

Solis v McDonald's Corp.

2010 NY Slip Op 32752(U)

October 1, 2010

Sup Ct, NY County

Docket Number: 104972/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____
J.S.C.
Justice

PART 10

Index Number : 104972/2009
SOLIS, LUIS
vs.
MCDONALD'S
SEQUENCE NUMBER : 002
STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The Amended N/M duplicates M/M w/ additional claims

FILED

OCT 05 2010

COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 10/1/10

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

Luis Solis,

Plaintiff,

Decision/Order

-against-

Index# 104972/09

Mot. Seq. # 002

McDonald's Corporation, McDonald's
Franchise and Bruce C Ltd. Partnership,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS

	NUMBERED
Notice of Motion, RSG affirm., exhibits.....	1
Amended Notice of Motion, RSG affirm., exhibits.....	2
ADF affirm. in Opp., exhibits.....	3
RSG Reply affirm., exhibits.....	4
ADF affirm. in further Opp., exhibit.....	5

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OCT 05 2010
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NEW YORK

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This is an action for personal injuries claimed to have occurred when plaintiff slipped and fell in an interior stairwell in a McDonald's restaurant owned and operated by defendant Bruce C Ltd. Partnership. Plaintiff now moves for certain relief based upon his claim that certain evidence has been spoliated. He seeks: [1] to strike defendants' answer or [2] preclude defendants from offering evidence or [3] a spoliation hearing. Defendants oppose the motion.

There are two claims of spoliation made by plaintiff. The first pertains to a video surveillance tape. The second pertains to plaintiff's claim that the stairwell was repaired before his expert had an opportunity to inspect.

It is uncontested that at the time of the incident, defendants had a security camera in place at the premises which recorded activity in the area. Defendants have provided 21:15 minutes of video prior to plaintiff's fall and 30:49 minutes thereafter. Defendants have also provided still images of plaintiff's fall that were taken from the security video.

During discovery plaintiff requested surveillance video for one hour prior to the incident. In response, defendant stated that it did not have additional surveillance video, which is routinely recorded over after 20 days.

Plaintiff claims that because the defendant knew about the incident before the 20 days elapsed, it should have preserved the entire days worth of video without recording over. Plaintiff claims that video for additional time would have shown that wet conditions existed on the stairs for a sufficient amount of time before the incident to constitute constructive notice.

In addition, plaintiff claims that while the parties were arguing about his right to inspect the site, defendants completely repaired the slippery conditions on the stairs, thereby spoliating the evidence before his expert could come to the site.

For the reasons stated below, the motion for sanctions of any kind is denied.

Spoliation occurs when a litigant disposes of crucial items of evidence involved in an accident before an adversary has an opportunity to inspect them. Kirkland v. New York City Housing Authority, 236 AD2d 170 (1st dept. 1997). The destruction may be either intentional or negligent. Kirkland, supra. Spoliation can be improper even if there is no litigation pending—but where litigation is reasonably anticipated. See. Ortega v. City of New York, 9 NY3d 69 (2007). Once spoliation is found to have occurred, it is

within the courts discretion to fashion a remedy. Miller v. Weyerhaeuser Company, 3 AD3d 627 (3rd dept. 2004).

It is the burden of the party seeking sanctions to prove their entitlement to them. The courts possess broad discretion to provide proportionate relief to the party deprived of the of the lost evidence. Ortega v. City of New York, *supra*. This may include precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to develop replacement evidence or employing an adverse inference instruction at the trial of this action. Ortega v. City of New York, *supra*. The remedy should, however, be tailored to the spoliation and its effect on the case. Minaya v. Duane Reade, 66 AD3d 402 (1st dept. 2009).

In the ordinary course of business, defendants re-record over surveillance videos within 7 to 20 days. Here, however, they were aware about the accident. They took it upon themselves to save approximately an hours worth of video tape, consisting of the incident and about 30 minutes before and 30 minutes after. Although plaintiff's attorneys contacted defendants to notify them about the accident within a matter of days, none of those communications put defendant on notice to retain any surveillance video, let alone an entire days worth of video.

The amount of tape retained by defendant was reasonable under the circumstances and it was provided to plaintiff's attorney. Defendants were under no obligation to retain tape for a longer period of time. Plaintiff's complaints that the existing video tape was not voluntarily provided at first is irrelevant to the issue of spoliation.

Defendants admit that shortly before plaintiff was due to inspect the site with his

expert, the stairs were refurbished with different covering materials. While they claim that they were unaware of the impending Court ordered inspection, and therefore did not act deliberately, the flooring material was substantially changed. Notwithstanding that spoliation of the evidence (ie the condition of the stairwell) had changed, no spoliation sanctions are warranted because there is no evidence of any prejudice to plaintiff. Before the scheduled inspection with an expert and the refurbishing of the stairwell, plaintiff's attorney gained access and took photographs of the stairs.


Plaintiff's expert has issued a report opining that even without actually observing the flooring material, he was able, based on the photographs to identify the material covering the stairs at the time of accident and opine about its slip resistance, especially when wet. Moreover, defendant has offered to provide plaintiff's expert with a sample of the material previously covering the steps for testing, should he need it.

Under the circumstances, spoliation sanctions would be severe and disproportional to any prejudice suffered by plaintiff.

In accordance herewith, the court denies the plaintiff's motion in its entirety. This constitutes the decision and order of the Court.

Dated: New York, NY
October 1, 2010

SO ORDERED:



J.G. J.S.C.

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NEW YORK