Slutsky v City Ctr. of Music & Drama, Inc.
2016 NY Slip Op 30547(U)
April 4, 2016
Supreme Court, New York County
Docket Number: 153629/2014
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

OLEG SLUTSKY and ANNA SLUTSKY,

Plaintiffs

- v -

CITY CENTER OF MUSIC & DRAMA, INC.,
LINCOLN CENTER FOR THE PERFORMING ARTS, INC.

Defendants.

INDEX NO. 153629/2014

MOTION DATE 02/10/2016

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is ordered that defendant's motion for summary judgment dismissing plaintiff's complaint and plaintiff's cross-motion for an adverse inference at trial due to defendant's spoliation of evidence are denied.

Defendant's Summary Judgment Motion:

In this action to recover for personal injuries as a result of plaintiff Oleg Slutsky's slip and fall on an alleged snowy/icy surface on defendant's premises, defendant moves for summary judgment dismissing the complaint on the grounds that 1) plaintiff Oleg cannot identify the cause of his fall and therefore his allegations of slipping on ice or snow are purely speculative, or 2) putting aside plaintiffs' inability to identify the cause of plaintiff Oleg's fall, defendant's snow removal process did not cause the plaza where plaintiff Oleg fell to be any more dangerous nor did it increase the hazard posed by snow. (see Aff. In Supp.).

Defendant's moving papers contain the deposition transcripts of plaintiff (husband) Oleg Slutsky, plaintiff (wife) Anna Slutsky, a security guard by the name of Nigel Pitt who was at the scene after the fall, and the director of defendant's operations and facilities Edwin Devine. Also included as exhibits are a surveillance video of the moments leading up to and including the accident plus a number of seconds after, an incident report created by defendant's employees, and corrections made by plaintiff Oleg as to his deposition.

Plaintiff Oleg testified at his deposition that : "I stepped on something that I believe to be a piece of ice and I slipped and fell." (see Mot. Exh. F P. 41, L. 3-4).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

When questioned if plaintiff Oleg noticed any ice as he approached the immediate area in which he fell he testified that he was not paying attention but there had been a little bit of snow all over the plaza. (Id. P. 42, L. 10-16). When asked if plaintiff Oleg's foot got stuck on anything, his response was "It wasn't stuck. I just hit whatever was there. Snow or something." (Id. P. 43 L. 2-5). In response to a question about plaintiff Oleg observing any ice in the location of his fall after the accident, he testified that "After I fell, I was bleeding a lot. I didn't see anything." (Id. P. 70 L. 6-10).

Defendant also argues that plaintiff Oleg's revision and changes made to his deposition testimony regarding his viewing of the surveillance video capturing the fall admit that he did not know why he tripped and fell. (see Aff. In Supp. P. 6). Defendant contends that by plaintiff Oleg making the changes to include that his "foot slipped and caught something on the ground," shows that the fall was not caused by snow or ice and proves plaintiff does not know why he fell. (Id. P. 7). Defendant's position is that plaintiff Oleg's testimony proves that he does not know why he fell and that any "assertion that he slipped on ice is merely a guess and...insufficient to maintain this action." (Aff. In Supp. P. 10).

Defendant provides testimony from the security officer, Nigel Pitt, employed by defendant who was at the scene of the fall and provided some information for the incident report, though he did not actually write the report. (Id. P. 7). Mr. Pitt testified that plaintiff wife told him that her husband "misstep and fell," and that he did not observe any wetness in the area of where plaintiff Oleg fell. (Id. P. 8; also see Pitt's testimony attached as Mot. Exh. H P. 27-28, L. 20-11, and P. 31, L. 17-22). In further support of defendant's contention that plaintiff Oleg was not aware of how he fell, defendant offers plaintiff Anna Slutsky's deposition testimony where Mrs. Slutsky testified that she did not see any water, salt, garbage, or any type of broken sidewalk or concrete around her husband's feet. (see Aff. In Supp. PP. 8-9; Note: the specific pages of Mrs. Slutsky's testimony referred to in the Aff. In Supp. are not provided in the deposition pages of Mot. Exhibit J, i.e. P. 19-20).

In the alternative, defendant argues that even if plaintiff Oleg's allegations as to falling on ice were true this action could still not stand because defendant was not negligent in the removal of any snow or ice from its premises. (Aff. In Supp. PP 10-13). In support of this argument, defendant provides the testimony of its associate director of operations and facilities, Edwin Devine. Mr. Devine testified to the snow removal process at defendant's premises. (see Mr. Devine's deposition testimony attached as Mot. Exh. K). Defendant's position is that the snow removal procedures in effect at the time of plaintiff Oleg's fall shows that the snow removal efforts did not make the plaza "anymore dangerous nor did it in any way increase the hazards posed by the snow." (see Aff. In Supp. P. 13).

Defendant moves for summary judgment dismissing the complaint on the grounds that plaintiff Oleg is speculating as to how he fell and there is no evidence to support a triable issue of fact as to how he fell, and in the alternative that putting this contention to the side, defendant was not negligent in their snow removal process as to make the plaza where plaintiff Oleg fell more dangerous.

In opposition, Plaintiff Oleg argues that in testifying "I stepped on something that I believe to be a piece of ice and I slipped and fell", indicates that he does know why he fell. (see Aff. In Opp. P. 1). Plaintiff Oleg further contends that the incident report prepared by defendant indicates that the area where he fell was wet. (Id. P. 2; also see incident report attached as Mot. Exh. I). Plaintiff Oleg further contends that his testimony together with the deposition testimony of plaintiff Anna stating that when plaintiff Oleg got up after the fall his clothes "...were wet..." and that she saw, "a lot of ice on the plaza," as well as the temperature being below freezing that day all create triable issues of fact. (see Aff. In Opp. P. 5).

Plaintiffs further provide an affidavit of Plaintiff Anna Slutsky whereby she denies certain incident report admissions argued by the defense which were not fully substantiated. (see Aff. In Opp. PP 3-5; see also Affidavit of Mrs. Slutsky attached to Aff. In Opp. as Exh. F). Plaintiffs refer to portions of Mr. Pitt's testimony where he states that he gathers certain information for the incident report and then passes that along to the supervisor. The report is therefore put together with a combination of the security officer's information as well as an assessment by the supervisor. (see Aff. In Opp. P 3; see also PP 13, 14, 18, 23, 24, 26, 27, and 34 of Mr. Pitt's testimony Mot. Exh. H). The supervisor was precluded from being deposed via this Court's Order of May 13, 2015 due to his failure to appear for several court ordered examinations. (see Aff. In Opp. Pg. 5; see also Exh. G attached thereto).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

After reviewing the edited surveillance video of plaintiff Oleg's fall, together with the incident report that states the area where plaintiff Oleg fell was wet, and in taking into consideration each side's arguments, there is clearly an issue of fact as to what, if anything, caused plaintiff Oleg to fall. The surveillance video does not show snow, but the view of the camera does not completely rule out any possibility of ice being present in the plaza either. Therefore, defendant has failed to make a prima facie case for entitlement to judgment as a matter of law.

The totality of the submissions present a triable issue with respect to ice being present in the area where plaintiff Oleg fell. Plaintiffs, in opposition, provide through 1) plaintiff Oleg's testimony that he believes he stepped on ice prior to his fall, 2) Plaintiff Anna's testimony that there was snow and ice all over the plaza and plaintiff Oleg's clothes were wet when he got up after his fall, and 3) that the incident report indicates the area surrounding plaintiff Oleg was wet at the time of the incident.

"The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned." Perez v. Bronx Park South Associates, 285 A.D.2d 402 (Ct. of Appeals 2001), citing Glick & Dolleck v. Tri-Pac Export Corp., 22 N.Y.2d 439 (Ct. of Appeals 1968).

Here, Defendant urges that the surveillance video is a clear depiction of the plaza being clear of any snow and ice. (see Reply Aff. P 2). While it appears through the surveillance video that no snow was in the immediate area where plaintiff Oleg fell, it is not clear that there was absolutely no ice present. This is a triable issue of fact which cannot be decided on the affidavits submitted.

Plaintiff's Cross-Motion for Spoliation of Evidence:

Plaintiffs cross-move for an order determining that defendant engaged in spoliation of evidence by editing the surveillance video of plaintiff Oleg's fall to exclude the portion of the video that shows him being lifted off the ground. The argument is that by editing this portion of the video out the ground beneath plaintiff Oleg could not be observed once he was removed from the area in order to determine what, if any, wetness was present. (see Aff. In Supp. of Cross-Motion). Further, plaintiffs argue that plaintiff Oleg was, "entitled to see if defendant...took any remedial measures to the area in question after SLUTSKY was lifted up." (see Plaintiffs' Reply Aff. P. 2).

In further support of plaintiffs' argument that having access to the post-accident footage was important, plaintiffs further argue that pictures of plaintiff Oleg's jacket, which he was wearing at the time of the accident, were exchanged during discovery and that the pictures show the coat had wet marks, which now show stains, as a result of plaintiff Oleg's fall. (see Aff. In Supp. of Cross-Mot. P 1). Plaintiffs' contention is that having the video of when plaintiff Oleg was lifted from the ground to observe the area beneath him is important because the pictures of the coat show wet marks and stains from the fall, and together with the temperature being below freezing the day of the incident and the readings from

Central Park for that day showing a reading below freezing, "had the video not been destroyed we could have seen the wetness, during this below freezing day." (Id. P 1-2). However, these pictures do not show clear stains, nor can it be said that these stains, if apparent, are a result of plaintiff Oleg's fall on defendant's premises. Further, though plaintiffs provide a temperature reading from the U.S. Dept. Of Commerce National Oceanic & Atmospheric Administration of the day of the incident, no authentication document is provided.

Plaintiffs' main position is that defendant had a duty to preserve any relevant material when litigation is anticipated. (see Aff. In Supp. of Cross-Mot. P 2). Plaintiffs cite Voom HD v. Echo Star, 93 A.D.3d 33 (1st Dept. 2012), arguing that a suspension of a party's routine retention/destruction policy must occur to preserve relevant materials. (see Aff. In Supp of Cross-Mot. P2).However, this is distinguished by Strong v. City of New York, 112 A.D.3d 15 (1st Dep't. 2013). In Strong, the 1st Dep't. specifically refers to the Voom court which incorporated the Zubulake IV rule that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to preserve evidence" as being the standard for discovery in ESI cases. Further, the Strong court addresses whether this "litigation hold" rule should be incorporated into the New York common-law standard regarding non-ESI evidence as the Zubulake standard, which had interpreted and adapted federal rules in ESI discovery, provided "litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered." (see Voom). The Strong court states that a "plaintiff's spoliation claim can be fully addressed under New York's common-law spoliation doctrine," that Voom also observes that this Zubulake standard is "harmonious with New York precedent in the traditional discovery context," and that though some cases involving destruction of non-ESI evidence quote the Voom and Zubulake standard, whereby it is implicitly employing the federal standard for spoliation of non-ESI evidence, "reliance on this federal standard is unnecessary." (see Strong). Lastly, "the erasure of, and the obligation to preserve, relevant audiotapes and videotapes, can be, and has been, fully addressed" using the New York common-law standard. (Id.)

New York's common-law doctrine of spoliation refers to "'willful, deliberate, or contumacious' destruction of evidence." Id., citing Kerman v. Martin Friedman, CPA, PC, 21 A.D.3d 997, 999, 801 N.Y.S.2d 387 [2nd Dept. 2005]. Sanctions for spoliation have also been imposed where the evidence was destroyed negligently rather than willfully. (see Strong). A "negligent erasure of audiotapes 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.'" Id., citing Standard Fire Ins. Co. V. Federal Pac. Elec. Co., 14 A.D. 3d 213, 220, 786 N.Y.S.2d 41 [1st Dept. 2004]. (Emphasis added).

Citing CPLR 3101, plaintiff states that full disclosure of all video shall be provided and that spoliation occurs "when a party destroys key evidence before the other side can examine it." (Kirkland v. NYC Housing Authority, 236 A.D.2d 170 (1st Dept. 1997).

Plaintiffs contend that defendant had control of the surveillance tape, did not have a policy in place at the time of the incident regarding how to deal with surveillance footage, and that the defendant destroyed the relevant portions of the tape due to negligence at the very least. (See Cross-Mot.) Plaintiffs rely on the Affidavit of Nonexistence of Additional Security Footage by Lesley Rosenthal, defendant's Senior Vice President, General Counsel and Secretary as proof of this negligence. (see Cross-Motion and Exhibit D attached thereto.

Plaintiffs' argument, however, is unavailing. Rosenthal's Affidavit provides information as to the customary practice and policy of defendant in deletion and retention of security footage. According to this Affidavit, defendant will "cyclically delete Security footage after thirty (30) days, unless the footage depicts an incident that could give rise to a claim, in which case the thirty-day cyclic deletion is suspended with respect to that footage." (see Rosenthal Aff. attached as Cross-Mot. Exh. D). Rosenthal further explains that after plaintiff Oleg fell on February 16, 2014, defendant "immediately and automatically preserved from cyclic destruction" the security footage showing the fall. (Id. P 1). Any other security footage, or non-incident footage, was "cyclically destroyed on March 18, 2014 pursuant to institutional practice." (Id.).

There is no evidence provided that plaintiffs requested footage of the incident or the footage following the incident prior to commencement of the action on April 15, 2014. The suit was commenced more than 30 days after the incident had occurred and past the time period during which defendant's practice of deleting non-incident footage would have already taken place. It was not until after the lawsuit was commenced that plaintiffs, upon serving demands for discovery, requested the surveillance footage from the incident. (see Aff. In Opp. to Cross-Mot. P 2.) Plaintiffs argue in their Cross-Motion that demands for the surveillance video resulted in defendant producing only a "limited extraction" of the incident. (Aff. In Supp. of Cross-Mot. P 1). However, plaintiffs' demand for discovery was not served until June 12, 2014, well past the 30 day time period in which defendant had its customary practice of deleting non-incident footage. (see Exh. C- Demand for Discovery- attached to Reply Aff. in Supp. of Cross-Mot.) Plaintiffs further argue that this Court's Preliminary Conference Order of July 23, 2014 ordered defendant to respond to plaintiffs' demands. (see Reply Aff. In Supp. Of Cross-Mot. P 3) However, a review of this Court's Order shows that defendant was required to provide plaintiff the video of the accident, which for all intents and purposes defendant did do. (see Preliminary Conference Order attached as Exh. A to defendant's Aff. In Opp. to the Cross-Mot.; see also surveillance video attached as Exh. E to Defendant's Motion).

The video footage provided by defendant is 60 seconds long and depicts the 6 seconds leading up to plaintiff Oleg's fall, plaintiff Oleg's fall, and approximately 54 seconds post-incident where plaintiff Oleg can be seen laying on the ground.

"While it is true that a plaintiff is entitled to inspect tapes to determine whether the area of an accident is depicted and 'should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes', this principle does not translate into an obligation on a defendant to preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a

plaintiff's request for them." Duluc v. AC & L Food Corp., 119 A.D.3d 450 (1st Dept. 2014) citing Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 251, 926 N.Y.S.2d 53 [1st Dept. 2011].

Duluc further states that a "moving party must establish that 1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; 2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and 3) the destroyed evidence was relevant to the moving party's claim or defense." Id. citing Voom.

Defendant was the party with control over the footage, and, with notice that an incident had occurred, was on notice that litigation may be impending. However, in accordance with its ordinary practice, defendant did in fact preserve the relevant portion of the incident in which the footage shows the area of plaintiff Oleg's fall leading up to and including plaintiff Oleg's fall. It was not until plaintiffs' June 2014 discovery demand that a request for "post-accident activities and/or conditions" (see Reply Aff. In Supp. Of Cross-Mot. Exh. C) of surveillance video was made. Hence, the June 2014 demand was made well past the time in which the remaining portions of what defendant declared as portions of non-incident footage was destroyed. Absent a clear showing that defendant engaged in willful or negligent conduct in the erasure of the remaining footage, defendant appears to have been acting in accord with its customary practice of deleting non-incident footage after 30 days, and therefore no spoliation of evidence occurred.

Accordingly , it is ORDERED that defendant's motion for summary judgment, and plaintiff's cross-motion for an adverse inference at trial due to defendant's spoliation of evidence are denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: April 4, 2016

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE