At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of October, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

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ARSLAN YERGESHOV,

Plaintiff,

- against -

Index No. 505523/13

DAGUS, INC., GARDEN SPORT FRAME & ALIGNMENT SERVICE INC. AND FEDERAL TRANSPORTATION LLC,

MOTION SEQ. #10, #11 & #12

Defendants.

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The following papers numbered 1 to 10 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4 5-6
Opposing Affidavits (Affirmations)	7 6, 8 10
Reply Affidavits (Affirmations)	9 10

Upon the foregoing papers in this personal injury action, defendant Garden Spot Frame & Alignment Service Inc. (Garden Spot) moves (Motion Seq. #10) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the second amended complaint and all cross claims asserted against it.

Defendant Dagus, Inc. (Dagus) also moves (Motion Seq. #11) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the second amended complaint.

Plaintiff Arslan Yergeshov (Yergeshov) cross-moves (Motion Seq. #12) for an order: (1) striking Dagus' answer for spoliation of key evidence, and (2) granting him a negative inference at trial as against Dagus.

Background

The Truck Incident

This action arises from a June 25, 2013 incident in which the tractor-trailer owned by Dagus and operated by Yergeshov caught fire while Yergeshov was driving in Utah. According to Yergeshov, the tractor-trailer's brakes caught fire, the vehicle stopped and he attempted to extinguish the fire when one of the vehicle's rear tires exploded injuring him. *Two weeks before* the incident, Garden Spot had repaired the vehicle's brakes.

More specifically, Yergeshov, at his deposition, testified that he was driven to Pennsylvania by a manager from Dagus to pick up the truck from a body shop, which had repaired the exterior of the truck following an unrelated minor accident. Yergeshov, who testified that he had no mechanical expertise, explained that the truck "would self-brake" when they retrieved it from the body shop. Yergeshov took the truck from the body shop to Garden Spot, a nearby repair shop in Pennsylvania, for repairs. Yergeshov testified that he slept in the truck for two days waiting for the truck to be repaired. After the mechanics changed "something" on one of the axles of the truck, Yergeshov testified that "they showed me that the brakes are released and so I went to work." After Yergeshov retrieved the trailer, he testified that a dispatcher gave him a load of cargo to deliver.

Yergeshov testified that, after he left Garden Spot's repair shop in Pennsylvania, he hauled one or two loads approximately 2,000 miles to Las Vegas and that the truck caught fire when he was returning to New York with another load. Yergeshov testified that he had no difficulty with the

brakes from the time he left Pennsylvania until the time he arrived in Las Vegas. Yergeshov testified that he was on 70th Road, a highway, driving through the mountains in the middle of Utah on his way back to New York when the incident occurred. Yergeshov testified that there were high hills and downward drops in Utah. Yergeshov recalls that he was driving between 200 and 300 meters at a 6% decline downhill, at a speed of more than 60 miles per hour, when he looked in the drivers' side mirror and noticed smoke coming from the left rear of the truck. Yergeshov testified that he tried to pump the brakes while driving down the hill, but the brakes would not work. When the truck came to a stop as the road leveled, Yergeshov pulled the truck over to the shoulder, got out of the truck and noticed that the "iron where the brakes are became red in color . . ." and the driver's-side rear axle tire was on fire. Yergeshov retrieved a fire extinguisher from the left side of the driver's seat and attempted to extinguish the fire when the inside rear axle tire exploded. Yergeshov was injured when parts of the exploded tire struck him. According to Yergeshov, the truck "got burned out" and he did not know where the truck was taken after the incident or whether the truck was ever inspected to determine the cause of the fire.

Dave Gunning, who testified on behalf of Garden Spot, confirmed that Garden Spot had inspected the vehicle because the customer had complained that the brakes had locked up. Gunning testified that, upon inspection, Garden Spot determined that the left front drive axle was locked up. Garden Spot's invoice reflects that work was performed on the truck's brakes, the air compressor and the air conditioner. Gunning testified that brakes could possibly catch fire from "improper usage," a wheel seal leak or a faulty air compressor. When asked what he meant by "improper usage," Gunning responded "if your truck is fully loaded . . . and you are going down some of the

big mountains out West, if you are not on your game, you can be on the brakes too hard. They can get too hot and could possibly catch fire."

Sirazhutdin Mingazazhev, the President of Dagus, testified that Yergeshov was not an employee of Dagus at the time of the incident and he did not give Yergeshov a W-2, but Yergeshov was paid by Dagus "for the miles that he drove" its 2007 Freightliner truck. According to Mingazazhev, Federal Transportation, LLC (Federal) employed the dispatchers, "found the loads" and contacted drivers by SMS (text) message with pick-up and delivery locations. Federal paid Dagus for each load delivered. Mingazazhev testified that the 2007 Freightliner was repaired at Garden Spot around June 13, 2013, after his friend, Arslan,[1] told him that "one of the brakes was working badly." Mingazazhev testified that Garden Spot fixed everything that was necessary, that the truck was destroyed and that he does not know where the wreckage is.

The Personal Injury Action

Yergeshov, on September 18, 2013, commenced this action against Dagus by filing a summons and a verified complaint alleging that "the aforesaid accident was caused solely and wholly by reason that Defendant **DAGUS INC** breached its duty to properly and timely supervise, inspect, maintain and repair the aforesaid vehicle and that said vehicle was not fit for intended use and a danger to the plaintiff" (complaint at ¶ 17). Yergeshov further alleges that Dagus "was negligent, reckless and careless in the supervision, maintenance, use, repair, inspection and control of its aforesaid vehicle, and had actual notice of the dangerous and defective condition of its aforesaid

[1] A different individual than the plaintiff, Arslan Yergeshov.

vehicle" (*id.* at ¶ 18). Dagus, on December 2, 2013, answered the complaint, denied the material allegations therein and asserted affirmative defenses.

By a January 13, 2015 order, Yergeshov was granted leave to amend his complaint in order to add Garden Spot as a defendant. Dagus and Garden Spot answered the amended complaint and denied the material allegations therein on February 12, 2015 and March 19, 2015, respectively. In addition to affirmative defenses, Garden Spot asserted a cross claim against Dagus for apportionment, contribution and indemnification.

By a May 18, 2016 order, Yergeshov was granted leave to amend his complaint to add Federal as a defendant. The second amended complaint variously alleges that Dagus "was the owner of a 2007 Freightliner bearing New York State license plate number known as 25946PC"; that Federal "was the owner of a semi tractor and/or trailer bearing New York State license plate number known as BD29019"; that Garden Spot "performed work on the aforesaid freightliner . . . on or around June 11, 2013, under work order number L033546"; and that "defendants were negligent, reckless and careless in the supervision, maintenance, use, repair, inspection and control of the aforesaid semi tractor and trailer, and had actual and/or constructive notice of the dangerous and defective condition of the aforesaid vehicle" (second amended complaint at ¶¶ 18, 27, 47 and 55).

Garden Spot answered the second amended complaint on June 29, 2016, by which it denied the material allegations therein, asserted affirmative defenses and asserted a cross claim against Dagus and Federal for apportionment, contribution and indemnification. Federal failed to answer or otherwise appear in the action, and consequently, Yergeshov was granted a default judgment against Federal.

Yergeshov, on January 29, 2018, filed a note of issue and certificate of readiness indicating that the parties had completed discovery.

Garden Spot's Summary Judgment Motion

Garden Spot now moves for summary judgment dismissing the second amended complaint and the cross claims asserted against it on the ground that the evidence establishes that the vehicle was repaired and that Yergeshov reported no mechanical problems for several thousand miles of operation before the incident. Garden Spot argues that "[t]he mere fact that [it] performed repairs on the subject vehicle does not, in and of itself, provide a basis for finding negligence" and that "[p]laintiff cannot state, without speculating, what caused the incident or what aspect of Garden Spot's repairs was negligent . . ." because "***the truck was never inspected following the fire***."

Yergeshov, in opposition, submits an attorney affirmation arguing that "Garden Spot produces no evidence whatsoever to establish that the Truck was allegedly 'in proper working order when it left Garden Spot's shop' . . ." Yergeshov's counsel further contends that "Garden Spot was the only entity that performed any work on the Truck in the two weeks before the Accident occurred," and thus, "the doctrine of *res ipsa loquitur* is applicable to establish its negligence." Yergeshov's counsel speculates that a faulty air compressor, negligently fixed by Garden Spot, caused the brakes to fail and caused the fire.

Garden Spot, in reply, contends that plaintiff's counsel's speculation is insufficient to defeat its summary judgment motion, and that Yergeshov "submits no evidence by an expert or otherwise" regarding Garden Spot's allegedly negligent repairs and the cause of the fire. Garden Spot reiterates that "***Yergeshov admitted that he experienced no problems with the brakes from the time he left Garden Spot in Pennsylvania and when he arrived in Las Vegas, some 2000 miles later***." Garden

Spot argues that it "already met [its] burden of proof simply by showing (through plaintiff's own testimony) that the brakes functioned properly for well over two weeks and thousands of cross-country miles before the truck fire." Garden Spot asserts that the doctrine of *res ipsa loquitur* does not apply here since "there was a period of approximately two (2) weeks during which Yergeshov, not Garden Spot, had exclusive possession of the instrumentality (i.e., the tractor trailer)."

Dagus' Summary Judgment Motion

Dagus also moves for summary judgment dismissing the second amended complaint on the ground that Yergeshov lacks standing to maintain a personal injury action against Dagus because he has a pending claim against Dagus for Workers' Compensation Benefits, which is Yergeshov's exclusive remedy. Dagus thus contends that "an employee cannot maintain a common law tort action against his employer for injuries sustained in the course of employment since such injuries were covered by the Workers' Compensation Law." Dagus further argues that summary judgment is warranted because "[p]laintiff cannot prove that DAGUS deviated from a standard of care of any sort."

Garden Spot, in "partial" opposition to Dagus' summary judgment motion, argues that Dagus previously filed a dismissal motion arguing that Yergeshov cannot maintain a tort claim against Dagus because he has a pending claim for Workers Compensation benefits. Garden Spot submits a copy of the court's September 8, 2015 order (Partnow, J.) denying Dagus' prior dismissal motion on the ground that "the complaint does not allege that [plaintiff] was employed by Dagus." Garden Spot argues that Dagus "offers no definitive proof as to whether [Yergeshov] was an employee of DAGUS or an independent contractor" and "discovery conducted since DAGUS' prior motion was denied establishes that ***DAGUS' owner, Sirazhutdin Mingazhev, testified that p[laintiff was NOT***

an employee of DAGUS." Garden Spot also submits a Notice of Decision by the New York State Workers' Compensation Board in which the Board determined that:

> "[c]laimant is suing alleged employer, Dagus, directly in civil court. He must elect his remedy in this forum in order to proceed here. Until he does so, *this case is marked no further action.* No further action is planned by the Board at this time" (emphasis added).

In addition, Garden Spot submits a copy of Yergeshov's March 23, 2015 bill of particulars, in which he alleges that he was employed by Stallion Transport, LLC on the date of the incident.

Garden Spot further opposes Dagus' summary judgment motion "to the extent that it is determined that any defective mechanical condition of the truck plaintiff was operating at the time of the accident caused or contributed to the accident" because "[t]he vehicle was not under GARDEN SPOT's supervision or control, and DAGUS, as the vehicle's owner would have had responsibility to maintain and/or repair said vehicle during that period if there was a need to do so."

Yergeshov, in opposition to Dagus' summary judgment motion, similarly argues that Dagus' principal, Mingazhev, testified at his deposition that Dagus did not employ Yergeshov or give him a W-2. Yergeshov further argues that "there have been no findings by a Workers' Compensation Court that Plaintiff is, in fact, Dagus' (or Mingazhev's) employee." Yergeshov also argues that Dagus' summary judgment motion should be denied because it was filed on April 18, 2018, more than 60 days after Yergeshov filed his note of issue.

Dagus, in reply, argues that its motion "was filed properly and timely" because the motion was filed "well before the 120 day deadline . . ." set forth in CPLR 3212 (a), and that Dagus' counsel confirmed with the court that "Judge Landicino has no such specific rules, and instead, he follows the deadlines set forth in the C.P.L.R." Regarding the merits, Dagus argues that it sufficiently

established a Workers' Compensation defense based on Yergeshov's deposition testimony that he was employed by Dagus at the time of the incident. Dagus further argues that it is entitled to summary judgment because Yergeshov has failed to prove that Dagus departed from a standard of care that caused his injuries.[2]

Yergeshov's Cross Motion

Yergeshov cross-moves for an order striking Dagus' answer for spoliation of "key evidence" and granting him a negative inference at the time of trial as against Dagus. Essentially, Yergeshov argues that Dagus and its insurer "had a duty to preserve the Truck . . ." and that Dagus' failure to do so warrants the striking of its answer.

Dagus, in opposition, argues that Yergeshov's post-note of issue cross motion to strike its answer is untimely. Dagus further contends, on the merits, that "[n]o evidence was negligently lost or destroyed in the present action" and that Yergeshov's counsel submits no proof that Dagus negligently destroyed evidence.

Discussion

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of a *prima facie* showing of its entitlement to summary judgment as a matter of law, by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that

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[2] Pursuant to CPLR 3212(a), local Court rules, if any, are to be followed. Rule 13 of the Uniform Civil Term Rules of the Supreme Court, Kings County provides that any motion not made by the City of New York cannot be made more than 60 days after the plaintiff has filed a note of issue, unless there is a showing of good cause as set forth in *Brill v. City of New York.* However, the Court finds that the motion by Dagus is sufficiently similar to the initial motion made by Garden Spot so as to provide the requisite good cause to review the untimely motion made by Dagus. *See Grande v. Peteroy*, 39 A.D.3d 590, 592, 833 N.Y.S.2d 615, 617 (2007), as amended [2nd Dept , 2007]. As a result, the Court will address the merits of the motion by Dagus.

showing requires denial of the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a *prima facie* showing then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Furthermore, the court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]).

Here, Garden Spot is entitled to summary judgment dismissing the second amended complaint because it demonstrated that it was not negligent in repairing the truck two weeks before the incident. Yergeshov's own deposition testimony proves that the truck functioned properly for more than 2,000 miles during Yergeshov's drive cross-country, during which he traversed hilly terrain, two weeks after Garden Spot repaired the truck (*see Vaccariello v Meineke Car Center, Inc.*, 136 AD3d 890, 893 [2016] [holding that "the defendant demonstrated its *prima facie* entitlement

to judgment as a matter of law by demonstrating that the vehicle's brakes functioned adequately for two days before the accident, as well as immediately before the collision"]; *Tufano v Nor-Heights Service Center, Inc.*, 15 AD3d 470, 471 [2005] [holding that "Nor-Heights made a *prima facie* showing of its entitlement to judgment as a matter of law by demonstrating that the brakes were functioning adequately for nine days prior to the accident and immediately before the collision"]; *Breslin v Rij*, 259 Ad2d 458, 458 [1999] [holding that "Anton's made a *prima facie* showing of its entitlement to judgment as a matter of law by demonstrating that the brakes were functioning adequately four days before the accident, as well as immediately before the collision"]; *Williams v Healy International Corp.*, 240 AD2d 403, 404 [1997] [holding that "Healy made a *prima facie* showing of its entitlement to judgment as a matter of law . . . by demonstrating that the brakes passed inspection approximately two weeks prior to the accident and were functioning adequately immediately before the collision"]; *Duprey v Drake*, 182 AD2d 1015, 1016 [1992] [holding that repair shop was entitled to summary judgment because "no evidence other than deposition testimony that defendant's employees worked on the truck's brakes some three weeks before the accident has been offered to support a finding that the alleged brake failure was due to defendant's negligence"]).

Dagus' summary judgment motion is similarly granted. While Dagus cannot rely on its Workers' Compensation defense, since the testimonial evidence proves that Yergeshov was not employed by Dagus at the time of the incident, Dagus is nevertheless entitled to summary judgment dismissing the second amended complaint because Yergeshov offered nothing more than "bare assertions of negligence" by Dagus regarding its maintenance and repair of the truck (*see Delio v Percom Equip. Rental Corp.*, 249 AD2d 354, 355 [1998]).

Finally, Yergeshov's cross motion for an order striking Dagus' answer and granting a negative inference at trial is moot, but, in any event, denial of the cross motion is warranted because Yergeshov presented no evidence of spoliation. Accordingly, it is

ORDERED that Garden Spot's summary judgment motion is granted, the second amended complaint and Dagus' cross claims as against Garden Spot are dismissed and the action is severed as against Garden Spot; and it is further

ORDERED that Dagus' summary judgment motion is granted, the second amended complaint is dismissed as against Dagus, Garden Spot's cross claim against Dagus is rendered moot and the action is severed as against Dagus; and it is further

ORDERED that Yergeshov's cross motion for an order striking Dagus' answer and granting it a negative inference at trial as against Dagus is denied.

This constitutes the decision and order of the court.

E N T E R,

Carl J. Landicino J.S.C

KINGS COUNTY CLERK
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