

Government Empls. Ins. Co. v BMW of N. Am., LLC
2019 NY Slip Op 33885(U)
December 20, 2019
Supreme Court, Kings County
Docket Number: 523110/2017
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 523110/2017

SEQ#002

Part 91

DECISION/ORDER

GOVERNMENT EMPLOYEES INSURANCE COMPANY AS
SUBROGEE OF ANN M. GITTENS,

Recitation, as required by CPLR §2219 (a), of the papers
considered in the review of this Motion

Plaintiff,

against

BMW OF NORTH AMERICA, LLC,

Defendant.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other	<u> </u>

Upon the foregoing papers, defendant’s motion for sanctions and for summary judgment
is decided as follows:

Factual and Procedural Background

Plaintiff is Government Employees Insurance Corporation (“GEICO”), the insurer of Ann M. Gittens. Ms. Gittens purchased a vehicle from Life Quality BMW on December 23, 2015. As Ms. Gittens testified at her deposition, her vehicle was parked in her garage on March 23, 2015. Ms. Gittens testified that, that day, she heard a “boom” coming from her garage, and then another “boom”, and saw fire coming from the garage. Ms. Gittens testified that the vehicle and other items were damaged in the fire. Ms. Gittens testified that she contacted GEICO to inform it about the incident and to start the insurance claim process. Ms. Gittens testified that she transferred title to the vehicle to GEICO. In return, GEICO paid Ms. Gittens’s insurance claim.

GEICO, as subrogee of Ms. Gittens, commenced this action against defendant BMW of North America, LLC (“BMW”), in which GEICO asserts claims for products liability based upon defective design and manufacture, and for negligent design, manufacture, installation, maintenance, and failure to warn.

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Analysis

Defendant's Request for Summary Judgment

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

BMW argues that GEICO's claims for products liability and negligence are barred by the economic loss doctrine. The economic loss doctrine provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue" (*126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc.*, 121 AD3d 651, 652 [2d Dept 2014]). As subrogee, GEICO stands in the place of Ms. Gittens, the downstream purchaser (*Zurich Am. Ins. v Hereford Ins. Co.*, 173 AD3d 880, 882 [2d Dept 2019]).

In opposition, GEICO mischaracterizes defendants' motion as one for dismissal based on documentary evidence pursuant to CPLR 3211(a)(1). GEICO argues that its complaint could be construed to assert claims for breach of contract or breach of warranty. However, the claims asserted are clearly for products liability and negligence; there is no claim for, or allegation of, contractual or warranty breach. Furthermore, GEICO does not move to amend.

Defendant's Request for Sanctions

BMW seeks sanctions against GEICO for GEICO's release of the vehicle and for allowing it to be destroyed. BMW's request for sanctions is largely moot because BMW is

dismissed on summary judgment. For the sake of completeness, however, the court will address the request.

“A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense” (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]). For purposes of spoliation, a culpable state of mind includes ordinary negligence (*Hirschberg v Winthrop-Univ. Hosp.*, 175 AD3d 556, 556-57 [2d Dept 2019]).

“Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense” (*Pegasus Aviation*, 26 NY3d at 547-48 [citations omitted]).

GEICO contends that the vehicle was destroyed in the normal course of business and only after it received permission from BMW. GEICO claims that its representative, Tricia Scott, spoke with BMW’s representative, Betsy Hoehman, on January 28, 2016, by telephone. GEICO provides a copy of the claim note and Ms. Scott’s call log, which indicates that the telephone call at issue occurred. The claim note states, “Discussed claim with Betsy Hohmann [sic] - ok to release hold on vehicle.”

Prior to the its destruction, both parties conducted three inspections of the vehicle. BMW argues that each of the inspections were “initial” and “preliminary” and limited to only visual

observations. At oral argument, there was discussion that one of these inspections may have actually been a “reconstructive inspection.”

BMW also provides a copy of a report from Jeff Lange, a professional engineer and certified vehicle fire inspector, who inspected the vehicle for GEICO. After some analysis of the burn patterns and electrical activity in the vehicle, Mr. Lange concluded that the fire originated in the power distribution module, and notes that the module has been preserved.

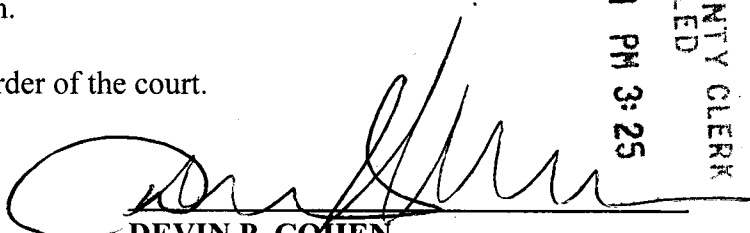
Under the circumstances, there are too many questions of fact to award sanctions here. First, there are questions of fact as to whether GEICO received permission from BMW to destroy the vehicle, which Ms. Scott testified happened in the normal course of business (*Sanders v 210 N. 12th St., LLC*, 171 AD3d 966, 968 [2d Dept 2019] [holding that, in the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices]). Additionally, the parties were present for three inspections prior to the destruction of the vehicle. Lastly, Mr. Lange opines that the fire originated in the power distribution module, which has been preserved, and so there is a question as to whether the remainder of the vehicle needed to be preserved (*Sarris v Fairway Group Plainview, LLC*, 169 AD3d 734, 736 [2d Dept 2019]).

Conclusion

For the foregoing reasons, defendant’s motion is granted to the extent that summary judgment is awarded dismissing this action.

This constitutes the decision and order of the court.

December 20, 2019
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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