Travlos v Coram Country Lanes, LLC
2007 NY Slip Op 34439(U)
December 20, 2007
Supreme Court, Suffolk County
Docket Number: 05-1290
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-1290
CAL. No. 07-00760-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-24-07
ADJ. DATE 10-24-07
Mot. Seq. # 004 - MD

STACEY TRAVLOS and NICHOLAS TRAVLOS,

Plaintiff,

- against -

CORAM COUNTRY LANES, LLC,

Defendant.

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Upon the following papers numbered 1 to 25 read on this motion for an order pursuant to CPLR 3126 and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 20 -23; Replying Affidavits and supporting papers 24 - 25; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3126 dismissing plaintiffs' complaint or imposing other sanctions against plaintiffs for spoliation of key evidence by plaintiff Stacey Travlos and for an order pursuant to CPLR 3212 granting defendant summary judgment is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Stacey Travlos on September 6, 2004 at approximately 10 p.m. when she slipped and fell directly in front of a bowling lane after throwing a bowling ball at Coram Country Lanes, which is a bowling alley operated, controlled and maintained by defendant. Plaintiffs allege that the floor had been recently oiled and was slippery and that defendant had actual notice of the alleged dangerous condition inasmuch as defendant's employees created the condition and that defendant had constructive notice of said condition inasmuch as the condition existed for a sufficient period of time for its employees to remedy the condition. In addition, plaintiffs allege that as a result of the fall, plaintiff sustained injuries including traumatic injuries to her right wrist; distal radial metaphyseal intraarticulation fracture with volar angulation and displaced fragment near the distal radioulnar joint requiring a splint and short arm cast; and swelling of the right wrist.

Ten months after said incident, on July 20, 2005, plaintiff had x-rays taken of her right wrist at Smithtown Radiology, P.C. The radiologist at Smithtown Radiology, P.C. rendered a report one day later indicating that there was no evidence of fracture or dislocation or of skeletal abnormality of the right wrist. After sending plaintiff's authorization for x-rays, defendant's counsel was notified by letter dated July 21, 2006 from the Medical Records Manager of Smithtown Radiology, P.C. that the office did not possess the original films inasmuch as plaintiff had signed them out on July 20, 2005 and had never returned them. Said letter also enclosed the findings report dated July 21, 2005 of their radiologist. Defendant's counsel wrote various letters to plaintiff's physician and plaintiffs' counsel in an attempt to discover the whereabouts of said films. Plaintiffs' counsel responded by letter dated January 12, 2007 that plaintiff was not in possession of the films and was unaware of their present location. The Court's computer records indicate that the note of issue in this action was filed on March 29, 2007.

Defendant now moves for the imposition of sanctions on plaintiff Stacey Travlos for spoliation of key evidence in the instant action, x-ray films performed on plaintiff's right wrist at Smithtown Radiology, P.C. on July 20, 2005. Defendant asserts that said x-rays showed that the fracture that plaintiff allegedly sustained had healed by July 20, 2005 contradicting plaintiff's deposition testimony concerning her alleged continuing problems with respect to the fracture area and critical to the defense of damages. Defendant characterizes plaintiffs' behavior in signing out the x-ray films and refusing to disclose where the films were or to make them available as willful and contumacious conduct to prevent defendant's proper preparation of a defense and spoliation of evidence. Defendant points to a pattern of continuously delayed discovery, some items provided only after defendant moved to preclude. In support of defendant's request, defendant submits, among other things, an affirmation of good faith; the radiologist's finding's report of July 21, 2005 and the letter dated July 21, 2006 from the Medical Records Manager of Smithtown Radiology, P.C.; defendant's counsel's letters sent in an effort to locate plaintiff's x-ray films; and plaintiffs' counsel's response letter dated January 12, 2007.

In their opposition to the instant motion, plaintiffs' counsel cursorily states that defendant's motion pursuant to CPLR 3126 is moot inasmuch as the x-ray that is the subject of the motion has been found and is available for review at plaintiffs' counsel's offices. Plaintiffs submit a letter dated August 31, 2007 from plaintiffs' counsel to defendant's counsel advising that the subject x-ray films were now available for inspection at plaintiffs' counsel's office[1]. In reply, defendant's counsel contends that sanctions must still be imposed for plaintiff's failure to explain the late appearance of said films and argues that defendant has been irreparably prejudiced because plaintiff's willful action has destroyed the chain of custody of the x-ray films rendering their evidentiary value useless. Defendant's counsel adds that defendant's medical expert's opinion would now be inadmissible since the films can no longer be authenticated.

The sanction of dismissal of a pleading pursuant to CPLR 3126 is not appropriate where the loss does not deprive the opposing party of the means of establishing a claim or a defense (*see*, ***Bjorke v Rubenstein***, 38 AD3d 580, 833 NYS2d 115 [2d Dept 2007]). A less severe sanction is appropriate

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[1] Plaintiffs' remaining exhibit consisted of the deposition transcript of non-party witness Michael Czajkowski on behalf of defendant.

where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense (*see*, ***De Los Santos v Polanco***, 21 AD3d 397, 799 NYS2d 776 [2d Dept 2005]). Here, defendant failed to show that the loss of original films deprived defendant of the evidence needed to establish a defense, particularly since the radiologist's findings report from the time that the original films were rendered is in existence (*see*, ***Bjorke v Rubenstein***, *supra*). Therefore, defendant's request for CPLR 3126 sanctions is denied. Nevertheless, plaintiffs are henceforth directed to comply more expeditiously with any outstanding discovery.

Defendant also moves for summary judgment dismissing the complaint on the grounds that defendant neither created nor had actual or constructive notice of the alleged dangerous condition. In support of this request, defendant submits, among other things, the summons and complaint; defendant's answer; plaintiffs' bill of particulars; plaintiffs' deposition transcripts; the deposition transcript of Michael Czajkowski, a non-party witness on behalf of defendant; and the Bowling Center Incident Report.

A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that defendant neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see*, ***Ulu v ITT Sheraton Corp.***, 27 AD3d 554, 813 NYS2d 441[2d Dept 2006]). Only after the movant has satisfied this threshold burden will the court examine the sufficiency of plaintiff's opposition (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***DeFalco v. BJ's Wholesale Club, Inc.***, 38 AD3d 824, 832 NYS2d 632 [2d Dept 2007]).

Plaintiff testified at her deposition that she and her husband met plaintiff's cousin and a co-worker at defendant's bowling alley close to 9 p.m. on the date of the incident. Plaintiff remembered that she rented shoes and that the lane that they used was in the middle of the alley, closer to the snack bar side rather than the main desk side. According to plaintiff, the incident occurred about one hour after their arrival, when plaintiff walked up to the right side of the approach, and after releasing the ball, plaintiff's right foot slipped and she fell forward and then plaintiff put her left foot in front of her and she began falling backwards. Plaintiff also testified that she put her right hand out to break her fall and that her wrist hit a dark gray object dividing the lanes. Plaintiff further testified that she had been to this bowling alley previously, less than ten times; that prior to the incident she had drunk water from a bottle that she had purchased at the bowling alley and that her cousin had also been drinking a bottle of water that was on a table where the seats were located. Prior to the incident, plaintiff did not observe any bowling alley personnel performing any maintenance work on the lanes, including the lane that plaintiff was bowling on. According to plaintiff, as she was getting up after the fall, she saw blotches of oil on the floor in the approach area which appeared as little spots, not drops, that had been stepped in. Plaintiff did not look at the bottom of her shoes after her fall to see if there was any oil there. Plaintiff stated that she did not see any bowling alley personnel perform any maintenance or cleanup and that an employee filled out an accident report for her.

At his deposition, plaintiff's husband, plaintiff Nicholas Travlos, testified that before they started bowling on Labor Day Monday 2004, he bought a soda and a water for his wife. In addition, he testified that they were bowling in Lanes 15 and 16 and that prior to bowling he did notice that said lanes had been oiled and that the oil machine was being operated a few lanes down. According to plaintiff's

husband, before they started bowling he mentioned to the girl at the counter that he saw that the lanes had been oiled and she responded that the power had been out for a day or two over the weekend and that the alley had just regained power so they were oiling the lanes. Plaintiff's husband also testified that he actually witnessed plaintiff's fall while he was standing behind the table at Lane 15 but that he did not see details because he was watching her bowl and not looking at plaintiff's feet.

Michael Czajkowski testified at his deposition that he was employed by defendant as general manager and described the inside of the bowling alley and explained that Lanes 15 and 16 were directly in front of the snack bar. In addition, Mr. Czajkowski testified that in September 2004 the head mechanic, David Adams, was in charge of mechanical aspects as well as the oiling of the lanes. He added that there usually were three other mechanics but he could not remember who they were. Mr. Czajkowski also described the machine that oiled the lanes as well as how it functioned and testified that it was owned by defendant and operated by the head mechanic and his assistant mechanics. He stated that the machine containing stripper fluid and oil was placed in the foul line area of a lane; that the machine applied the oil with a plastic roller and stopped oiling six inches from the foul line; and that the head mechanic was responsible for the machine's maintenance. Mr. Czajkowski explained that to move the machine from one lane to another, the machine would be pulled by its handle and walked across the approach to the next lane. He testified that there was no safety mechanism on the machine to prevent oil from dripping as it was being moved from one lane to another. Mr. Czajkowski also testified that prior to the subject incident, oil had dripped out of the machine about once a month while the machine was being moved and that he was responsible for checking the approach area for any dripped oil after the lanes had been oiled. He explained that if he found that some oil had dripped, he wiped the area clean with rubbing alcohol on a paper towel. Mr. Czajkowski stated that he was working the evening of the subject incident and that the lanes were oiled during his shift, probably starting at 7 p.m., and not in any particular order, just based on whichever lanes were vacant. He did not know at what time Lanes 15 and 16 were oiled that day or whether he had performed a visual inspection of said lanes prior to the subject incident. He stated that there had been a power outage on Saturday which was repaired on Sunday and that the alley reopened on Monday, the day of the incident so that there were two days that the lanes were not stripped and oiled. Mr. Czajkowski testified that he was notified of plaintiff's fall, saw that plaintiff was hurt and got ice for her and filled out an incident report indicating that plaintiff lost her footing, stepped over the foul line, and fell on her right wrist, hitting it on a gutter cap. According to Mr. Czajkowski, he inspected the area after plaintiff fell and did not observe any oil or any other substance on the floor.

Here, defendant failed to satisfy its initial burden inasmuch as the proffered deposition testimony raised triable issues of fact as to whether defendant's employees caused the approach area to be slippery by negligently operating an oiling machine used to oil the lanes (*see*, ***Roethgen v AMF Babylon Lanes***, 30 AD3d 398, 816 NYS2d 568 [2d Dept 2006]; ***Overton v Leisure Time Recreation, Inc.***, 280 AD2d 655, 721 NYS2d 95 [2d Dept 2001]). While plaintiff's evidence need not positively exclude every possible cause of her fall other than the alleged oil spots, the evidence must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation (*see*, ***Reed v Piran Realty Corp.***, 30 AD3d 319, 818 NYS2d 58 [1st Dept 2006], *lv denied* 8 NY3d 801, 828 NYS2d 292 [2007]). Inasmuch as the deponents, plaintiff and Mr. Czajkowsk, presented conflicting evidence as to whether there was a slippery substance in the area where plaintiff fell and if so, whether the substance was oil from the oiling machine, the proffered proof raises questions of fact regarding their credibility such that

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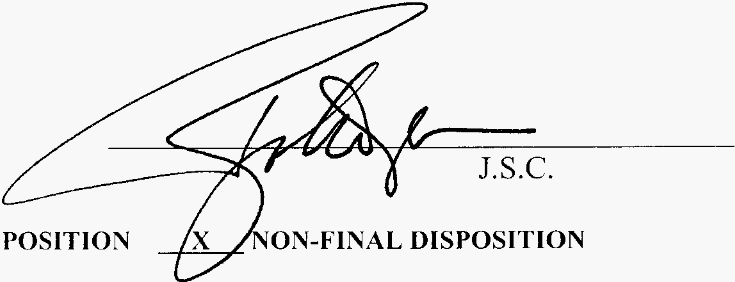
defendant failed to make a prima facie showing of its entitlement to judgment as a matter of law (*see*, ***Rivera v Hickey***, 283 AD2d 415, 723 NYS2d 865 [2d Dept 2001]; *see also*, ***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]). Thus, defendant's motion must be denied, regardless of the sufficiency of the opposition papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Dated: DEC 2 0 2007



J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION