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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

NINA BROCK,

Plaintiff,

-against-

7-ELEVEN, INC. and FRANKLIN JOHNSON, INC., JOSEPH P. VITRANO and JOSEPH VITRANO OWNER/OPERATOR and d/b/a VITRANO'S 7-11 STORE # 2422-32380a a/k/a VALUE EXPRESS FOOD SERVICES, INC., d/b/a 7-ELEVEN, INC.,

Defendants.

Motion Sequence #3
Submitted March 13, 2009

INDEX NO: 6957/07

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Plaintiff, NINA BROCK, moves for an order, pursuant to CPLR §3126, striking defendants' answer for failure to provide material and necessary discovery and for the spoilation of evidence. Defendants, 7-ELEVEN, INC., FRANKLIN JOHNSON, INC., JOSEPH P. VITRANO and JOSEPH VITRANO OWNER/OPERATOR and d/b/a VITRANO'S 7-11 STORE #2422-32380a a/k/a VALUE EXPRESS FOOD SERVICES, INC. d/b/a 7-ELEVEN, INC., (hereinafter referred to as "7-ELEVEN"), oppose the motion, which

is determined as follows:

Initially, the Court notes that the current caption is the result of consolidation of two (2) separate actions. The first, against 7-ELEVEN, INC., and FRANKLIN JOHNSON, INC., was commenced by the filing of an amended summons and amended complaint, on or about July 10, 2006. After joinder of issue in that action, plaintiff's counsel commenced another action against the remaining defendants, on or about April 24, 2007. Thereafter, counsel for defendants moved for consolidation, which was effectuated by execution of a Stipulation, which was incorporated into an order of the Court, dated July 30, 2007.

This litigation arises from an accident on February 2, 2006, when it is alleged that plaintiff entered the 7-ELEVEN store, located at 413 Jerusalem Avenue in Hicksville, New York, and slipped and fell on what is described as a "wet and soapy" floor, striking her head on a metal rack, sustaining serious injuries. At her deposition, plaintiff testified that she entered the store, walked eight (8) to ten (10) steps and made a right turn and proceeded to the coffee counter. She stated that, as she walked from the entrance, she noticed that the floor was soapy and wet for the first five (5) or six (6) steps, but there was no debris or foreign substance on the floor after those steps and up to the point where she reached the coffee counter. Plaintiff testified that she made her coffee and then turned right to go to the back of the store. She stated that she took six (6) or seven (7) steps and then her left foot slipped causing her to fall and hit her head on a metal rack. She testified that, after fall, she noticed that the floor in the whole rear of the store was wet and soapy. She stated that, although there was a "wet floor" warning sign in the front of the store, there was not such sign in the rear of the store where she slipped.

Plaintiff's counsel relates that, on November 7, 2007, defendant VITRANO appeared by its Operations Manager, Brian Torlincasi, who testified that the subject 7-ELEVEN had a surveillance camera system on the date of the incident and that the tapes from that evening were viewed by the store manager, Andrew Szego, and the Loss Prevention Manager, Anthony Bravata, who sent the tapes to Sedgwick Claims, the agent of their insurer designated to process plaintiff's claim. After depositions, plaintiff's counsel demanded that defendants produce a copy of the subject videotape. According to plaintiff's counsel, defendants responded that they were not in possession of either the original or a copy of the videotape and, after an alleged diligent search, they had been unable to locate it. Plaintiff's attorney asserts that, although the deposition testimony of defendants' witness does not contradict that Mr. Bravata sent the tape to Sedgwick Claims, the loss of the tape highlights either the duplicity or carelessness of the persons in control of the tape, allegedly a vital piece of evidence. Furthermore, plaintiff's counsel asserts that defendants had an obligation to maintain a copy of the tape and there failure to do so is sufficient to warrant the striking of defendants' pleadings. Counsel for defendants cites a long line of case law setting forth the ramifications for intentional or negligent spoilation of evidence. Moreover, plaintiff's counsel claims that the only way to determine both the veracity of the defendants' contentions or the strength of plaintiff's claim is to view the video tape which would depict the objective account of the accident.

An affidavit of Terri Hesson, the claims litigation specialist employed by Sedgwick Claims, who initially handled the claim, reflects that, after speaking to the store manager, she requested that he send her the videotape taken at the 7-ELEVEN on the evening of the accident. Ms. Hesson states that, after several months, she realized that she had not

received the tape and spoke to Mr. Bravado, who informed her that the manager had mailed the tape to her months before. Ms. Hesson asserts that, despite repeated searches of the her office, the file room, the mail room and the cubicles in the claims department, the tape has never been found. Indeed, she has told defense counsel upon their requests for the tape that the tape was lost, and to date, has never been seen.

In opposition to the motion, counsel for 7-ELEVEN states that the relief requested by plaintiff is unwarranted because the videotape plaintiff seeks is not in any way key or crucial evidence in the case and was not destroyed by the willful or contumacious conduct of the defendants. Counsel for 7-ELEVEN states that the videotape did not tape the accident itself, the situs of the accident, or the condition of the floor where plaintiff's accident occurred because the camera only visualized the front of the store, and the accident took place in the back of the store, pointing to plaintiff's own testimony. Indeed, plaintiff deposed three (3) witnesses produced by defendants -- Brian Torlincasi, operations manager of four (4) franchised stores, including the store at issue, Andrew Szego, the store manager, and Paul Cheshire, the assistant manager who worked on the evening of the accident– all who testified that there was one (1) security camera inside each store, which surveyed the front of the store, the front door, and the registers. According to Mr. Torlincasi's testimony, the camera was located above the food service area and visualized the front doors and counter area, and was designed for robbery prevention. Defendants maintain that there is no evidence that the camera viewed the back of the store. Moreover, counsel for 7-ELEVEN argues that plaintiff produced no evidence that defendants' employees, or the employees of defendants' insurer, lost, misplaced or "ditched" the tape. According to 7-ELEVEN, the tape disappeared after it left defendants'

hands and before it reached defendants' insurer's hands.

It is defendants' counsel's position that no sanction is warranted herein because the plaintiff is not prejudiced by the loss of the tape since the tape did not show the area where the fall occurred, citing *Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695, 796 NYS2d 119 (2nd Dept. 2005) and *Liberty Insurance Corp. v US Security Associates, Inc.*, 13 Misc, 3d 1230 (A), 831 NYS 2d 354 (Supreme NY Co. 2006). Therefore, 7-ELEVEN states, that since there is no evidence to support plaintiff's arguments that sanctions are warranted because of spoliation of evidence, it is likewise inappropriate to foreclose defendants from pursuing their affirmative defense regarding comparative negligence or to give a negative inference charge to the jury.

In reply, counsel for plaintiff claims that it is not clear that the accident occurred in the back of the store because the defendants do not have the tape to prove it. Plaintiff's attorney claims that defendants have not produced any evidence to show when the tape was sent, how it was sent, or to whom it was sent, and such carelessness warrants the requested relief. Finally, plaintiff's attorney contends that defendants can not reasonably rely on *Deveau v CF Galleria at White Plains*, *supra*, because they cannot state what the tape did or did not show since they lost the tape.

Sanctions for the spoliation of evidence are within the broad discretion of the courts. *Iannucci v Rose*, 8 AD3d 437, 778 NYS2d 525 (2nd Dept. 2004). The Court "may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might

be needed for future litigation'". *Iannucci v Rose, supra,* quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 682 NYS2d 452 (2nd Dept. 1998), and citing *Favish v Tepler*, 294 AD2d 396, 741 NYS2d 910 (2nd Dept. 2002) and *Baglio v St. John's Queens Hosp*, 303 AD2d 341, 755 NYS2d 427 (2nd Dept. 2003). Nevertheless, "[r]ecognizing that striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." *Iannucci v Rose, supra*, citing *Favish v Tepler, supra*. Where the moving party is not deprived of their ability to establish their claim or defense, a sanction less severe than striking a pleading is appropriate. *Iannucci v Rose, supra*, citing *Chiu Ping Chung v Caravan Coach Co.*, 285 AD2d 621, 728 NYS2d 767 (2nd Dept. 2001) and *Klein v Ford Motor Co.*, 303 AD2d 376, 756 NYS2d 271 (2nd Dept. 2003).

After a careful reading of the submissions herein, the plaintiff's application to strike the defendant's pleading based upon the 'loss' of the video surveillance tape is denied. The Court finds that "[t]he plaintiff] failed to demonstrate that the defendant intentionally attempted to hide or destroy evidence or that they 'negligently disposed of any key physical evidence after being placed on notice that it might be needed for future litigation.'" *Goll v American Broadcasting Companies, Inc.,* 10 AD3d 672, 783 NYS2d 599 (2nd Dept. 2004) citing *Popfinger v Terminix Intl. Co. Ltd. Partnership,* 251 AD2d 564, 674 NYS2d 769 (2nd Dept. 1998) and *Andretta v Lenahan*, 303 AD2d 527, 756 NYS2d 454 (2nd Dept. 2003). It is the judgment of the Court that plaintiff will not be deprived of its ability to present or prove its case at trial without the videotape. *See, Friel v Papa*, 36 AD3d 754, 829 NYS2d

569 (2nd Dept. 2007). Thus, this is not a case in which the defendant reaped an unfair advantage in the litigation as a result of its conduct. See, *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 791 NYS2d 119 (2nd Dept. 2005) quoting *Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 772 NYS2d 78 (2nd Dept. 2004); *see also, De Los Santos v Polanco*, 21 AD3d 397, 799 NYS2d 776 (2nd Dept. 2005). It is the judgment of this court that the instant case is akin to *Deveau v CF Galleria at White Plains, LP.*,*supra*, wherein plaintiff slipped and fell in a puddle on the floor. As in the case at bar, the plaintiff in *Deveau* sought a videotape that defendants claimed was lost and plaintiff moved for sanctions based on spoilation of evidence. The Court held that no sanction was warranted because, contrary to plaintiff's contention, she was not prejudiced by the loss of the tape because the tape did not show the situs of her fall. Similarly, in the case at bar, it is the judgment of the Court, based upon the sworn testimony of the witnesses herein, including the plaintiff's, that the accident did not occur where the video tape surveys the store and the tape was not key or crucial evidence and its loss was not prejudicial to the plaintiff. Nor was the loss of the tape the result of defendants' willful or contumacious conduct. Based on the foregoing, it is hereby

ORDERED, that plaintiff's motion to strike defendant's answer based upon spoliation of evidence or, in the alternative, to preclude defendant from offering evidence at the time of trial with regard to the subject missing videotape and to instruct the jury with an adverse inference charge, is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 17, 2009

WILLIAM R. LaMARCA, J.S.C.

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