SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

MARK SERLIS,

Plaintiff,

SUBMISSION DATE: 08/19/04
INDEX No.: 17282/02

-against-

MAERSK, INC., CSX WORLD CRANE SERVICES LLC, UNIVERSAL MARITIME SERVICES, INC., MAERSK CONTAINER SERVICE CO, and PORTWIDE SECURING SERVICES, INC.,

MOTION SEQ. #7, 8

Defendants.

MAERSK, INC.,

Third-Party Plaintiff,

-against-

PORTWIDE SECURING SERVICES, INC.,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, this motion by plaintiff MARK SERLIS for: (1) an order pursuant to CPLR § 3126 striking defendants' Answers; (2) an order pursuant to CPLR § 3212 granting him summary judgment as to liability against all defendants; (3) an order pursuant to CPLR § 3126 precluding all defendants from offering any evidence at trial with respect to the condition of the truck's passenger door, including expert testimony; and, (4) an order pursuant to CPLR § 3212 (e) striking defendants' affirmative defenses alleging plaintiff's contributory negligence and/or his

failure to use a seat belt, is determined as provided herein.

This cross-motion by defendant/third-party plaintiff Maersk, Inc., for an order pursuant to CPLR § 3101(d), § 3126, precluding plaintiff from offering any expert evidence or testimony at trial, or, in the alternative, an order pursuant to CPLR § 3101(d)(iii) permitting further discovery of plaintiff's expert Daniel S. Burdet, is granted to the extent provided herein.

Plaintiff seeks to recover damages for injuries he suffered in an accident on June 2, 2002, when, while being transported from his work site to his car, he fell out of a Chevrolet pick-up truck known as "Truck #5318" when the passenger door came open. At the time of his accident, plaintiff was working for defendant CSX World Crane Services. The truck was being driven by a co-worker, James Perez.

At his examination-before-trial plaintiff testified that he was not wearing a seatbelt at the time of the accident because there wasn't one available. Other witnesses have disagreed, testifying at their examinations-before-trial that there in fact was a passenger seatbelt in the truck. Photographs of the truck allegedly taken after the accident have been described as showing a passenger seatbelt.

Plaintiff's employer, CSX World Crane Services, had a contract with Maersk Container Services ("Maersk") to service and repair the cranes used at Berth 88. Berth 88 was leased by Maersk's affiliate, Universal Maritime Services, in Port Elizabeth, New Jersey. Truck #5318 was actually owned by Universal Maritime Services and was being used by CSX World Crane Services pursuant to a contract with a company related to Universal Maritime Services, Maersk Container Service Co.

After plaintiff's accident, CSX World Crane Services retained possession of the truck. At some point, Mr. Latko, the Foreman of Portwide Securing Services, Inc. ("Portwide") which did some vehicle maintenance and repair work at the Terminal, was asked to remove Truck #5318 from the general parking lot and place it in the scrap pile behind the Berth's Power Shop. While Latko testified at his examination-before-trial that Marsk's Power Equipment and Maintenance Manager Mr. Kovach gave him this instruction, Kovach denied doing so at his examination-before-trial. Mr. Latko testified at his examination-before-trial that when he placed the

truck in the scrap pile, neither Kovach nor any other Maersk representative had informed him or anyone else at Portwide that Truck #5318 was involved in litigation. In fact, claims against Portwide had not yet been advanced. Kovach admitted at his examination-before-trial that his approval was generally necessary to remove a vehicle from the Terminal to be scrapped. He testified that usually a vehicle was scrapped when the cost of its repair outweighed its value. He admitted that after discussing the status of Truck 5318 with Mr. Latko after it had been put in the scrap pile, he determined that Truck #5318 should be scrapped and authorized it. However, he denied knowledge of this action. After the vehicle was scrapped, upon a request by risk management, Kovach was able to retrieve the passenger door, which he instructed Latko to save. Though repeatedly demanded, none of the defendants' records regarding Truck's 5318 maintenance or repair have been produced.

Plaintiff presently seeks an order striking defendants' Answers and awarding him partial summary judgment with respect to liability against all defendants based upon Truck 5318's disappearance and defendants' failure to produce any records, or an order precluding defendants from introducing any evidence at trial with respect to Truck 5318's condition. Plaintiff also seeks dismissal of defendants' affirmative defenses alleging his contributory negligence and failure to use a seatbelt.

"Where a crucial item of evidence is lost, either intentionally or negligently, the party responsible should be precluded from offering evidence as to its condition." (Yi Min Ren v. Professional Steam-Cleaning, 271 A.D.2d 602, 603). "Moreover, where the lost item is the 'key' evidence in the case, the proper sanction is to strike the pleading of the responsible party." (Marro v. St. Vincent's Hosp., 294 A.D.2d 341, citing DiDomenico v. C & S Aeromatik Supplies, 252 A.D.2d 41, 53; Squitieri v. City of New York, 248 A.D.2d 201, 202; Kirkland v. New York City Hous. Auth., 236 A.D.2d 170, 173). "However, a less drastic sanction than dismissal of the responsible party's pleading may be imposed where the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense." (Marro v. St. Vincent's Hospital, *supra*). "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction of preclusion may be appropriate." (Foncette v. LA Express, Inc., 295 A.D.2d 471, 472)." "[W]hile courts are reluctant to dismiss a pleading absent willful or contumacious

conduct, it may be warranted 'as a matter of elementary fairness.'" (Madison Avenue Caviartera v. Hartford Stein Boiler Inspection & Ins. Co., 2 A.D.3d 793, *quoting* Kirkland v. New York City Hous. Auth., *supra*, at p. 275). Where a party destroys key evidence leaving its opponents "prejudicially bereft of appropriate means to [advance or] confront a claim with incisive evidence," the spoiler's pleading should be striken. (New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec., Inc., 280 A.D.2d 652, *citing* DiDomenico v. C&S Aeromatik Supplies, *supra*, at p. 53, and Kirkland v. New York City Hous. Auth., *supra*, at p. 174). The court must, however, also consider whether the party responsible for the loss of the evidence has been as adversely affected in their investigation and proof of the proximate cause of the accident as the nonresponsible party. (Foncette v. LA Express, *supra*, at p. 472).

To ascertain who was responsible for Truck #5318's disappearance and the failure to produce the truck's records, a review of the truck's history is necessary.

Defendant Maersk, Inc. is the lessee of the Maersk/Sea-Land Terminal (the "Terminal") in Port Elizabeth, New Jersey. Sea-Land was the previous lessee of that Terminal; Maersk merged with Sea-Land in December, 1999. Maersk operates and manages the Terminal and serves as the general contractor for the construction work performed at the site. Prior to the merger, Sea-Land owned and maintained various vehicles for use at the Terminal. Truck #5318 was used by Sea-Land's crane department and its workers for transport in the Terminal. Prior to the merger, Sea-Land's Terminal's repair garage, commonly referred to as the "Power Shop," maintained the crane department's trucks, as well as other vehicles used at the Terminal. When Maersk merged with Sea-Land in December 1999, Maersk and Universal Maritime Services assumed ownership of most of the Terminal's vehicles, including Truck #5318. Following the merger, Maersk/Universal entered into a contract with Portwide Security Services, Inc. to perform maintenance and repair on some of its vehicles. Practically speaking, the Terminal's Power Shop's mechanics became Portwide's employees. Maersk's maintenance manager supervised what work was to be done by Portwide. Following the merger, Maersk entered a contract with defendant CSX World Crane Services to maintain and repair the cranes used at the Terminal. In effect, Sea-Land's crane department became CSX World Crane Services and its employees became CSX World Crane Services' employees. CSX World Crane Services continued to use at least two

(2) of the trucks which had been used by Sea-Land's crane department, including Truck #5318, to transport its workers around the Terminal.

Whether Portwide performed the maintenance and repairs on the trucks used by CSX World Crane Services following the merger is not clear. Portwide and Maersk maintain that following the merger, the Power Shop, *i.e.*, now operated by Portwide, no longer maintained and repaired the trucks used by the crane department, now known as CSX World Crane Services. Many of their employees so testified at their examinations-before-trial. Plaintiff and CSX World Crane Services disagree; several of their employees testified at their examinations-before-trial that the Power Shop did in fact continue to do work on the trucks used by CSX World Crane Services, however, what kinds of repairs were done by Portwide is disputed. Portwide's foreman, Mr. Latko, testified that while he knew that Maersk's policy barred Portwide from working on trucks used by CSX World Cranes Services, he did small jobs as a favor to the workmen.

Plaintiff's complaint against CSX World Crane Services has been dismissed.

As for Portwide, the evidence presented demonstrates that it does not possess maintenance and/or repair records for the truck nor was it responsible for Truck #5318's destruction. What repairs it did on the truck, if any, is unclear. Plaintiff has not established sufficient grounds for summary relief against Portwide. The motion for summary judgment and an order of preclusion against Portwide is denied.

As for Maersk and Universal Maritime Services, while the destruction of the subject evidence and resulting inability to comply with discovery demands may have been deliberate, "there [is] insufficient proof to conclusively establish that [they] acted willfully, contumaciously, or in bad faith." (Mylonas v. Town of Brookhaven, 305 A.D.2d 561, 563). Moreover, while plaintiff's ability to prove his claim may be impaired by the lost evidence, his claim unquestionably survives. "While the evidence destroyed by [defendants] was relevant, the loss of the opportunity to inspect the vehicle and the loss of the repair and maintenance records will not deprive the plaintiff of the means of proving his claim." (Mylonas v. Town of Brookhaven, *supra,* at p. 562; *see also,* Tommy Hilfiger, USA v. Commonwealth Trucking, 300 A.D.2d 58; Foncette v. LA Express, *supra;* Marro v. St. Vincent's Hosp., & Med

Ctr. of N.Y., *supra*; ChiuPing Chung v. Caravan Coach Co., *supra*). Not only can plaintiff testify as to his version of events, numerous employees have testified at their examinations-before-trial that the problem with the door had persisted for a considerable time and that attempts to fix it repeatedly failed. Moreover, numerous photographs were taken and the door was salvaged. More importantly, Maersk and Universal Maritime Services are at an equal disadvantage in their attempt to establish the door's condition. In addition, defendants' seatbelt defense is also impaired by the missing truck.

Under the circumstances extant, defendants' Answer will not be striken nor will there by an order of evidentiary preclusion. (*See*, Iannucci v. Rose, 8 A.D.3d 437; Mylonas v. Town of Brookhaven, *supra*; Klein v. Ford Motor Co., 303 A.D.2d 376; Foncette v. LA Express, Inc., *supra*; Barlow v. Weiner, 295 A.D.2d 381; Marro v. St. Vincent's Hosp. and Med Ctr., *supra*; Chiu Ping Chung v. Caravan Coach Co., *supra*; *compare*, Dorsa v. National Amusements, Inc., 6 A.D.3d 652; Miller v. Weyerhaeuser Co., 3 A.D.3d 627; Baglio v. St. John's Queens Hosp., 303 A.D.2d 341; Behrbom v. Healthco Intern., Inc., 285 A.D.2d 573; New York Central Mutual Fire Ins. Co. v. Turnerson's Elec., Inc., *supra*). Whether a negative inference charge is appropriate in light of the missing truck is referred to the trial Judge.

The court notes that plaintiff's summary judgment application appears to be predicated upon the missing evidence. To the extent that plaintiff seeks summary judgment on traditional grounds, suffice it to say that summary judgment must be denied as there are issues of fact as to the cause of the accident. While some witnesses testified at their examination-before-trial that there had been persistent problems with the truck's door up until shortly before plaintiff's accident, others disagreed and opined that the door was in good working order on the date of plaintiff's accident. And, as already stated, who was responsible for the truck's maintenance and repair presents issues of fact as well. Furthermore, plaintiff's failure to wear a seatbelt presents an issue of fact as well.

Similarly, in light of the conflicting evidence regarding the availability of a seatbelt and the resulting disadvantage to defendants of the missing truck, plaintiff's motion to strike the affirmative defenses is denied. Defendants' application for an order precluding plaintiff's expert evidence is denied.

Serlis v. Maersk
Index No.: 17282/02

In view of plaintiff's violation of this court's order by producing his expert evidence after receiving defendants', Maersk is granted permission to have its expert file Supplemental Disclosure, to be filed within twenty (20) days of service of this order.

This decision constitutes the order of the court.

Dated: OCT 0 1 2004

J.S.C.

HON. KENNETH A. DAVIS

ENTERED

OCT 0 8 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE