# SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**
**COUNTY OF NASSAU**

Present:
**Hon. Thomas Feinman**
Justice

SANDRA RIVERA,

Plaintiff,

- against -

WALMART,

Defendant.

TRIAL/IAS PART 15
NASSAU COUNTY

INDEX NO. 22435/08

MOTION SUBMISSION
DATE: 7/13/10

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion and Affidavits..... | X |
| Memorandum of Law in Support of Motion..... | X |
| Affirmation in Opposition..... | X |
| Reply Affirmation..... | X |

The defendant moves for an order pursuant to CPLR §3212 granting defendant summary judgment and dismissing plaintiff's complaint. The defendant submits a Memorandum of Law in support of the defendant's motion. The plaintiff submits opposition. The defendant submits a reply affirmation.

## BACKGROUND

The plaintiff initiated this action to recover for personal injuries sustained on July 14, 2008 when plaintiff fell at Walmart located at 1123 Jerusalem Avenue, Uniondale, New York. The plaintiff claims she fell on a wet slippery floor as a result of a leaky display in the toy section of the store and that the defendant failed to post any warning signs of such condition prior to plaintiff's fall.

The defendant, in support of its motion, submits the affidavits of Fauzia Ibrahim, a Walmart sales associate in the Health and Beauty Department, and Nargis Tariq, a Walmart sales associate in the Toy Department. Ms. Ibrahim avers that on July 14, 2008, she took a fifteen minute break with Nargis Tariq, passed the pallet display of green turtle sandboxes near the Toy Department, and there was no water on the floor near the display, and no water dripping from the green turtle sandboxes or from the pallet display. Ms. Ibrahim submits that right after she returned from her fifteen minute break, she heard a noise, went to the area where the green turtle sandboxes were

located and saw the plaintiff sitting on the floor. Nagris Tariq avers that on July 14, 2008, he took a fifteen minute break with Fauzia Ibrahim, passed the pallet display of green turtle sandboxes near the Toy Department, and there was no water on the floor near the display, and no water dripping from the green turtle sandboxes or from the pallet display.

DISCUSSION

To impose liability upon the defendant, there must be evidence tending to show the existence of a dangerous or defective condition, and that the defendant either created the condition, or had the actual knowledge of it. (*Gordon v. American Museum of Natural History*, 501 NYS2d 646). In order for there to be constructive notice, the defect must be visible for a sufficient period to allow for discovery and inspection. (*Id*). The Court must decide, as a matter of law, whether the evidence, viewed in the most favorable light to plaintiff, will support a negligence verdict against the owner or possessor of land. (*Akins v. Glens Falls City School Dist.*, 441 NYS2d 644). If varying inferences are permissible, the case must go the jury. (*Quinlan v. Cecchini*, 394 NYS2d 872).

Here, the defendant has met its initial burden on this motion for summary judgment by demonstrating that the defendant did not create the alleged condition upon which the plaintiff slipped on, nor had notice of that condition. (*Bruer v. Wal-Mart Stores, Inc.*, 289 AD2d 276). However, the plaintiff, in opposition to the motion, has raised an issue of fact warranting the denial of this summary judgment motion.

Sultana Rahman, Walmart Assistant Manager at the time of the incident, testified that when she arrived at the scene where plaintiff fell, she called maintenance and an associate, "maybe Chris" and told him to "put the cone around, take a picture, then mop". Ms. Rahman testified that the floor was "like damp floor, like floor was little, you know wet, slightly wet". When asked if it was slightly wet after they mopped or before they mopped, Ms. Rahman responded "Before they mopped". When asked how much of the floor was damp, Ms. Rahman responded "like a foot and a half". When asked why the floor was mopped, Ms. Rahman responded it was a little wet, damp means wet and she saw a little bit of wet when she arrived. When asked if she saw water, Ms. Rahman responded, "Yeah, that was water".

Fauzia Ibrahim testified that if there is a spill in the store, the process would be to clean it, put the orange cone up, and if it is a big spill, one employee would stay there and another employee would call maintenance to come and clean it.

Plaintiff, in support of her opposition, submits the affidavit of Pamela Pirthipal, who avers that she was present at Walmart on July 14, 2008 and came upon the accident scene where plaintiff was sprawled on the floor adjacent to a display of green kiddie pools. Ms. Pirthipal avers that the display was surrounded by a very large puddle, she noticed water leaking from the top pool, Walmart employees appeared, mopped the floor and put paper towels under and around the display while another employee was taking pictures. Plaintiff also submits the affidavit of Gloria Hernandez, plaintiff's mother, who avers that she was at Walmart with the plaintiff on July 14, 2008 and when she arrived at the scene of the accident, she immediately noticed that there was water in the top green turtle/kiddie pool, that the sides of the pool were wet, and the green turtle/kiddie pools were surrounded by water. Ms. Hernandez avers that she saw Walmart employees wiping up the water with paper towels.

Plaintiff seeks sanctions against the defendant for spoliation as a result of the defendant's failure to preserve and produce twelve photographs. The defendant's incident report provides that twelve photographs were taken at the time of the incident. Ms. Rahman testified that "Kim" took twelve photographs of the area or floor where plaintiff fell, gave Ms. Rahman the twelve photographs once printed, and Ms. Rahman turned the twelve photographs over to the Personnel Department whereby the twelve photographs were put in a file and maintained in a Customer Incident and Report File. Therefore, plaintiff requested, by way of written discovery demands, the defendant to produce the twelve photographs. The defendant is unable to locate such photographs. The defendant, by way of counsel, essentially provides, by way of defendant's response to the Preliminary Conference Order and by way of defendant's response to plaintiff's Second Notice for Discovery and Inspection, that the defendant is unable to locate the twelve photos referenced in the incident report. The defendant, by way of counsel, responds by way of a reply affirmation, that the defendant has conducted an exhaustive search of said photographs and they cannot be located.

Where crucial evidence has been negligently destroyed, spoliation sanctions are appropriate. (*Kirkland v. New York City Housing Authority*, 236 AD2d 170). One party's negligent loss of evidence can be just as fatal to another party's liability to present a defense as the willful destruction of evidence. (*Squitieri v. City of New York*, 248 AD2d 201). Where a party intentionally or negligently destroys essential physical evidence "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence,' the spoliator may be sanctioned by the striking of its pleading. (*New York Cent. Mut. Fire. Ins. Co. v. Turnerson's Elec.*, 280 AD2d 652, citing, *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 AD2d at 53).

However, where the loss of evidence does not have the effect of depriving the non-responsible party of all means of establishing its claim or defense, or is not prejudicial, a lesser sanction, or no sanction, may be appropriate (*Klein v. Ford Motor Co.*, 303 AD2d 376; *Marro v. St. Vincent's Hospital and Medical Center*, 294 AD2d 341; *Mylonas v. Town of Brookhaven*, 305 AD2d 561).

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 Hospital*, 303 AD2d 341). The sanction of spoliation has been extended to also include the non-intentional or negligent destruction of evidence. (*Cummings v. Central Tractor & Farm Country, Inc.*, 281 AD2d 792; *Conderman v. Rochester Gas & Electric,* 687 NYS2d 213; *Kirkland v. New York City Housing Authority*, 236 AD2d 170). In determining the appropriate sanction, the essential issue is the resulting prejudice to the adversary. (*Conderman v. Rochester Gas & Electric*, 236 AD2d 170). In cases where the spoiled evidence is not crucial to a litigant's case, such that its absence does not prevent the outright prosecution or defense of a case, preclusion of evidence, rather than outright dismissal of pleadings, is the preferred remedy (*Shea v. Spellman*, 2004 NY Slip. Op. 50785(U), citing *Longo v. Armor Elevator Co.*, 278 AD2d 127).

Here, the defendant has deprived the plaintiff of an opportunity to inspect and examine the twelve photographs taken by the defendant of the accident scene which were maintained by the defendant. While the plaintiff has not demonstrated that the spoliation of such evidence was willful, intentional or in bad faith, the defendant has not offered an affidavit on behalf of the defendant to demonstrate what search was made to locate the twelve photographs or what reasonable steps, if any,

were taken in an effort to preserve the twelve photographs. The defendant has failed to preserve the evidence in this matter. Certainly, the failure to preserve the photographs has deprived plaintiff, the non-responsible party, of a means of establishing her claim, but certainly, not of all means of establishing her claim. Plaintiff has not demonstrated the inability to prosecute her claim against the defendant without the submission of the twelve photographs. However, plaintiff's claim is hindered as plaintiff has not been given the opportunity to inspect and examine such photographs.

Under these circumstances, the appropriate remedy, confined to the sound discretion of this Court, is not the striking of defendant's answer, or preclusion, but rather the lesser sanction of imposing the charge, Pattern Jury Instruction 1:77.1, at the time of trial.

CONCLUSION

It is hereby

ORDERED that the defendant's motion for summary judgment is denied, and it is hereby further

ORDERED that the plaintiff is entitled to the charge dealing with missing or destroyed evidence contained in Pattern Jury Instruction 1:77.1, to be modified by the trial judge at the time of trial, with respect to the twelve photographs taken by the defendant at the time of plaintiff's call, at the scene of plaintiff's fall, which cannot be located by the defendant.

ENTER:

J.S.C.

Dated: August 19, 2010

cc: Riconda & Garnett, LLP
Brody, O'Conner & O'Conner, Esqs.