

**Hiney v City Ctr. of Music & Drama, Inc.**

2014 NY Slip Op 32693(U)

October 9, 2014

Supreme Court, New York County

Docket Number: 150615/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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BARBARA HINEY,

INDEX NO.  
150615/12

Plaintiff,

- against -

CITY CENTER OF MUSIC & DRAMA, INC.,

DECISION/ORDER

Defendant.  
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DONNA M. MILLS, J.:

Plaintiff moves to compel defendant, City Center of Music & Drama, Inc. to respond to outstanding discovery and for sanctions based on the spoliation of evidence. The parties resolved the discovery issues pursuant to a status conference order dated September 19, 2014. The only issue remaining before this Court pertains to the issue of spoliation of evidence.

This action concerns injuries suffered by plaintiff on June 21, 2011 as she allegedly tripped and fell at the second floor lobby area at the David H. Koch Theater, or a premises operated, maintained, managed and controlled by defendant. The complaint alleges that there was a wooden barrier on the floor surrounding floor lights, which plaintiff contends constituted a trip hazard. By letter dated January 5, 2012, plaintiff put defendant on notice of plaintiff's claim and requested that it maintain any surveillance footage from the date of the accident.

On October 1, 2013, defendant produced Clement Mitcham, the security manager, to be deposed as its witness. During Mr. Mitcham's deposition, he testified that there were two surveillance cameras that recorded the scene of the accident. Following Mr. Mitcham's deposition, several demands were sent to defendant, seeking a copy of the surveillance footage on the date of the accident. To date, no surveillance tapes have been supplied, which necessitated the bringing of this motion, inter alia, for an appropriate sanction.

In opposition to the motion, defendant acknowledges that video equipment was at the subject accident location on the date of plaintiff's fall, and while it would have provided a live feed to a monitor, any recorded video would automatically delete within a week. As such, defendants contend that there is no video to produce.

Under the traditional law of spoliation of evidence, "[w]hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation" [ *Squitieri v. City of New York*, 248 A.D.2d 201, 202 [1st Dept 1998] ]. Until recently, New York state courts have grappled with the difficult issue of how to apply the traditional law of spoliation-e.g., the prohibition against destroying easily identifiable physical evidence related to, for example, some kind of accident-to the destruction of email and other electronic documents, as "[e]lectronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR," and "are not faced in traditional paper discovery" ( *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A), 2004 N.Y. Slip Op 50967[U], [Sup Ct, Nassau County 2004] ). However, in *Ahroner v. Israel Discount Bank of New York* (79 AD3d 481 [1st Dept 2010] ), the First Department has recently clarified the standard for imposing sanctions for the destruction of electronic evidence:

Under CPLR 3126 and New York case law, where a litigant destroys evidence, courts "possess broad discretion to provide proportionate relief to the party deprived of the lost evidence" ( *Ortega v. City of New York*, 9 NY3d 69, 76 [2007] ). Remedies for the spoliation of evidence include (1) dismissing the action or any part thereof; (2) deeming resolved for the purposes of the action any issues as to which the destroyed evidence is relevant; (3) precluding proof favorable to the spoliation on the issues, claims, or defenses to which the destroyed evidence is relevant; or (4) employing an adverse-inference instruction ( see *id.* ).

Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of data (see *Pension Comm. Of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC.*, 685 F.Supp.2d 456, 473 [S.D. N.Y.2010]). Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, direct that routine destruction policies such as auto-delete functions cease (*id.*).

In this case, the evidence shows that the video cameras at the subject location may have recorded the plaintiff's fall. However, the tapes were not saved, as is the defendant's normal business practice. After the fall, ambulance personnel came to the scene and took plaintiff out on a stretcher, and security personnel for defendant filled out an incident report. Under these circumstances, the Court finds that the defendant was under a duty to preserve the videotapes.

Since defendant was on notice of a credible probability that it would become involved in litigation, plaintiff demonstrated that defendant's failure to take active steps to halt the process of automatically deleting surveillance video and to preserve it for litigation constituted spoliation of evidence. Plaintiff may rely on evidence other than defendant's surveillance video to prove that defendant was negligent, therefore, the Court finds that the appropriate sanction is an adverse inference charge (see *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [1<sup>st</sup> Dept 2002]).

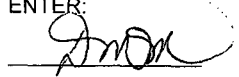
Accordingly it is

ORDERED that the motion of plaintiff for spoliation sanctions is granted to the extent that an adverse inference charge shall be given at the time of trial for the failure of

the defendant to preserve the surveillance video.

Dated: 10/9/14

ENTER:



J.S.C.

**DONNA M. MILLS, J.S.C.**