[* 1]

SHORT FORM ORDER

COPY

INDEX No. 06-33015
CAL No. 11-01935OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 2-22-12 (#008)
MOTION DATE 4-6-12 (#009 & #010)
MOTION DATE 4-25-12 (#011)
ADJ. DATE 4-25-12 (#008, #010 & #011)
ADJ. DATE 5-23-12 (#009)
Mot. Seq. # 008 - MD # 010 - MD
009 - MD # 011 - MD

NANCY LAWRENCE,

Plaintiff,

- against -

CBS LINES, INC., COUNTY OF SUFFOLK and HOGAN MFG., INC.,

Defendants.

MARTIN JOSEPH COLEMAN, ESQ.
Attorney for Plaintiff
100 Crossways Park Drive West, Suite 412
Woodbury New York 11797

ZAKLUKIEWICZ PUZO & MORRISSEY
Attorney for Defendants CBS Lines, Inc. & County of Suffolk
2701 Sunrise Highway, P.O. Box 389
Islip Terrace, New York 11752

ANDREA G. SAWYERS, ESQ.
Attorney for Defendant Hogan MFG, Inc.
3 Huntington Quadrangle, P.O. Box 9028
Melville, New York 11747

Upon the following papers numbered 1 to 57 read on this motion STRA/STRA/RRRR/COMPEL ; Notice of Motion/ Order to Show Cause and supporting papers 1 -13, 14 - 20, 21 - 27, 28 - 35 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 36 - 41, 42 - 47, 48 - 53 ; Replying Affidavits and supporting papers 54 - 55, 56 - 57 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 008) by defendant Hogan Mfg., Inc., the motions (# 009 & 010) by defendants County of Suffolk and CBS Lines Inc., and the motion (# 011) by plaintiff are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants County of Suffolk and CBS Lines Inc. for an order compelling plaintiff to respond to its demand for disclosure of her expert witness information is denied; and it is

ORDERED that the motion by defendants County of Suffolk and CBS Lines Inc. for leave to renew and/or reargue a prior motion by the County of Suffolk for an order compelling plaintiff to appear for a further deposition, which was determined by order of this Court dated December 14, 2011, is granted to the extent set forth herein, and is otherwise denied; and it is

ORDERED that the motion by defendant Hogan Mfg., Inc. and the motion by plaintiff for the imposition of sanctions against defendants CBS Lines Inc. and the County of Suffolk based upon the alleged spoliation of key evidence in the action are denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Nancy Lawrence on September 6, 2005 while she was attempting to board a transit bus owned by defendant County of Suffolk and operated by defendant CBS Lines, Inc. Plaintiff, who is disabled and rides in a wheel chair, allegedly was injured when the curbside ramp barrier attached to the bus's mechanical lift failed to stop in its barrier position and rotated backward on to her feet. Following her accident, plaintiff filed a notice of claim against Suffolk dated October 12, 2005, which asserts, among other things, that she sustained injuries as a result of a malfunction in the bus's mechanical lift. Plaintiff also commenced an action in the United States District Court for the Eastern District of New York, naming Suffolk and CBS Lines (hereinafter collectively known as "Suffolk") as the sole defendants in the action. Following the commencement of the federal action, Suffolk allegedly conducted its own inspection of the alleged defective mechanical lift and sold it, together with the bus, on June 24, 2006. Shortly thereafter, plaintiff commenced the instant action against Suffolk and defendant Hogan Mfg., Inc. ("Hogan"), the alleged manufacturer of the subject forklift.

Suffolk joined issue in the instant action and asserted a cross claim against Hogan for contribution and/or common law indemnification. Hogan then joined issue, and asserted identical cross claims against Suffolk. Following joinder, the parties engaged in discovery, including, as relevant to this determination, the taking of plaintiff's deposition testimony on January 28, 2008 and February 1, 2011. On September 16, 2011, Suffolk moved this court for an order compelling plaintiff to appear for another deposition. The note of issue and certificate of readiness were filed by plaintiff on September 27, 2011. By order dated December 14, 2011, this Court denied Suffolk's motion on the basis that it entered a prior stipulation warranting that discovery was complete and failed to submit copies of any medical records or reports tending to support its claim that plaintiff sustained subsequent injuries to her feet following the accident that is the subject of this action.

Suffolk now moves to renew and/or reargue its prior motion seeking to compel plaintiff to appear for further deposition, arguing, inter alia, that its failure to include copies of medical records with its initial moving papers allegedly proving that plaintiff sustained subsequent injuries to her feet was due to inadvertent law office error. By way of a separate motion, Suffolk also seeks to compel plaintiff to respond to its January 2007 demand for expert witness information. Suffolk asserts that plaintiff failed to respond to its disclosure request despite alleging additional injuries sustained to her stomach as a result of the prolonged use of pain medication. In opposition, plaintiff argues, inter alia, that Suffolk's motion to renew must be denied, as it was in possession of the medical records concerning alleged subsequent injuries to her left foot for two years prior to the time of the original motion, and that such records indicate that she sustained little, if any, injuries that were attributable to the alleged accident which

occurred in February 2007.

The motion by Suffolk for an order compelling plaintiff to comply with outstanding demands for disclosure is denied, without prejudice, as Suffolk's motion was not supported by an affirmation of good faith setting forth that it conferred with plaintiff's counsel to resolve the disclosure issues that are the subject of the motion (*see* ***Chervin v Macura***, 28 AD3d 600, 813 NYS2d 746 [2d Dept 2006]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]; ***Matos v Mira Realty Mgt. Corp.***, 240 AD2d 214, 658 NYS2d 880 [1st Dept 1997]; ***Romero v Korn***, 236 AD2d 598, 654 NYS2d 38 [2d Dept 1997]). The Court notes that CPLR 3101 (d)(1) does not obligate a party to retain an expert by a specific time or mandate that a party be precluded from offering expert testimony at trial based on noncompliance with such statute "unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (***Aversa v Taubes***, 194 AD2d 580, 582, 598 NYS2d 801 [2d Dept 1993]; *see* ***Hoberg v Shree Granesh, LLC***, 85 AD3d 965, 926 NYS2d 578 [2d Dept 2011]; ***Ocampo v Pagan***, 68 AD3d 1077, 892 NYS2d 452 [2d Dept 2009]).

With regard to the motion by Suffolk for renewal and/or reargument of its prior motion to compel plaintiff to appear for further deposition, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts" (***Ramirez v. Khan***, 60 AD3d 748, 748, 874 NYS2d 257 [2d Dept 2009]; *see* ***State Farm Fire and Cas. v Parking Systems Valet Service***, 85 AD3d 761, 926 NYS2d 541 [2d Dept 2011]). What constitutes a "reasonable justification" is within the Court's discretion (*see* ***Heaven v McGowan***, 40 AD3d 583, 586, 835 NYS2d 641 [2d Dept 2007]). Furthermore, it has been recognized that accepting law office failure as a "reasonable justification" for a movant's failure to include the alleged new or additional facts with its prior motion is a sound use of the Court's discretion (*see* ***State Farm Fire and Cas. v Parking Systems Valet Service***, *supra*; ***Nwauwa v Mamos***, 53 AD3d 646, 649, 862 NYS2d 110 [2d Dept 2008]).

Although Suffolk demonstrated that its failure to include medical records and reports tending to show that plaintiff sustained subsequent injuries to her left foot with its previous motion was due to inadvertent law office failure (*see* ***Gordon v Boyd***, 96 AD3d 719, 945 NYS2d 741[2d Dept 2012]; ***Nwauwa v Mamos***, *supra*; ***State Farm Fire and Cas. v Parking Systems Valet Service***, *supra*), it failed to demonstrate that unusual or unanticipated circumstances developed which would warrant further discovery under the circumstances of this case (*see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, *supra*; ***Audiovox Corp. v Benyamini***, *supra*; ***Marks v Morrison***, 275 AD2d 1027, 714 NYS2d 167 [4th Dept 2000]; ***Sims v Ferraccio***, 265 AD2d 805, 695 NYS2d 641 [4th Dept 1999]). Significantly, Suffolk does not dispute that plaintiff previously disclosed medical records from the Stony Brook University Medical Center in September 2008, which detail the injuries and treatment she received when a car allegedly ran over her left foot in February 2007. Thus, Suffolk's assertion that it became aware of the alleged accident and possible additional injuries to plaintiff's left foot only after her further deposition was conducted on February 1, 2011 is belied by its earlier possession of medical records which placed it on notice of the occurrence of the accident and the medical treatment plaintiff received as a result of said accident. "A lack of diligence in seeking discovery does not constitute a special or an extraordinary circumstance" for the purposes of post-note discovery (***Laudico v Sears, Roebuck & Co.***, 125 AD2d 960, 961, 510 NYS2d 787 [4th Dept 1986]; *see* ***Eskenazi v Mackoul***, 92 AD3d 828, 939 NYS2d 484 [2d Dept 2012]).

Moreover, the physician's report included in Suffolk's motion specifically states that plaintiff's left foot was not fractured, and notes no new additional or aggravating injuries to her feet that are attributable to the subsequent accident. Accordingly, the motion by Suffolk seeking leave to renew its motion for an order compelling plaintiff to appear for a further deposition hearing is denied.

Hogan moves pursuant to CPLR 3126 for an order striking Suffolk's answer and cross claims based upon its alleged spoliation of key evidence in the action, namely the bus and its mechanical lift. Hogan argues that such sanctions are appropriate under the circumstances of this case, since Suffolk had notice of the action and failed to preserve the mechanical lift, take photographs of it, or retain experts to inspect and document the condition of the device before it sold the bus and lift. Plaintiff moves for the same relief as Hogan and adopts its arguments. Alternatively, plaintiff requests, should her application to strike Suffolk's pleadings be denied, that she be provided with a missing evidence instruction at trial. Suffolk opposes both motions, arguing that neither plaintiff nor Hogan sought an inspection of the bus or requested that it be preserved, and that they failed to demonstrate that the absence of the bus will prevent them from prosecuting or defending the action. Suffolk further avers that its mechanics were deposed, and that it provided copies of a post-accident inspection report and the maintenance records for the subject bus and lift during the discovery phase of the action.

The striking of a pleading for spoliation of evidence is justified only when a party alters, destroys, or loses possession of key physical evidence before it can be examined by its opponents' experts "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence' " (***New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.***, 280 AD2d 652, 653, 721 NYS2d 92 [2d Dept 2001], *quoting* ***Di Domenico v C & S Aeromatik Supplies***, 252 AD2d 41, 53, 682 NYS2d 452 [2d Dept 1998]; *see* ***Klein v Ford Motor Co.***, 303 AD2d 376, 756 NYS2d 271 [2d Dept 2003]). While the best proof of a defective product is the product itself, "both the existence of a product defect as well as the identity of the manufacturer of the product are issues of fact capable of proof by circumstantial evidence" (***Otis v Bausch & Lomb***, 143 AD2d 649, 650, 532 NYS2d 933 [2d Dept 1988]; *see* ***Healey v Firestone Tire & Rubber Co.***, 87 NY2d 596, 640 NYS2d 860 [1996]). Further, in cases of alleged design defects, there is growing recognition that the loss of the specific instrumentality that allegedly caused the plaintiff's injuries is not automatically prejudicial to the manufacturer because the defect will be exhibited by other products of the same design (*see* ***Dayal v Coinmach Indus. Co.***, 284 AD2d 206, 727 NYS2d 412 [1st Dept 2001]; *see* ***Kirkland v New York City Hous. Auth.***, 236 AD2d 170, 175, 666 NYS2d 609 [1st Dept 1997]). "[T]he striking of a pleading is a drastic sanction" (***Klein v Ford Motor Co.***, *supra* at 376, 756 NYS2d 271), and courts are "reluctant to dismiss a pleading [based upon spoliation of evidence] absent willful or contumacious conduct [so prejudicial that] dismissal is necessary as a 'matter of elementary fairness'" (***Favish v Tepler***, 294 AD2d 396, 396, 741 NYS2d 910 [2d Dept 2002], *quoting* ***Puccia v Farley***, 261 AD2d 83, 85, 699 NYS2d 576 [3d Dept 1999]; *see* ***Mylonas v Town of Brookhaven***, 305 AD2d 561, 759 NYS2d 752 [2d Dept 2003]). Where the evidence lost is not central to the case or its destruction does not cause severe prejudice, a lesser sanction may be imposed (***Klein v Ford Motor Co.***, *supra* at 376, 756 NYS2d 271; *see* ***Mylonas v Town of Brookhaven***, *supra* at 752, 759 NYS2d 752).

Considering the underlying claim in the instant action rests, in large part, on the existence of a defectively designed mechanical lift and Suffolk has disclosed maintenance and post-accident reports

relating to the subject lift, neither plaintiff nor Hogan have demonstrated that the sale of the bus left them prejudicially bereft of any means of prosecuting or defending the action (*see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 610, 933 NYS2d 735 [2d Dept 2011]; ***Shayovich v 800 Ocean Parkway Apt. Corp.***, 77 AD3d 814, 909 NYS2d 749 [2d Dept 2010]; ***Tossing v Townsend Manor Inn, Inc.***, 72 AD3d 884, 900 NYS2d 101 [2d Dept 2010]; ***Minaya v Duane Reade Intl., Inc.***, 66 AD3d 402, 886 NYS2d 154 [1st Dept 2009]). Moreover, neither Hogan nor plaintiff demonstrated that unusual or unanticipated circumstances developed after the filing of the note of issue which would justify their request for additional pre-trial proceedings in this case (*see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, *supra*; ***Audiovox Corp. v Benyamini***, *supra*). Accordingly, the motions by plaintiff and Hogan for the imposition of sanctions striking Suffolk's answer and cross claims based upon the alleged spoliation of evidence are denied.

Dated: 25 Sept 2012

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**