At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 27th day of February 2013.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

BETSY ENEIDA LOPEZ,

Plaintiff,

- against -

J&S MEDICAL SUPPLIES, INC. and HEALTHLINE TRADING, INC.,

Defendants.

DECISION AND ORDER

Index No. 1619/09

The following papers numbered 1 to 6 read on this motion:	Papers Numbered
Notices of Motion/ Affidavits (Affirmations) Annexed	1-2
Affirmations in Opposition/Partial Opposition	3-4
Affirmations in Reply	5-6

The plaintiff in this action claims that as she was being pushed in a wheelchair, through the intersection of Knickerbocker Avenue and Suydam Street in Brooklyn, New York, "the front left wheel of her wheelchair bent completely down but did not actually break off", and that

"[w]hen the wheel bent, her foot struck the pavement". As a result thereof, the plaintiff claims that she was injured. The plaintiff alleges that the wheelchair in question was provided by defendant J&S MEDICAL SUPPLIES, INC., (hereinafter referred to as defendant J&S) and manufactured by defendant HEALTHLINE TRADING, INC., (hereinafter referred to as defendant HEALTHLINE).

In separate motions, both defendants now move this Court for Orders, pursuant to CPLR §3212, granting them summary judgement and dismissing the plaintiff's action in its entirety, as well as dismissing any cross claims between the defendants.

In support of its motion, defendant J&S argues that summary judgement should be granted in their favor "[b]ecause plaintiff has failed to establish a prima facie case of negligence, and there is no evidence that the defendant created or had actual or constructive notice of any dangerous condition". Defendant J&S further contends that "[t]he wheelchair was not in a defective condition at the time it was delivered to the plaintiff"and, as such, the "[p]laintiff's products liability claims are without merit". Finally, defendant J&S argues that "[*r*]*es ipsa loquitor* is inappropriate as the wheelchair was in plaintiff's control for four months"

In support of its motion, defendant HEALTHLINE argues that "[t]here is no competent evidence or proof submitted in admissible form establishing that Healthline supplied and/or sold the wheelchair alleged to have been involved in the subject accident"; that "[t]here is no competent evidence or proof submitted in admissible form establishing that Healthline is liable under claims of products liability"; and that "[t]here is no competent evidence or proof submitted in admissible form establishing negligence, because there is no evidence that Healthline had notice of any defects or malfunctioning of the wheelchair".

Defendant HEALTHLINE further argues that "[*r*]*es ipsa loquitor* is inapplicable to the facts herein"; that "[t]he subject wheelchair was never photographed, located or produced for an inspection and, therefore, dismissal premised upon spoliation of evidence is warranted"; and that the "[p]laintiff has failed to establish that the injuries alleged to have been sustained in the subject accident were caused by the incident at issue insofar as plaintiff has violated multiple Orders and failed to provide discovery concerning prior injuries sustained that involve the same body part, her ankle."

In opposition to the motions, the plaintiff offers a brief recitation of her version of the chronology of events that transpired, relating to her accident and her claims, and argues that the "[d]efendants' motions, respectively, should be denied on the grounds of spoliation. It is well settled New York case law that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. A pleading may be stricken even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation". The plaintiff further argues that "[t]he end result is that the plaintiff, thru [*sic*] no fault of her own, has never had the opportunity for an expert inspection. On that basis alone defendants' motions should be denied".

Defendant J&S also offers an affidavit in partial opposition to defendant HEALTHLINE's motion, arguing that "[s]hould this Court find a triable issue of fact against J&S, J&S asserts that the Court should also find a triable issue of fact against the manufacturer Healthline". Specifically, defendant J&S argues that "[M]ichael Nisanov of J&S stated that he knows Healthline was the manufacturer of the wheelchair because the model number on the

invoice begins with HL, which stands for Healthline" and that, as such, a question of fact exists regarding the manufacturer of the wheelchair that is the subject of this lawsuit.

In reply to the opposition papers submitted by the plaintiff to their motion, defendant J&S, in addition to reiterating the arguments made in their initial motion papers, argues that "[t]he motion should be granted because there is no triable issue of fact before this Court since plaintiff failed to establish that the wheelchair was defective at the time that it was given to plaintiff, or that J&S had notice of a dangerous or defective condition". Defendant J&S further argues that the plaintiff's spoliation claim should be dismissed by the Court because the "[p]laintiff proffers no evidence that J&S was put on notice of a potential lawsuit in her opposition papers based upon spoliation of evidence".

In reply to the plaintiff's opposition to its motion, and specifically the portion of the plaintiff's opposition papers wherein she states that the wheelchair in question was "[r]eturned to HEALTHLINE TRADING LLC. after the incident giving rise to potential litigation was communicated to the defendants in August of 2008", defendant HEALTHLINE argues that the "[p]laintiff's conclusory statement is wrong, has no evidence in support, and serves as a blatant and misguided attempt to mislead this Court. At no time in August 2008, the month of the accident, where [*sic*] the facts giving rise to this litigation communicated to Healthline. In fact, plaintiff failed to initially name Healthline as a defendant in this action, as set forth below, and at no time did plaintiff ever make a demand on Healthline to preserve or produce the wheelchair for an inspection".

Defendant HEALTHLINE also contends that the plaintiff failed to address multiple arguments that were made in its motion. Specifically, defendant HEALTHLINE argues that

"[t]here has been no evidence present [*sic*] to contradict Healthline's argument that plaintiff's description of the wheelchair that was involved in the alleged accident did not resemble the chair that was alleged to be defective" and that "[t]here has been no showing that the wheelchair involved in this accident was provided by Healthline".

Defendant HEALTHLINE also argues that the plaintiff has "failed to rebut defendant's argument concerning the absence of any support for the claim of product liabiity, design or manufacturing defects, breach of implied and/or express warranty, failure to properly label and failure to warn", and that the "[p]laintiff failed to rebut Healthline's argument that there has been no showing of any prior accidents or complaints concerning this wheelchair's wheel and, thus, plaintiff will be unable to establish a negligence claim since there is no proof of actual or constructive notice". Defendant HEALTHLINE also points out that the plaintiff's papers are silent on the issue of *res ipsa loquitor*, which defendant HEALTHLINE claims is inapplicable to the facts of this case because they did not have exclusive control of the wheelchair, which was in the plaintiff's sole possession for four (4) months prior to the alleged date of accident.

Defendant HEALTHLINE further contends that the plaintiff has failed to establish that the injuries claimed in the accident that is the subject of this lawsuit were actually sustained in that accident on August 13, 2008, and not in a prior accident that the plaintiff had in Puerto Rico, where she sustained a fracture to the same ankle that she is claiming was injured in the subject accident. Defendant HEALTHLINE argues that the "[p]laintiff has failed to provide any records or diagnostic tests concerning said injury", and that "[s]ince plaintiff's claimed injury in the instant case concerns the exact same body part, it is unfathomable how plaintiff will be able to distinguish said injuries and Healthline is prejudiced in defending said claim".

Finally, defendant HEALTHLINE attacks the plaintiff's spoliation argument, which plaintiff raises for the first time in her affirmation in opposition. Specifically, defendant HEALTHLINE claims that "[t]he wheelchair at issue was in plaintiff's possession immediately following the accident and plaintiff made no attempt to preserve, maintain, inspect or photograph the wheelchair"; "[t]here was no notice of the accident or the injury given to Healthline until Healthline was belatedly made a defendant by ways of an amended summons and complaint"; and "[p]laintiff never served Healthline a demand or notice to inspect or preserve the wheelchair and their argument is procedurally defective insofar as they have not moved for spoliation, failed pursue alternate avenues of establishing liability and certified that discovery was complete".

In reply to the affirmation in partial opposition to their motion submitted by defendant J&S, defendant HEALTHLINE argues that "[J]&S failed to address Healthline's argument that the description of the wheelchair, as testified to by the plaintiff, bears no resemblance to wheelchair [*sic*] alleged to have been involved in the subject incident"; that the "[p]laintiff was unaware of the identity of the wheelchair supplier and unable to provide any description or identify any tags, plates or stickers that were on the chair"; and that the invoice produced by defendant J&S, which defendant J&S claims is the invoice for the subject wheelchair, bears no information about who it was delivered to, arguing that "[t]here was no way to determine whether the wheelchair noted on the invoice was the one delivered to the plaintiff".

Discussion

Upon review of the papers submitted by the parties, the Court initially notes that the plaintiff offers no opposition to the portions of the defendants motions which seek dismissal of the plaintiff's design and manufacturing defect claims; the plaintiff's claims of breaches of

implied and/or express warranties; the plaintiff's claims of failure to properly label and/or failure to warn; the plaintiff's general negligence claims; and the plaintiff's claim that *res ipsa loquitur* applies to the facts of this case. As the plaintiff's spoliation of evidence argument is inapplicable to any of the aforementioned claims and/or causes of action, the portions of the defendants motions seeking dismissal of those claims and/or causes of action are granted.

The Court further notes that the plaintiff has failed to refute or offer any opposition to the defendants claims that the plaintiff was involved in a prior accident, wherein she sustained an injury to the exact same part of her body that she is claiming was injured in the subject accident, less than six months prior to the date of the accident that is the subject of this lawsuit. The plaintiff's opposition papers are utterly silent on this issue and the plaintiff neither denies that she was involved in a prior accident, which involved an injury to the same part of her body that she claims was injured in the subject accident, nor does she deny that she has failed to provide the defendants with any records, authorizations or information regarding that accident or injury.

Typically, failure to provide discovery regarding a prior accident or injury would result in an Order of preclusion being issued against the offending party. This is particularly true when the injury being claimed in the lawsuit is to the same part of the body that is claimed to have been injured in previous accident. CPLR 3126(2). "Having placed his physical condition in controversy, plaintiff "may not insulate from disclosure material necessary to the defense concerning that condition" Hoenig v. Westphal, 52 N.Y.2d 605, 610, 422 N.E.2d 491, 439 N.Y.S.2d 831 (Ct. Of Appeals, 1981). *See also*, Davidson v. Steer/Peanut Gallery, 277 A.D.2d 965, 715 N.Y.S.2d 560 (4th Dept., 2000); Razmilovic v. Dowd, 14 A.D.3d 546, 789 N.Y.S.2d 191 (2nd Dept., 2005); CDJ Corp. v. Commodore Mfg. Corp., 50 A.D.3d 1084, 856 N.Y.S.2d 249

(2nd Dept., 2008); O'Brien v. Clark Equipment Co., 25 A.D.3d 958, 807 N.Y.S.2d 703 (3rd Dept., 2006); Mingo v. Manhattan and Bronx Surface Transit Operating Authority, 302 A.D.2d 274, 756 N.Y.S.2d 13 (1st Dept., 2003). However, based upon the oral arguments and review of the papers submitted by the parties, this Court is of the opinion that such a sanction will not be necessary in this matter.

The only defense that the plaintiff offers in opposition to the defendants motions is a spoliation of evidence argument which pertains to her products liability claim, and is identical to one of the arguments made by defendant HEALTHLINE in its motion. Specifically, the plaintiff contends that "[t]hru [*sic*] no fault of her own", she "[h]as never had the opportunity for a discovery and inspection of the chair, let alone an opportunity for an expert inspection. On that basis alone defendants' motions should be denied".

Spoliation of evidence occurs where a litigant intentionally or negligently disposes of crucial items of evidence before his or her adversaries have any opportunity to inspect them. Spoliation sanctions may be appropriate even if the destruction occurred through negligence rather than willfulness and even if the evidence was destroyed before the spoliator became a party, provided that he or she was on notice that the evidence might be needed for future litigation. Enstrom v. Garden Place Hotel, 27 A.D.3d 1084, 811 N.Y.S.2d 263 (4th Dept., 2006); Steuhl v. Home Therapy Equipment, Inc., 23 A.D.3d 825, 803 N.Y.S.2d 791 (3rd Dept., 2005); Amaris v. Sharp Electronics Corp., 304 A.D.2d 457, 758 N.Y.S.2d 637 (1st Dept., 2003).

Where there is destruction of evidence before an action is filed, sanctions are inappropriate if the destruction was done pursuant to normal business practices and without knowledge of any impending litigation. Hemingway v. New York City Health and Hospitals

Corp., 13 A.D.3d 484, 787 N.Y.S.2d 86 (2nd Dept., 2004); Steuhl v. Home Therapy Equipment, Inc., 23 A.D.3d 825, 803 N.Y.S.2d 791 (3rd Dept., 2005); Raymond v. State, 294 A.D.2d 854, 740 N.Y.S.2d 743 (4th Dept., 2002); Boyle v. City of New York, 291 A.D.2d 315, 738 N.Y.S.2d 324 (1st Dept., 2002) ; Bow v. J-A Concessions, Inc., 285 A.D.2d 992, 727 N.Y.S.2d 228 (4th Dept., 2001).

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. Kirkland v. New York City Housing Authority, 236 A.D.2d 170, 666 N.Y.S.2d 609, (1st Dept., 1997). One such sanction that has been found to be viable for the loss of a key piece of evidence that precludes inspection is dismissal of the action. Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243, 633 N.Y.S.2d 493 (1st Dept., 1995). However, under all circumstances it is the court that determines the nature and extent of any penalties. CPLR 3126.

In this case, the subject accident allegedly occurred on August 13, 2008. The record before the Court indicates that the plaintiff returned the allegedly defective wheelchair to defendant J&S, in exchange for another wheelchair, on August 14, 2008, the day following the plaintiff's claimed accident. The record also indicates that at some point after the initial suit was commenced, the wheelchair could no longer be located. Defendant J&S's manager testified that it is their custom and practice to discard broken wheelchairs that are more than one year old, and that wheelchairs that are less than one year old would be returned to the manufacturer. However, in this case, regardless of their custom and practice, the witness for defendant J&S stated that he has no proof or knowledge that the specific wheelchair in question was actually returned to

defendant HEALTHLINE. The witness for defendant HEALTHLINE testified that he has no recollection of the wheelchair in question being returned, and further stated that it is their custom and practice, when items are returned, to issue a credit memo, but no such memo for the return of the wheelchair in question has been offered by any party.

Absent any proof that defendant J&S actually returned the subject wheelchair to defendant HEALTHLINE, spoliation sanctions, if any, would only apply to defendant J&S, which was the last party known to be in possession of the broken wheelchair.

It is well settled that in order to sustain a claim of spoliation, the party making the spoliation claim must demonstrate that the party alleged to have spoliated the evidence was on notice of a potential lawsuit. This notice creates a duty on the part of the party in possession and control of the evidence to see that it is preserved. Amaris v. Sharp Electronics Corp., supra.

In this case, the plaintiff did not commence suit until January 22, 2009, more than five months after the accident allegedly occurred. On June 25, 2009, more than ten months after the date of the subject accident, the plaintiff filed an amended complaint also naming HEALTHLINE as a defendant. It must also be noted that the plaintiff was in sole possession of the wheelchair before and after the accident. The plaintiff offers no other proof that either defendant was given notice of the potential for litigation in this matter prior to the commencement of her action in January of 2009. Although the plaintiff testified that when her daughter called defendant J&S to request a replacement wheelchair, the daughter also told defendant J&S that the plaintiff had been injured, the record is devoid of any other proof that the plaintiff's daughter ever made such a statement. None of the parties ever took the daughter's deposition and the plaintiff fails to annex an affidavit from her daughter to her motion papers, leaving the Court with only the

plaintiff's hearsay statement to consider. Aside from the obvious hearsay problems which make the plaintiff's claim regarding her daughter's conversation with representatives of defendant J&S inadmissible, her claim that she overheard the aforementioned conversation is even more questionable when one considers the fact that the plaintiff required a translator at her deposition and testified that she neither speaks nor writes any English.

The witness for defendant J&S testified about the conversation with the plaintiff's daughter, but never stated that he was told that the plaintiff had been in an accident or was injured. In fact, the witness for defendant J&S testified that he did not learn of the plaintiff's claims until January of 2009 and the witness for defendant HEALTHLINE testified that the wheelchair in question was never returned to them, and that the first time that they learned of the plaintiff's claimed accident was after the plaintiff filed her amended summons and complaint in June of 2009.

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. Schidzick v. Lear Siegler, Inc., 222 A.D.2d 841, 635 N.Y.S.2d 323 (3rd Dept., 1995); Hallock v. Bogart, 206 A.D.2d 735, 736, 614 N.Y.S.2d 651 (3rd Dept., 1994). "The trial court properly denied plaintiff's cross motion to strike the answer of the defendant based on its alleged spoliation of evidence, as nothing in the record demonstrated that this defendant destroyed evidence which it knew might be needed for future litigation." Santorelli v. Apple & Eve, L.P., 290 A.D.2d 499, 290 N.Y.S.2d 499 (2nd Dept., 2002).

Unlike cases where a party destroys evidence, either willfully or negligently, once litigation is pending, or where plaintiff destroys evidence prior to commencing an action, there is

no proof in this case that either defendant had any notice of the potential for litigation in this matter, despite the plaintiff's contentions to the contrary. *See generally*, Squitieri v. City of New York, 248 A.D.2d 201, 669 N.Y.S.2d 589 (1st Dept., 1998); Kirkland v. New York City Hous. Auth., supra; Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., supra. As such, and based upon the foregoing, it is the opinion of this Court that the plaintiff's failure to give any notice of her claims during the first five months following her accident, excuses defendant J&S for the loss or destruction of the wheelchair that is the subject of this action.

In addition to the substantive spoliation arguments, this Court cannot ignore the fact that, prior to the defendants making the within motions, the plaintiff filed her note of issue and certified that discovery was complete and that the case was ready to proceed to trial. Based upon a review of the record before the Court, it appears that the plaintiff never made any effort to obtain discovery and inspection of the subject wheelchair prior to filing the note of issue. It also appears that the plaintiff never raised any spoliation arguments until after the defendants made these motions, and there is no indication that the plaintiff ever would have affirmatively made such a spoliation claim or even addressed the issue of the missing wheelchair.

Based upon the plaintiff's claim that discovery was complete and that she was ready for trial, it is the opinion of this Court that her claim of spoliation, made at this juncture, in opposition to motions for summary judgement, is not only unsubstantiated and unpersuasive, it is also untimely.

It should also be noted that even if the Court had not rejected the plaintiff's spoliation argument, defendant HEALTHLINE's motion would nevertheless have been granted on multiple

other grounds. First and foremost, although the plaintiff does not have a valid spoliation claim, defendant HEALTHLINE's claim of spoliation is entirely valid because, despite multiple demands for discovery and inspection of the subject wheelchair, they were never given an opportunity to conduct said discovery and, as such, would be severely prejudiced should they be forced to proceed to trial without the benefit of having an expert opinion to present to the jury.

This Court is also of the opinion that defendant HEALTHLINE would have also been entitled to summary judgement based upon their contention that there is no proof that they manufactured the wheelchair that was involved in the plaintiff's accident. Although both the plaintiff and defendant J&S offer an invoice from defendant HEALTHLINE to defendant J&S for the purchase of a round stool and a wheelchair dated April 4, 2008; as well as a delivery ticket from defendant J&S to the plaintiff dated April 8, 2008, and a delivery receipt from defendant J&S to the plaintiff dated August 16, 2008, none of these prove that the wheelchair that was involved in the plaintiff's accident was manufactured by defendant HEALTHLINE.

A review of the information contained on the invoice dated April 4, 2008 reveals that defendant J&S purchased both a stool and a wheelchair from defendant HEALTHLINE, but the document provides no information regarding the intended future recipients of either the stool or the wheelchair. Examination of the delivery ticket dated April 8, 2008, reveals that, aside from a generally vague description of the wheelchair that was delivered to the plaintiff, there is nothing on the delivery ticket that would allow one to determine the name of the manufacturer of the wheelchair in question. Finally, a review of the delivery receipt dated August 16, 2008, provides even less information than the April 8th delivery ticket. Aside from indicating that a new twenty inch wheelchair was to be delivered to the plaintiff by 8 a.m., no other information is provided

about the wheelchair that was being delivered. It should also be noted that the August 16th delivery receipt bears no information about either defendant J&S picking up the broken wheelchair or about the broken wheelchair itself, despite testimony that the broken wheelchair was picked up by defendant J&S at the same time that the new wheelchair was delivered.

The general rule is that one of the necessary elements in a strict products liability cause of action must be the establishment, by competent proof, of the fact that it is the named defendant who manufactured and placed the injury-causing defective product in the stream of commerce. Hymowitz v. Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (Ct. of Appeals, 1989). After hearing the oral arguments of the parties and upon review of the papers submitted in this case, this Court finds no competent proof or evidence that the wheelchair involved in the subject accident was manufactured by defendant HEALTHLINE.

Based upon the foregoing, this Court finds that the loss and/or destruction of the wheelchair that was involved in the plaintiff's claimed accident is excused because the defendants were never put on notice of the potential for litigation, and were never asked to retain the wheelchair for any reason. As the plaintiff fails to offer any opposition to the defendants summary judgement motions, aside from the aforementioned spoliation argument, it is the opinion of this Court that the defendants motions must be granted.

Conclusion

Accordingly, it is

ORDERED, that defendant J&S's motion for a Order, pursuant to CPLR §3212, granting it summary judgement and dismissing both the plaintiff's complaint and the co-defendant's cross-claims in their entirety, is granted, and it is further;

ORDERED, that defendant HEALTHLINE's motion for a Order, pursuant to CPLR §3212, granting it summary judgement and dismissing both the plaintiff's complaint and the co-defendant's cross-claims in their entirety, is granted.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

BERNADETTE BAYNE
Supreme Court Justice

COUNTY CLERK
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