SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

VINCENT GUARISCO,	TRIAL/IAS, PART 39 NASSAU COUNTY INDEX NO.: 012864-12
Plaintiff,	MOTION SUBMISSION DATE: 4-24-14
-against-	
KING KULLEN GROCERY CO., INC.,	MOTION SEQUENCE NO. 001
Defendant.	

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Memorandum of Law	X
Affirmation in Opposition and Exhibits	X
Reply Affirmation	X

Plaintiff moves for an Order striking Defendant's answer for failure to exchange video surveillance footage for a twenty-four (24) hour period prior to the subject accident; or in the alternative, precluding Defendant from offering testimony to contradict Plaintiff's claim of adequate notice of the alleged defective condition; and/or precluding Defendant from offering into evidence the portion of the video surveillance footage that has been exchanged; and/or directing that an adverse inference charge be given at trial with respect to the missing footage.

This is an action for alleged personal injuries sustained by Plaintiff when he allegedly slipped and fell in an aisle of Defendant's supermarket on June 7, 2012 at approximately 7:05 a.m. On June 12, 2012, Plaintiff sent a certified letter to Defendant advising of a claim and requesting that any and all video surveillance footage for the twenty-four (24) hour period prior to the time of the accident be preserved. Subsequent to commencement of this action, Plaintiff served a notice for discovery and inspection requesting any and all video surveillance footage for the twenty-four (24) hour period prior to the time of the accident. In response to that notice and subsequent court orders, Defendant exchanged video surveillance footage for a period of approximately thirty-five (35) minutes prior to the accident through approximately one hour and a half after the accident. Plaintiff followed up requesting the full footage, and Defendant responded by stating that all footage in its possession was exchanged. Plaintiff now moves for sanctions for the failure to produce the rest of the footage.

Defendant was put on notice of a potential lawsuit when contacted within five days of the accident. Defendant therefore had an obligation to preserve the video surveillance footage. *See DiDomenico v. C & S Aeromatik Supplies,* 252 AD2d 41 (2nd Dept. 1998). Defendant contends that upon receiving notice all normal procedures were followed. As a result, a representative of Defendant's Risk Management Department went to the subject store and reviewed the video surveillance footage, which Defendant claims to

show Plaintiff entering the aisle in question at approximately 7:06 a.m. and surreptitiously creating the condition that allegedly caused him to fall.

It is Defendant's standard practice to preserve footage from the time of the creation of the condition through the time of the incident. As a result of the representative's determination as to the cause of the condition, he preserved the video for one half-hour prior to the creation of the condition. Any footage not preserved was deleted approximately thirty (30) days after the accident.

Regardless of Defendant's standard practices, it is not for the representative to make a determination as to what created the condition that caused the accident. That is for the trier of fact to determine. Further, when the representative went to the store he was on notice that Plaintiff had requested preservation of the footage for a twenty-four (24) hour period prior to the incident.

Defendant's actions do not indicate that the spoilation of the rest of the footage was done wilfully. It appears that Defendant's representative was following its protocol. However, an answer can be stricken even if the spoliation was not wilful. *Id.* at 53, citing *Kirkland v. New York City Hous. Auth.,* 236 AD2d 170 (1st Dept. 1997); *Healy v. Firestone Tire & Rubber Co.,* 212 AD2d 351 (1st Dept. 1995), *rev'd on other grounds*, 87 NY2d 596 (1996); *Vaughn v. City of New York,* 201 AD2d 556 (2nd Dept. 1994); *Squitieri v. City of New York,* 248 AD2d 201 (1st Dept. 1998); *Madge, Rose, Guthrie, Alexander & Ferdar v. Penguin Air Conditioning Corp.,* 221 AD2d 243 (1st Dept. 1995).

Although Plaintiff has demonstrated that the remaining footage should have been preserved, he has failed to show that it is essential to the prosecution of his case. The half hour prior to Plaintiff's fall that is depicted on the footage should be a sufficient time frame, especially in light of the fact that other customers are shown walking in the same location. However, Defendant's excuse for not preserving the full footage requested is not reasonable. As such, rather than sanction Defendant with the drastic remedy of striking Defendant's answer, precluding Defendant from offering evidence to contradict Plaintiff's claim of adequate notice, or precluding Defendant from offering the surveillance video into evidence, it is more appropriate to direct that an adverse witness charge be given at the trial of this matter as to the requested portion of the video that was not preserved. *Coleman v. Putnam Hosp. Ctr.*, 74 AD3d 109 (2nd Dept. 2010); *Tapia v. Royal Tours Service,* 67 AD3d 894 (2nd Dept. 2009).

Accordingly, Plaintiff's motion is granted to the extent that Plaintiff is entitled to an adverse inference charge at trial.

This constitutes the Decision and Order of the Court.

Dated: June 6, 2014

STEVEN M. JAEGER, A.J.S.C.