

**Albright v Lafayette**

2013 NY Slip Op 30129(U)

January 22, 2013

Supreme Court, New York County

Docket Number: 111576/2011

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOUIS B. YORK  
J.S.C. Justice

PART 2

Index Number : 111576/2011  
ALBRIGHT, DOROTHY  
vs.  
CORAL LAFAYETTE  
SEQUENCE NUMBER : 002  
STRIKE ANSWER

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

## FILED

JAN 25 2013

NEW YORK  
COUNTY CLERK'S OFFICE Luy, J.S.C.

Dated: 1/22/13

1. CHECK ONE: .....  CASE DISPOSED
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

**LOUIS B. YORK**  
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

-----X  
DOROTHY ALBRIGHT,

Plaintiff,

-against-

Index No.: 111576/2011

CORAL LAFAYETTE LLC, CORAL BROOME  
STREET, LLC, CORAL REALTY, LLC, and CAFÉ  
LAFAYETTE INC.,

Defendants.

**FILED**

**JAN 25 2013**

NEW YORK  
COUNTY CLERK'S OFFICE

YORK, J.:

In this action in which plaintiff Dorothy Albright (plaintiff) alleges personal injuries as a result of a trip and fall at the entranceway of a restaurant, plaintiff moves, pursuant to CPLR 3216, to strike the answer of defendant Café Lafayette, Inc. (Café Lafayette) for failing to preserve a mat upon which plaintiff allegedly tripped. Plaintiff moves for an order precluding Café Lafayette from introducing any evidence regarding the condition of the mat, due to Café Lafayette's alleged destruction and spoliation of the mat, and requests that a negative inference charge be given to the jury. Plaintiff also moves, pursuant to CPLR 3124, to compel Café Lafayette to produce discovery, and for an order of preclusion prohibiting Café Lafayette from introducing any evidence regarding actual and constructive notice regrading the mat, and seeks sanctions.

Plaintiff alleges that on July 28, 2011, at approximately 9:00 a.m., she was walking in the entranceway of Café Lafayette, which is located at 80 Lafayette Street, Manhattan, New York, when she slipped, tripped, and fell, due to a dirty and defective mat, platform, landing, and staircase. Plaintiff filed a summons and verified complaint on October 12, 2011, which states

that as a result of the “hazardous, dirty and unsafe conditions, and the improper and inadequate mat, lighting, steps, platform, landing, and handrails . . . [p]laintiff was caused to slip/trip and fall and to sustain severe injuries to her body.” (Kotlarewski Affirm., ex A, ¶ 50). Plaintiff also served a verified bill of particulars which states that “[p]laintiff slipped/tripped and fell on a curled, raised, worn, hazardous mat and staircase with inadequate handrails.” (Kotlarewski Affirm., ex C, ¶ 7).

A preliminary conference was held on December 21, 2011, at which time both parties agreed to an inspection of the premises to take place on February 24, 2012. Counsel for plaintiff maintains that she served Café Lafayette’s counsel with a notice to preserve the mat on February 24, 2012, and mailed three good faith letters dated March 7, 2012, March 30, 2012, and April 4, 2012, which request that Café Lafayette produce all of the documents regarding the type and placement of the mats. Sun Cho Kim, president of Café Lafayette, who works at the premises, appeared for a deposition on behalf of Café Lafayette. Kim testified:

Q. When did you remove the mat from the location?

A. I replaced at the beginning of February of 2012, this year.

Q. Why did you replace the mat?

A. It’s old, torn, and there has been the same mat for a long time, that’s why.

(Kim EBT, at 20).

Café Lafayette argues that although the preliminary conference order directed an inspection of the premises, the order does not request the preservation, production, or inspection of the subject mat. Café Lafayette maintains that plaintiff failed to timely request the preservation of the mat, and only did so on February 24, 2012, after the mat was discarded. Defendants also contend that the mat was not disposed of intentionally or negligently with any

knowledge of its evidentiary value, and that destruction of the mat in no way inhibits plaintiff's ability to prove her case.

Pursuant to CPLR 3126, in order to strike an answer, the movant must make a clear showing that its opponent failed to comply with discovery demands in a willful, contumacious manner or in bad faith. *See Rodriguez v United States Bronx Parents, Inc.*, 70 AD3d 492, 492 (1st Dept 2010). Spoliation is the loss, destruction, or alteration of key evidence to a lawsuit. *See Squitieri v City of New York*, 248 AD2d 201, 202 (1st Dept 1998). “[A]lthough sanctions may be imposed for even negligent spoliation, striking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability.” *Russo v BMW of N. Am., LLC*, 82 AD3d 643, 644 (1st Dept 2011) (citations omitted).

Here, plaintiff fails to demonstrate that defendant acted in a willful, contumacious, or bad faith manner. Although defendant requested to inspect the premises, a demand was not made to preserve the subject mat until after the inspection took place in February of 2012, seven months after the accident. *See American Intl. Ins. Co. v A. Steinman Plumbing & Heating Corp.*, 93 AD3d 559, 560 (1st Dept 2012) (holding that plaintiff's request for sanctions for spoliation of evidence, regarding the disposal of the alarm system and water float was properly denied because plaintiff had made no request that they be retained). By the time of plaintiff's request for the mat, the mat had already been discarded. Furthermore, Keith M. Andresen, Esq., counsel for Café Lafayette, affirms that plaintiff had an opportunity to photograph the mat as well as the entrance of the premises, and attaches the photo as an exhibit to his affirmation in opposition.

Kim testified that although he kept the subject mat for several months after the accident, he eventually had to replace it because it was old and torn and it was utilized at the front

entrance. There is no evidence that Café Lafayette deliberately destroyed the mat and plaintiff does not demonstrate that the loss of the mat will fatally compromise the action. *See Cameron v Nissan 112 Sales Corp.*, 10 AD3d 591, 592 (2d Dept 2004). Both plaintiff and defendant were deposed about the condition of the mat and they will have the opportunity to testify at trial.

Therefore, because plaintiff fails to meet her burden and does not demonstrate that Kim acted in willful, contumacious manner, or in bad faith, plaintiff's motion to strike the answer, must be denied. Plaintiff also requests that Café Lafayette be compelled to produce any records regarding the mat, or documents regarding the type and placement of the mat. To the extent that such documents exist and are in their possession, and because such documents may be relevant, defendant must provide such documents within 20 days.

Accordingly, it is

ORDERED that the part of plaintiff Dorothy Albright's motion seeking to strike the answer of defendant Café Lafayette, Inc., or preclude or otherwise impose sanctions is denied; and it is further

ORDERED that the part of plaintiff's motion seeking to compel records regarding the mat, or documents regarding the type and placement of the mat, is granted, and Café Lafayette must provide such documents within 20 days from service of a copy of this order with notice of entry.

Dated: 1/20/13

**FILED**

**JAN 25 2013**

**NEW YORK  
COUNTY CLERK'S OFFICE**

ENTER:

*Ley*  
J.S.C.