 FILED Sep 30 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM, PART - 11

ECENA CUETO

Plaintiff,

Index No. 301294-2013

- against -

DECISION AND ORDER

BOGOPA-BUCKNER INC., BOGOPA-BRUCKNER, LLC, BOGOPA SERVICECORP. And BOGOPA INC., d/b/a FOOD BAZAAR at the premises known and designated as 1630 Bruckner Boulevard, Bronx, New York (Block 3653, Lot 50),

Defendants.

HON. LAURA G. DOUGLAS:

This motion concerns the plaintiff's repeated efforts to obtain discovery of any relevant video surveillance recordings which were made at the defendants' premises. The plaintiff allegedly sustained injuries in a slip and fall accident at the defendants' store on September 10, 2012. Two days after the accident, on September 12, 2012, plaintiff's counsel sent written notice to the defendants by certified mail instructing them to preserve any and all video recordings, surveillance tapes, and still photos of recordings [collectively, "video recordings"] made on the date of the accident from 7:00 a.m. to 10:30 p.m.

This action was commenced on February 25, 2013. On April 29, 2013, the plaintiff served a Notice to Produce with respect to the video recordings. On May 10, 2013, the defendants responded by simply stating, in pertinent part, that "[a]fter conducting a search as requested by our office for a copy of the surveillance video, defendants are unable to locate said surveillance video".

The preliminary conference order of May 23, 2013 directed that all outstanding discovery demands be responded to within 45 days. Thereafter, the Plaintiff moved for an order directing a discovery and inspection of the defendants' video/audio surveillance recording system and equipment, or in the alternative, an order deeming the issue of notice to be resolved as against the defendants. After oral argument, an order was issued on July 17, 2013 directing the defendants to furnish a sworn affidavit from a person with knowledge providing responses to seven specific inquiries as to the videotaping system, including whether a video recording exists, the particulars of the search that was made with respect to said video recordings, whether the video recording was sent to the insurance carrier, and other inquiries. This affidavit was to be provided within 45 days of the date of said order. No response was received within this time period.

The plaintiff has now moved for an order pursuant to CPLR §3216 deeming the issue of notice to which this material is relevant be deemed resolved against the defendants or, in the alternative, for an order striking the defendants' answer or, alternatively, precluding the defendants from testifying or producing evidence at the time of trial due to their defaults under the terms of the orders of this Court dated July 17, 2013 and November 18, 2013. The motion is granted solely as ordered below, and is otherwise denied.

In response, on January 17, 2014, the defendants furnished an affidavit from Gilbert Lee, an employee identifying himself as the night manager of the store[1] where the accident occurred. Mr. Lee avers that he has conducted a search of the store's video and/or

[1]Mr. Lee contends that as night manager he has access to recorded videos, and that defendants do not "have" a technician responsible for these materials.

photographic records, and that he can "conclusively state" that "no such preserved, recorded video or photographic evidence depicting the area where the plaintiff fell or the actual fall itself was found in the records which I have searched."

Mr. Lee contends that recordings from these cameras are "typically" only retained for a period of one to two weeks, although the plaintiff has shown that a written notice to retain such information was mailed to the defendants' store a mere two days after the accident. He further contends that many of the cameras in the premises do not record at all, but are used by the employees as an anti-theft measure. He does not state, however whether the camera or cameras which were trained on the area of the plaintiff's alleged fall were recording cameras, assuming there were such cameras stationed in that area, nor does he state how long such recordings were retained for these specific cameras. Mr. Lee concludes that his comprehensive search of the videos retained on the company's hard drive established that no video had been retained which would be within the scope of the plaintiff's inquiry.

As the plaintiff highlights, the issue of notice is a crucial one in this matter, and the existence of a surveillance tape or other recording or photo is therefore highly relevant to establishing or refuting liability. Mr. Lee's affidavit, while partially responsive, does not resolve the issues surrounding the claim of spoliation, nor can such a sanction be imposed without proof that probative evidence existed which was intentionally or negligently not preserved (*see Kirkland v. New York City Housing Authority*, 236 A.D.2d 170 [1st Dept 1997]. To cite an obvious illustration, there is a viable claim for sanctions based on spoliation if a relevant recording of the area in question was erased one or two weeks after the accident, but none if there was never a recording made in the first place. The Court

finds that Mr. Lee's affidavit is of insufficient specificity to resolve this claim of spoliation in favor of either party, and that further discovery with respect to this question is warranted.

Accordingly, it is hereby

ORDERED, that the plaintiffs are entitled to an adverse inference charge at trial in sum and substance as set forth in Pattern Jury Instruction 1:77.1 (2014) with respect to the subject video recording(s) unless the defendants permit the plaintiff to conduct a discovery and inspection of the video surveillance system and equipment of the store in question by plaintiff's counsel and an expert of plaintiff's choosing at a mutually convenient time and date, but no later than 45 days after service of a copy of this order with notice of entry thereon; and it is further

ORDERED, any expert or other testimony on the defendants' behalf derived from any such video recordings not made available to the plaintiff is precluded from use at trial or in motion practice.

This constitutes the decision and order of the Court.

Dated: 9-25-14

LAURA G. DOUGLAS
J.S.C.