

Labat v H&M Hennes & Mauritz LP
2014 NY Slip Op 30640(U)
March 12, 2014
Sup Ct, NY County
Docket Number: 150608/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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AISHLING LABAT and ZIA ZIPRIN,

Plaintiffs,

Index No. 150608/2013

-against-

DECISION/ORDER

H&M HENNES & MAURITZ LP d/b/a "H&M"
and JOHN DOE,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This is an action to recover damages for alleged personal injuries sustained by the plaintiffs while present at one of defendant H&M Hennes & Mauritz LP's ("H&M") stores. Plaintiffs now move for an order striking H&M's answer in its entirety due to spoliation of evidence, or in the alternative, directing that an adverse inference be drawn against H&M at trial and that it be precluded from offering any testimony or evidence at trial concerning the condition of its premises at the time of the incident. For the reasons set forth below, plaintiffs' motion is denied.

The relevant facts are as follows. On or about January 23, 2010, plaintiffs were allegedly filmed by a voyeur while changing out of their clothes in the dressing room of the defendant

H&M clothing store located at 111 Fifth Avenue, New York, New York 10003 (the “store”). At this time, the store had a video camera at the entrance/exit of the store and following the incident a copy of the footage from the surveillance video was given to the New York City Police Department (“the police”). According to the police report, plaintiffs went to the police precinct and viewed the surveillance footage but were unable to identify the alleged voyeur. Specifically, the police report states: “The complainant was not certain that the person on the video was the actual perpetrator.”

On or about January 28, 2010, approximately five days after the incident, plaintiffs’ attorney wrote H&M requesting that they “preserve any and all surveillance tapes and/or recordings made on your premises on January 23, 2010.” It is undisputed that H&M failed to preserve the original surveillance tapes and said tapes were recorded over as all H&M surveillance footage is recycled and recorded over every 30 days.

On or about January 13, 2013, plaintiffs’ commenced the instant action sounding in negligence against H&M. On or about April 16, 2013, plaintiffs served a notice of discovery and inspection demanding any and all surveillance footage of the incident. Thereafter, having no copy of the footage in its possession H&M, by letter dated June 27, 2013, served a FOIL request upon the police requesting a copy of the surveillance video. On July 25, 2013, H&M received a letter from the police denying the request on the ground that the video, if disclosed, would “interfere with law enforcement investigation or judicial proceeding.” Thereafter, plaintiffs served a subpoena on the police for the surveillance video. In response to the subpoena, the police produced the records it had relating to the investigation but notified plaintiffs that it was not “in custody of, nor has it maintained any video or photographic evidence regarding [the

incident].”

Plaintiffs now bring the instant motion seeking an order granting sanctions against H&M for spoliation of evidence based on H&M’s failure to maintain a copy of the video surveillance footage. H&M opposes the motion on the ground that no sanction of any kind is warranted here as: (i) the disposal, if any, was not willful or intentional; (ii) plaintiffs had ample opportunity to review the entire surveillance tape at issue; (iii) the absence of the video surveillance has caused no prejudice to plaintiffs since they already reviewed it; and (iv) not only is the subject surveillance not crucial to plaintiffs’ case, it is irrelevant to this litigation.

“Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them.” *Kirkland v. N.Y.C Housing Auth.*, 236 A.D.2d 170, 173 (1st Dept 1997). “A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind’; and finally, (3) that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense.” *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept 2012). The requisite culpable state of mind can be demonstrated through intentional or willful conduct, gross negligence, or ordinary negligence. *Id.* If the destruction of evidence was brought about through intentional or willful conduct or gross negligence, relevance is presumed. *Id.* However, if spoliation is brought about through ordinary negligence, relevance must be proven by the party seeking spoliation sanctions. *Id.*

In the present case, as it is undisputed that H&M was under a duty to preserve the

surveillance video footage, the court must first determine whether H&M's destruction of the video surveillance footage was brought about through intentional or willful conduct or gross negligence. Here, the court finds that the undisputed facts clearly demonstrate that H&M neither intentionally nor willfully destroyed the footage in bad faith. As an initial matter, it is clear that the footage was deleted in the normal course of business as H&M's surveillance footage is recycled and recorded over every 30 days and not through an intentional act. Additionally, when the incident occurred, H&M fully cooperated with the police investigation and provided a copy of the surveillance footage to the police. While H&M should have maintained its own copy, the fact that it gave a copy to the police evidences no willful or bad faith conduct on its part to destroy the video. Indeed, upon being served with plaintiffs' discovery requests, H&M made its own attempt to obtain the video footage in police custody. Accordingly, H&M's failure to preserve the video amounts to, at the most, mere negligence and, as such, plaintiffs must establish the missing surveillance video's relevance in order to be entitled to sanctions.

Here, the court finds that plaintiffs have failed to demonstrate that the missing surveillance footage is relevant to their claims. Plaintiffs argue that the video footage is crucial to their case as: (1) it likely shows the extreme negligence of defendant's security personnel as they failed to apprehend the voyeur and failed to prevent him from filming the plaintiffs; and (2) the video likely shows the horrific emotional shock suffered by the plaintiffs upon the discovery that they had been filmed naked and such look of shock and fear would likely be central in proving the damages portion of plaintiffs' claim for negligent infliction of emotional distress. The court finds both these arguments unavailing. As an initial matter, it is undisputed that there are no cameras in the dressing room and as such there would not have been any footage of

plaintiffs' reaction at the time they allegedly discovered they were being filmed, nor would such evidence be probative in proving plaintiffs' claimed damages. Moreover, plaintiffs have offered no evidence to dispute H&M's contention that the only video camera in the store at the time of the incident was located at the entrance/exit of the store. Thus, the missing surveillance footage would only depict people entering and exiting the store and would have no relevance to proving plaintiffs' claims for negligent security or construction of its dressing rooms. Indeed, it is telling that while plaintiffs have actually seen the missing surveillance footage, they have failed to provide the court with affidavits on this motion attesting to what they saw or how such footage would be relevant or crucial to their case.

In the alternative, plaintiffs move for an adverse inference charge. This motion is denied without prejudice as plaintiffs may make this motion at trial.

Accordingly, plaintiffs' motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 3/12/14

Enter: _____

CK
J.S.C.

CYNTHIA S. KERN
J.S.C.