

Luberda v Ball, Bounce and Sport, Inc.

2009 NY Slip Op 30006(U)

January 7, 2009

Supreme Court, Albany County

Docket Number: 6075-05

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KRISTIN LUBERDA,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6075-05
RJI NO. 01-06-85770

BALL, BOUNCE AND SPORT, INC.,
d/b/a HEDSTROM PLASTICS, HEDSTROM
CORPORATION and WAL-MART STORES,
EAST, L.P.,

Defendants.

Supreme Court Albany County All Purpose Term, December 19, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

The Tuttle Law Firm
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Attorneys for Plaintiff
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Leah Casey, Esq.
Attorneys for Defendants Ball, Bounce and Sport, Inc.
and Wal-Mart Stores, East, LP
20 Corporate Woods Boulevard
Albany, New York 12211

TERESI, J.:

Plaintiff, while walking past a large vinyl ball display rack located in a Wal-Mart Stores East, LP store (hereinafter Wal-Mart), claims she was severely injured when one of those vinyl balls exploded. She commenced this action seeking damages due to the injuries she sustained.

Issue was joined by each of the defendants¹, and discovery is complete. Plaintiff now moves for an order precluding defendants from offering any testimony contradicting plaintiff's claim that Wal-Mart employees were inflating vinyl balls in her vicinity seconds before the vinyl ball exploded, due to defendants' alleged spoliation of evidence.

It is well settled that "when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection... [or] where a litigant negligently disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them" sanctions are appropriate, and left to the sound discretion of the trial Court. (Cummings v. Central Tractor Farm & Country, Inc., 281 AD2d 792, 793 [3d Dept. 2001][internal quotations and citations omitted]; Lawrence v. KPMG Peat Marwick, LLP, 5 AD3d 918 [3d Dept. 2004]). However, "[a] defendant who destroys documents in good faith and pursuant to normal business practice should not be sanctioned unless the defendant is on notice that the evidence might be needed for future litigation". (KPMG Peat Marwick, LLP, supra at 920).

Plaintiff demonstrated that Wal-Mart video taped, by surveillance video, the approximate location of her claimed injury on the day of its happening. At his deposition, a Wal-Mart employee testified that following plaintiff's injury he filled out an incident report, reviewed the video surveillance tape of the location of her claimed injury, and would have set the tape aside. He testified that he cannot remember: how much of the video he checked, seeing the plaintiff, a

¹ Defendants will refer collectively to Ball, Bounce and Sport, Inc. and Wal-Mart Stores, East, LP

ball exploding or pieces of an exploded ball. However, he did allege that he remembers that the video tape recorded the “main aisle right next to where the ball rack was and... the top of the ball rack”. The video did not show the “floor around a couple sides of the ball rack.”

Plaintiff’s negligence claim against Wal-Mart, in part, focuses on where its employees were filling up the vinyl balls. Plaintiff claims that Wal-Mart’s employees were filling up the balls in store aisles, open to the public. Plaintiff’s witness’ deposition testimony further alleged that after the employees filled up the vinyl balls they were throwing them up and into a tall display case. Plaintiff also demonstrated, by the deposition testimony of a number of Wal-Mart employees, that Wal-Mart intends to contradict this contention. The Wal-Mart employees who were deposed claimed that the vinyl balls were not inflated in the store’s aisles, but rather the balls were inflated in a back section of the store not open to the public.

This factual dispute, about where Wal-Mart employee’s were inflating vinyl balls on the day of plaintiff’s accident, makes a video of such area uniquely relevant evidence for the trial of this matter. The evidentiary value of such a video is undeniable, and could have demonstrated conclusively one parties’ version of these events.

Wal-Mart acknowledged possessing a video of the area where the above factual dispute would have been. Wal-Mart further acknowledged that it filled out an incident report and would have set the video aside. However, the video has not been provided to plaintiff, despite its due demand. Although there is no evidence on this record that Wal-Mart intentionally destroyed or refused to turn over this video tape, the record demonstrates that Wal-Mart is not blameless. Wal-Mart knew, or should have known, when filling out the incident report and setting this tape

aside the potential for litigation. Moreover, plaintiff commenced this litigation less than four months after plaintiff sustained her injury. This record demonstrates that the defendants were aware that this video "might be needed for future litigation". (KPMG Peat Marwick, LLP, supra at 920). Defendants, by contrast, wholly failed to demonstrate that if the tape was destroyed that it was done so pursuant to normal business practices, as Wal-Mart's deposition testimony establishes that they have "lost" the tape.

Because plaintiff has not demonstrated an intentional, contumacious or bad faith destruction of relevant evidence, the sanction it seeks is too great for the defendants' failure to turn over this video. A sanction for defendants' failure to turn this video over to plaintiff, however, must be imposed. The appropriate sanction for the instant violation is an adverse inference instruction to be given to the jury. (Marotta v. Hoy, 866 NYS2d 415 [3d Dept. 2008]; Allain v. Les Industries Portes Mackie, Inc., 16 AD3d 863 [3d Dept. 2005]; 1 NY PJI 1:77 [2009]). The adverse inference instruction strikes a balance between the defendants' violation and its severity, with the importance of the evidence to plaintiff's case.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 7, 2008
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 10, 2008, Affirmation of James B. Tuttle, dated June November 10, 2008, with attached Exhibits A-F.
2. Affidavit of Leah Casey, dated December 11, 2008.
3. Reply Affirmation of James B. Tuttle, dated December 17, 2008.