LEXSEE 1999 U.S. DIST. LEXIS 12285

MARK W. BEERS and JANET BEERS, Plaintiffs, -against- GENERAL MOTORS CORPORATION, Defendant.

97-CV-482 (NPM/DNH)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

1999 U.S. Dist. LEXIS 12285

May 17, 1999, Decided
May 17, 1999, Filed

DISPOSITION: [*1] GM's motion to dismiss pursuant to *Fed. R. Civ. P. 37* GRANTED. Defendant's motion for summary judgment GRANTED in entirety.

COUNSEL: For Plaintiff: Diane V. Bruns, Esq., LoPinto, Schlather, Solomon & Salk, Ithaca, New York.

For Defendant: Timothy S. Coon, Esq., Eckert Seamans Cherin & Mellott, LLC, Pittsburgh, Pennsylvania.

For Defendant: Margaret J. Fowler, Esq., Chernin & Gold, LLP, Binghamton, New York.

JUDGES: Neal P. McCurn, Senior United States District Judge.

OPINION BY: Neal P. McCurn

OPINION

MEMORANDUM-DECISION & ORDER

INTRODUCTION

Defendant General Motors ("GM") moves for dismissal pursuant to *Federal Rule of Civil Procedure 37(b)(2)*, [1] or alternatively, for summary judgment. The motion for dismissal is based on plaintiff's loss of crucial evidence. Plaintiff opposes the sanction of dismissal, and argues in part that summary judgment is inappropriate. [2] For the reasons that follow, the court grants GM's motion to dismiss, or in the alternative, grants summary judgment.

1 *Fed. R. Civ. P. 37(b)(2)* states:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) An order striking out pleadings or parts thereof . . . or dismissing the action or proceeding . . . or rendering a judgment by default against the disobedient party[.]

Fed. R. Civ. P. 37(b)(2).

[*2]

2 Although GM moves for summary judgment on all of plaintiff's claims, including failure to warn, see Def. Mem. of Law at 18 n. 7, docket no. 48 and Def. Response at 6-8, docket no. 67, plaintiff fails to oppose summary judgment on the failure to warn claim.

BACKGROUND

Plaintiff Mark Beers was injured in March of 1994 while working on a friend's 1984 GM pickup truck. The truck had a flexible engine cooling fan ("flex fan") installed to cool the engine. It is undisputed that this flex fan did not belong on the truck, and was installed by a third party. [3] At some point, while the engine was

running, one of the flex fan blades broke off, penetrated the plastic protective shroud, and struck plaintiff, injuring him.

> 3 It appears the flex fan was from a 1974 GM truck. Trucks designed with flex fans had metal protective shrouds over the fans. The 1984 type of truck involved in plaintiff's injury was not designed to have a flex fan, and had a plastic protective shroud over the fan.

[*3] Plaintiff retained legal counsel, and the flex fan assembly was obtained from the owner of the truck. Plaintiff's expert, Robert Wehe, then examined the flex fan assembly. See Wehe Dep. at 11. As part of the inspection, he disassembled the flex fan assembly, which irreparably altered it from its condition at the time of the accident. See GM's Supplemental Br. Ex. 1 at P 20, docket no. 62. Moreover, plaintiff's counsel never notified GM that the flex fan was to be taken apart, gave it the opportunity to be present, or allowed it to inspect the flex fan first. See id. at PP 21-22. No video or photos were taken at the time of disassembly. See id. at P 23. Although Wehe now claims the fan blade broke because of a design defect, he also noted the arm which held that blade was "severely bent." [4] Wehe Dep. at 11. Wehe recognized that this damage could have caused the blade to come off. [5] See id. at 79-80. In response to the present motion, Wehe now admits that he has misplaced most of the flex fan assembly, and that it is lost. See Wehe Aff. at P 3, docket no. 56.

> 4 The possibility that the flex fan failed due to prior damage is a major reason GM moves for dismissal. GM's primary defense theory is that the fan was not defective, but failed because it had been previously damaged. GM argues it is unable to present such a defense because the flex fan, except for a few pieces, is now missing, and thus its expert is not capable of effectively rendering such an opinion.

[*4]

> 5 At a later portion of his deposition, Wehe maintained that he had ruled out the flex fan's failure due to the bent arm. See Wehe Dep. at 81-82. He was unable to explain, however, what basis he had for ruling out the same. See id. GM argues that because its expert has not examined the flex fan assembly, including the bent arm, he is unable to effectively refute Wehe.

Plaintiff brought suit against GM in the New York Supreme Court, Cortland County, on March 12, 1997. The action was removed to the United States District Court for the Northern District of New York on the basis of complete diversity.

The file and record in this case are replete with examples of discovery abuse by plaintiff. GM has sought to inspect the flex fan assembly for more than a year. On May 12, 1998, after application by GM, Magistrate Judge Hurd found that plaintiff failed to comply with the pretrial scheduling order (in part to supply the flex fan assembly for inspection), failed to respond in opposition, and failed to participate in a telephone conference with the court. He consequently granted GM permission [*5] to move before this court for dismissal under either *Federal Rule of Civil Procedure 37* or *56*. See Order of May 12, 1998, docket no. 14. GM then promptly moved for the same.

In opposition to the motion, plaintiff's counsel Diane Bruns filed an affidavit with this court averring that "the fan blades and housing are available for defendant's inspection, should the court [deny GM's motion and] grant plaintiffs' cross motion to reopen and extend the discovery period." Bruns Aff. of June 17, 1998 at P8, docket no. 22. Plaintiff's statement of material facts in opposition to this first motion stated that "the fan belt [sic] assembly, which was in the custody of plaintiffs' expert witness and in storage during his absence, and the housing are now available for defendant's inspection." Pl.'s Statement of Material Facts of June 17, 1998 at P6, docket no. 24. Finally, plaintiff's memorandum in opposition argued that the action should not be dismissed for discovery abuse because "plaintiffs . . . have provided . . . access to the fan blade assembly now that it has become possible to do so." [6] Pl.'s Mem. of Law of June 17, 1998 at 5, docket no. 25. On August 18, 1998, this court denied [*6] GM's motion and granted plaintiff's cross-motion to reopen and extend the discovery period because counsel represented that plaintiff was now willing to comply with discovery orders and turn over the flex fan assembly.

> 6 The reason plaintiff then claimed inability to comply with the discovery orders was an extended trip by Wehe. See Bruns Aff. of June 17, 1998 at P3. Wehe apparently had the flex fan assembly in storage during his trip. As GM then correctly pointed out, however, "there is no indication . . . that any attempt was made [by plaintiff's counsel] to contact Dr. Wehe during the period of his alleged 'unavailability[.]'" GM Reply of June 30, 1998 at 2, docket no. 27.

Following the court's denial of GM's first motion, plaintiff continuously failed to turn over the flex fan assembly, despite counsel's representations that she would do so. Consequently, on September 14, 1998, GM moved by order to show cause to compel discovery. Judge Hurd granted the order to show cause. See Order to Show Cause [*7] of September 17, 1998, docket no. 35. GM then withdrew the motion to compel when it appeared plaintiff would finally turn over the flex fan assembly. See Coon Letter to Judge Hurd of September

23, 1998, docket no. 37. Plaintiff's cooperation, however, proved short-lived. GM again moved for orders to show cause and compel before Judge Hurd on October 7, 1998. Judge Hurd granted the order to show cause on the same date. See Order to Show Cause of October 7, 1998, docket no. 39. In opposition to the motion to compel, plaintiff's counsel admitted that "defendant's counsel is correct in stating that the complete fan assembly has not yet been provided to defendant's expert." Rather, she stated that Wehe "has moved twice and placed many of his records and files in storage." Thus, although some fan blades had been sent to GM, Wehe had yet to locate the remainder of the fan assembly. See Bruns Aff. of October 7, 1998 at P3-4, docket no. 40.

On October 26, 1998, Judge Hurd granted the motion to compel, and specifically ordered plaintiff to turn over the flex fan assembly for inspection. ("Plaintiffs shall produce the complete engine cooling fan to the attorneys for the defendant [*8] on or before November 6, 1998. Failure to produce shall entitle defendant to make a dispositive motion or preclusion motion to the District Judge."). Order of October 26, 1998, docket no. 42. GM then moved for leave to file a summary judgment motion on the merits of the case on November 3, 1998. On the same day, this court denied the motion without prejudice to renew. Moreover, it stated that "the parties are hereby ORDERED to comply in all respects with the aforementioned order of Magistrate Judge Hurd." Order of November 3, 1998, docket no. 44. Plaintiff, as of present, has yet to turn over the flex fan assembly. Pursuant to this court's Order of November 3, 1998, and Judge Hurd's Order of October 26, 1998, GM filed the present motion to dismiss, or alternatively moves for summary judgment. In opposition to this present motion, plaintiff finally admits that the remainder of the flex fan assembly has been lost, and can not be found. See Bruns Aff. of February 1, 1999 at P 4, docket no. 55.

After motion papers were filed, the United States Court of Appeals for the Second Circuit decided the case of *West v. Goodyear Tire and Rubber Co., 167 F.3d 776 (2d Cir. 1999)*, [*9] which pertained to spoliation of evidence and the propriety of dismissal as a sanction pursuant to *Federal Rule of Civil Procedure 37*. The court then directed the parties to file supplemental briefs discussing this new case and *Rule 37*, as each related to dismissal for spoliation of evidence.

Oral argument was held in Syracuse, New York on March 24, 1999. There, the court questioned plaintiff's counsel to determine what fault, if any, plaintiff bore for the loss of the flex fan assembly. While the court reserved decision on the motions for dismissal or summary judgment, it did make a finding of fact that counsel and Wehe had been, at minimum, negligent in failing to preserve the crucial evidence.

Aside from arguments as to spoliation of evidence, plaintiff also raised a new theory of liability. [7] Defendant argued that plaintiff should not be permitted to assert a new claim so late in case and only in response to summary judgment.

7

> "Although the 1984 Chevrolet pick-up was designed with a [safer] clutch fan as original equipment, it was also designed in such a way that the clutch fan could be readily and easily replaced with the more dangerous flex fan, resulting in the hazardous combination of a flex fan with an insufficiently protective plastic shroud, and no warnings concerning the hazards."
>
> Pl.'s Statement of Design Defect at 2, docket no. 66.

[*10] The court noted that discovery and motions were closed, and that it would not allow plaintiff to amend the complaint. The court did, however, instruct plaintiff to file a statement setting forth his new claim, with any references in the record supporting its existence, within seven days. Thereafter, defendant was ordered to file its opposition within ten days. Finally, the court ordered plaintiff to file a reply within an additional ten days. [8]

8 Plaintiff filed his statement of the new theory and defendant responded in opposition. Plaintiff, however, then failed to file a reply as directed by the court.

For the reasons that follow, GM's motion to dismiss under *Rule 37* is granted. Alternatively, the court grants summary judgment for defendant.

DISCUSSION

I. Dismissal

GM argues that this matter should be dismissed as a sanction for spoliation of evidence. Spoliation of evidence, as recently defined by the Second Circuit, consists of "the destruction or significant alteration of evidence, [*11] or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West, 167 F.3d at 779* (citation omitted). A federal court may impose sanctions upon a party who engages in spoliation in derogation of court order. See *Fed. R. Civ. P. 37(b)(2)*; *West, 167 F.3d at*

779; *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988)*. Even in the absence of a discovery order, the court "may impose sanctions for spoliation, exercising its inherent power to control litigation." *West, 167 F.3d at 779*; accord *Chambers v. NASCO, Inc., 501 U.S. 32, 43-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)*; *Sassower v. Field, 973 F.2d 75, 80-81 (2d Cir. 1992)*, cert. denied, *507 U.S. 1043, 113 S. Ct. 1879, 123 L. Ed. 2d 497 (1993)*.

Sanctions for spoliation, including dismissal, are reviewed by the Circuit for abuse of discretion. See *West, 167 F.3d at 779* (citing *Complaint of Consolidation Coal Co., 123 F.3d 126, 131 (3d Cir. 1997)*, cert. denied, *523 U.S. 1054, 118 S. Ct. 1380, 140 L. Ed. 2d 526 (1998)*); [*12] *Sieck v. Russo, 869 F.2d 131, 134 (2d Cir. 1989)*. The Circuit "will reject the district court's factual findings in support of its imposition of sanctions only if they are clearly erroneous." *West, 167 F.3d at 779* (citing *Friends of Animals, Inc. v. United States Surgical Corp., 131 F.3d 332, 334 (2d Cir. 1997)* (per curiam)).

The district court possesses "broad discretion in crafting a proper sanction for spoliation" but such sanction is to "serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." Id. This sanction is fashioned to: "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" Id. (quoting *Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)*).

"'Outright dismissal of a lawsuit . . . is within the court's discretion.'" Id. (quoting *Chambers, 501 U.S. at 45*); see also *Fed. R. Civ. P. 37(b)(2)(C)*. Dismissal [*13] is proper if there is "a showing of willfulness, bad faith, or fault on the part of the sanctioned party." *West, 167 F.3d at 779* (citing *Jones v. NFTA, 836 F.2d 731, 734 (2d Cir. 1987)*). Contrary to plaintiff's arguments, dismissal is not limited only to matters where the offending party has acted with bad faith or willful intent, but is permitted where there is *any* fault of the sanctioned party. See *Bobal v. Rensselaer Polytechnic Institute, 916 F.2d 759, 764 (2d Cir. 1990)*. Plaintiff argues that "the court should consider less drastic measures[.]... where there is no evidence of bad faith causing the loss of the evidence, because two of the most important rationales underlying *Rule 37* sanctions are to punish an offending party, and to deter others from acting similarly." Pl.'s Supplemental Brief at 5 (emphasis supplied). Yet, it has been noted that negligent wrongs, like intentional wrongs, are proper subjects for general deterrence. See *Penthouse Int'l, Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 387 (2d Cir. 1981)* (citing G. Calabresi, The Cost of Accidents, 133-173 (1970)). Not only have negligent [*14] wrongs been found proper subjects for deterrence, but federal courts have dismissed under *Rule 37* as punishment for negligence. See *Thiele v. Oddy's Auto and Marine Inc., 906 F. Supp. 158, 162-63 (W.D.N.Y. 1995)* (evidence negligently lost by plaintiff necessitated dismissal under *Fed. R. Civ. P. 37*); *Brancaccio v. Mitsubishi Motors Co., Inc., 1992 U.S. Dist. LEXIS 11022, 1992 WL 189937*, at *2 (S.D.N.Y. 1992) (plaintiff's negligent loss of the defective product, after her expert had examined it, but where defendant had not, necessitated dismissal under *Rule 37*). [9] Hence, even under plaintiff's own interpretation of the purposes of *Rule 37*, quoted above, it is quite clear that courts regard the type of spoliation undertaken by plaintiff as cause for dismissal.

> 9 New York State courts also dismiss for negligent spoliation. See *Squitieri v. City of New York, 248 A.D.2d 201, 202-03, 669 N.Y.S.2d 589, 590* (1st Dep't 1998) ("Spoliation sanctions such as [dismissal] are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense[.]" [citation omitted]); *Kirkland v. New York City Housing Auth., 236 A.D.2d 170, 174-75, 666 N.Y.S.2d 609* (1st Dep't 1997) (noting that numerous federal and state courts "have found dismissal warranted when discovery orders were not violated, and even when the evidence was destroyed prior to the action being filed . . . notwithstanding that the destruction was not malicious . . . or in bad faith[.]" [citations omitted]); *Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243, 243, 633 N.Y.S.2d 493* (1st Dep't 1995) ("Dismissal of the amended complaint is also warranted because of plaintiff's *negligent loss of a key piece of evidence which defendants never had an opportunity to examine*[.]" [citation omitted]) (emphasis supplied). While this federal court is bound to vindicate the Federal Rules of Civil Procedure, it surely would be an anomaly if plaintiff was permitted to negligently spoliate evidence and have his case survive in a federal diversity action, but have his claim dismissed if the action was in state court.

[*15] Plaintiff should be held responsible for both his expert's loss of the crucial evidence, and his counsel's defiance of court orders. This is the type of fault required for dismissal under *Rule 37*; although there has been no allegation that Wehe intentionally discarded the flex fan assembly, as an expert retained to examine the actual defective part, he was grossly negligent in permanently altering, and then even worse, losing the very item this lawsuit is over. "Gross professional incompetence no less than deliberate tactical intransigence may be responsible

for the interminable delays and costs that plague modern complex lawsuits." *Penthouse, 663 F.2d at 387*.

Aside from Wehe's loss of the crucial evidence, counsel bears fault for disobeying several orders of both Magistrate Judge Hurd and this court in failing to provide the flex fan assembly, and wasting the scant judicial resources of the court in assuring plaintiff's compliance with mandatory discovery. Until this present motion, counsel never notified the court of her inability to comply with the court's orders, instead engaging in a pattern of delay and avoidance, perhaps waiting for Wehe to return from his [*16] trip, and then hoping Wehe would rediscover the missing evidence. The district court possesses the discretion to dismiss for disobedience of discovery orders. See *Sieck, 869 F.2d at 134* (we . . . prefer to . . . provide the teeth to enforce discovery orders by leaving it to the district court to determine which sanction from among the available range is appropriate.").

Counsel not only bears fault for disobeying court orders, but responsibility for carefully supervising the expert retained. The fact that plaintiff or counsel themselves did not personally lose the evidence is irrelevant. With full knowledge of the pretrial discovery order, and deadlines to turn over evidence, including the flex fan assembly, counsel continued to retain Wehe despite his trip, and let him keep the very items required to be turned over, which were inaccessible while he was on his trip (and ultimately lost). Even after Wehe returned, despite numerous representations to the court that the complete flex fan assembly would be turned over to defendant, it never was.

Finally, plaintiff sometimes must suffer for the faults of his lawyers and experts, especially when their acts are extremely [*17] prejudicial to the opposing party, who otherwise has no effective remedy. See *Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* (client freely selected attorney and is bound by acts of lawyer-agent); see also James Wm. Moore, *Moore's Federal Practice § 37.50[2][b]*, at 37-83, and 37-83 n. 42.2 ("the Supreme Court has rejected the notion that dismissal of a plaintiff's complaint because of counsel's unexcused conduct imposes unjust penalty on the client.").

Dismissal is a drastic remedy and should be imposed only after consideration of alternative, less drastic sanctions. See *West, 167 F.3d at 779*. [10] The Second Circuit has also directed, however, that in fashioning a sanction, the district court must take into account the ability of the sanction to "restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." Id. As GM's defense revolves around pre-accident damage to the very item missing, it will be unable to effectively show that the fan blade broke for reasons other than a defect. A lesser sanction is thus inappropriate [*18] as it does not cure the prejudice to GM. [11]

10 Another circuit has noted that the district court should not be required "to incant a litany of the available lesser sanctions[.]" *Harmon v. CSX Transp., Inc., 110 F.3d 364, 368 (6th Cir. 1997)*.

11 Alternatively, if lesser sanctions were imposed, such as evidence preclusion, there is a strong possibility of summary judgment in GM's favor due to plaintiff's inability to make out a prima facie case without evidence of the flex fan or pertinent portions of his expert's testimony.

A. Distinction Between *West* and the Present Case

Plaintiff argues that this case is similar to West, and consequently should not be dismissed. In West, the district court dismissed pursuant to *Rule 37* after plaintiff spoliated certain evidence which prejudiced defendants. See *West v. Goodyear Tire and Rubber Co., 1998 U.S. Dist. LEXIS 1529, 1998 WL 60942 (S.D.N.Y. 1998)*. The Second Circuit reversed, *167 F.3d 776*, holding that other, less severe [*19] sanctions than dismissal should have been utilized. West is clearly distinguishable.

The West plaintiff was injured when a tire he was mounting exploded. Plaintiff had already mounted an identical tire (the "exemplar wheel") which had not exploded. Defendants' theory of defense was that plaintiff grossly overinflated both tires, and the second tire exploded. They planned to show the overinflation by introducing evidence of the overinflated but unexploded exemplar wheel. The exemplar wheel, however, was sent by plaintiff to a lawyer specializing in tire explosion cases. Fearing the tire would explode, that lawyer ordered it deflated. As the Circuit noted, "defendants believe that by deflating the exemplar wheel, West's lawyers deflated their case." *West, 167 F.3d at 780*.

Furthermore, defendants planned to introduce the tire mounting machine and air compressor as circumstantial evidence that the exploded tire was overinflated. As the Circuit itself observed, "the compressor was set at an astronomical pressure of 160 pounds per square inch." *Id. at 778*. Though defendants requested inspection of the compressor and tire mounting machine, and an [*20] inspection was scheduled, plaintiff sold the devices before inspection occurred. See id. The devices were later located, but by then had been left outside and their conditions had deteriorated. See id. While defendants' experts were able to examine the devices, and opined that the devices could have malfunctioned and caused overinflation, "because West sold these items and the purchaser left them outside over the winter, defendant's experts had no way to determine the condition of the machines when they were in West's shop at the time of the accident." *Id. at 780*.

Based upon the spoliation of the exemplar wheel, compressor and tire mounting machine, the district court held defendants had been severely prejudiced, and dismissed the case pursuant to *Rule 37*. Reversing, the Circuit held that other less drastic sanctions were available to the district court which would have eliminated the prejudice to defendants without disposing of the case, such as evidence preclusion and inference charges. See *West, 167 F.3d at 780*.

The present matter is entirely different. Most importantly, the missing or spoliated item, unlike in West, is not circumstantial [*21] evidence, but the actual part that failed. There can be no adequate lesser sanctions, as they would be tantamount to summary judgment against plaintiff. Cf. *Pesce v. General Motors Corp., 939 F. Supp. 160, 165 (N.D.N.Y. 1996)* (Hurd, M.J.) ("the drastic sanction of preclusion [as to the missing defective item] would be tantamount to dismissal of the action."). Although in a defective design case lesser sanctions may not always prevent the claim, both federal and New York State courts have dismissed defective design cases as a result of plaintiff's spoliation, even where the spoliation occurred negligently. [12]

> 12 A defective design claim arguably does not require evidence of the product which actually failed, since all of the same type of product are uniformly defective. However, courts have dismissed for spoliation, even where plaintiff alleged a design defect. See Brancaccio, 1992 WL 189937, at *2 (case dismissed for spoliation under *Rule 37* where claim of improper seat belt design was present, when seat belt --and vehicle-- were disposed of through plaintiff's negligence); *Squitieri v. City of New York, 248 A.D.2d 201, 202, 669 N.Y.S.2d 589, 590* (1st Dep't 1998) (dismissal of third party complaint alleging defective design for loss of the defective product).

[*22] Even if the court did impose lesser sanctions, they would not likely remedy the wrong GM has suffered. Not only does GM argue that the flex fan was damaged, precipitating its failure, but GM sought inspection of the flex fan assembly to develop other defenses. As GM never examined the complete flex fan assembly, it does not even know what sanctions it wants the court to impose because it will never know of other defenses an inspection may have revealed. See GM Supplemental Brief at 6-7, 10-11.

In West, the Circuit Court also observed that the exemplar wheel was allegedly deflated as a purported public safety measure, which was a mitigating factor in the spoliation. There are no mitigating factors in the present matter. Plaintiff's expert lost the crucial evidence in this case. There is no excuse for such conduct, nor has plaintiff attempted to argue such. Furthermore, plaintiff's counsel has utterly failed to explain any efforts on her part to mitigate her failure to comply with the court's orders.

Another notable distinction between West and the present case is the type of remedy defendants sought as a sanction for spoliation. In West, only one of two defendants [*23] moved to dismiss. The other defendant moved only for lesser sanctions. This made clear that alternatives were available other than dismissal. [13] The circumstances here are different: GM, the sole defendant, moves for dismissal and argues that no other sanction will remove the prejudice plaintiff's spoliation has caused. The court agrees.

> 13 As the Circuit stated, "it is noteworthy that Goodyear did not move for dismissal as a sanction for spoliation; it only sought to have evidence relating to the spoliated materials excluded at trial. Only [the second defendant] moved to dismiss the complaint on the ground of spoliation. *Obviously, Goodyear believed that lesser sanctions, like exclusion of spoliated evidence, would protect its interests, although Goodyear would now benefit from the district court's dismissal*." *West, 167 F.3d at 780 n. 1* (emphasis supplied).

Finally, as a last distinction, the district court in West relied only on plaintiff's spoliation for dismissal. In this matter, [*24] the court relies not only upon the spoliation, but counsel's noncompliance with orders of both a Magistrate Judge and a District Judge. Not only does this court have the discretion under *Rule 37* to order dismissal for a plaintiff's noncompliance, see *Fed. R. Civ. P. 37*, but as the Supreme Court has recognized, the district court has the inherent power to regulate and control litigation before it. See *Chambers, 501 U.S. at 43-45*. If parties were allowed to disregard mandatory discovery deadlines and orders of the court, orderly and timely adjudication of cases would be subverted.

In summary, West can be distinguished, and the result will not be followed here for several reasons: (1) the evidence spoliated is not circumstantial; (2) due to the nature of the spoliated evidence, effective lesser sanctions may well be tantamount to summary judgment; (3) lesser sanctions may not remedy GM's prejudice because it does not know exactly what a physical inspection of the flex fan would have revealed as a potential defense; (4) no mitigating factors to the spoliation are present; (5) defendant herein actually moves for dismissal and argues only dismissal will protect [*25] its interests adequately; (6) plaintiff's counsel's disregard of discovery and other orders of the court support dismissal as a sanction under *Rule 37* and under the court's inherent power to control litigation

before it.

Having carefully examined and considered the alternatives, no other remedy than dismissal appears appropriate. Only dismissal serves the three prongs the West panel enumerated as to the purposes of *Rule 37* and spoliation. [14] First, it will serve as a deterrent to plaintiff's counsel, his expert and non-parties from engaging in spoliation and disobedience of court orders. Second, the risk of an erroneous judgment will be on the party to lose the critical evidence. Third, it appears no other sanction will restore GM to the position it would have been in absent the spoliation.

14 "(1) Deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." *West, 167 F.3d at 779* (internal quotations and citation omitted).

[*26] Accordingly, GM's motion for dismissal is granted. Moreover, as set forth below, the court alternatively grants GM's summary judgment motion.

II. Summary Judgment

Even if the court did not impose lesser sanctions (which it would if it were not dismissing the case) plaintiff's claims fail as a matter of New York law. [15]

15 In a diversity action, the court must apply the substantive law of New York. See *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*; *Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 243 (2d Cir. 1981)*; *Paul Revere Life Ins. Co. v. Adelman, 1997 U.S. Dist. LEXIS 19804, 1997 WL 773706 (N.D.N.Y. 1997)* (Munson, S.J.).

Plaintiff's defective design claims are barred by the subsequent modification doctrine of *Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 475, 426 N.Y.S.2d 717, 403 N.E.2d 440 (1980)*. As the New York Court of Appeals recently reiterated, "a manufacturer is not responsible for injuries [*27] resulting from substantial alterations or modifications of a product by a third party that render the product defective or otherwise unsafe." *Liriano v. Hobart Corp., 92 N.Y.2d 232, 236, 677 N.Y.S.2d 764, 765, 700 N.E.2d 303 (1998)* (citing Robinson).

This present matter is analogous to a recent Appellate Division, Third Department case upholding the subsequent modification doctrine under similar facts. See *Colonial Indem. Ins. Co. v. NYNEX, 260 A.D.2d 833, 688 N.Y.S.2d 744, 1999 WL 216867*, *2 (3d Dep't 1999). There, the Appellate Division granted summary judgment to defendant manufacturer because the undisputed cause of the damages was a part added by a third party subsequent to the product's manufacture. See id. at *1-2.

In the case at bar, as in Colonial Indemnity, plaintiff seeks to hold the manufacturer, GM, liable for the failure of a part which was added to the truck by a third party subsequent to the truck's manufacture and sale. Despite GM's assertion that New York law mandates summary judgment on these claims, plaintiff fails to oppose this argument in his opposition papers. [16] The court [*28] agrees that the subsequent modification doctrine of Robinson requires the claims to be dismissed. Moreover, plaintiff's failure to oppose GM's argument is deemed by the court as consent to summary judgment on these claims.

16 Plaintiff's sole opposition to summary judgment on his defective design claims is the assertion of the "new" theory of liability, mainly that the truck was defectively designed when it left GM's hands, as it was designed to allow the less safe flex fan to be installed. It is too late for plaintiff to assert this new theory, especially when his purpose is plainly to avoid summary judgment due to the subsequent modification doctrine. To determine whether the claim was indeed new, or had been present all along, as maintained by plaintiff, the court directed plaintiff to file a statement describing this new theory, supplemented with references to the record supporting its previous existence. Contrary to his assertions, none of the citations plaintiff points to disclosed or set forth this new theory. As discovery and motions are closed, the court declines to permit the new liability theory on either defective design or failure to warn.

Notwithstanding the untimeliness of plaintiff's new theory, the court notes and adopts GM's argument that plaintiff's novel theory still has, "at its heart, the issue of whether the flex fan was defective and at the root of that issue lies the question of the cause of the failure; a question that GM cannot adequately defend due to plaintiffs' negligent loss of the fan." Def. Reply at 4 n. 2, docket no. 59. Accordingly, even if the court allowed plaintiff's new theory, it does not alter the court's conclusion that this case must be dismissed for spoliation.

[*29] Plaintiff also alleges a failure to warn claim in his complaint, and reiterated the same at oral argument. Plaintiff otherwise fails to mention or support his allegation of failure to warn. In its motion for summary judgment, GM argues that "there is no record

evidence to establish that a warning would have prevented this action, to whom a warning should have been given, the content of the warning, and all the other elements necessary to prove this type of claim." Def. Mem. of Law at 18 n. 7, docket no. 48. Plaintiff never responded to or refuted this argument in his opposition papers. After the court ordered supplemental briefing at oral argument, GM again argued the failure to warn claim was unviable. "Plaintiff[] here can point to no evidence or expert opinion in the record that the 1984 truck was defective because it lacked appropriate warnings. In contrast, the record shows that GM did provide information about the proper cooling fan to use on this truck." Def. Response at 8 n. 4, docket no. 67. Despite the court's order at oral argument for plaintiff to reply to GM's Response, plaintiff again not only failed to address GM's argument, but failed to file the reply at all. Thus, [*30] plaintiff has never opposed GM's argument for summary judgment on this claim.

This court has dismissed failure to warn claims when plaintiff fails to support the claim at a summary judgment motion. See *June v. Lift-A-Loft Equip., Inc., 1992 U.S. Dist. LEXIS 10064, 1992 WL 168181*, *2-3 (N.D.N.Y. 1992) (McCurn, C.J.). As with the present case, the June plaintiff left the "record[] devoid of any factual basis for concluding that the [product] carried inadequate warnings" and the court therefore granted summary judgment to defendant. Id. at *3. The same result is required here.

Additionally, Local Rule 7.1(b)(3) states that "failure to file or serve any papers as required by this rule shall be deemed by the court as consent to the granting or denial of the motion, as the case may be, unless good cause is shown." N.D.N.Y. L.R. 7.1(b)(3). Plaintiff fails to oppose summary judgment on the warning claim although GM specifically argues it is entitled to such. Not only does plaintiff fail to address GM's argument in his opposition papers, but he failed to file a reply addressing similar arguments after the court directed him to file the same. The court considers plaintiff's failures to oppose [*31] as consent to GM's motion for summary judgment on the failure to warn claim.

CONCLUSION

For the aforementioned reasons, GM's motion to dismiss pursuant to *Fed. R. Civ. P. 37* is GRANTED. Dismissal is granted (a) due to plaintiff's spoliation of the crucial evidence under *Rule 37*; (b) due to counsel's noncompliance with orders of the court, pursuant to *Rule 37*; and (c) under the inherent authority of the court to control litigation before it. Alternatively, defendant's motion for summary judgment is GRANTED in the entirety.

IT IS SO ORDERED.

Dated: May 17, 1999

Syracuse, New York

Neal P. McCurn

Senior United States District Judge

JUDGMENT IN A CIVIL CASE - FILED MAY 18 1999

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: GM's motion to dismiss is GRANTED. Defendant's motion for summary judgment is GRANTED in the entirety.

May 18, 1999

DATE