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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ALICE HANGLEY and JAMES HANGLEY,

Plaintiffs,

-against- Index No.: 103863/05

BANANA REPUBLIC, INC.,

Defendant.

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BANANA REPUBLIC, INC.,

Third-Party Plaintiff,

-against-

CLEAN R'US CORP.,

Third-Party Defendant.

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DECISION

WALTER B. TOLUB, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition and disposed of in the following memorandum opinion.

In motion sequence number 003, defendant/third-party plaintiff Banana Republic, Inc. (Banana Republic) moves (CPLR 3212), for summary judgment dismissing the complaint. Plaintiffs Alice Hangley (Hangley) and James Hangley cross-move to strike Banana Republic's answer due to spoliation of evidence. The Third-party defendant Clean R'Us Corp. (Clean) cross-moves to dismiss (CPLR 3212).

In motion sequence number 004, Banana Republic moves for summary judgment (CPLR 3212) against Clean in its third-party

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action for contractual and common-law indemnification, and for breach of contract.

Facts

The underlying action concerns Mrs. Hangley's slip and fall when she entered a store owned by Banana Republic. According to Mrs. Hangley, she slipped and fell on a streak of water. James Hangley is Hangley's husband, who joins in the action for loss of consortium.

On the day of the accident, the street was wet and damp, snow having fallen the weekend before, and snow was piled up on the street. Mrs. Hangley descended a bus, crossed the street, entered the store, and, after taking a few steps, fell.

At her examination before trial (EBT), Mrs. Hangley stated that when she entered the store she walked over a small mat with a little rubber around it (EBT, at 14-16). Mrs. Hangley stated that she did not see or feel anything on the floor before the accident (*id.* at 19-20), but that after she fell, she felt that her raincoat was a little wet and she saw a wet streak of water on the floor (*id.* at 33-34). Mrs. Hangley described the streak as clear, with a little melted snow or ice on it (*id.* at 33). The streak was about a foot or 18 inches long, about four inches wide, and perhaps half an inch deep (*id.* at 33-34). Additionally, Mrs. Hangley stated that she did not know how the water got there, but supposed that it was tracked in. She also

had no idea how long the water may have been there (*id.* at 35).

Chin Sun Eliot Ko, the associate manager of the store, testified at her EBT that the store had a mat placed at its entrance, which is the only entrance to the store (EBT, at 10, 13). Ms. Ko stated that the mat was approximately eight feet across and three to five feet wide, that it covered the entrance doors to the store, that it had a rubber backing to keep it in place, and that it is always there (*id.* at 13-14). Ms. Ko further stated that the purpose of the mat was to absorb water.

As part of her duties, ms. Ko is required to perform what she termed "figure eights," circling the store to make sure that nothing needs to be mopped, cleaned, dusted or picked up (*id.* at 28). Ms. Ko avers that she was performing a figure eight at the time the accident occurred (*id.* at 37). In an affidavit submitted with the instant motion, Ms. Ko said that she had been in the area in which the accident occurred approximately five to ten minutes prior to the accident, at which time she did not see any conditions that needed correcting (Ex. H).

It is noted that, although copies of the depositions were sent to both Mrs. Hangley and Ms. Ko for signature and correction, neither returned the depositions within 60 days of their mailings.[1]

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[1] Hangley has argued that, because these depositions were not signed, they are inadmissible as support for Banana Republic's motion. However, pursuant to CPLR 3116, depositions that have not been signed by the deponents within 60 days of receipt are admissible

Clean is a maintenance service employed by Banana Republic to perform maintenance at the subject location. Clean's duties involved mopping and cleaning the store prior to its 10 o'clock opening. Clean would place mats and warning notices of slippery conditions, and, after the store opened, maintain the bathrooms, remove trash, and take care of any back of store items. Ms. Ko could not recall whether Clean placed additional signs in the store on the day of the accident, but believes that one of Clean's employees may have put them out (EBT, at 47).

In an accident report filled out by Banana Republic on the day of the accident, Banana Republic indicated that the accident was captured on a video tape. Pursuant to Banana Republic's policy, such tapes are retained for a 30-day period following an accident, at which time they are recorded over unless Banana Republic is put on notice that the video tape should be maintained. The accident occurred on January 26, 2005, and the summons and complaint were filed on or about March 21, 2005. Prior to filing the instant lawsuit, plaintiff did not request that Banana Republic preserve the video tape, nor was Banana Republic informed that a lawsuit was contemplated. During discovery, the subject video tape could not be located (Opp. to Cross Motion, Ex. A).

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in evidence as though they were signed.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiffs' cross motion to strike Banana Republic's answer because of spoliation of evidence is denied.

> "[A] spoliator of key physical evidence is properly punished by the striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than wilfulness, and 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 [internal quotation marks and citation omitted]."

(*Metlife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 483 [2004]).

In the instant case, plaintiffs have failed to establish that Banana Republic was on notice of the lawsuit at the time the

video tape was recycled in the normal course of Banana Republic's standard business practice. (*Anthony v Wegmans Food Markets, Inc.*, 11 AD3d 953 [4th Dept 2004]; *Iannucci v Rose*, 8 AD3d 437 [2d Dept 2004]). Further, the note of issue was filed on April 23, 2009, more than three years after discovery indicated that the video tapes had been destroyed, and a month before this cross motion was served. The court has broad discretion to determine what, if any, sanction for spoliation of evidence may be warranted. (*Holland v W.M. Realty Management, Inc.*, 2009 WL 2032405; 2009 NY App Div Lexis 5690 [2d Dept 2009]). Based on the foregoing, the court declines to strike Banana Republic's answer as being an inappropriate sanction.

Banana Republic's motion for summary judgment dismissing the complaint is granted.

> "To impose liability for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building, a defendant must have either created the dangerous condition, or had actual or constructive notice of it, and a reasonable time to undertake remedial action."

(*Ruic v Roman Catholic Diocese of Rockville Centre*, 51 AD3d 1000, 1000 [2d Dept 2008]).

In the instant matter, Mrs. Hangley

> "neither informed defendants of the alleged hazardous condition nor produced evidence to raise a factual question as to whether they had received notice from any other source. Nor did plaintiff provide evidence as to the cause of the condition or how long it had existed prior to her accident to demonstrate constructive notice, and thus she has failed to make out a prima facie

case of negligence [internal citations omitted]." (*Casado v OUB Houses Housing Co., Inc.*, 59 AD3d 272, 272 [1st Dept 2009]).

The evidence submitted with this motion indicates that Banana Republic had been checking the area of the store in which the accident occurred minutes before plaintiff entered the premises, and no wet condition existed at the time that required correction. Plaintiff testified that the streak of water was clear, that she did not notice it prior to her fall, that she supposed that the water had been tracked in because of the inclement weather, and that, after the fall, she noticed a piece of ice, which had yet to melt, amidst the streak. All of these factors, taken together, indicate that the water that caused the accident had only recently appeared on the floor, that Banana Republic did not cause the water to be on the floor, that Banana Republic did not have any notice of the wet condition, and that Banana Republic did not have time to clean it up. Based on all of these facts, the court grants Banana Republic's motion for summary judgment to dismiss the complaint.

As such, Clean's cross motion to dismiss the third-party complaint is rendered moot, as is Banana Republic's motion for summary judgment on the third-party complaint.

Accordingly, it is hereby

ORDERED that Banana Republic, Inc.'s motion (motion sequence

number 002) for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that Clean R'Us Corp.'s cross motion (motion sequence number 003) for summary judgment is denied as moot; and it is further

ORDERED that Banana Republic, Inc.'s motion (motion sequence 004) for summary judgment against Clean R'Us Corp. is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 8/18/09

ENTER:

Walter B. Tolub, J.S.C.