

Abreu v Amir Convenience Store, Inc.

2016 NY Slip Op 30934(U)

May 23, 2016

Supreme Court, New York County

Docket Number: 159150/14

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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FLAVIA ABREU,

Plaintiff,

-against-

Index No. 159150/14

AMIR CONVENIENCE STORE, INC., D/B/A
AMIR CONVENIENCE STORE.

Defendants.

-----X
CAROL R. EDMEAD, J.

Plaintiff Flavia Abreu moves, pursuant to CPLR 3212 (e), for partial summary judgment as to liability, or in the alternative, for an order striking the defendant’s answer, because of spoliation of evidence and a failure to comply with a discovery request. Defendant Amir Convenience Store, Inc., d/b/a Amir Convenience Store (Store), moves for summary judgment dismissing the complaint.

This action arises from an accident at the Store on May 14, 2014, in which plaintiff fell and broke her leg. In her verified bill of particulars, which her attorney acknowledged not having shown to her, plaintiff states that she tripped on cardboard that the Store had placed on the floor because of heavy rain at the time. In her amended bill of particulars, served after her deposition, she states that she tripped over shopping bags left on the floor of the Store by another customer. At her deposition, plaintiff testified: (1) that she slipped on the cardboard, because it was wet, and that she fell on the bags; and (2) that she tripped on the bags. Kelly affirmation, exhibit F at 18.

A party seeking sanctions for the spoliation of evidence must show that it was prejudiced

by the unavailability of the evidence, and that the evidence was destroyed with “a culpable state of mind.” *Duluc v A.C. & L Food Corp.*, 119 AD3d 450, 451 (1st Dept 2014), quoting *VOOM HD Holdings L.L.C. v EchoStar Satellite, LLC*, 93 AD3d 33, 45 (1st Dept (2012)); *see also Parra v City of New York*, 137 AD3d 532 (1st Dept 2016). Both parties have supplied the court with a DVD of footage taken by a security camera at the Store, which shows an unidentified customer leaving her shopping bags and umbrella in the aisle and plaintiff’s subsequent fall. The missing documentation consists of video tapes that were taken by the three other surveillance cameras in the Store, and that were routinely overwritten. Inasmuch as the video tape that was retained and produced by the Store shows the relevant acts of the other customer, in front of nonparty Sunil Guragain, who was working behind the counter, and shows plaintiff’s subsequent accident, that portion of her motion which seeks to strike the Store’s answer for spoliation of evidence is denied. The discovery allegedly denied to plaintiff consists of the last known addresses of Mr. Guragain and Fardush Alam, the two Store employees who were working at the Store at the time of her accident, but were no longer working there at the time of plaintiff’s request. Plaintiff requested those addresses by letter, dated February 9, 2016, and two days later, before the Store could reasonably be expected to reply, she filed her motion for summary judgment. Moreover, in her bill of particulars, plaintiff disclosed that she had both the telephone number and the email address of Mr. Alam. Accordingly, that branch of her motion that seeks an order striking the Store’s answer for failing to comply with a discovery request is denied.

Turning to the merits, the Store argues that it had neither actual, nor constructive notice of the hazard posed by the presence of the shopping bags, and that the hazard was open and obvious. That a danger, such as that posed by the shopping bags left on the floor, is open and

obvious relieves a property owner of a duty to warn of it, but it does not negate the owner's duty to maintain the property in a reasonably safe condition. *Westbrook v WR Activities-Cabrera Mks.*, 5 AD3d 69, 70 (1st Dept 2004); *see also Johnson-Glover v Fu Jun Hao, Inc.*, __AD3d __, 2016 NY Slip Op. 02748 (1st Dept 2016). Here, plaintiff is not complaining about a failure to warn.

In order to impute constructive notice of a hazard to a property owner, the hazard "must be visible and apparent for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gale v BP/CG I LLC*, 49 AD3d 454, 454 (1st Dept 2008), citing *Shernikoff v 1700 Broadway Co.*, 304 AD2d 409 (1st Dept 2003). Here, it is undisputed that plaintiff fell less than three minutes after the shopping bags and umbrella were placed on the floor.

As for actual notice, the parties agree that the DVD "speaks for itself," but they draw opposite conclusions as to whether it shows that Mr. Guragain saw the shopping bags being placed on the floor. As the New York Court of Appeals has recently reaffirmed, "[s]ummary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts." *Friends of Thayer Lake v Brown*, 2016 WL 2633031, 2016 LEXIS 1097,*4 (2016).

Accordingly it is hereby

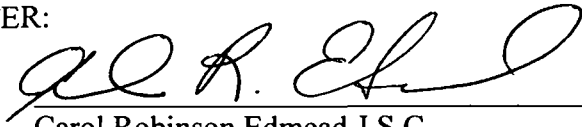
ORDERED that the motion of plaintiff Flavia Abreu for partial summary judgment or, in the alternative, an order striking defendant's answer, is denied; and it is further

ORDERED that the cross motion of defendant Amir Convenience Store, Inc., /d/b/a Amir Convenience Store for summary judgment is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for defendant.

Dated: May 23, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'Carol R. Edmead', written over a horizontal line.

Carol Robinson Edmead J.S.C.
HON. CAROL R. EDMEAD
J.S.C.