Vizcaino v Western Beef, Inc.
2016 NY Slip Op 32059(U)
September 30, 2016
Supreme Court, Bronx County
Docket Number: 301814/2012
Judge: Laura G. Douglas
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[* 1] FILED Oct 04 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11
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YOLANDA VIZCAINO,

Plaintiff,

-against-

WESTERN BEEF, INC., WESTERN BEEF RETAIL, INC., CACTUS HOLDINGS, INC., and 1564 SOUTHERN BOULEVARD, LLC,

Defendants.

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Index No. 301814/2012

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to strike defendants' answer, compel production of certain discovery, extend deadline to file note of issue, and grant a trial preference:

Papers	**Numbered**
Plaintiff's Notice of Motion, Affirmation of Alex A. Omrani, Esq. dated February 10, 2016 in Support of Motion, and Exhibits ("1" through "29").....	**1**
Affirmation of Albert W. Cornachio III, Esq. dated April 8, 2016 in Opposition to Motion and Exhibits ("A" through "F")....................................	**2**
Reply Affirmation of Alex A. Omrani, Esq. dated May 25, 2016	**3**

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The plaintiff seeks an order striking the defendants' answer as a penalty for spoliation of evidence and their purported failure to furnish certain discovery, compelling the defendants to fully comply with certain discovery, extending the deadline to file a note of issue, and granting a trial preference based upon the plaintiff's age. The motion is granted solely as ordered below and is denied in all other respects.

The plaintiff seeks monetary damages for injuries allegedly sustained when boxes stacked vertically on the floor of the supermarket owned and/or operated by the defendants fell and struck the plaintiff as she was shopping on November 22, 2009.

At issue is the identity of a cashier who may have witnessed the accident, the identities of certain other supermarket employees who may have assisted the plaintiff after the accident, and video recording from the store's security surveillance system that may have captured footage of the accident.

With respect to the video recording, the defendants now contend that the recording had been overridden by the time that the plaintiff made a request to preserve any such footage. This is supported by the affidavit of Joseph Galarza, the defendants' Claims Manager, who states that the defendants are not in possession of video surveillance for this accident and that the recording system in place at the time of the accident would override every 15 days depending on the amount of movement captured by video. However, the plaintiff notes the contradictory deposition testimony of various witnesses produced on behalf of the defendants - store manager Manuel Frias testified that there was a video recording surveillance system at the subject store on the date of the accident, but Saudhi Garcia, the defendants' Loss Prevention Specialist, testified that there was no surveillance system installed at the subject store in November of 2009. These conflicting stories regarding the existence of video surveillance - first, that there was such a system in place, then that there was no such system in place, and finally, that there was such a system in place, but that the footage had been taped over - warrant a sanction.

Where a party, intentionally or otherwise, discards crucial evidence before its adversary has had an opportunity to inspect it, the court may grant relief commensurate with the impairment posed by the unavailable evidence (*see Ortega v. City of New York,* 9 NY.3d 69 [Ct App 2007]). Here, the defendants responded at the time of the accident and became aware of what had occurred. Therefore, they knew that they would probably be involved in litigation and should have undertaken efforts to preserve the footage (*see Suazo v. Linden Plaza Associates, L.P.*, 102 AD3d 570 [1st Dept 2013]). The court has a range of remedies that it can deploy at its discretion, tailored to the ramifications of the spoliation on the particular action, but the party seeking relief has the burden of establishing that it has been prejudiced (*see Perez v. New York City Transit Authority*, 73 AD3d 529 [1st Dept 2010]).

Since the plaintiff is unable to pinpoint exactly why her accident occurred, this video footage would be significant. It could shed light on whether the boxes were arranged in a dangerous manner. However, the drastic sanction of striking a pleading is reserved for those instances where the missing

item deprives the aggrieved party of the means of proving his claim (*see Scansarole v. Madison Square Garden, L.P.*, 33 AD3d 517 [1st Dept 2006]). That is not the case here. However, it may be more difficult for the plaintiff to establish the requisite elements of her claims in this action without these records (*see Minaya v. Duane Reade International, Inc.*, 66 AD3d 402 [1st Dept 2009]). Under these circumstances, an adverse inference against the defendants is justified.

With respect to disclosing the name and last known address of the cashier who assisted the plaintiff on the accident date, the defendants state that while the name "Wanda" is listed on the plaintiff's cashier's receipt, their records reflect that there was no employee with that name working on the date of the accident. While the defendants have furnished the names and last known addresses of all employees who were purportedly working at the subject store on the date of the accident, the plaintiff should not have to cull through a list of names to figure out which employee was assigned by the defendants to work at a certain station on a particular date. The defendants are in the best position to do so. However, since the defendants have provided plausible disclosure on this subject, including the last known address for the only employee named "Wanda" who worked at the subject store and a list of employees who were working at the subject store on the date of the accident (including several who are no longer employed), their conduct does not warrant the extreme sanction of the striking of their answer. There appears to be no reason why the defendants cannot, at a minimum, cull the list of employees to only those employees who may have served as the plaintiff's cashier on the accident date and provide the names and last known addresses of those persons. The plaintiff can then proceed with the appropriate investigation and discovery. This Court's Order dated June 4, 2013 noted that there was plenty of information available to the defendants that would permit them to identify the cashier. Therefore, the defendants shall provide the plaintiff with a fresh list of employees, with the last known address of any former employees, who may have served as the plaintiff's cashier on the date of the accident.

The unopposed request to extend the deadline to file a note of issue is granted.

The plaintiff has submitted unopposed evidence that she qualifies for a trial preference pursuant to CPLR 3403(a)(4).

Accordingly, it is hereby

ORDERED, that the plaintiff shall be entitled to an adverse inference charge at the trial of

this action in sum and substance as set forth in Pattern Jury Instruction (2016) 1:77.1 with respect to the defendants' video recording at the subject supermarket on the date of the plaintiff's accident; and it is further

ORDERED, that the defendants shall provide the plaintiff with a fresh list of employees who may have served as the plaintiff's cashier on the date of her accident, including the last known address of any former employee, no later than 20 days following service of a copy of this Order with notice of entry; and it is further

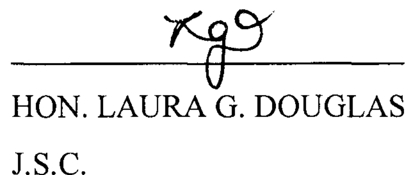
ORDERED, that he deadline to file a note of issue is extended to November 30, 2016; and it is further

ORDERED, that this action shall be given a preference on the trial calendar upon the filing of a note of issue; the plaintiff shall file a copy of this Order along with the note of issue.

This constitutes the Decision and Order of this Court.

Bronx, New York

September 30, 2016



HON. LAURA G. DOUGLAS

J.S.C.