Macias v Asal Realty LLC
2015 NY Slip Op 32684(U)
October 29, 2015
Supreme Court, Bronx County
Docket Number: 306584/10
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

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JIMMY MACIAS,

Plaintiff,

-against-

ASAL REALTY LLC,

Defendants.

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Index No.: 306584/10

DECISION/ORDER

Howard H. Sherman
J.S.C.

The following papers1-3 read on this motion to strike defendant's answer noticed on April 14, 2014 and duly submitted on the motion calendar of August 18, 2014.

	PAPERS NUMBERED	
Notice of Motion, Affirmation, Exhibits A-F	1	
Affirmation in Opposition	2	
Affirmation in Reply	3	

Plaintiff commenced this action seeking damages for injuries sustained when he fell while exiting defendant's residential building after having made a delivery for his employer, FedEx. Plaintiff alleges that when he stepped on to the lobby floor mat, it began to move, causing him to fall and to sustain injuries to his right knee.

Plaintiff now moves for an order pursuant to CPLR 3126 striking defendant's answer for spoliation due to the failure to preserve from automatic deletion video recordings of the lobby location at the time of the accident. It is plaintiff's contention that defendant should have reasonably anticipated litigation to follow the incident and preserved the video because the resident superintendent immediately became aware of the accident, and observed plaintiff being removed by ambulance from the building, and within a day or so, imparted this information to the owner.

Plaintiff also asserts that the recording was deleted with the requisite "culpable state of mind" because despite his contemporaneous knowledge of the incident, the superintendent allowed the automatic overwriting to proceed a week or two later. It is also maintained that this evidence is relevant to plaintiff's claim as it would have provided indisputable proof of the causative defect.

In opposition, defendant argues that the inadvertent deletion does not warrant the drastic sanction sought because at the time of the deletion there was no notice of a pending lawsuit, nor is there any showing that by virtue of its deletion, plaintiff has been deprived of establishing his claim.

Testimony

It is not here disputed that at the time of the incident there were two video surveillance cameras positioned in the building lobby, and that the recording system in place automatically overwrites the videos within a week or two of recording. It is also undisputed that defendant took no steps to preserve the recording of the lobby on the day of the accident.

The disputed portion of the record is that with respect to the timing of the owner's first notice of the incident, and the superintendent's observation, if any, of the video . There are significant discrepancies in the respective testimony of defendant's witnesses, the resident superintendent, and sole caretaker of the 36- unit building, Aloune Siss, and the building's owner, Arnold Kotzen. The court also notes an internal inconsistency in Siss' testimony concerning the timing of an investigative visit by representatives of FedEx in connection with plaintiff's work-related claim .[1]

Siss testified that he was alerted by a tenant that a FedEx employee had fallen in the lobby, and after proceeding there, he observed plaintiff and a coworker sitting on a step outside the building [SISE EBT: 17-19]. Siss stayed until the ambulance arrived [21], and on the following day,

[1] Plaintiff confirmed that he made a claim for Worker's Compensation benefits right after the accident [MACIAS EBT: 18].

he called Kotzen and advised him of the incident [26]. At no time prior to its automatic overwriting [2] did Siss look at the video [22-23].

He also testified that after the accident, Fed Ex employees came to the building and "asked [him] what happened", and he told them he did not witness the accident. The visit occurred " a couple of days" after the incident [22:7-8]. Siss did not view the video with the Fed Ex workers, because they "didn't ask [him] anything." He testified as follows concerning the timing of this meeting in connection with the availability of the video.

Q. So you never showed anybody that tape ?

A. No, because the tape erase by itself.

Q. But I'm talking before it erased itself, like within the first week or two.

A. Before it erased, I don't even look at that time and nobody ever ask me to look at that time and probably maybe these people , when they come it's like maybe two, three, four weeks. It's already gone, it's not there no more.

Q. So by the time the people from FedEx came, it was three to four weeks later ?

A. Yes, I think so.

23:14-24:2

Kotzen testified that he first became aware of the accident upon his receipt of process in this case [KOTZEN EBT: 11]. He then contacted Siss , who told him that while he had reviewed the video, he did not have it [54]. Also, as pertinent here, Kotzen testified that in 2010, Siss would review tapes on a daily basis, in large measure to monitor whether tenants were leaving garbage in the hallway [46], and "it was completely up to [Siss] whether or not the videos were erased or kept."

[2] Siss testified that the automatic deletion occurred one [24], and two [22] weeks after recording.

[24:19-22]. A monitor was maintained in the basement outside of Siss's apartment [44], and there was also a video feed to Kotzen's office [55].

Discussion and Conclusions

The court first notes that it is the common-law doctrine of spoliation, rather than CPLR 3126, that must be considered on this motion because the statute pertains to refusal to comply with a discovery order or a willful failure to disclose, neither of which is applicable here. (see, Strong v. City of New York, 112 A.D.3d 15, 21 , 973 N.Y.S.2d 152 [1st Dept. 2012]; compare, Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d 481, 913 N.Y.S.2d 181 [1st Dept. 2010], cited by plaintiff as authority here). [3]

Under the common- law doctrine, a party may be sanctioned where it negligently loses or intentionally destroys key evidence (see, Morales v. City of New York , 130 A.D.3d 792, 793, 13 NYS3d 548 [2nd Dept.. 2015]), and while precedent has held that only "willful, deliberate, or contumacious" destruction of evidence warrants the imposition of spoliation sanctions (see e.g. *Kerman v Martin Friedman, C.P.A., P.C.*, 21 AD3d 997, 999, 801 NYS2d 387 [2d Dept 2005]) [the court] on many occasions, authorized the imposition of sanctions where the destruction of evidence was negligent rather than willful (see *Adrian v Good Neighbor Apt. Assoc.*, 277 AD2d 146, 717 NYS2d 99 [1st Dept 2000], lv dismissed 96 NY2d 754, 748 NE2d 1075, 725 NYS2d 279 [2001]; *Sage Realty Corp. v Proskauer Rose,* 275 AD2d 11, 713 NYS2d 155 [1st Dept 2000], lv dismissed 96 NY2d 937, 759 NE2d 374, 733 NYS2d 375 [2001]; *Squitieri v City of New York*, 248 AD2d 201,

[3] Nor, it is noted, was defendant in receipt of a notice from plaintiff's counsel to preserve the video footage prior to its deletion, triggering certain obligations on behalf of the building owner (compare, Duluc v. AC & L Food Corp., 119 A.D.3d 450, 990 N.Y.S.2d 24 [1st Dept. 2014] lv den. 24 N.Y.3d 908).

669 NYS2d 589 [1st Dept 1998])." Strong, supra, at 21

The negligent erasure of tapes "can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was 'on notice [that] the [audiotapes] might be needed for future litigation' " (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 220, 786 NYS2d 41 [1st Dept 2004]; *Westbroad Co. v Pace El. Inc., 37 AD3d 300,* 829 NYS2d 529 [1st Dept 2007]; *Enstrom v Garden Place Hotel, 27 AD3d 1084, 811 NYS2d 263* [4th Dept 2006]; *Lawrence Ins. Group v KPMG Peat Marwick, 5 AD3d 918, 920, 773 NYS2d 164* [3d Dept 2004]; *DiDomenico v C & S Aeromatik Supplies, 252 AD2d 41, 53, 682 NYS2d 452* [2d Dept 1998])." Id. at 22

To prevail on this motion, plaintiff bears the burden of establishing that 1) defendant had an obligation to preserve the video at the time it was deleted, and 2) that it was deleted with a "culpable state of mind," which may include ordinary negligence, and 3) the deleted video was relevant to the plaintiff's claim such that the trier of fact could find that the evidence would support that claim (see, Pegasus Aviation I, Inc. v. Varig Logistica S.A., 118 A.D.3d 428, 435, 987 N.Y.S.2d 350 [1st Dep. 2014]; see also , Duluc , supra at 451-452 [1st Dept. 2014];VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 37, 939 N.Y.S.2d 321 [1st Dept. 2012]).

In determining whether to impose sanctions, this court is charged with consideration of the extent "that the spoilation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. " (Dulac, supra at 451-452, citing authority of Standard Fire Ins. Co. supra at 218), and in considering the sanction to be imposed "appropriately tailor[ing] it to achieve a fair result." (Cohen Bros. Realty v J.J. Rosenberg Elec. Contrs., 265 A.D.2d 242, 245, 697 N.Y.S.2d 20 [1st Dept. 1999], *app dism* 95 N.Y.2d 791, 733 N.E.2d 229

[2000]; see also, Balaskonis v. HRH Constr. Corp., 1 A.D.3d 120, 767 N.Y.S.2d 9 [1st Dept. 2003]). The determination of the appropriate sanction is within the broad discretion of the court , and "[t]he nature and severity of the sanction depends upon a number of factors, including , but not limited to, knowledge and intent of the spoliator , the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party." (Samaroo v. Bogopa Serv. Corp., 106 A.D.3d 713, 714, 964 N.Y.S.2d 255 [2nd Dept. 2013]; see also, Morales v. City of New York , supra at 793)

Upon a review of the testimony here, and the above precedent, it is the finding of this court that prior to automatic overwriting one to two weeks after the incident, defendant was on notice of a credible probability that it would become involved in future litigation , and consequently , that the video depicting the specific location of plaintiff's fall at the time of the accident might need to be viewed for purposes of that litigation . Despite this knowledge, defendant took no affirmative action to ensure that the video was not erased (see, Voom HD Holdings LLC, supra at 43 ; see also, Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d 570, 571, 958 N.Y.S.2d 389 [1st Dept. 2013]). As noted, it is undisputed that the resident superintendent witnessed the plaintiff being taken by emergency services from the building , and while waiting for the ambulance, Siss had a conversation with either plaintiff or with his co-worker [4] concerning the specific allegation here, that plaintiff slipped and fell inside the lobby. [5] To the extent that it is also undisputed that the owner delegated

[4] Plaintiff stated that he heard a conversation between his co-worker and the superintendent concerning the mat moving, while Siss testified that he spoke to plaintiff who stated that he had slipped inside the lobby [SISS EBT: 19; MACIAS EBT: 47-48].

To the extent Siss provided alternate timings for the Fed Ex visit, this factor is not considered for purposes of the court's finding.

to Siss exclusive discretion with respect to the review and the maintenance of the videos, with the understanding that the superintendent reviewed them on a daily basis, any unresolved issue of when the owner received notice of the incident is not crucial to the court's determination that on the day of the accident defendant by the party exclusively charged with maintaining the videos "was on notice that the surveillance video footage might be needed for future litigation." Maiorano, supra

While the video is relevant to plaintiff's claim , its spoliation has not fatally compromised his ability to prove his claim nor does it "leave[] [plaintiff] prejudicially bereft of appropriate means to confront a claim [or defense] with incisive evidence (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174, 666 NYS2d 609 [1st Dept 1997] [internal quotation marks omitted] ." (Suazo v. Linden Plaza Assoc., L.P., supra at 571). He can testify as to the circumstances of his fall, including his observations immediately preceding and after it. Nor , on this record, is plaintiff confronted with a situation in which he is compelled to accept "defendant's self-serving statement concerning the contents of the destroyed tapes" (Gogos v Modell's Sporting Goods, Inc., 87 AD3d 248, 251, 926 NYS2d 53 [1st Dept 2011]), because Kotzen's testimony concerning Siss's statement about the contents of the video is inadmissible hearsay.

In consideration of these factors, the court finds that nothing in this record would support a finding that the deletion of the video was made in such bad faith as to justify the granting of the drastic relief requested , the striking of defendant's answer (compare, DiDomenico v. C & S Aeromatik Supplies, Inc., 252 A.D.2d 41, 682 N.Y.S.2d 452 [1st Dept. 1998]). However , to the extent that the deletion of the video may have impaired plaintiff's, ability to establish prior notice of a defective condition in the lobby, as in Suazo, supra., the court finds that a less severe sanction would be appropriate consisting of an adverse inference charge at trial that would permit the jury

would be appropriate consisting of an adverse inference charge at trial that would permit the jury to infer that relevant evidence against defendant's interest was present on the erased recording (see New York Pattern Jury Instructions 1:77.1)

Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of directing that that an adverse inference charge be given at trial relative to the missing surveillance video of the lobby location on the day of the accident , with the trial judge to determine the precise wording of the jury instruction ordered by this Court.

This shall constitute the decision and order of this court.

Dated: October 29 2015

Howard H. Sherman