based on the foregoing, the first, second and sixth causes of action shall be dismissed.

The court has considered all of Praetorian's other arguments and have found them to be unpersuasive. Similarly, based on the foregoing, the court need not address the other arguments posited with respect to these causes of action.

That branch of IMI's motion seeking to dismiss the third, fourth and fifth causes of action as asserted against it as being time-barred is granted.

UCC § 2-725, Statute of Limitations in Contracts for Sale, states:

> "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

In the case at bar, delivery of the ice machine was made to

BLT on July 1, 2005, and the fire occurred on July 29, 2009, more than four years later. Hence, these causes of action are dismissed as time-barred. Heller v U.S. Suzuki Motor Corp., 64 NY2d 407 (1985)[3]; Kaparos v Bay Ridge Mitsubishi, 249 AD2d 449 (2d Dept 1998).

The sole case cited by Praetorian in opposition to this argument is Dormitory Authority of the State of New York v Michael Baker, Jr. of New York, Inc. (218 AD2d 515 [1st Dept 1995]), which is clearly distinguishable. In Dormitory Authority, the Court held that, where a clause specifically warrants future performance, a claim for its breach accrues when the breach is, or should have been discovered. In the instant matter, not only is there no such explicit warranty, but Praetorian is suing on implied warranties. Therefore, the four-year statutory period appearing in UCC 2-725 applies, accruing on tender of delivery, and the third, fourth and fifth causes of action are dismissed as asserted against IMI.

Based on the foregoing, the court need not address the other arguments proffered by the parties.

Americold's cross motion seeking to dismiss the complaint as asserted against it, based on spoliation of evidence is granted.

"Spoliation is the destruction of evidence. Although

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[3]The court states that there are exceptions to this four-year rule when personal injuries are involved, but no such injuries are alleged in this action.

> originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. A correlating trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission
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> Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them [internal citations omitted]."

Kirkland v New York City Housing Authority, 236 AD2d 170, 173 (1st Dept 1997).

> "When parties involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law. Under CPLR 3126, if a court finds that a party destroyed evidence that 'ought to have been disclosed ..., the court may make such orders with regard to the failure or refusal as are just.' New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action [internal citations omitted]."

Ortega v City of New York, 9 NY3d 69, 76 (2007).

There is no dispute that panels were missing from the machine and that the serial number of the machine could not be determined. IMI and Americold's experts stated that, without these missing parts, it would be impossible to determine the

cause of the fire. However, in opposition, LeBow, while opining that the missing parts are not necessary to determine the fire's origin, was unable to indicate the cause or the source of the fire. LeBow's conclusory opinion was that the fire pattern "suggested" that the source was the condenser, which is insufficient, as a matter of law, to raise a triable issue of fact to defeat the dispositive motions. Gargiulo v Geiss, 40 AD3d 811 (2d Dept 2007); Commissioner of Department of Social Services of City of New York v Morello, 8 AD3d 154 (1st Dept 2004)

Based on the foregoing, the court need not address the other arguments posited by Praetorian, which the court finds unavailing, and, in the exercise of its discretion, the court dismisses the complaint as asserted against Americold.

Praetorian's cross motion for sanctions to be imposed against IMI and Americold for noncompliance with discovery orders shall denied as moot.[4]

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[4]Even if the cross motion were not moot, it would still be denied.

> The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. However, the 'drastic remedy' of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious. Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply or a failure to comply with court-ordered discovery over an

Based on the foregoing, it is hereby

ORDERED that defendant IMI Cornelius Inc.'s motion for summary judgment dismissing the complaint as asserted against it is granted and the complaint is dismissed as against such defendant, with costs and disbursements to such defendant as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that defendant Americold, Inc's cross motion for summary judgment dismissing the complaint as asserted against it is granted and the complaint is dismissed as against defendant Americold, Inc, with costs and disbursements to such defendant as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the action is severed and continued against the

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extended period of time [internal quotation marks and citations omitted].
Orgel v Stewart Title Insurance Company, 91 AD3d 922, 923 (2d Dept 2012); see also Tos v Jackson Heights Care Center, LLC, 91 AD3d 943 (2d Dept 2012); Gal-Ed v 153rd Street Associates, LLC, 73 AD3d 438 (1st Dept 2010); Baralan International, S.p.A. v Avant Industries, Limited, 242 AD2d 226 (1st Dept 1997).
In the case at bar, there was only one preliminary conference court order, recently issued, with which Praetorian claims defendants failed to comply. At this juncture, the appropriate course would be a status conference to allow additional court supervision and the determination of appropriate penalties, if any, in a ex parte status discovery order.

remaining party.

This is the decision and order of the court.

**Dated:** October 23, 2012 ENTER:

J.S.C.

**DEBRA A. JAMES**