

Centeno v Century 21 Dept. Stores, LLC

2014 NY Slip Op 30718(U)

March 17, 2014

Sup Ct, New York County

Docket Number: 105159/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

HON. EILEEN A. RAKOWER

Index Number : 105159/2010

CENTENO, EVELYN

vs

CENTURY 21 DEPARTMENT STORES

Sequence Number : 001

STRIKE A PLEADING

PART 15

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). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

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

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE NEW YORK

Dated: 3/17/14

 J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 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

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

EVELYN CENTENO and JESUS CENTENO,

Plaintiffs,

INDEX NO. 105159/10

- v -

MOTION DATE _____

CENTURY 21 DEPARTMENT STORES LLC,

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

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

Answer — Affidavits — Exhibits _____

FILED

Replying Affidavits _____

MAR 25 2014

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

This action arises from a slip and fall accident that occurred on February 16, 2010, inside the Century 21 Department Store, located at 22 Cortlandt Street, New York, New York, which resulted in injuries sustained by plaintiff Evelyn Centeno. Plaintiffs allege that Defendant Century 21 Department Stores, LLC ("Defendant") negligently provided small, low to ground, shopping carts that could not be seen in the crowded store, thereby creating dangerous tripping conditions when customers use the carts throughout the store.

Presently before the Court is Plaintiffs' motion to strike Defendant's answer, preclude, strike Defendant's affirmative defenses, and/or grant a missing evidence charge on the grounds that Defendant failed to provide or preserve a copy of the video recording of the alleged incident.

Defendant opposes, stating that Plaintiff has not offered any proof that there was video footage of the alleged accident or that Defendant had notice of any footage taken on the day of the alleged incident would be needed for future litigation. Defendant submits the affidavits of Steven Finkelstein and John Feehan,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

Director of Fraud and Risk Management.

On September 16, 2010, Plaintiffs served a Notice to Produce including a request for copies of the video footage of the alleged accident. On September 16, 2010, Plaintiffs served a Demand for Witnesses that included a demand for photographs, slides, videotapes, and motion pictures. This demand specifically requested that Defendant produce “photographs, negatives, slides, films, videotapes, or other visual reproductions, whether taken openly or surreptitiously depicting 1) Plaintiff and 2) the location of the accident site.”

On September 21, 2010, the parties entered into a preliminary compliance conference order that directed “all parties, on or before 10/2/2010, shall exchange names and addresses of all eye witnesses and notice witnesses, statements of opposing parties, and photographs, or, if none, provide an affirmation to that effect.

Defendant served a response to the preliminary conference order on October 18, 2010, stating, “Defendant is not aware of the names and addresses of any witnesses to the occurrence, acts, or conditions listed in plaintiff’s demand,” and, “The defendant is not in possession of any surveillance video of the plaintiff.”

On January 11, 2012, Steven Finkelstein appeared for a deposition on behalf of Defendant. Mr. Finkelstein testified that Defendant has video cameras located throughout the store on the third floor, and that the video cameras show the entire store. Mr. Finkelstein also testified that Defendant’s employees in the security department run the video cameras for the purpose of securing Defendant company’s assets. Mr. Finkelstein met with Plaintiff after the incident while she was still in the store on the date of the incident. Mr. Finkelstein did not know whether anyone saved the video footage, but none has been exchanged.

CPLR §3216 provides, in pertinent part:

If any party... refuses to obey an order for disclosure...
the court may make such orders with regard to the failure
or refusal as are just, among them:

- (3) an order striking out pleadings or parts thereof...

“CPLR § 3126 covers refusal to comply with a discovery order or a willful failure to disclose.” (*Strong v City of New York*, 112 A.D.3d 15, 21 [1st Dep’t 2013]). Pursuant to CPLR §3126, a court may impose sanctions when a party

willfully fails to disclose information which the court finds ought to have been disclosed, or fails to comply with disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dep't 2006]).

Additionally, New York's common-law doctrine of spoliation permits the imposition of sanctions where the destruction of evidence was negligent rather than willful. (*Strong v City of New York*, 112 A.D.3d 15, 21 [1st Dep't 2013]). "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. New York City Hous. Auth.*, 236 A.D.2d 170, 173 [1st Dep't 1997]).

Negligent erasure of videotapes may give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was on notice that the video tapes might be needed for future litigation. (*Strong v City of New York*, 112 A.D.3d 15, 21 [1st Dep't 2013]) (finding spoliation sanctions warranted for negligent failure to prevent automatic erasure of audio tapes, under New York's common-law doctrine of spoliation).

Here, Plaintiffs argue that Defendant was on notice that the video should be preserved because the subject incident occurred inside Defendant's store, Plaintiff reported the incident to Defendant, and an investigation revealed that there were no witnesses. Plaintiffs also argue that Defendant knew the video would be needed for future litigation because EMS responded to Plaintiff's accident, and an incident report was filled out.

Plaintiffs argue that the video is a key piece of evidence because there were no witnesses to Plaintiffs' accident. Plaintiffs further argue that, even if the surveillance video did not capture the incident itself, the video would have shown the premises leading up to and following Mrs. Centeno's accident, including how crowded the store was at or about the time the alleged incident occurred, and whether it was a dangerous to give customers low shopping baskets in such conditions.

Plaintiffs also argue that Defendant failed to provide an affidavit of a person with knowledge responsive to Plaintiffs' demand for surveillance video of Plaintiff's accident, since Mr. Finkelstein and Mr. Feehan have no personal knowledge of the video recording in question. Plaintiffs also argue that Defendant fails to provide a reasonable excuse for its failure to preserve the surveillance videos, because Defendants fail to provide evidence of the store's video retention policy to support Mr. Finkelstein's and Mr. Feehan's assertions that it was store policy to record over footage after 30 days. Plaintiffs argue that Defendant's

failure to produce the video, in light of its apparent relevance to foreseeable litigation, gives rise to the inference that the video was either willfully or negligently destroyed.

Defendant, in turn, argues that sanctions are not warranted under New York's common-law doctrine of spoliation because Defendant did not have notice that any video footage taken on the day of the alleged incident might be needed for future litigation. Defendant argues that its policy is to retain video footage for a period of thirty days, and that Plaintiffs commenced this action after the thirty-day retention period expired. Defendant argues that Mr. Finkelstein spoke with employees in the area who all stated that they did not see the alleged incident, that Mr. Finkelstein did a "walk through" of the area following Plaintiff's report and did not observe any tripping hazards, and that Mr. Finkelstein would not have requested a copy of the surveillance video based on Plaintiff's report.

Defendant also argues that, although Plaintiff reported the incident to Mr. Finkelstein, there was no indication, prior to the filing of Plaintiffs' summons and complaint, that this incident, which involved tripping over a shopping basket when another customer stopped short, would be litigated. Defendant argues that Plaintiffs did not file their claim immediately, that there was no written notice from Plaintiffs' attorney advising Defendant to maintain the video, or court order issued requiring the Defendant to preserve video footage, and that Defendant did not become aware of Plaintiffs' claim until Defendant was served with a complaint.

In addition, Defendant argues that the store's surveillance cameras are roaming cameras used predominantly for purposes of crime prevention, and that Plaintiffs offer no proof that these cameras captured any video footage of the alleged incident. Defendant argues that Plaintiffs fail establish that Defendant refused to comply with a disclosure order or willfully failed to produce evidence, because Defendant responded to Plaintiffs' discovery demand and does not have any video footage regarding incident in question, and that sanctions are therefore not warranted under CPLR § 3126.

Here, there is no showing of negligence, willfulness, or spoliation. Plaintiffs make no showing that Defendant willfully failed to preserve the surveillance video in question, or that Defendant refused to comply with a court order for disclosure. Plaintiffs fail to show that Defendant was on notice that the subject video might be necessary for future litigation, before the standard retention period for surveillance video expired under Defendant's video retention policy. Plaintiffs not only filed the instant complaint long after the retention period had expired, but also failed to file a motion for pre-action discovery prior to serving

* 6]
the complaint, or to submit a letter from their attorney alerting Defendant to any potential litigation or need to preserve the tapes.

Accordingly, Plaintiffs fail to establish the elements of a spoliation claim sufficient to support the severe sanctions of striking a pleading or precluding an affirmative defense. Whether Defendant's erasure of the video tapes gives rise to a missing evidence charge is a matter reserved for the trial court.

Wherefore, it is hereby

ORDERED that Plaintiffs' motion is denied.

This constitutes the decision of the Court. All other requested relief is denied.

Dated: March 17, 2014



**HON. EILEEN A. RAKOWER
J.S.C.**

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**

FILED

MAR 25 2014

**COUNTY CLERK'S OFFICE
NEW YORK**