Alfaro v Alvarez Corp.
2013 NY Slip Op 32243(U)
August 30, 2013
Sup Ct, Suffolk County
Docket Number: 09-45563
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

INDEX No. 09-45563
CAL No. 13-00310T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-4-13 (#001)
MOTION DATE 5-9-13 (#002)
ADJ. DATE 5-30-13
Mot. Seq. # 001 - MD
002 - XMD

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ARNOLD ALFARO, an infant by his parent and natural guardian, JOSE ALFARO and JOSE ALFARO, individually

Plaintiffs,

- against -

ALVAREZ CORPORATION, ALVAREZ LAUNDRY CORPORATION and CECILIO ALVAREZ,

Defendants.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 24; Answering Affidavits and supporting papers 25 - 26; 27 - 28; Replying Affidavits and supporting papers 29 - 30; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that this cross-motion by plaintiffs for an Order, pursuant to CPLR 3126, striking the defendants' answer for spoliation of evidence or, in the alternative, for a negative inference against defendants at trial, is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by infant plaintiff Arnold Alfaro, then five years old, on March 28, 2008, when he slipped and fell on water that was on the floor of a laundromat in Huntington Station, New York, owned and operated by

defendants. The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage and control the premises by permitting liquid to remain on the floor, thereby creating a hazardous condition.

Defendants now move for summary judgment dismissing the complaint against them on the grounds that they neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, defendants submit, *inter alia,* the pleadings, the bill of particulars, and the deposition testimony of infant plaintiff Arnold Alfaro, defendant Cecilio Alvarez, and non-party witnesses Glenda Palma, Robin Alfaro, and Francisco Guevara.

At his examination before trial, infant plaintiff Arnold Alfaro testified to the effect that on the day of the accident, he went to defendants' laundromat with his mother and brother at around 5:00 p.m. While his mother was doing her laundry, he followed his brother, walking towards the store within the building. He slipped on water near a washing machine and fell forward, causing his right hand to go under the machine. When he got up off the ground, the left side of his shirt and pants were wet, and his hand started to bleed. Prior to the accident, he was looking straight ahead, and did not see water on the floor. He stated that before he fell, he was not running, skipping or jumping.

At his deposition, Robin Alfaro testified to the effect that he is a brother of infant plaintiff Arnold Alfaro. At the time of the subject incident, he was eight years old. As he was walking towards his mother in the laundromat, his brother Arnold Alfaro was behind him. When he heard his brother scream, he turned around and saw his brother getting up. He observed blood on his brother's hand, and water on the floor where his brother fell. The water was described as being clear, and appeared to be a big puddle. Robin Alfaro stated that he saw the water for the first time right before his brother fell.

At her deposition, Glenda Palma testified to the effect that on the day of the accident, she and her two sons, Arnold Alfaro and Robin Alfaro, entered the laundromat through a rear entrance from the parking lot. As she went to a washing machine in the middle, her two sons went to see the candy machine in the front entrance. When her sons came back to her to ask her for money, the subject accident happened. She did not see Arnold Alfaro fall, but heard him scream and cry. She stated that although her sons told her about water, she did not actually see the water on the ground.

At his deposition, defendant Cecilio Alvarez testified to the effect that he owned the subject laundromat with his two sisters, Edis Alvarez and Maria Baptista, and that he sold the laundromat in 2011. On the afternoon of the accident, Mr. Alvarez left his brother Francisco Guevara in charge of the laundromat and had asked him to watch the machines and the cashier. Approximately 20 minutes later, Mr. Alvarez received a phone call from Mr. Guevara and learned of the subject accident. When Mr. Alvarez returned to the laundromat, Mr. Guevara showed him where the accident supposedly happened, and there were small droplets of blood thereon. Mr. Guevara told Mr. Alvarez that he mopped the portion of the floor after the accident. Mr. Alvarez testified that the cashier would be in charge of walking around the laundromat and checking the floor. He testified that although there were four or six

cameras at the premises on the day of the accident, and the camera systems were working, he had no recollection as to whether anybody looked at the recordings of that day. He added that approximately a month before the closing of the sale of the laundromat, the camera systems were broken, and he did not fix them. After he sold the laundromat, he did not keep any of the video equipment or recordings from the premises.

At his deposition, Francisco Guevara testified to the effect that on the day of the accident, Mr. Alvarez had left him in charge of the laundromat and went out. Before Mr. Alvarez left, he walked around the laundromat to check everything. After Mr. Alvarez left, Mr. Guevara went out to take out the garbage. He walked around and checked the premises. He did not notice any soap, papers or anything on the floor. When Mr. Guevara was situated by the register in the front of the laundromat, he saw five or six children running in front of him. Then, he heard one of them crying, but he did not witness the accident. When he cleaned up the floor, he was told by people in the laundromat that one of the children who were running and playing fell on the floor and hurt himself on a can he had in his hand. While cleaning up the blood on the floor, he observed neither "any cans or objects" nor "any water" on the floor in the vicinity of where the accident occurred.

While, to prove a *prima facie* case of negligence in a slip/trip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (*see* ***Williams v SNS Realty of Long Is.***, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]), the defendant, as the movant in this case, is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law (*see* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs.*, Inc.**, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.***, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, defendants have failed to establish their entitlement to judgment as a matter of law. The deposition testimony of infant plaintiff, Glenda Palma, Robin Alfaro, and Francisco Guevara conflict as to the happening of the accident (*see* ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). There are questions of fact as to how the accident happened; whether a dangerous condition existed on the floor of the subject laundromat so as to create liability on the part of defendants; whether they had actual or constructive notice of water on the floor (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]); whether they exercised reasonable care under the circumstances (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether infant plaintiff was comparatively

negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Accordingly, defendants' motion for summary judgment is denied.

Plaintiffs cross-move for an Order, pursuant to CPLR 3126, striking the defendants' answer for spoliation of evidence or, in the alternative, for giving a negative inference charge against defendants at trial. Plaintiffs submit a letter dated October 5, 2011, from their attorneys to defendants' attorneys, requesting "any photographs, videos or other media ("Media") depicting the premises" at the time of the subject accident. Plaintiffs also submit a letter dated October 25, 2011, from defendants' attorneys to plaintiffs' attorneys, indicating that defendants were "not in possession of any photographs or video depicting the premises" on the date of the accident. Plaintiffs' submission includes a letter dated December 7, 2011, from defendants' attorneys to plaintiffs' attorneys, stating that neither defendants nor their attorneys were in possession of any photographs or video.

In opposition, defendants contend that there existed no such video recordings, although Mr. Alvarez testified at his deposition that the subject laundromat had a video recording system. Defendants also contend that Mr. Alvarez' testimony does not indicate that he actually reviewed any video recordings that depicted the subject accident. Furthermore, defendants contend that they did not intentionally or negligently destroy the evidence.

To impose the drastic remedy of striking a pleading pursuant to CPLR 3126, there must be a clear showing that a party's failure to comply with discovery demands was willful, contumacious, or in bad faith (*see* CPLR 3126; ***Mylonas v Town of Brookhaven***, 305 AD2d 561, 759 NYS2d 752 [2d Dept 2003]). Under the common-law doctrine of spoilation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party of the ability to prove its claim or defense, the responsible party may be sanctioned (*see* ***Coleman v Putnam Hosp. Ctr.***, 74 AD3d 1009, 903 NYS2d 502 [2d Dept 2010]). The court has discretion to impose sanction for the spoliation of evidence by striking a party's pleadings or instructing the jury that it may draw negative inference from the missing evidence (*see* CPLR 3126; PJI3d 1:77 [2003]; ***Lawrence Ins. Group v KPMG Peat Marwick***, 5 AD3d 918, 773 NYS2d 164 [3d Dept 2004]). A defendant who destroys documents in good faith and pursuant to normal business practice should not be sanctioned unless the defendant is on notice that the evidence might be needed for future litigation (*see* ***Ravnikar v Skyline Credit-Ride, Inc.***, 79 AD3d 1118, 913 NYS2d 339 [2d Dept 2010]; ***Lawrence Ins. Group v KPMG Peat Marwick***, *supra*).

Here, there is simply no evidence that defendants deliberately and intentionally discarded or destroyed evidence or otherwise thwarted the plaintiffs' attempts at disclosure (*see* ***Abbadessa v Sprint***, 291 AD2d 363, 736 NYS2d 880 [2d Dept 2002]; ***Herd v Town of Pawling***, 244 AD2d 317, 663 NYS2d 665 [2d Dept 1997]; ***Goens v Vogelstein***, 146 AD2d 606, 536 NYS2d 525 [2d Dept 1989]). Defendants may not be compelled to produce or sanctioned for failing to produce information which they do not possess (*see* ***Sagiv v Gamache***, 26 AD3d 368, 810 NYS2d 481 [2d Dept 2006]). Nor does the record demonstrate that the loss of the video recording deprives plaintiffs of a means to present their claim (*see* ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). In particular,

plaintiffs' spoliation claims are unsupported by competent proof establishing that the video recordings are of significance (*see* ***Gomez v Metro Terms. Corp.***, 279 AD2d 550, 719 NYS2d 283 [2d Dept 2001]). Accordingly, plaintiffs' cross-motion as to the issue of spoliation of evidence is denied.

Dated: August 30, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**