

Nagi v Mario Broadway Deli Grocery Corp.
2016 NY Slip Op 31352(U)
June 29, 2016
Supreme Court, Bronx County
Docket Number: 300265/13
Judge: Elizabeth A. Taylor
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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART I.A.S. 2

ABDULLA NAGI,

Plaintiff,

-against

MEMORANDUM
DECISION/ORDER
Index No.: 300265/13

MARIO BROADWAY DELI GROCERY CORP.,

Defendant.

HON. ELIZABETH A. TAYLOR

Defendant moves for an order, pursuant to CPLR§3212, granting defendant summary judgment dismissing plaintiff's complaint in its entirety. Plaintiff cross-moves for an order, pursuant to CPLR§3126, striking defendant's answer for spoliation. The motion and cross-motion are decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on August 12, 2012, as a result of plaintiff's slipping and falling on soapy water on the floor of defendant's premises.

Plaintiff opposed defendant's motion on procedural and substantive grounds. The procedural objection raised by plaintiff asserts that defendant is precluded from offering testimony pursuant to order of Justice Laura G. Douglas, dated November 15, 2013, for failure to appear for an examination before trial ("EBT"). Defendant does not dispute that it failed to produce a witness for an EBT, but asserts that defendant is not precluded as no preclusion order was signed or "So Ordered" by Justice Douglas. Defendant further asserts that plaintiff waived his right to conduct defendant's deposition.

On November 15, 2013, a Compliance Conference was held in this case in Part IA-11. At said Compliance Conference, Justice Douglas issued an order, applicable to all parties herein, which states in relevant part, at follows:

"4. EXAMINATION BEFORE TRIAL:

To Be Held On Feb. 11 & 12, 2014 at 10:00 A.M. At Bronx Diamond or unless otherwise agreed, the Bronx Supreme Court Building, Room 118.

FAILURE TO COMPLY WITH THIS SCHEDULE WILL RESULT IN THE PRECLUSION OF THE OFFENDING PARTY OR WAIVER OF EBT BY NON-APPEARING PARTY*."**

Said order further:

"ORDERED that failure to comply with the directives and schedules detailed herein will result in either a *waiver of the item requested or preclusion of items or testimony of the offending party's evidence at the time of trial, and/or the imposition of costs and sanctions, unless otherwise ordered by the Court.*"

The copy of Justice Douglas' Compliance Conference order, attached to the cross-motion as Exhibit "D," does not contain Justice Douglas' signature. However, in searching the record, the Bronx County Clerk's Office has a signed copy of Justice Douglas' order, dated November 15, 2013, entered on November 20, 2013.

It is undisputed that defendant failed to comply with Justice Douglas' order by not submitting to an examination before trial. Accordingly, pursuant to Justice Douglas' order, defendant is precluded from giving testimony and cannot use the affidavit of its president to support its summary judgment motion. *Wilson v. Galicia Contr. & Restoration Corp.*, 10 N.Y.3d 827 (2008); *Ortiz v. 3115 Broadway Development Fund*, 73 A.D.3d 540 (1st Dept. 2010).

Defendant's attorney, in paragraph "9" of his affirmation in support of the motion, asserts that plaintiff waived the deposition of defendant by filing his Note of Issue. Further, defendant's

attorney, for the first time, in reply papers, asserts that plaintiff's counsel waived his right to conduct defendant's deposition in a conference before Justice Douglas' law secretary.

A party in possession of a preclusion order does not waive its rights thereunder by filing a Note of Issue.

"The purpose of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion' (*id.* [internal quotation marks omitted]). This impropriety deprived plaintiffs of an opportunity to respond to the argument." *Gumbs v. Flushing Town Center III, L.P.*, 114 A.D.3d 573 (1st Dept. 2014). Defendant cannot raise a new issue of an alleged waiver by plaintiff at a motion conference. *Id.* at 574.

In support of plaintiff's cross-motion to strike defendant's answer for alleged spoliation of evidence, plaintiff submits his affidavit, wherein he states, *inter alia*, that a few days after the accident, the deli owner told him that plaintiff's accident was recorded by a video camera inside the deli. The deli owner had an employee show plaintiff the images that were captured at the time of his accident. The portion of the video he saw commenced with plaintiff behind the counter, getting up, taking a few steps, slipping on soapy water, and falling into the opened trap door, such that he was completely out of view of the camera.

In opposition to the cross-motion, defendant submits, *inter alia*, the affidavit of its president, Essaedi Zaid ("Zaid"), wherein he states that he was asked to perform a search to determine if there was any surveillance video of plaintiff's accident. After conducting a search, Zaid states that he can confirm that there was no surveillance video of plaintiff's alleged accident and that he never showed plaintiff any surveillance video in connection with plaintiff's

alleged accident.

The affidavits submitted by plaintiff and Zaid, are bereft of relevant detail and create numerous factual issues as to whether or not there was spoliation of evidence, and if so, the extent of prejudice, if any.

At plaintiff's deposition, he was asked if anyone told him that they saw the accident. Plaintiff's answer was "[n]o, no, no." Plaintiff further testified that he broke his leg as a result of the accident and remained in bed for approximately two months, as he could not move around and could not walk on it. (Plaintiff's transcript, Exhibit "F" to the cross-motion, pg. 58, lines 13 – 25, pg. 133, lines 10 – 25). Plaintiff's affidavit presents no time frame as to when he allegedly viewed the surveillance video. Further, plaintiff's supplemental/amended Bill of Particulars, dated April 21, 2014, alleges, *inter alia*, "inadequate lighting," which brings into question what was observable (*i.e.*, soapy water), on the surveillance video.

Zaid's affidavit, while stating that no surveillance video exists of plaintiff's alleged accident, does not specifically state that it never existed, does not state when he searched the surveillance videos, and more pointedly, does not state that he reviewed the surveillance video for the date and approximate time of plaintiff's alleged accident. While Zaid denies ever showing plaintiff any surveillance video of the alleged accident, he does not specifically state whether any of his employees had access to the surveillance videos and whether they showed them to plaintiff.

Accordingly, plaintiff's cross-motion to dismiss defendant's answer on the ground of spoliation of evidence is denied. At trial, plaintiff may make an appropriate application, based upon the evidence submitted, to the Justice Presiding, as to whether a jury charge based upon

defendant's alleged failure to produce physical evidence (an alleged surveillance video), or other sanction is warranted.

Motion pursuant to CPLR § 3212 for an order granting defendant summary judgment, dismissing the complaint, is denied.

Assuming, *arguendo*, that defendant was not precluded from submitting the affidavit of its president in support of its summary judgment motion, the motion would still be denied because of spoliation issues. Having denied defendant's motion for summary judgment on the grounds above stated, the Court need not address the merits of defendant's motion.

The foregoing constitutes the Decision and Order of the Court.

Dated: JUN 29 2016



ELIZABETH A. TAYLOR, A.J.S.C.