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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK , IAS PART 11

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BARBARA BORITZ-COHEN, Index No. 153839/12

Plaintiff,

-against-

PATHMARK STORES, INC.,

Defendant.

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JOAN A. MADDEN, J.:

In this personal injury action, plaintiff moves "to dismiss" defendant's answer and to direct a judgment as to liability on plaintiff's favor based on defendant's alleged spoliation of evidence and its alleged failure to comply with court orders directed discovery (motion seq. 001). Defendant opposes the motion.

Background

Plaintiff asserts that she sustained personal injuries on May 13, 2012, at approximately 7:00 pm when she was struck by a metal cart pushed by defendant's employee while plaintiff was a customer standing line at the cash register at defendant's store no. 610 located at 410 West 207th street in Manhattan (hereinafter "the Store").

On May 21, 2008, counsel for plaintiff forwarded a letter by certified mail, return receipt requested to defendant's claim representative which requested a copy of the accident report and the video tape from the date of the accident. On May 22, 2012, plaintiff's counsel sent a letter to defendant supermarket advising that "the store video/film must be preserved as evidence of the matter to be potentially used a trial." This action was filed on June 20, 2012. On December 4, 2012, plaintiff served a notice for discovery and inspection which included demands for the accident report(s) and all photos, films, discs, etc, showing the occurrence, the scene of the occurrence and/ the plaintiff within the premises-including plaintiff after the occurrence.

Defendant did not respond the Notice of Inspection. Despite numerous orders requiring

the production of surveillance tape, defendant has failed to produce any tape with images of the accident[1] or an affidavit stating none is available. In August 2014, defendant provided plaintiff with a document entitled "Customer Incident Prompt Sheet," which states that accident occurred when "customer standing and got bump[ed] by cart that an employee was pushing." The form includes a question as to whether the area was covered by s surveillance camera and the box with "yes" is checked. To the right of the box, the form states in bold letters "if yes, please isolate for future retrieval."

Plaintiff argues that based on defendant's failure to produce the videotape of the incident, or to provide an explanation for its failure to produce it despite repeated court orders to do so, defendant's answer should be stricken, and judgment of liability enter in its favor. Alternatively, plaintiff argues that the failure to preserve the videotape should result in spoliation sanctions including striking defendant's answer or requiring an adverse inference charge at trial.

In opposition, defendant argues that videotape preservation procedures were followed and submits the affidavit of Tom Jones (Jones), the Store's day-shift store manager. Jones states that on the date of the accident he requested that the in-store video surveillance department preserve the tape by copying to a disc of all images involving the plaintiff. Jones states that the request was made orally. He further states that the same day he was given a disc and he placed it an envelope addressed to defendant's risk management department and put it in the inter-office mail bag kept in the Bookkeeper's office within the Store. He further states that "upon information and belief" that the mail bag was picked up in the regular course of business by a courier service, which brought it to defendant's risk management department in New Jersey.

Jones states that, upon information and belief, on May 15, 2012, he communicated with

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[1]Defendant provided plaintiff with a video disc which defendant stated "could have" images of the accident. However, the disc did not contain any relevant images or appear to be from the date of the incident.

the insurance company administrator at the Store and informed him that the videotape was preserved on a disc and sent to defendant's risk management department in New Jersey. He also states that he had no further contact with his employer or the insurance company administrator regarding the videotape until the late summer or early fall of 2014, when he was contacted by defendant's attorney regarding his recollection as to the videotape.

Defendant also submits an affidavit of Harry Kickey ("Kickey") the director of risk management for The Great Atlantic & Pacific Tea Co., which owns the defendant. Kickey states that he established the video retention and request procedures relating to accident reported by customers about incidents that happen in stores owned by The Great Atlantic & Pacific Tea Co. and that these procedures were in place for the Store. He further states that he reviewed the incident report and conducted a search of all documents and information relating to the receipt of a video of the accident. After reviewing the video logs kept in the ordinary course of business he states that "the logs represent that no video surveillance footage capturing the accident [at issue]...was received by The Great Atlantic & Pacific Tea Co." (Kickey Aff., ¶ 7).

Defendant argues that the absence of the videotape will not fatally compromise plaintiff's case since plaintiff identified an eyewitness named Nelson Dez Grudice who observed the accident. Moreover, the record shows that defendant took affirmative steps to preserve the video and that the video was not intentionally lost, and that since the destruction of the videotape was, at most, negligent spoliation sanctions are not appropriately granted in the absence of a showing that the tape was crucial to plaintiff's case.

Defendant also asserts that its current law firm replaced the previous firm and since that time, counsel has diligently attempted to comply with all discovery obligations, and each time the issue of production of the incident report and videotape arose, defendant explained the extent of its search efforts.

When defendants involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law." Ortega v. City of New York, 9 NY3d 69, 76 (2007). Thus, under CPLR 3126, "if the court finds that a party destroyed evidence that 'ought to have been disclosed..., the court may make such orders with regard to the failure or refusal as are just.'" Id. This provision gives New York courts "broad discretion to provide proportional relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay the cost to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at trial of the action." Id. (citations omitted). In addition, "where appropriate a court can impose the ultimate sanction of dismissing the action or striking the responsive pleadings, therefore rendering a judgment on default against the offending party." Id. (citations omitted).

However, the severe sanction of dismissing the action or striking responsive pleadings is not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of its destruction. See Balaskonis v. HRH Constr. Corp., 1 AD3d 120 (1st Dept 2003); Riley v. ISS Intern. Service System, Inc., 304 AD2d 637 (2d Dept 2003). At the same time, when the destroyed evidence is not shown to be crucial, the lesser sanctions in the form of an adverse inference instruction, a missing document charge or a preclusion order have been found to be a proper exercise of the court's discretion. See Metropolitan New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc., 1 AD3d 168 (1st Dept 2003); Melendez v. City of New York, 2 AD3d 170 (1st Dept 2003); Foncette v. LA Express, 295 AD2d 471, 472 (2d Dept 2002).

Here, as it has not been shown that the videotape is crucial to proving plaintiff's case, it is

not appropriate to strike defendant's answer. Instead, the appropriate sanction is that a negative inference charge shall be given at trial in accordance with PJI 1:77. See generally Ortega v. City of New York, 9 NY3d at 76; Hulett ex rel. Hulett v. Niagara Mohawk Power Corp., 1 AD3d 999 (4th Dept 2003)(trial court did not abuse its discretion in determining that the proper sanctions for railroad defendants' spoliation of evidence by failing to preserve, *inter alia*, dispatcher records and audio tapes was the giving of a missing evidence charge to the jury and precluding the use of audible portions of the audio tapes at trial). This sanction is appropriate as it has not been shown that the failure to produce the videotape was wilful or contumacious, and thus striking defendant's answer is unwarranted.

With respect to the description of the accident in the incident report, including the use of the word "bump," the court makes not determination as to its admissibility as this is an evidentiary issue is for the trial court.

In view of the above, it is

ORDERED that plaintiff's motion is granted to the extent that that a negative inference charge shall be given at trial in accordance with PJI 1:77 with respect to the missing videotape.

DATED: June 26, 2015

HON. JOAN A. MADDEN
J.S.C.