Dimitratos v APW Supermarkets, Inc.
2008 NY Slip Op 30827(U)
February 28, 2008
Supreme Court, Queens County
Docket Number: 0025294/2006
Judge: Patricia P. Satterfield
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

---X

BARBARA DIMITRATOS,

Plaintiff,

-against-

APW SUPERMARKETS, INC. d/b/a WALDBAUMS SUPERMARKETS,

Defendant.

---X

Index No: 25294/06
Motion Date: 2/20/08
Motion Cal. No: 13
Motion Seq. No: 1

The following papers numbered 1 to 14 read on this motion for an order, pursuant to CPLR §3212, seeking summary judgment on the basis that plaintiff cannot prove a prima facie case against defendant APW SUPERMARKETS, INC. d/b/a WALDBAUMS SUPERMARKETS; and on this cross motion for an order striking the defendant's answer due to the defendant's intentional, reckless and/or negligent spoliation of evidence via the defendant's failure to exchange and/or preserve surveillance video tape evidence of the subject accident, pursuant to CPLR 3126, or, in the alternative, for an order compelling defendant to produce outstanding discovery, pursuant to CPLR 3124.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits......................................	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits............................	5 - 8
Reply to summary judgment motion and Affirmation in Opposition to Cross Motion-Exhibits......................	9 - 11
Reply Affirmation-Exhibits...	12 - 14

Upon the foregoing papers, it is ordered that the motion and cross motion are decided as follows:

Plaintiff Barbara Dimitratos ("plaintiff") commenced this personal injury action against defendant APW Supermarkets, Inc. d/b/a Waldbaums Supermarkets ("Walbaums") to recover damages for injuries allegedly sustained on August 18, 2006, when plaintiff slipped and fell at the Walbaums store located at 39-09 Francis Lewis Boulevard, Bayside, New York. Walbaums moves for summary judgment dismissing the complaint on the ground that plaintiff cannot prove that Walbaums had actual or constructive notice of the purported blueberries on the floor or that

Walbaums created the condition that allegedly caused her to fall. Plaintiff cross moves for an order striking Waldbaum's answer due to its intentional, reckless and/or negligent spoliation of evidence via its failure to exchange and/or preserve surveillance video tape evidence of the subject accident, pursuant to CPLR 3126, or, in the alternative, for an order compelling Waldbaum to produce outstanding discovery, pursuant to CPLR 3124.

Relevant Facts

On August 18, 2006, at approximately 12:30 p.m., plaintiff, while shopping at Walbaums, slipped and fell due to "smashed" blueberries in the eighth aisle of the supermarket,[1] which she observed immediately after her fall. Karen Whiting, Walbaums' store manager, testified at her deposition that when she arrived at the accident location, she observed crushed blueberries on the floor as well as a blue skid across the floor. Ms. Whiting also testified that she may have gone to the basement to check the surveillance videos, and related that when something happens in the supermarket the videotapes are reviewed and if an incident is caught on tape the procedure for preserving the footage would be to pull the tape and the tape would be submitted to the insurance carrier. Plaintiff's unsuccessful attempts to secure copies of the surveillance video, and other responses to discovery demands, is the basis of their cross-motion. Inasmuch as the determination of the cross motion may obviate the need to address the motion, the cross motion will be addressed first.

Cross Motion to Dismiss

Plaintiff moves for an order striking Walbaums' answer on the ground that it has willfully and contumaciously refused to produce the surveillance tapes, notwithstanding two court orders directing it to do so. She alleges that Walbaums has provided no reason or explanation for its failure to produce the tapes, and conclude that it has "committed intentional, or at the very least, negligent spoliation of evidence by failing to follow its own internal rules and guidelines for the preservation of evidence." She further alleges that Walbaums was on notice that plaintiff had been involved in an accident and knew that the surveillance tapes of that accident would be key evidence. Plaintiff concludes that Walbaums' conduct in failing to exchange and/or preserve the surveillance video tape evidence warrants the imposition of sanctions, pursuant to CPLR 3126 or, in the alternative, an order compelling it to produce the outstanding discovery.

It is well settled 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 'even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be

---

[1]There is inconsistency as to the aisle number where the accident occurred; all parties alternate between aisle "6" and aisle "8." The consistency is that whatever the aisle number, the goods located in the aisle were pasta, tomato sauce and other canned goods. The aisle at issue will hereafter be referenced as aisle "6."

[* 3]

needed for future litigation' (DiDomenico v. C & S Aeromatik Supplies, supra at 53, 682 N.Y.S.2d 452; see New York Cent. Mut. Fire Ins. Co. v. Turnerson's Elec., 280 A.D.2d 652, 721 N.Y.S.2d 92)." Baglio v. St. John's Queens Hospital, 303 A.D.2d 341 (2nd Dept. 2003). "Although actions should be resolved on the merits whenever possible (citations omitted), the court may, among other things, issue an order "striking out pleadings or parts thereof" (CPLR 3126[3]) when a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). Under the common-law doctrine of spoliation, '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"'(Baglio v. St. John's Queens Hosp., 303 A.D.2d 341, 342; see Denoyelles v. Gallagher, 40 AD3d 1027)." Ingoglia v. Barnes & Noble College Booksellers, Inc., __A.D.3d__ , __ N.Y.S.2d ___, 2008 WL 458504 (2nd Dept. 2008).

The court, however, has broad discretion in determining the sanction for spoliation of evidence and may, under the appropriate circumstances, impose a sanction if the destruction occurred through negligence rather than willfulness (Molinari v. Smith, 39 A.D.3d 607 (2nd Dept. 2007), and "if a court finds that a party destroyed evidence that 'ought to have been disclosed ..., the court may make such orders with regard to the failure or refusal as are just'(citations omitted)." Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007). As stated in Ortega, supra, 9 N.Y.3d at 76:

> New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliation to restore balance to the litigation, requiring the spoliation to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action (citations omitted). Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party (citations omitted).

"Because the striking of a pleading is a severe sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. . .A less severe sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense (citations omitted)." Molinari v. Smith, 39 A.D.3d 607 (2nd Dept. 2007). "To impose the drastic remedy of striking a pleading pursuant to CPLR 3126, there must be a clear showing that a party's failure to comply with discovery demands was willful, contumacious, or in bad faith." Mylonas v. Town of Brookhaven, 305 A.D.2d 561, 562-563 (2nd Dept. 2003). No such showing was made in the instant case.

Here, Walbaums' witness, Ms. Whiting, testified at her deposition that the store had "some" camera system which was an "old archaic system," there were no photographs taken of the area where plaintiff fell, and that the area of the fall was not covered by video surveillance, a fact that was allegedly confirmed by photographs taken of the area that show no video cameras in the area. Waldbaums' Assistant Store Manager, Al Smith, stated in his affidavit that "Aisle 6 of the subject Waldbaums, which contained canned vegetables, rice, canned tomatoes and pasta products, where I have been advised that Plaintiff was shopping at the time of her alleged fall, was not covered by video surveillance on the date of Plaintiff's accident." Also submitted in opposition, is the affidavit of due diligence of Michael Hickey, investigator for MJM Investigations who is employed by Broadspire, the third-party administrator for Walbaums, who performed a search of the video surveillance tape storage area for Broadspire and located no tape of the accident scene. Walbaums concludes that as there was no surveillance tape there could be no spoliation of evidence, and therefore plaintiffs' cross motion must be denied. This Court agrees.

Not only is there no evidence that a surveillance tape ever existed, but even assuming its existence, there is no evidence that Walbaums acted willfully, contumaciously, or in bad faith (see, Friel v. Papa, 36 A.D.3d 754 (2nd Dept.2007), or negligently in the loss of such tape. In any event, the absence of the tape in no way deprives plaintiff of the means to prove her case. See, Soto v. New York City Transit Authority, 25 A.D.3d 546 (2 Dept. 2006)["plaintiffs failed to establish that the defendant negligently or intentionally destroyed key evidence, thereby depriving them of their ability to prove their claim"]; see, also, Iannucci v. Rose, 8 A.D.3d 437, 438 (2nd Dept. 2004). Here, as in Deveau v. CF Galleria at White Plains, LP, 18 A.D.3d 695 (2nd Dept. 2005), a strikingly similar case, no sanction against Waldbaums is warranted due to the alleged spoliation of a videotape depicting the accident. Accordingly, the cross-motion is denied in its entirety.

Motion for Summary Judgment

Turning next to Waldbaums' motion for summary judgment, it is beyond cavil that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

"'A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it' (Curtis v. Dayton Beach Park No. 1 Corp., 23 A.D.3d 511, 806 N.Y.S.2d 664; see Britto v. Great Atl. &

Pac.Tea Co., Inc., 21 A.D.3d 436, 799 N.Y.S.2d 828)." Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999).

Here, Walbaums met its burden of making a prima facie showing affirmatively establishing the absence of notice or creation of a dangerous condition by proffering the deposition transcripts of plaintiff and Ms. Whiting, and the affidavit of Al Smith, an assistant manager, who has been employed by Walbaums Supermarket in Bayside for twelve (12) years. Plaintiff testified at her deposition that although she slipped on blueberries in aisle "6," she did not see the blueberries prior to her fall, but observed the blueberries after falling. She testified that the blueberries had footprints and carriage marks going through them, and that she observed a Walbaums employee breaking open boxes and stocking shelves in the aisle where and when she fell. She further testified that when she was on the floor, "this lady came by, and those were her words, 'I told them to pick up the blueberries." Ms. Whiting testified that she routinely conducted a general inspection of the store, described as "a tiny store," when the store opened in morning and constantly checked during the working day the store aisle, on an average of "once or twice an hour," and that she had last inspected the area of plaintiff's fall approximately twenty (20) minutes prior to learning of plaintiff's accident. She further testified that "there were only nine aisles in the store;" that produce, where blueberries were sold, was located in the first aisle; and that blueberries upon which plaintiff slipped were in aisle "6," the aisle for pasta, sauce and canned tomatoes. This evidence was sufficient to satisfy Waldbaums' initial burden of demonstrating that it did not create the alleged dangerous condition and that it did not have notice of it.

Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 AD2d 503, 505 (1993). In opposing the summary judgment motion, plaintiff was required to show that defendant indeed had actual or constructive notice of the condition. Kucera v. Waldbaums Supermarkets, 304 A.D.2d 531 (2003); Associated Mut. Ins. Co. v. Kipp's Arcadian II, Inc., 298 A.D.2d 478 (2002); Bradish v. Tank Tech Corp., 216 A.D.2d 505, 506 (1995); Gaeta v. City of New York, 213 A.D.2d 509 (1995).

Here, plaintiff's opposition is insufficient to establish that Waldbaums created the hazardous condition, had actual notice of the condition existing in aisle "6," or to impute notice to it that the condition existed for a period of time sufficient to give rise to constructive notice. See, Pirillo v. Longwood Associates, Inc., 179 A.D.2d 744 (2nd Dept. 1991). First, plaintiff failed to come forward with any evidence suggesting that the blueberries were present for any appreciable length of time prior to her accident. See, Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006). Moreover, despite the fact that the blueberries allegedly appeared smashed, with carriage marks running through them and blue skid marks were present after the accident, these allegations are insufficient to raise

a triable issue with respect to notice to Waldbaums. The facts presented here are similar to those before the courts in Kaufman v. Man-Dell Food Stores, Inc., 203 A.D.2d 532 (2nd Dept.1994) and Anderson v. Klein's Foods, 139 A.D.2d 904, affd., 73 N.Y.2d 835 (1988). In Kaufman, the Appellate Division, Second Department, found:

> As there was no evidence that the defendant had created the allegedly dangerous condition, or had actual notice of it prior to the accident, and from the evidence which was presented, any finding that the lily had been on the floor for any appreciable period of time would be mere speculation; the evidence was just as consistent with a finding that someone had dropped the lily on the floor and had stepped on it shortly before Mr. Kaufman fell. It is well settled that, without evidence that the defendant created the dangerous condition or had actual notice of it, and absent a showing of evidentiary facts from which a jury can infer constructive notice from the amount of time that the dangerous condition existed, the complaint must be dismissed.

Similarly, in Anderson v. Klein's Foods, the Appellate Division, Fourth Department stated:

> After plaintiff fell she saw grapes on the floor, some of which she crushed, and some others farther away, which had been crushed by someone else. From this evidence, any finding that the grapes had been on the floor for any appreciable period of time would be mere speculation. The evidence is just as consistent with a finding that someone had dropped grapes on the floor and had stepped on them shortly before plaintiff fell.

Nor do the alleged statements made to plaintiff by some unidentified woman concerning her having told "them" to remove the blueberries lend any assistance to plaintiff. In the absence of establishing that this woman had "authority to speak" for Waldbaums so as to bind it, there is no evidence that such a statement constituted notice of the alleged hazardous condition. Berzon v. D'Agostino Supermarkets, Inc., 15 A.D.3d 600 (2nd Dept. 2005). See, also, Rivest v. Pizza Hut of America, Inc., 264 A.D.2d 388 (2nd Dept. 1999)[There was insufficient evidence that the manager had the authority to make the alleged statement or to support the argument that the statement could properly be used to establish notice (see, Williams v. Waldbaums Supermarkets, 236 A.D.2d 605, 653 N.Y.S.2d 962)]. See, also, Ganci v. National Wholesale Liquidators of Farmingdale, Inc., 20 A.D.3d 551 (2nd Dept. 2005)[the defendant made a prima facie showing of entitlement to summary judgment by demonstrating that none of its supermarket employees had any knowledge or reason to know of the spilled sugar, or did anything to create the condition]. As plaintiff failed to raise a triable issue of fact in opposition to Waldbaums' showing of entitlement to judgment as a matter of law, Waldbaums' motion for summary judgment is granted and the complaint hereby is dismissed as a matter of law.

Dated: February 28, 2008

....
J.S.C.