Clark v CVS Pharm., Inc.
2014 NY Slip Op 33104(U)
May 7, 2014
Supreme Court, Queens County
Docket Number: 5057/2012
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

JOSEPH CLARK,
Plaintiff,

- against -

CVS PHARMACY, INC.,
Defendant.

Index
No. 5057 2012

Motion
Date April 23, 2014

Motion
Cal. No. 28

Motion
Seq. No. 2

The following papers numbered 1 to 17 read on this motion by defendant for an order granting it summary judgment dismissing the complaint; and on this cross motion by plaintiff for an order, inter alia, striking defendant's answer pursuant to CPLR 3126.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Notice of Cross Motion - Affirmation - Exhibits.....	5-8
Answering Affirmation - Exhibits.....	9-13
Reply.....	14-17

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on October 21, 2010 at approximately 5:00 P.M., when, while shopping in a CVS store located at 85-29 126th Street in Queens, New York, he was caused to fall in one of the aisles which was "full of debris." Plaintiff testified at his examination before trial that he went down the middle aisle toward the pharmacy in order to pick up a prescription.

As he passed, he noticed grey merchandise bins which were stacked up on the right side, about waist height. He waited in line and heard two people in front of him arguing. One of the two looked at him, and plaintiff stepped back to move out of the way, as the "guy was yelling and being belligerent," thereby causing him to fall against the bins and sustain injuries. Plaintiff stated that he did not tell anyone that he was assaulted. John Vaccaro, store manager who testified on behalf of defendant, testified that he was made aware of *an* incident (which could have been the one in which plaintiff was involved) by a staff supervisor, who indicated that there was video surveillance which captured an altercation. In the video, Mr. Vaccaro saw one customer grab another in the aisle and they started to fight. One customer then threw the other against the aisle and knocked him to the ground, at which point the two started fist-fighting and kicking. One of the CVS employees responded and the police were called. Mr. Vaccaro indicated that he burned a DVD copy (possibly two) of the video "in case someone wanted it . . . and this way I could produce it for them." However, at some point later on when he attempted to search for it, it could not be found. Mr. Vaccaro also testified with respect to the procedure regarding the merchandise bins. Specifically, he stated that the bins which are delivered and put on the floor during the daytime, are unloaded and merchandise shelved, and that same are usually removed by approxiamtely 4:00 P.M. "because it gets too busy in the afternoon."

Turning to defendant's motion, defendant first argues that it is entitled to dismissal on the basis that it owed no duty to plaintiff to protect against the bins since they were open and obvious and not inherently dangerous as a matter of law. "While a landowner has a duty to maintain its premises in a reasonably safe manner for its patrons, there is no duty to protect or warn against an open and obvious condition that is not inherently dangerous" (*Bellini v Gypsy Magic Enters., Inc.*, 112 AD3d 867 [2013] [internal citation omitted]; *see Stern v River Manor Care Ctr., Inc.*, 106 AD3d 990 [2013]; *Robles v Bruhns*, 99 AD3d 980 [2012]).

While the court notes that the cases with respect to this issue vary, it would appear that the determining factors in each are the particular facts presented. Indeed, the issue of whether a dangerous condition is open and obvious is fact-specific, and is generally a question of fact for a jury to resolve (*see Pellegrino v Trapasso*, 114 AD3d 917 [2014]). Moreover, "[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*id.*; *see also Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634 [2010]).

Here, viewing the evidence submitted in the light most favorable to plaintiff, defendant failed to establish as a matter of law that it maintained the premises in a reasonably safe condition (*see Gradwohl*, 70 AD3d at 636-637 [court's recitation of the facts appears to indicate that: (1) plaintiff was distracted and (2) the u-boat dolly upon which plaintiff

tripped likely was not to be left on the merchandise floor]). Plaintiff's testimony reveals that he may have been distracted by two people arguing in front of him, and Mr. Vaccaro's testimony suggests that the merchandise bins are usually removed by 5:00 P.M. (the approximate time of plaintiff's accident).

Defendant next argues that "plaintiff cannot prove that [defendant] either created or had notice of the alleged dangerous condition." Though defendant spends a considerable amount of time on the issue of actual/constructive notice, it failed to comment on the issue of creating the alleged condition (a fact which apparently is conceded). Thus, defendant is not entitled to summary judgment on this basis.

Finally, defendant avers that plaintiff's accident was not caused by the bins at all but, rather, by an assault by another customer. To that end, defendant relies on, inter alia, Mr. Vaccaro's testimony regarding the video which he observed. Defendant also relies on plaintiff's own (unauthenticated) hospital records in which he apparently complained in the emergency room, inter alia, that "I was assaulted." Finally, defendant submits an unauthenticated copy of a police report in which complainant/victim (plaintiff herein) told police that "he was waiting in line to pharmacy behind [the assailant]" when the latter said " 'Yo that my girl' " and struck him w/a closed right fist knocking him to the floor," and that the scuffle caused him injuries. The police report also refers to the investigating officer having gone to the CVS to view a video which is alleged to have captured the incident.

While the above documentary submissions (to wit: the police report and the hospital records) may raise certain evidentiary problems – as pointed out by plaintiff in opposition to the motion – they cannot be ignored in the sense that same present clear issues of fact regarding, inter alia, the way in which the accident happened, such that summary judgment is not appropriate.

Along those lines, plaintiff, on his cross motion, contends that spoliation sanctions are warranted for defendant's failure to produce the video alleged to have captured the incident, in that defendant's failure to preserve the video has deprived him of the opportunity to verify what Mr. Vaccaro viewed, and has prejudiced him in that this defense was used in support of defendant's motion for summary judgment.[1] To that end, plaintiff seeks an order striking defendant's answer or, in the alternative, precluding defendant from using testimony as to what was alleged to be on the surveillance video.

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1. It is noted that the court need not have considered Mr. Vaccaro's testimony at all – in any event – in arriving at its conclusion as to whether defendant was entitled to summary judgment based upon the fact that plaintiff's accident was not caused by a condition created by defendant but rather by an alleged assault.

In opposition, defendant avers that it neither intentionally nor negligently lost the video since defendant was not made aware of the instant suit until March 2012 and, as such, was not placed on notice that the video required preservation.[2] In any event, defendant argues that the video was not a crucial piece of evidence leaving plaintiff without the ability to prove his case.

> "[U]nder the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. The determination of a sanction for spoliation is within the broad discretion of the court, and a court may impose a sanction less severe than the striking of the responsible party's pleading or no sanction where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" (*Falcone v Karagiannis*, 93 AD3d 632 [2012] [internal quotations and citations omitted]; *see also Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598 [2011]; *Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009 [2010]).

While plaintiff demonstrated that defendant negligently disposed of the surveillance video, considering the fact that Mr. Vaccaro testified that he purposefully burned copies of same in case they would be needed for later use and then could not produce same (*see Lentz v Nic's Gym, Inc.*, 90 AD3d 618 [2011]; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 610 [2011]), plaintiff did not demonstrate that he was left "prejudicially bereft" of a means of proving his case simply by having been "deprived of the opportunity to observe the video clip" which apparently forms the basis of one of defendant's defenses, such that the drastic remedy of striking the answer is warranted (*see Laskin v Friedman*, 90 AD3d 617 [2011]; *Madkins v State of New York*, 82 AD3d 1174 [2011]; *Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814 [2010]). Rather, the court – in its exercise of discretion and given the circumstances of this case – finds that defendant is precluded from offering Mr. Vaccaro's testimony regarding what he is alleged to have seen on the video.[3] Notwithstanding, the court recognizes that, during the course of trial, depending on, inter alia, the presentation of evidence and witnesses, circumstances may change which may warrant a different result and, as such, the Justice assigned to the trial of this matter is in a

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2. Defendant also claims that it was possible that the police took the copies as the incident is alleged to have involved an assault.

3. Mr. Vaccaro's testimony regarding said video, in any event, appears to be speculative in that he was not able to say with certainty whether the video depicted plaintiff and the circumstances which are alleged to have occurred on the date of the accident.

better position to determine whether a different result is warranted or appropriate at that juncture.

Accordingly, defendant's motion is denied. Plaintiff's cross motion is granted only to the extent set forth above.

Dated: May 7, 2014

J.S.C.