

<b>Stadler v Lord &amp; Taylor LLC</b>
2017 NY Slip Op 32299(U)
October 30, 2017
Supreme Court, New York County
Docket Number: 160479/2015
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

SYDELLE STADLER,

INDEX NO. 160479/2015

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

LORD & TAYLOR LLC,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that **the motion and cross motion are denied.**

In this personal injury/negligence action, defendant Lord & Taylor, LLC (“L&T”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and plaintiff Sydelle Stadler (“Stadler”) cross-moves for discovery sanctions. After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, **the motion and cross motion are denied.**

**FACTUAL AND PROCEDURAL BACKGROUND:**

This action arose on September 17, 2015, when Stadler allegedly slipped, fell and was injured while shopping at L&T’s department store located at 158 Walt Whitman Road in the Town of Huntington Station, County of Nassau, State of New York. See notice of motion, exhibit A.

2

At her deposition on May 23, 2016, Stadler testified that, at approximately 4 p.m. on the day of the alleged accident, she and her husband, Max Stadler (“Mr. Stadler”), were shopping for slacks on the second floor of L&T’s premises, and she was walking with her cane and he with his walker. *See* notice of motion, exhibit D at 57, 62-63, 67-69. Stadler also stated that, at one point, she had a discussion with a salesperson about certain blouses being offered for sale at a discount when purchased along with a pair of slacks, and that she then followed the salesperson in search of the blouses. *Id.* at 81-84, 88-89. Stadler stated that she followed the salesperson into an aisle that had been formed by two racks of clothes having been pushed close together. *Id.* at 91-92. Stadler added that, while in that aisle, her left foot struck the bottom of the clothes rack to her left, which had not been visible to her, as a consequence of which, she tripped, fell and was injured. *Id.* at 93-96. Stadler later reviewed photographs that Mr. Stadler had taken at the time of her accident and, although she clarified that it was actually her right foot that had tripped on the base of the clothes rack, she reiterated that she could not see the rack before she tripped. *Id.* at 116-120. Stadler then stated that she was unsure which foot had come into contact with the bottom of the rack, or whether her cane came into contact with the bottom of the rack, but that in either event she suffered an extremely painful broken hip from the fall. *Id.* at 124-126.

Stadler’s deposition was continued on August 2, 2016, at which time she again reviewed the photographs which had been taken by Mr. Stadler at the time of her accident. *Id.* at 199-225. Stadler reiterated that she tripped over “a piece of a clothes rack that was sticking out,” but was unable to identify the specific rack from the photographs. *Id.* at 217-220.

Mr. Stadler was deposed on August 2, 2016, at which time he testified that, at the time of his wife’s accident, he was seated in a chair near the dressing room, and witnessed his wife fall

when her foot “went under” an “extension of the feet that go out” from the bottom of a clothes rack. *See* notice of motion, exhibit F at 41-42. Mr. Stadler also identified photographs of the accident site. *Id.* at 43-53.

L&T was first deposed on September 28, 2016 by sales associate Kelly Laufer (“Laufer”), who stated that she was the salesperson assisting Stadler at the time of her accident. *See* notice of motion, exhibit G at 26-30. Laufer described the three types of clothes racks used on L&T’s sales floor as “ballet bars,” “tensor racks,” and “t-stands.” *Id.* at 32-33, 44. Laufer stated that she and the other sales associates were responsible for the placement of these racks on the sales floor in accordance with a design generated by a sales manager, and that she and the other sales associates had been instructed by the managers to make sure that the racks were all placed “a shoulder and a half length apart” to give customers sufficient space to walk between them. *Id.* at 45-50, 53-60. Laufer recalled that she was standing behind Stadler, and had twice directed her to walk in the direction of the clearance racks, and that she observed Stadler fall when her cane (which she was holding in her right hand) hooked onto the bottom of a “ballet bar.” *Id.* at 67-75.

L&T was deposed a second time on February 6, 2017 by “asset protection supervisor” Greg Hammond (“Hammond”), who testified that he was present in the store at the time of Stadler’s accident, responded, and called an EMS ambulance to take her to the hospital. *See* notice of motion, exhibit I at 28-30. Hammond also acknowledged filling out an accident report after Stadler fell. *Id.* at 46-50.

Stadler commenced this action on October 13, 2015 by filing a summons and complaint setting forth a claim of negligence. *See* notice of motion, exhibit A. L&T filed an answer with affirmative defenses on November 11, 2015. *Id.*, exhibit B. L&T now moves, pursuant to CPLR

4

3212, for summary judgment dismissing the complaint, and Stadler cross-moves for discovery sanctions.

## LEGAL CONCLUSIONS:

### L&T's Motion for Summary Judgment

A party seeking summary judgment bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1<sup>st</sup> Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1<sup>st</sup> Dept 2003). As was previously mentioned, Stadler's sole cause of action sounds in negligence. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1<sup>st</sup> Dept 2005). Regarding the first of these elements, in *Boyd v New York City Hous. Auth.* (105 AD3d 542 [1<sup>st</sup> Dept 2013]), the Appellate Division, First Department, observed that:

Although property owners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware, they have no duty to protect or warn, and a court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous.

105 AD3d at 542-543 (internal citations omitted).

5

Here, L&T first argues that “the clothing rack [over which Stadler tripped] was not inherently dangerous as a matter of law,” because that condition was “open and obvious.” *See* defendant’s mem of law at 3-4 (pages not numbered). Specifically, L&T asserts that “the base of the clothing racks . . . were plainly observable and did not pose any danger to someone making reasonable use of his or her senses.” *Id.* at 4 (page not numbered). In support of its argument, L&T cites to Stadler’s deposition testimony that the aisle where she tripped was “too narrow,” and maintains that this testimony contradicts the portion of plaintiff’s deposition testimony in which she stated that she had been walking with no difficulty through the second floor aisles for 30-45 minutes before her fall. *Id.*; exhibit D. L&T also cites Laufer’s deposition testimony, that Stadler appeared to be “uneasy using her cane and . . . swayed when she walked,” in arguing that the cause of Stadler’s fall was “her own inattention or loss of balance.” *Id.* at 5 (page not numbered), exhibit G.

Stadler responds that L&T’s “narrow pathway” argument is a red herring concocted by Hammond, and that it does not address the issue of whether the clothes rack foot that she tripped over was “open and obvious.” *See* plaintiff’s mem of law at 18. Stadler also notes that, at their depositions, Hammond and Laufer identified photographs of different areas at the location of the alleged accident. *See* notice of cross motion, Schulman affirmation, ¶ 2; exhibit A. Finally, Stadler cites the holding of the Appellate Division, First Department, in *Centeno v Regine's Originals* (5 AD3d 210 [1<sup>st</sup> Dept 2004]), to support her argument that whether the clothes rack foot over which she tripped was an “open and obvious inherently dangerous condition” is a factual issue which must be determined by a jury. *See* plaintiff’s mem of law at 13-15. L&T replies that the deposition testimony herein discloses that there are no such issues of fact present in this case. *See* Kenyon

6

reply affirmation, ¶¶ 5-14. However, a review of the deposition testimony and the applicable case law establishes that Stadler's argument is correct.

In *Centeno*, the Appellate Division, First Department held that:

The motion court erred in determining, as a matter of law, that the rack base, completely covered with and concealed by clothing, was not an inherently dangerous condition and was readily observable by the use of one's senses. There is no bright line test for determining what is open and obvious. The test is whether '[a]ny observer reasonably using his or her senses would see' the condition. Since the test incorporates a reasonableness standard, it is fact-specific and usually presents a question for resolution by the trier of the fact.

5 AD3d at 211 (internal citations omitted).

In *Schulman v Old Navy/Gap, Inc.* (45 AD3d 475 [1<sup>st</sup> Dept 2007]), a more recent case involving a trip and fall over a clothes rack base, the First Department held that:

Here, plaintiff admitted that she knew the bracket was there, and indeed its presence, even if obscured, was obvious because of the presence of like brackets and racks throughout the store. Plaintiff's reliance on *Centeno v Regine's Originals* is misplaced. There, the plaintiff tripped and fell while attempting to step over a pile of clothing covering the rectangular base of a clothing rack. The plaintiff in *Centeno* was unaware, unlike this plaintiff, that there was anything beneath the clothing.

45 AD3d at 476 (internal citation omitted).

Here, Stadler specifically testified that she did not see the clothes rack base that she tripped over. *See* notice of motion, exhibit D at 116-118. However, the remainder of her testimony was equivocal insofar as she could not say for certain which of her feet came in contact with the clothes rack base, or whether her cane did so. *Id.* at 122-125. Laufer testified that she had a clear view of the accident, and that it was Stadler's cane which "hooked under" the clothes rack base. *Id.*, exhibit G at 67-75. However, Laufer, Stadler and Hammond identified photographs of different locations

7

as being the actual accident site. See notice of cross motion, Schulman affirmation, exhibit A. This conflicting evidence gives rise to issues of credibility which are not appropriately addressed on a motion for summary judgment. See e.g. *Santos v Temco Serv. Indus.*, 295 AD2d 218 (1<sup>st</sup> Dept 2002). Therefore, the issue of whether the alleged condition was open and obvious must be resolved at trial.

L&T next argues that “plaintiff’s allegation that the aisle was too narrow must fail as a matter of law,” because “store owners have no duty to warn against a condition which is readily observable.” See defendant’s mem of law at 5-8. As previously noted, Stadler responds that this argument is a ‘red herring’ because her negligence claim is not based on the narrowness of the aisle where she tripped, and because L&T’s argument is a subterfuge to distract from its failure to address her own “open and obvious argument.” See plaintiff’s mem of law at 18. It is true that appellate authority exists to support the position that there is “no duty to warn against a condition which is readily observable, such as the narrowness of a pathway created by clothing racks.” *Weiner v Saks Fifth Ave.*, 266 AD2d 390, 390 (2d Dept 1999), citing *Lamia v Federated Dept. Stores*, 263 AD2d 498 (2d Dept 1999); *Sewer v Fat Albert’s Warehouse*, 235 AD2d 414 (2d Dept 1997). However, that authority applies to negligence claims that are premised on a breach of the duty to warn, rather than those which are based on the alleged breach of a property owner’s duty to maintain his/her premises in a reasonably safe condition. Here, since Stadler claims the latter, the cases cited by L&T are inapposite.

Further, to the extent that L&T bases its second dismissal argument on its claim that the condition which caused Stadler’s injury was “readily observable,” this Court has already

8

determined that this is a factual issue which must be determined by a jury. Thus, this Court rejects L&T's second ground for dismissal and denies its motion for summary judgment.

### **Plaintiff's Cross Motion for Discovery Sanctions**

In her cross motion, Stadler requests a "negative inference charge at trial" as a "spoliation sanction" for L&T's failure to produce any video surveillance footage made of her on the day of the accident and Hammond's contemporaneous handwritten investigative notes. *See* plaintiff's mem of law at 19-20. Stadler cites the decision of the Appellate Division, First Department, in *Duluc v AC & L Food Corp.* (119 AD3d 450 [1<sup>st</sup> Dept 2014]) for the rule that:

On a motion for spoliation sanctions, the 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. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing.

119 AD3d at 451-452 (internal citations omitted).

Stadler asserts that she has met all of these criteria with respect to the evidence she seeks. *See* plaintiff's mem of law at 19-20. With respect to the video footage, L&T cites to the portion of Hammond's deposition testimony in which he states that he performed a search for footage of the accident and discovered that there was none. *See* Kenyon reply affirmation, ¶¶ 35-38; notice of motion, exhibit I at 12-17, 57-60. L&T then cites the decision of the Appellate Division, Second Department, in *Sagiv v Gamache* (26 AD3d 368, 369 [2d Dept 2006]), for the rule that "a party may not be compelled to produce or be sanctioned for failing to produce information which he

9

does not possess.” *See also Scott v King*, 83 AD3d 510 (1<sup>st</sup> Dept 2011). Stadler replies that Hammond’s assertion “defies logic,” but offers no further argument or case law to review. *See Schulman reply affirmation*, ¶ 3. This speculative argument hardly satisfies Stadler’s burden of proof under *Duluc*. Therefore, this Court denies that branch of Stadler’s cross motion based on L&T’s failure to produce surveillance video footage.

Although Stadler’s cross motion also mentions L&T’s failure to disclose Hammond’s notes, it does not raise any specific argument or cite any case law pertaining to them. For its part, L&T cites Hammond’s deposition testimony that he was “unable to recall” what he had done with his investigative notes, and asserts that those notes were “lost or destroyed in the normal course of business.” *See Kenyon reply affirmation*, ¶ 42. L&T also argues that the unavailability of these notes does not render Stadler “prejudicially bereft” of the means with which to prove her claim. *Id.* Stadler’s reply papers contain no further argument on this point. Given the foregoing, this Court finds that Stadler is not entitled to any discovery sanctions against L&T.

In *Denoyelles v Gallagher* (40 AD3d 1027, 1027 [2d Dept 2007]), the Appellate Division, Second Department, observed that “a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense,” and reiterated that it is incumbent on the moving party to demonstrate that its opponent’s actions “rendered [it] ‘prejudicially bereft of appropriate means’ to prove [its] claims.” Here, Stadler has made no such showing. Indeed, this Court has already determined that the success of Stadler’s negligence claim will depend upon the jury’s assessment of the veracity of the witness testimony. It is difficult to see how the absence of Hammond’s investigative notes will have any

impact on that testimony. Therefore, this Court rejects Stadler's argument and denies the cross motion.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendant Lord & Taylor, LLC for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that the cross motion by plaintiff Sydelle Stadler seeking discovery sanctions is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

10/30/2017  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	