SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ROBERTO HAIBI, individually and as Administrator of the Estate of Erasmo Haibi, Deceased,

Plaintiff

- against -

790 RIVERSIDE DRIVE OWNERS, INC., individually and d/b/a RIVIERA COOPERATIVE, 790 RIVERSIDE DRIVE, LLC, individually and d/b/a RIVIERA COOPERATIVE, and ORSID REALTY CORP.,

Defendants

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Index No. 116364/2009

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, the administrator of the deceased Erasmo Haibi's estate, sues to recover damages for Haibi's injury from a fall on an interior stairway in defendants' residential apartment building October 24, 2009. On the day of Haibi's fall, his granddaughter, Danette Rodriguez, and defendants' building property manager or superintendent watched a surveillance videotape depicting Haibi's fall and the stairs on which Haibi fell. Rodriguez testified at her deposition, without contradictory evidence, that, when she watched the videotape, she requested a copy from defendants' superintendent. Plaintiff's attorney also made a written request to preserve the videotape November 12, 2009, by overnight mail delivery to defendants at their building. After neither Rodriguez nor plaintiff's attorney

received a response to the requests, and plaintiff then moved for preservation of the videotape in February 2010, defendants admitted it had been destroyed by the recording device's automatic overwriting and erasure after 30 days.

II. GROUNDS FOR THE RELIEF SOUGHT

Due to defendants' destruction of the videotape, plaintiff now moves for an instruction at trial that the jury may infer that the videotape would have supported plaintiff's depiction of Haibi's fall and the stairs' condition when Haibi fell. Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007); Strong v. City of New York, 112 A.D.3d 15, 24 (1st Dep't 2013); Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d 570, 571 (1st Dep't 2013); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 250 (1st Dep't 2011). Defendants' destruction of the tape, whether willful, reckless, or negligent, deprives both plaintiff and defendants of that evidence. Although each side may present a witness who viewed the videotape, the tape itself is the only impartial, objective, and hence definitive evidence of Haibi's fall and the stairs' condition. Strong v. City of New York, 112 A.D.3d at 21-22; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d 33, 47 (1st Dep't 2012). The tape is especially critical now, since the only human eyewitness, Haibi himself, is deceased, and the witnesses who viewed the tape did so only once over five years ago.

Since defendants have not deprived plaintiff of all means to establish defendants' liability and Haibi's injury, but have

deprived plaintiff of this impartial and objective material evidence, the court's task is to provide proportionate relief to restore balance in favor of the party who has lost evidence at an adversary's hands, whether or not the adversary caused the loss willfully. Ortega v. City of New York, 9 N.Y.3d at 76; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d 481, 482 (1st Dep't 2010). Defendants were asked on the day of Haibi's injury and 19 days later for a copy of the videotape, which would have ensured its preservation, and in the second request specifically to preserve the tape as well. Although defendants' property manager at the building, who receives the mail addressed to defendants there, denies personally receiving the written request, he does not indicate that he made any effort to determine whether any one else among defendants' personnel received the correspondence in his stead. In fact, Federal Express' delivery receipt shows that a person signing as "M. Rivera" received the correspondence. Reply Aff. of Scott Kagan Ex. B. Moreover, the property manager does not deny Rodriguez's oral request on the day of Haibi's injury. The property manager's comprehensive and specific knowledge of the injury itself, after watching the videotape, was enough to provide notice to defendants that Haibi would claim against defendants for his fall on their stairs. Strong v. City of New York, 112 A.D.3d at 22-23; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d at 36, 42; Ahroner v. Israel Discount

Bank of N.Y., 79 A.D.3d at 482.

III. DEFENDANTS' OPPOSITION

Defendants, which actually propose an adverse inference as a proportionate remedy, do not oppose plaintiff's request for relief based on their nonreceipt of any notice. Instead, they insist that the requests for the surveillance videotape were insufficiently comprehensive and specific regarding Haibi's injury.

Rodriguez's request was for the very footage she and the property manager had just viewed. The attorney's request was to preserve "any and all video and/or DVD footage" that depicted "Erasmo Habib, a resident of apartment #MM . . . on October 24, 2009, when he was caused to fall down the lobby stairs" in the "Lobby of 790 Riverside Drive," which "may become evidence in a legal proceeding," and which "Mr. Habib's niece has viewed." Aff. in Opp'n of Patrick J. Corbett Ex. C, Aff. of Aramis Fournier Ex. A, at 1.

Defendants nowhere indicate what details were lacking such that these requests failed to notify defendants what footage they were to preserve. While the correspondence misspells Haibi's last name and misidentifies his granddaughter as his niece, both identities are unmistakable from Haibi's first name and his apartment and from Rodriguez's viewing of the footage, and defendants do not cite these inaccuracies as a reason why the notification of what footage defendants were to preserve was insufficient. The explanation for the request may be relatively

unspecific, since no legal action had yet commenced, but it is difficult to conceive what further details might have been provided, let alone been necessary, to apprise defendants of the particular footage Haibi and his representatives were referring to and requesting be preserved. The necessary specificity concerns identification of what is depicted, when, and where: all details that plaintiff's representatives specified. See Dulac v. AC & L Food Corp., 119 A.D.3d 450, 453 (1st Dep't 2014).

IV. CONCLUSION

In sum, defendants were in sole possession of the videotape, were notified to preserve specified footage from October 24, 2009, before it was to be automatically erased 30 days later, did not question the specification of what footage they were asked to preserve, and yet allowed the specified footage to be destroyed, evidence unquestionably relevant to plaintiff's claims. Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d at 44; Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d at 482. See Pegasus Aviation I, Inc. v. Varig Logistica, S.A., 118 A.D.3d 428, 433 (1st Dep't 2014). Even if it is questionable, without viewing the tape now, how essential it would have been, because it is defendants that have placed plaintiff and the court in the position where the tape's usefulness is uncertain, defendants may not benefit from any such uncertainty. Strong v. City of New York, 112 A.D.3d at 24; Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 250-51, 255. Based on the notice to defendants,

timely provided with the required specificity, they owed a duty to preserve the tape. Dulac v. AC & L Food Corp., 119 A.D.3d at 451, 453; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d at 41-42. Therefore the court may not condone their destruction of the tape, even if the destruction was negligent, by permitting defendants to escape any consequences. Ortega v. City of New York, 9 N.Y.3d at 79; Strong v. City of New York, 112 A.D.3d at 21-22. The very fact that defendants allowed the designated footage to be destroyed after their property manager had viewed it and plaintiff's representatives twice had requested it raises an inference that defendants destroyed the footage because it was unfavorable to their defense against liability for Haibi's fall.

Plaintiff does not seek to preclude defendants from offering any evidence that their stairs were safe or that the stairs' condition did not cause Haibi to fall. Plaintiff does not seek to preclude defendants' property manager from testifying about what he viewed on the videotape. Plaintiff seeks only an instruction at trial that, due to defendants' destruction of the videotape, the jury may infer that the videotape would have supported plaintiff's depiction of Haibi's fall and the stairs' condition when Haibi fell. Strong v. City of New York, 112 A.D.3d at 24; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d at 44; Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 250, 254-55. This inference is the same that may be drawn from the

fact that defendants allowed the footage to be destroyed after their property manager had viewed it and plaintiff's representatives twice had requested it. Since a penalty is warranted, and this one is the least harsh of the applicable penalties, the court grants plaintiff's motion insofar as it seeks this relief. C.P.L.R. § 3126; Strong v. City of New York, 112 A.D.3d at 24; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d at 44, 47; Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 250, 255.

Plaintiff's motion insofar as it seeks to compel responses to his demand for a bill of particulars is resolved by defendants' stipulation dated October 9, 2014, to supplement the demanded particulars. That stipulation also withdraws his motion insofar as it seeks defendants' deposition as moot. His motion insofar it seeks to extend his time to file a note of issue is resolved by stipulations at status conferences. As set forth above, the court grants the remaining relief sought: plaintiff is entitled to an instruction at trial that, due to defendants' destruction of the videotape, the jury may infer that the videotape would have supported plaintiff's depiction of Haibi's fall and the stairs' condition when Haibi fell.

DATED: December 19, 2014

LUCY BILLINGS, J.S.C.