Arcos v Vee Bee Cooling Corp.
2024 NY Slip Op 34246(U)
November 25, 2024
Supreme Court, Kings County
Docket Number: Index No. 522644/2022
Judge: Ingrid Joseph

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of November, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ANIBAL ARCOS and GLORIA SALGADO,

Plaintiffs,

-against-

Index No.: 522644/2022

DECISION AND ORDER
(Mot. Seq. Nos. 4-5)

VEE BEE COOLING CORP. and
ABRAHAM MOSKOVITS,

Defendants.

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The following e-filed papers read herein: NYSCEF Doc. Nos.:

Motion Seq. No. 4
Notice of Motion/Affirmation in Support/Exhibits..... 67 – 75
Reply Affirmation..... 131

Motion Seq. No. 5
Notice of Cross-Motion/Affirmation in Support and in Opposition to Motion/Exhibits..... 79 – 96
Affirmation in Opposition/Exhibits..... 117 – 127
Reply Affirmation..... 133

Defendants Vee Bee Cooling Corp. ("Vee Bee") and Abraham Moskovits ("Moskovits") (collectively, "Defendants") move for an order, pursuant to Disciplinary Rule 5-105 of the New York Lawyer's Code of Professional Responsibility[1] and general supervisory powers of the Court, disqualifying Robert A. Hyams, Esq. from continuing to represent Plaintiffs Anibal Arcos ("Arcos") and Gloria Salgado ("Salgado") (collectively, "Plaintiffs") on the basis that a clear conflict of interest exists (Mot. Seq. No. 4). Plaintiffs oppose the motion and cross-move for an

[1] Defendants' explicit reliance on DR 5-105 [a] (former 22 NYCRR § 1200.24 [a], repealed eff April 1, 2009) is misplaced. Instead, the Court will proceed to analyze Defendants' motion under rule 1.7 (b) of the Rules of Professional Conduct, the current and similar rule, which Defendants cite in their moving papers.

order (a) granting spoliation sanctions against Defendants, including dismissing their counterclaim and precluding the testimony of Moskovits; and (b) directing Defendants to serve an authorization for Plaintiffs to obtain Progressive Insurance Company's unredacted property damage file (Mot. Seq. No. 5).

This action arises out of a motor vehicle accident that occurred on June 10, 2022. In their amended complaint, Plaintiffs assert that Arcos was operating a vehicle in which Salgado was a passenger when it came in contact with a vehicle operated by Moskovits and owned by Vee Bee.

In their motion to disqualify, Defendants aver that the law firm of Robert A. Hyams, Esq. represents Arcos (driver) and Salgado (passenger). Defendants argue that representing both a driver and a passenger in a personal injury action involving more than one vehicle creates a conflict of interest in violation of the Rules of Professional Conduct.[2] According to Defendants, it is "manifestly clear" that there is a conflict of interest. First, Defendants contend that the failure of the passenger to assert a claim against the driver does not resolve the issue of the driver's negligence, which is at issue here based on the differing versions of how the accident occurred as per the police report, i.e., Defendants rear-end them versus Plaintiffs improperly backed up their vehicle. Second, Defendants argue that their assertion of counterclaims against Arcos, places his pecuniary interests in conflict with Salgado's, and such conflict is caused by Salgado's ability to assert claims against Arcos for his alleged negligence.

In opposition to the motion, Plaintiffs claim that disqualification would be inappropriate and prejudicial. Plaintiffs assert that they consented to dual representation. In support, Plaintiffs attach two waivers signed June 13, 2022, titled "Driver-Passenger Waiver of Potential Conflict of Interest." In their affidavits, both Plaintiffs assert that their vehicle was struck in the rear by Defendants' vehicle and Salgado avers that she does not want to sue her husband, Arcos. Moreover, Plaintiffs allege that even if Salgado brought an action against Arcos, it would not be covered by insurance since no spousal coverage existed in the subject policy.

In their reply, Defendants reiterate that Plaintiffs have differing interests, warranting disqualification of Robert A. Hyams, Esq.

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[2] Rule 1.7 (a) of the Rules of Professional Conduct, which states that:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyers professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.7 [a]).

As the Second Department stated,

> Although the disqualification of an attorney is a matter which rests with the sound discretion of the trial court (*see Boyd v Trent*, 287 AD2d 475, 476, 731 NYS2d 209 [2001]), a party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (*Bentz v Bentz*, 37 AD3d 386, 387 [2d Dept 2007]).

However, the Second Department has routinely held that an attorney's representation of a driver and a passenger creates a conflict of interest and violates DR 5-105 (a) and/or rule 1.7 (a) of the Rules of Professional Conduct, especially where a counterclaim against the driver has been asserted by defendant and the passenger could assert claims against the driver for negligence (*see Shelby v Blakes*, 129 AD3d 823, 825 [2d Dept 2015]; *Quinn v Walsh*, 18 AD3d 638, 638 [2d Dept 2005]; *Alcantara v Mendez*, 303 AD2d 337, 338 [2d Dept 2003]; *Pessoni v Rabkin*, 220 AD2d 732, 732 [2d Dept 1995]). Contrary to Plaintiffs' contention, there is a conflict of interest.

Nonetheless, a conflict of interest does not amount to automatic disqualification. Despite the existence of a conflict of interest, an attorney may still represent a client if, pursuant to rule 1.7 (b) of the Rules of Professional Conduct,

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.7 [b]).

In their waivers, Plaintiffs acknowledge "that there may be a conflict of interest in that one of these parties may have claims against other occupants in the same vehicle" (NYSCEF Doc No. 94). In their affidavits, Plaintiffs assert that they were advised by counsel that their "interests could potentially be in conflict" since Salgado could bring a claim against Arcos (NYSCEF Doc Nos. 95-96). However, they "voluntarily agreed to be represented by the same firm" (*id.*). Plaintiffs further state in their affidavits that they had another conversation with counsel who advised them that Defendants were asserting a claim against Arcos (*id.*). According to Plaintiffs, their attorney "explained that this could be seen as a conflict of interest and advised that [they] could each get separate counsel" (*id.*). Nonetheless, Plaintiffs wanted their attorney to "continue to represent both of [them]" (*id.*). The Court finds that the formal waivers and affidavits demonstrate informed

consent waiving the conflict of interest (*cf. Shelby*, 129 AD3d at 825 [noting that there was "no written confirmation of informed consent to the potential conflict" between passenger and driver]; *Sanyang v Davis*, 198 AD3d 522, 522 [1st Dept 2021] [affirming trial court's granting of motion disqualifying counsel where he failed to obtain written consent as required by rule 1.7], *affd* 205 AD3d 493). Thus, Defendants' motion to disqualify is denied.

The Court now addresses Plaintiffs' cross-motion seeking spoliation sanctions and an authorization to obtain an unredacted property damage file. As an initial matter, the Court notes that after the instant motions were filed, Plaintiffs filed a motion seeking, inter alia, an order compelling Defendants to provide outstanding discovery (Mot. Seq. No. 6). By order dated April 18, 2024, Justice Leon Ruchelsman directed Defendants to provide a copy of its property damage file and if a claim of privilege was raised, Defendants were to provide a privilege log (NYSCEF Doc No. 135). Defendants were further directed to state the precise legal and factual basis for any objections (*id.*). Therefore, the portion of Plaintiffs' motion seeking an authorization to obtain an unredacted property damage file is rendered moot.

The remaining portion of Plaintiffs' cross-motion concerns Defendants' alleged failure to preserve a video from Defendants' vehicle's dash cam. Plaintiffs argue that Moskovits was aware that the vehicle had dash cam capabilities and had obtained video for other accidents involving that vehicle. In addition, Plaintiffs aver that Moskovits could have shown the video to police but failed to do so. Plaintiffs also refer to Moskovits' deposition testimony where he stated that his boss, Mr. Jacob Berger, would have dealt with the video. At his deposition, Plaintiffs argue that Berger testified that he did not remember the video but would look into it.

In opposition to the cross-motion, Defendants assert that Plaintiffs have failed to provide any evidence that any video of the accident exists and even if it did exist, that the Defendants destroyed it in bad faith. Defendants claim that Arcos testified that his son made a video at the scene after the accident but Plaintiffs have not disclosed this video. Defendants further cite to the respective deposition testimony of Moskovits and Mr. Berger, wherein Moskovits testified that he was not aware of the existence of any video and Mr. Berger testified that he never saw any video relating to the accident. Further, Defendants refer to the affidavit of Vee Bee's owner Miriam Berger who states that a video of the accident does not exist. Nonetheless, Defendants reference Second Department cases involving missing surveillance videos where the court only directed a negative or adverse inference charge against the defendant. Defendants also argue that the video

is not detrimental to the Plaintiffs' ability to establish their burden of proof on a summary judgment motion or at the time of trial.

In reply, Plaintiffs concede that they do not know if the video currently exists. However, Plaintiffs argue that the Defendants' vehicle had a dash cam, but Moskovits provided no reason to believe that it was not in operation. In addition, Moskovits had retrieved video in prior accidents involving the same vehicle. Plaintiffs also reference Mr. Berger's testimony that he did not recall if he had retrieved or seen the video. Plaintiffs argue that the Court has discretion to consider whether the testimony in this case suggests negligence or willfulness. Rather than an adverse inference instruction, Plaintiffs maintain that the more appropriate remedy would be preclusion and/or dismissal of the counterclaim.

The party moving for sanctions for spoliation must establish "[1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a culpable state of mind, and [3] 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]). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" (*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2d Dept 2007]). Ultimately, the court "has broad discretion in determining what, if any, sanction would be imposed for spoliation of evidence" (*Hudesman v Dawson Holding Co.*, 230 AD3d 744, 746 [2d Dept 2024]).

Here, the Court finds that Plaintiffs have failed to meet their burden. There can be no spoliation if the evidence did not exist. Plaintiffs have proffered no testimony or other evidence demonstrating that the video of this accident existed. The mere fact that Defendants' vehicle was equipped with a dash cam and Moskovits had previously retrieved video of other accidents is not dispositive of the issue of whether there was video of this accident. Additionally, Plaintiffs' papers are devoid of any evidence from which the Court can determine that Defendants intentionally or negligently failed to preserve the video. Even if Defendants failed to preserve the video, Plaintiffs have not shown that they have or will be deprived of their ability to prove their claims (*see Hirschberg v Winthrop-University Hosp.*, 175 AD3d 556, 557 [2d Dept 2019]; *Sanders v 210 N. 12th St., LLC*, 171 AD3d 966, 969 [2d Dept 2019]; *Schaum v Glass Gardens, Inc.*, 230 AD3d 711,

713 [2d Dept 2024]). Plaintiffs argue that the "unexplained but convenient disappearance of this video" allowed Defendants to assert a counterclaim and "transformed an indefensible case into a credibility question." However, Plaintiffs' papers failed to demonstrate that they are unable to rely on other evidence to prove their claims (*see Peters v Hernandez*, 142 AD3d 980, 981 [2d Dept 2016] [finding that even though plaintiff established defendants negligently disposed of video, his ability to prove his case without that recording was not "fatally compromised"]; *Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085 [2d Dept 2012] [since plaintiff could testify about alleged assault, the disposal of the video did not leave him "without means to prove his causes of action"]). Therefore, Plaintiffs' cross-motion seeking sanctions is denied.

Accordingly, it is hereby

ORDERED, that Defendants' motion to disqualify Plaintiffs' counsel (Mot. Seq. No. 4) is denied; and it is further

ORDERED, that the portion of Plaintiff's cross-motion for sanctions (Mot. Seq. No. 5) is denied and the portion seeking an authorization is denied as moot.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice