

Torres v Sears Holding Corp.

2013 NY Slip Op 33689(U)

October 2, 2013

Sup Ct, Bronx County

Docket Number: 310521/2010

Judge: Julia I. Rodriguez

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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 27

Present: JULIA I. RODRIGUEZ

Index No.: 310521/2010
~~201521/2010~~

AIDE TORRES,

Plaintiff

DECISION & ORDER

-against-

SEARS HOLDING CORP, et al

Defendants

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Plaintiff's Order to Show Cause noticed on May 16, 2013 and submitted on June 6, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Motion & Exhibits	1
Opposition & Exhibits	2
Reply	3

Upon the foregoing papers, Plaintiff moves for an Order imposing sanctions against Defendants including striking the Answers, precluding testimony, and an adverse inference. Although not requested in the Order to Show Cause Plaintiff requests an extension of time to file the notice of issue.

The instant case was commenced as a result of personal injuries sustained by Plaintiff while riding the escalator at a Kmart Store in Bronx County. Plaintiff alleges that footage of the accident was spoiled by Kmart; that Defendants have failed to produce non-party witnesses, that Defendant failed to provide all requested repair documents and that Defendant failed to provide a statement from someone with personal knowledge of the facts.

Defendant ~~argues~~ ^{was} that one of the witnesses ~~were~~ not served with notice, that the employees with personal knowledge of the facts are no longer employed by Defendant, and that the subpoenas to two of the nonparty witnesses did not provide sufficient notice as required by the CPLR. Defendant also argues that Plaintiff had the opportunity to depose a Schindler Elevator Corp. mechanic at length and, therefore, had notice of any repair work done to the escalator. Plaintiff also deposed the store manager who testified about the procedures for video production and preservation.

CPLR §3126(3) provides that if a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may

make such orders as are just. A court may strike an answer as a sanction where the moving party establishes that the failure to comply was “willful, contumacious or in bad faith.” *Fish & Richarson, PC v Schindler*, 75 AD3d 219 (1st Dept. 2010). A party may be found to be in civil or criminal contempt upon its failure to obey a court order. *CPLR §5104, Judiciary Law §§750, 753*. On a motion for contempt, the movant has the burden to establish, by clear and convincing evidence, that a court order, clearly expressing an unequivocal mandate, or subpoena has been violated. *Yalkowsku v Yalkowsky*, 93 AD2d 834 (2nd Dept. 1983), *Schwartz v Schwartz*, 79 AD3d 1006 (2nd Dept. 2010).

On a motion for sanctions for spoliation, the movant has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to present its case. *Utica Mutual Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717 (2nd Dept. 2009). A motion to punish a party for spoliation is addressed to the sound discretion of the motion court. *Id.* However, striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and thus, the courts must consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness. *Id.*

Three directives were provided in the Order dated February 7, 2012:

1. production of the video recording from the two cameras and if not available
2. affidavit describing safekeeping and disposal
3. records for the work performed.

There was footage presented which shows moments before the accident and footage from another camera that depicts the Plaintiff after the accident. The parties agree that the time frame during Plaintiff’s accident was not shown in the footage. Defendant alleges that the store only kept a copy of footage that they thought was relevant and that their standard practice is to record over the original footage. Defendant argues that the cameras did not catch the accident and therefore Defendant did not keep a copy of it. Although an affidavit was not originally provided, there was deposition testimony which explained the circumstances and procedures surrounding the footage. In addition, as part of the opposition Defendant has provided affidavits which also explains the safekeeping and disposal of the original footage.

The court finds that Plaintiff did not meet her burden in establishing that the original video footage did in fact contain footage of the accident. Firstly, Plaintiff did not even provide a

copy of the video in her moving papers and it is well-established that a movant must meet their burden with their submission. It is only after Plaintiff meets her burden, that the court reviews Defendant's submissions. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985), *Mallick v. Farfan*, 33 A.D.3d 762 (2nd Dept. 2006) . The movant's failure to establish their prima facie entitlement requires denial of the motion without consideration of the opposing papers.

Secondly, the court finds that the alleged spoliation does not fatally compromise Plaintiff's ability to present her case. Having viewed the video submitted with Defendant's opposition, although the court saw that there was a camera facing the escalator which may have depicted the accident, the quality of the video was too poor to be able to determine whether an accident took place. In addition, there was what appeared to be a column or other obstructions that could have blocked the accident. Thus, the court is not inclined to impose sanctions where it is not established that the alleged missing video footage would have been helpful. It is significant to note that the video showed that Plaintiff did not ambulate with a normal gait and had a difficult time stepping onto the elevator. Thus, Plaintiff's accident may have been caused by the fact that she was an elderly lady who does not maintain good balance at the present state in her life, and while the video is allegedly missing footage of the accident, the actual video may not assist Plaintiff's case or lack thereof may not cause prejudice to Plaintiff's case. Whether the original footage depicted the accident, whether Defendant spoiled the original footage, and what caused Plaintiff's accident is a question of fact for the jury which precludes the court from imposing sanctions.

With respect to the work performed, Defendant submitted documents by a non-party, Department of Buildings, which are not in admissible form nor does it contain first hand information as to what entity performed the repair work and what type of work was performed. Even though Defendant Schindler Elevator's mechanic was deposed, there should be some submission by Defendant Sears/Kmart providing whether there was other repair work by another repair company on the subject escalator during the relevant time period.

Accordingly, that portion of Plaintiff's motion seeking to strike Defendants' answer pursuant to *CPLR* §3126(3) for failing to comply with an Order to disclose is hereby **granted only to the extent** that Defendants shall provide first hand information, documents and/or proof of the repair work done on the escalator during the 8 month period before and after the subject

accident.

That portion of the motion seeking sanctions for spoliation is **denied**.

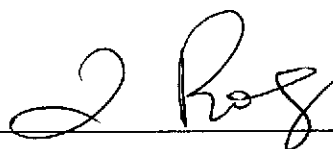
That portion of the motion seeking to punish Mariano Muniz and Mario Tapia for failure to attend a deposition is hereby **denied** for failure to provide sufficient notice.

That portion seeking to punish Michael Morrone is hereby **denied** for failure to serve and obtain jurisdiction over him.

That portion of the motion seeking an adverse inference charge at trial shall be reserved for the trial judge.

Any further discovery, including depositions and the exchange of documents shall be completed within 60 days ^{of notice of entry} of this Order. Plaintiff shall file her note of issue within 60 days ^{of notice of entry} of this Order.

Dated: October 2, 2013



Hon. Julia I. Rodriguez, J.S.C.