

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

<p>THOMAS MANGIARACINA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, GENERAL MOTORS, INC., and JERRY OCHOA,</p> <p style="text-align: right;">Defendant.</p>	<hr style="width: 100%;"/>	<p>Index Number..1035/2005</p> <p>Motion Date...9/18/06</p> <p>Motion Cal. Number.....</p> <p>Trial Cal. Number.....</p>
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The following papers numbered 1 to 4 read on this motion

Amended Notice of Motion	1 - 2
Affirmation in Opposition	3
Reply Affirmation	4

Defendant General Motors, Inc., moves to dismiss plaintiff's complaint on spoliation grounds for failure to preserve the vehicle involved in the accident; or in the alternative, for summary judgment, against the City of New York dismissing their cross-claims against General Motors.

This is an action for personal injury allegedly sustained by plaintiff on or about October 12, 2003 at the intersection of Broadway and Dugan Avenue in Queens County. Plaintiff was employed as a Police Officer and was a passenger in a New York City police Patrol car when he was involved in the collision. The airbag did not deploy as a result of the accident.

The spoliation of evidence is the destruction, or failure to preserve the property for another's use as evidence in a pending or reasonable foreseeable litigation (see, West v Goodyear Tire and Rubber Co., 167 F3d 776; also see CPLR 3126). The remedy for failure to preserve evidence is left to the sound discretion of the Court, on a case-by-case basis (Zubalake v. UBS Warburg et al. 2003 U.S. Dist. Lexis 18771 [SDNY Oct. 22, 2003]). Dismissing an action lies where there is a showing of wilfulness, bad faith or fault on the part of the party who failed to preserve evidence.

It is well settled that when a party negligently loses or intentionally destroys key evidence, there by depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of the pleadings (Baglio v. St. John's Queens Hosp., 303 AD2d 341; DiDemneico v. C & S Aeromatik Supplies, 252 AD2d 41; also see Foncette v. LA Express, 295 AD2d 4761).

In fact it does not matter whether the evidence is altered, lost or destroyed, but was unavailable for the other party's expert to examine (Squitieri v. City of NY, 248 Ad2d 261; Mudge, Rose, Guthrie, Alexanders & Ferdon v. Ponquin Air Conditioning Corp., 221 2d 243) even if it was unintentional (Gruberger v. Ford Motor Co., 11 Misc.3d 1063[A]).

However, where there is a design defect as here, it might be evaluated and proved circumstantially (see, Kirland v. NYC Hous. Auth., 236 AD2d 170, 175). The harshness of the preclusion rule has been mitigated where evidence is not essential to the case or where a lesser sanction or no sanction may be appropriate (Klein v. Ford Motor Co., 303 AD3d 376, 377-78). The Court retains broad discretion in determining how to proceed (see, DeLosSantos v. Polanco, 21 AD2d 397).

Although the Notice of Claim was served on the City January 9, 2004 and alerting the City that plaintiff was alleging a defect in the manufacture of the vehicle because the air bag failed to deploy, and the vehicle was sold February 25, 2004, the plaintiff should not be severely prejudiced by defendant City's failure to preserve the vehicle.

Accordingly, defendant's motion is denied, as is the branch of the motion dismissing the cross-claims against the City.

December 19, 2006

J.S.C.