SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH **PART 29**
Justice

JOSEFINA HURTADO and HAMLET HURTADO,

Plaintiffs,

INDEX NO. 153083/2014

MOTION DATE 9/08/17

MOTION SEQ. NO. 001

- v -

96 DAN MEAT MARKET, INC., individually and d/b/a DAN'S SUPERMARKET,

Defendant.

The following papers, numbered 30-69, were read on this motion to strike the answer.

Notice of Motion—Affirmation of Good Faith—Affirmation in Support—Exhibits 1-11—Affidavit of Service	No(s). 30-42
Affirmation in Opposition—Memorandum in Opposition—Exhibits A-O	No(s). 48-64
Reply Affirmation—Exhibit 1	No(s). 66-67
Letter from Defendant's Counsel re Exhibit 1 to Reply Affirmation	No(s). 68
Letter from Plaintiff's Counsel re Exhibit 1 to Reply Affirmation	No(s). 69

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

Motion by Plaintiffs Josefina Hurtado and Hamlet Hurtado, pursuant to CPLR 3126 and 3212, to strike the answer is granted in part as follows:

BACKGROUND

On this motion, Plaintiff moves for various discovery sanctions against Defendant 96 Dan Meat Market, Inc. for Defendant's alleged spoliation of evidence. In particular, Plaintiff alleges that Defendant failed to preserve and timely disclose: (1) video surveillance of Plaintiff's slip and fall at Defendant's premises on July 29, 2012; and (2) attendance records for the employees that were working on the day of Plaintiff's accident. As requested relief, Plaintiff asks this Court to: (1) strike Defendant's answer; or, in the alternative, (2) decide the issue

of liability in Plaintiff's favor and / or preclude Defendant from offering evidence on the issue of liability; or, in the alternative, (3) order that an adverse inference charge be given at trial; or, in the alternative, (4) extend Plaintiff's time to file a note of issue and certificate of readiness; or, in the alternative, (5) grant any other relief that the Court deems just.

I. Plaintiff's Allegations Regarding the Underlying Accident

In the instant action, Plaintiff alleges that she suffered injuries when she slipped and fell on a wet floor at a grocery store owned and operated by Defendant on July 29, 2012 at around 6:30 p.m. (Mathew Affirm. ¶ 3; Ex. 2 [Bill of Particulars] ¶¶ 3-5.) Plaintiff states that she was shopping with her daughter that evening and that she and her daughter, Helen, were at the checkout aisle when she realized that she had forgotten to pick up sugar. (Mathew Affirm., Ex. 3 [Hurtado EBT] at 29:18-30:16.) Plaintiff states that she then left her daughter at the checkout aisle and was walking to retrieve the sugar when she slipped and fell on a wet floor in front of the store's meat area. (*Id.* at 29:18-34:14.)

Plaintiff states that after she fell, a man holding a mop helped her up and assisted her in sitting down on some nearby boxes. (*Id.* at 34:15-35:08.) Plaintiff states that at the time of her accident she did not notice any warning signs or caution cones informing customers that the floor was slippery. (*Id.* at 95:11-16.)

Plaintiff states that shortly after she fell, she spoke to a cashier and the store supervisor. (*Id.* at 53:12-15.) Plaintiff states that the supervisor did not want to call an ambulance at first, but eventually called an ambulance. (*Id.*) Plaintiff states that she informed the supervisor: "That my back hurt a lot, that [my] head was hurting, that I was getting dizzy, and I couldn't stand the pain. And he said that I was lying." (*Id.*) Plaintiff states that she did not fill out an incident report with the store's personnel. (*Id.* at 57:05-15.)

Plaintiff states that the ambulance technician, after talking to the store manager, examined her inside the ambulance and informed her "that I was fine." (*Id.* at 58:01-59:23.) Plaintiff states that, upon request, the ambulance technician gave her a bandage for her fingers, and that she subsequently walked home with her daughter and went to bed. (*Id.*) Plaintiff states that her husband later took her to the hospital. (*Id.*)

The ambulance report for Plaintiff's accident states that Plaintiff "slipped on the floor hitting her elbow and back on floor, then got up with help of worker at supermarket." (Mathew Affirm., Ex. 10 [Ambulance Report.) The report further states that Plaintiff was "advised but refused a trip to hospital [] for further exam and aware of all rights. Pt. states she will go to her own doctor tomorrow." (*Id.*) Plaintiff signed the box on the form stating that she refused treatment and transportation to the hospital. (*Id.*)

II. Post-Accident and Litigation

Plaintiff's counsel states that it sent Defendant a letter on February 26, 2013—roughly 212 days after the accident—advising Defendant that "this office has been retained by [Josefina Hurtado] to pursue a claim for serious personal injuries arising out of and as a result of an accident which occurred on [July 29, 2012 at 96 Sherman Avenue], through your negligence." (Mathew Affirm., Ex. 11 [Claim Letter].) The letter requests that defendant "immediately forward this letter to your liability insurance carrier and ask them to contact the undersigned upon receipt of this letter." (*Id.*)

On March 31, 2014, Plaintiff commenced the instant action by filing a copy of the summons and complaint.[1] Based on documents filed on NYSCEF, it appears that Plaintiff's agent served a copy of the summons and complaint on Defendant on April 10, 2014 via the New York Secretary of State. (NYSCEF Document No. 10.)

Subsequently, Plaintiff served a notice for discovery and inspection on Defendant, dated September 26, 2014. (Mathew Affirm., Ex. 7 [First D&I].) Said discovery demand requested, among other things, the following items:

> "4. Provide the full name (and the last known address - if no longer employed) of the person(s) who were assigned cleaning and/or mopping duties/responsibilities at the subject location on the date the date of accident.
>
> 5. Provide the full name (and the last known address - if no longer employed) of the person(s) who were assigned cleaning and/or mopping

[1] Aside from the aforementioned claim letter, dated February 26, 2013, there is no mention of any communications between Plaintiff's counsel and Defendant or its counsel between said claim letter and the commencement of the instant lawsuit.

duties/responsibilities at the subject location of accident, for a minimum of one (1) month prior to the date of accident.

8. Provide the full name and last known address (if no longer employed by Defendant) of the manager on duty at the time of the subject occurrence.

11. Copies of all video recordings and/or surveillance taken within the subject premises on the date of the accident."

(First D&I ¶¶ 4-5, 8, 11.)

Defendant provided a response, dated February 11, 2015, to Plaintiff's First D&I, which stated, among other things that: Luis Santanil was the employee responsible for cleaning and mopping duties at the time of Plaintiff's accident and that Gary Then was the manager on duty at that time. (Mathew Affirm., Ex. 8 [Response to First D&I] ¶¶ 4-5, 8.) Defendant further stated that it was "not in possession of any video recordings and/or surveillance." (*Id.* ¶ 11.)

Thereafter, Plaintiff served Defendant with a second notice for discovery and inspection, dated April 20, 2015, requesting, among other things, the following information:

"2. Any and all attendance sheets and/or attendance records from July 20th through July 31st, 2012."

3. The names and employment status of all cashiers working at Dan's Supermarket on July 29, 2012. If any of these individuals is no longer employed, please provide their last known address.

4. The identity of any outside contractors, management companies or other individuals not employed by 96 DAN MEAT MARKET INC. who provided maintenance, cleaning, inspection and management services at the subject premises in July of 2012."

(Mathew Affirm., Ex. 7 [Second D&I]. ¶¶ 2-4.)

Defendant produced Gary Then—whom it had previously identified as the manager working on the day of the accident—for a deposition on May 26, 2015. (Naqvi Affirm., ¶ 13, Ex. F [Then EBT].) Mr. Then testified that, at the time of the

accident, there were about thirty cameras equipped "all around the store", including two cameras in the meat area where Plaintiff allegedly fell, and that any footage from the cameras is automatically stored and then "auto-erased" after 14 days. (Then EBT at 63:10-74:25.) Mr. Then testified that the store has only preserved video footage when police detectives have come to the store and requested the footage within that fourteen-day period before the footage auto-erased. (*Id.* at 75:02-78:13.) Mr. Then further testified that normally the footage the detectives sought related to incidents that occurred outside the store while the store was closed, and stating that "[i]t was either murder or just fights." (*Id.*) Mr. Then stated that he has never preserved video footage related to personal injuries occurring inside the store. (*Id.*) Mr. Then testified that he has sometimes reviewed video footage, without preserving it, where the footage pertained to things happening in the cashier areas—such as cashier mistakes or items potentially left behind by customers—but that he has never reviewed footage pertaining to alleged personal injuries occurring inside the store. (*Id.* at 78:14-79:15.)

Mr. Then further testified that all employee attendance records are stored in the store's computer for a year, and that he was not in possession of attendance records for the date of the accident. (*Id.* at 35:24-43:25.) Mr. Then stated that attendance information is obtained when hourly employees sign-in to work using a hand scanner, and that information is transferred to an on-site computer and processed for payroll. (*Id.*) Mr. Then stated that this information is auto-erased after a year. (*Id.*)

On or about June 16, 2015, Defendant provided a response to Plaintiff's Second D&I, stating that it was "not in possession of any attendance sheets and/or records." (Mathew Affirm., Ex. 8 [Response to Second D&I] ¶ 2.) Defendant also appears to have provided a partial response to Plaintiff's request for the names of cashiers working on the day of the accident: Defendant only provided either the first or last name of five employees, and did not indicate their last known address if they were no longer employed.[2] (*Id.* ¶ 3.)

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[2] Defendant appears to have offered the same employee names and employment statuses to Plaintiff's Third Notice for Discovery Inspection—also dated April 20, 2015. (*See* Mathew Affirm., Ex. 8 [Response to Third D&I] ¶ 1.) This latter request by Plaintiff asked for "[t]he names and employment status of all individuals who spoke to or observed the plaintiff at the supermarket on July 29, 2012 following the subject incident (witnesses after the fact)." (Third D&I ¶ 1.)

On October 23, 2015, Mr. Jose Santanil—whom Defendant previously identified as the employee responsible for mopping/cleaning duties on the date of Plaintiff's accident—appeared for a deposition. Mr. Santanil testified that he had no recollection of anyone slipping on a wet floor around July 2012. (Mathew Affirm., Ex. 5 [Santanil EBT] at 33:03-08.) Mr. Santanil stated that he generally did not work on Sunday—the day of the week on which the accident occurred. (*Id.* at 16:21-19:03; *see also* Mathew Affirm. ¶ 9.)

On or about April 15, 2016, Plaintiff served defendant with a Fourth Notice for Discovery and Inspection, requesting, among other things:

> "1. Provide the lull name and last known address (if no longer employed by Defendant) of all employees employed by defendant in July of 2012. including but not limited to managers, butchers, cashiers, maintenance people, grocery department workers and other employees, delineating their department or job title.
>
> 2. Provide the full name and last known address (if no longer employed by Defendant) of all employees on duty and working within the store on the date of the occurrence, including but not limited to all managers, butchers, cashiers, maintenance people, grocery department workers and other employees, delineating their department or job title."

(Mathew Affirm., Ex. 7 [Plaintiff's Fourth D&I] ¶¶ 1-2.)

III. The Instant Motion

A. Written Arguments

Plaintiff now brings the instant motion seeking discovery sanctions for alleged spoliation of evidence, arguing that Defendant failed to preserve and timely disclose: (1) video surveillance of Plaintiff's slip and fall at Defendant's premises on July 29, 2012; and (2) attendance records for the employees that were working on the day of Plaintiff's accident.

In Plaintiff's opening papers, Plaintiff argues that "Defendant had knowledge of the potential for litigation resulting from this incident immediately after Plaintiffs fall" because various employees of Defendant were aware of her fall, including at least one cashier, the employee mopping the floor that assisted

her, and the store manager. (Matthew Affirm. ¶ 6.) As such, Plaintiff argues that Defendant had a duty to preserve evidence relating to the fall, which started on the day of Plaintiff's accident. Plaintiff argues that Defendant's failure to immediately preserve such evidence constitutes spoliation. (*Id.* ¶ 11.)

Plaintiff further argues that Defendant's alleged failure to preserve surveillance footage of her accident "unduly prejudices" her because such evidence would "establish that the store created the condition of the wet floor and would confirm plaintiff's testimony that there were no warning signs or cones in the area to alert her of the danger." (*Id.* ¶ 16.)

Plaintiff argues that the "[a]ttendance records would establish who worked that day and would provide Plaintiff with an opportunity to depose potential witnesses to the occurrence and employees who spoke to Plaintiff after her fall." (*Id.*) As such, Plaintiff argues that Defendant's answer should be stricken. (*Id.* ¶ 18.)

In opposition, Defendant argues that "it was not made aware of this accident until nearly seven (7) months later when Plaintiffs' attorney sent Defendant a letter advising that they were pursuing a claim (which, importantly, did not request that any evidence be preserved)." (Opp. Memo. at 3.) Regarding any surveillance footage of the accident, Defendant states that it "was not made aware of the accident until well after the 14-day period that the video surveillance would have been available." (*Id.* at 4.)

With respect to attendance records, Defendant attaches—for the first time—a response to Plaintiff's Fourth D&I which appears to include the requested attendance from the day of Plaintiff's alleged accident. (Naqvi Opp. Affirm., Ex. O [Response to Fourth D&I].) In addition, Defendant attaches an affidavit from Mr. Then stating that on "numerous times" he had looked for an attendance list for the date of the accident and had been "unable to retrieve an attendance list." (Naqvi Opp. Affirm., Ex. N [Then Aff.] ¶ 6.) Mr. Then further states that, "[a]fter receipt of this motion, my attorney encouraged me to once again attempt to find the attendance records for the date of the accident. I did, and was able to reproduce the attendance records from our system." (*Id.* ¶ 7.) Mr. Then acknowledges that there were "significant delays in providing these records" but states "I assure you that this delay was not intentional." (*Id.* 8.)

Mr. Then suggests that the delay in providing the records was due to his company's "very rudimentary" understanding of the "time-clocking computer system" and because there is "nobody at the company who is any sort of 'expert' regarding all the different capabilities this system has." (*Id.* ¶ 5.) Defendant further states that "[t]o the extent that Plaintiff would seek any further depositions of any current employees, or would like to subpoena any of the former employees, Defendant will not stand in the way." (*Id.* ¶ 9.)

In reply, Plaintiff reiterated its argument that Defendant should have known to preserve video footage on the day of the accident. Taken together with Defendant's belated disclosure of the attendance records, Plaintiff argues that "spoliation sanctions are clearly warranted." (Matthew Reply Affirm. ¶ 4.)

B. Oral Arguments

Counsel for the parties appeared for oral argument before this Court on August 21, 2017, and largely reiterated the arguments made in their papers. With regard to the issue of surveillance footage, the following colloquy occurred between the Court and Plaintiff's counsel:

> THE COURT: What you're saying to me is you want me to rule that … any time an individual falls and there is a camera in the store, you're saying the obligation of the store is to retain and look at that photo, video, that's basically what you're saying?
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> MR. CANNATA: Yes
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> THE COURT: Because that was not done in this situation.
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> MR. CANNATA: Absolutely not.
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> THE COURT: Is there one case that says that? I haven't read one case that you cited to me that indicates that within the 14-day period, since no lawsuit was filed, no letter was received by the defendant, I have not seen one case that says that if a person falls, that's the obligation of the store automatically to preserve the tape. I haven't seen one. I'm not saying there isn't. I don't recall reading one case that says that.

> MR. CANNATA: Let me ask you this question then, your Honor. If we have -- if the defendant has control over evidence, and the evidence is not preserved, and it doesn't matter whether it's a boiler that causes a fire, as in the Smith case, or any other evidence, a defendant has an obligation to preserve that evidence. In this case we have conclusive evidence as to what the condition was at the time of the accident, whether the accident actually happened the way she said, what the defendant's employees were doing at the time.

(Oral Arg. Tr. at 6:21-7:26.) Plaintiff's counsel further suggested that the Court review a recent decision rendered in the Supreme Court, Queens County, that involved similar facts to the instant case: *Chen v J Mart Group, Inc.*, No. 711857/2015 (filed August 8, 2017 [NYSCEF Document No. 58]).

On the issue of the belatedly supplied attendance records, Plaintiff's counsel argued it would be "ridiculous" for Plaintiff to have to depose every employee on the attendance records and that, in combination with Defendant's failure to produce the requested surveillance footage, "giving us the witnesses five years after the accident, two years after we asked for it, basically precludes us from any meaningful discovery of the defendants." (Oral Arg. Tr. at 10:05-20.)

In addition to reiterating the arguments made on paper, Plaintiff's counsel stated that Mr. Then "admits that, to kind of state it plainly, he is not the most sophisticated of managers" and that Defendant's grocery store "is not the most sophisticated operation." Plaintiff's counsel urged the Court "to draw a difference between this grocery store and like a Whole Foods, which is a much larger operation." (*Id.* at 19:10-20.)

DISCUSSION

A party who moves for sanctions for spoliation of evidence must show: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction; (2) that the evidence was destroyed with a "culpable state of mind,"; and (3) "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." (*Pegasus Aviation I, Inc. v Varig Logistica* S.A., 26 NY3d 543, 547 [2015].) "Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed." (*Id.*) However, where it is found that evidence was "negligently

destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense." (*Id.* at 547-48.)

"The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for the spoliation of evidence." (*Golan v N. Shore Long Is. Jewish Health Sys., Inc.*, 147 AD3d 1031, 1032–33 [2d Dept 2017].) "[S]triking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, thus, the courts must consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." (*Peters v Hernandez*, 142 AD3d 980, 981 [2d Dept 2016] [internal quotation marks omitted].) "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." (*Pennachio v Costco Wholesale Corp.*, 119 AD3d 662, 663 [2d Dept 2014] [internal quotation marks and emendation omitted].)

I. Plaintiff Has Not Shown That Defendant Spoliated Evidence By Not Preserving Surveillance Footage of the Accident.

On the instant case, Plaintiff invites this court to rule that "any time an individual falls and there is a camera in the store . . . the obligation of the store is to retain and look at that photo [and] video." (Oral Arg. Tr. at 6:21-7:03.) For various reasons to be discussed, this Court declines to establish such a rule.

With regard to spoliation of electronically stored information—which is what the surveillance footage is—it is well settled that once a party "'reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 36 [1st Dept 2012], quoting *Zubulake v UBS Warburg LLC*, 220 FRD 212 [SDNY 2003].) A party can be said to reasonably anticipate litigation, when it is "on notice of a credible probability that it will become involved in litigation." (*Id.* at 43.)

Here, Plaintiff alleges, in sum and substance, that: she slipped and fell on Defendant's premises; argued with Defendant's store manager about calling ambulance; received a band-aid from the ambulance technicians after being informed that she was "fine"; and walked home with her daughter to later be taken to the hospital by her husband.

Even if the Court were to construe the above evidence in the light most favorable to Plaintiff—which the Court is not required to do on this motion—this Court cannot say that Defendant was on notice of a "credible probability" that it would be involved in litigation before the subject surveillance footage auto-erased fourteen days after Plaintiff's alleged slip and fall.

Such a finding is further buttressed by the fact that Plaintiff apparently did not retain counsel until roughly seven months after the date of her accident, and said counsel never requested that Defendant preserve video—or any—evidence when it mailed its claim letter to Defendant on February 26, 2013. (*See* Mathew Affirm. ¶ 8; Claim Letter.) Moreover, Plaintiff did not commence the instant litigation until 18 months after the accident, and did not specifically request the surveillance footage until 26 months after the accident. This is not to say that Defendant's obligation to preserve the surveillance footage did not arise before Plaintiff requested it. However, that it took Plaintiff—with the aid of her counsel—26 months to request the video undermines Plaintiff's claim that Defendant should have known to preserve the surveillance footage on the very day Plaintiff fell.

Moreover, for the Court to find that Defendant was on notice of a "credible probability" of litigation on the date of Plaintiffs accident, the Court would have to ignore the reality of everyday life: that individuals regularly slip and fall and do not sue as a result. (*See* Oral Arg. Tr. at 34:24-35:18.) This is not to say that a garden variety slip and fall will never put a grocery store defendant on notice of a credible probability of litigation. This is only to say that the facts presented on this motion are not such that this Court can find that Defendant was on notice of a credible probability of litigation.

Plaintiff's analogizing the instant slip and fall case to a narrow line of product liability cases is unavailing. For example, Plaintiff cites *Standard Fire Insurance Co. v Federal Pacific Electrica Co.*, 14 AD3d 213 [1st Dept 2004] in support of its request that this Court strike the answer. (Matthew Affirm. ¶ 13.) In that case, the plaintiff insurance company's engineer inspected the home of its insured following a fire. (*Id.* at 214.) The engineer's report concluded: "It is possible, but not certain, that an electrical fault ignited the subject fire. Furthermore, if the fire had an electrical cause, it is probable that a malfunction of the electrical service panel was a significant contributing factor." (*Id.* [internal quotation marks and emendation omitted].) Based on the engineer's report,

plaintiff brought a subrogation action against the defendant manufacturer of the electrical panel. The defendant manufacturer then sought to inspect the allegedly defective panel and subsequently moved for spoliation sanctions when plaintiff insurer failed to produce the panel.

On appeal, the *Standard Fire* court held that the plaintiff insurer's failure to preserve the allegedly defective panel warranted striking the complaint. As the Second Department there noted, "the entire purpose of [the engineer's] inspection of the equipment was to determine whether it had a basis for denying coverage to its insured or attempting to hold any other party responsible for the fire." (*Id.* at 217.) As such, the plaintiff insurer "should have foreseen that preservation of the panel and circuit breakers was absolutely essential to the assertion of any claim based upon a defect in the electrical equipment." (*Id.*)

Unlike in *Standard Fire*, no inspector—much less one hired by Defendant—appeared at Defendant's store to conduct an inspection of the premises or to review the surveillance footage. Neither was there an obvious major loss event like a fire—a customer alleged that she slipped and fell, and then refused ambulance transportation to the hospital.

The instant case is also distinguishable from those decisions addressing spoliation issues in garden variety negligence cases. For example, in *Pennachio v Costco Wholesale Corp.*, 119 AD3d 662 [2d Dept 2014], the plaintiff customer alleged that he was injured when he "reached for a shrink-wrapped, glass jar of olives on a shelf in a store owned by the defendant which, unbeknownst to him, was broken." The defendant store originally retained the subject jar and "marked it as 'evidence' not to be discarded" but the jar was "discarded inadvertently. (*Id.*) The Second Department held that the defendant store's retention and marking of the jar as evidence "evidence" indicated that the defendant was "on notice of the potential need for the evidence in future litigation." (*Id.* at 664.) In the instant case, the record is completely devoid of any action at all by Defendant that would indicate that it was on notice of potential litigation resulting from Plaintiff's fall.

Likewise, the decision in *Chen v J Mart Group, Inc.*, No. 711857/2015 (filed August 8, 2017 [NYSCEF Document No. 58]), cited by Plaintiff's counsel at oral argument, is similarly inapposite. In that case, the plaintiff "was seriously injured on August 25, 2015, when she slipped on produce left on the floor at the defendant supermarket." (*Id.* at *2.) The defendant supermarket had 15 cameras in operation, and the plaintiff's counsel—coincidentally also counsel for Plaintiff on the instant

case—"promptly demanded the preservation of the video" in letters and emails on September 11, 16 and 18, 2015. (*Id.*) Apparently, after two court orders the defendant eventually produced a ten-second excerpt of the subject video—which essentially was a filming of the original footage playing that was taken before the original footage auto-erased (i.e. a video of a video). (*Id.* at *10.) That court found that, even after multiple conference orders requiring production of the video, "defendant resisted producing the required evidence" and "decided to play fast-and-loose with the Court and the truth." (*Id.* at *2, 10.) The court further found that "[d]isclosure came piecemeal and only partially, requiring plaintiff's counsel to be taxed to the limit." (*Id.* at *2.)

Here, however, Plaintiff's counsel apparently did not request the subject surveillance footage until 26 months after the accident, and Plaintiff's counsel has never explained why it took roughly 11 months, after being retained, to request the footage. Neither has Plaintiff explained why she herself did not immediately attempt to contact the grocery store and request that the surveillance footage be preserved from the date of her accident. Given that she appears to have been a regular customer, she presumably was aware of at least some of the store's roughly 30 cameras. (*See* Hurtado EBT at 28:21-29:17 [stating that Plaintiff went to Defendant's grocery store "[t]here or two times a week, I would go daily, weekly"].)

Again, this is not to say that Defendant lacked a duty to preserve evidence until said evidence was requested—rather, Defendant's duty to preserve evidence began when it is on notice of a credible probability of litigation. However, again, Plaintiff's failure to take steps toward potential litigation until months after the accident undermines Plaintiff's assertion that Defendant was on notice of a credible probability of litigation—i.e. be held to higher standard. (*Compare Weissman v. TD Bank, N.A.*, 2013 N.Y. Slip Op. 33550[U] [Sup Ct, NY County 2013] [noting that that seven days after the plaintiff's slip and fall, her counsel requested the preservation of the entire day's surveillance footage of the subject area] [Wooten, J.]; *Campbell v TJX Companies, Inc.*, 17 Misc 3d 1138(A) [Sup Ct, NY County 2007] [Stallman, J.] [noting that within four days of the accident plaintiff's counsel advised defendant clothing store of the accident and demanded that the store "preserve" the broken chair that allegedly caused the accident].)

The instant case is also distinguishable from *Macias v. Asal Realty LLC*, 2015 N.Y. Slip Op. 32684(U) [Sup Ct, Bronx County 2015] [Sherman, J.], aff'd *Macias v ASAL Realty, LLC*, 148 AD3d 622, 622 [1st Dept 2017] which neither

party has cited to in its papers. In *Macias*, the plaintiff was a FedEx employee leaving the defendant's residential building when he allegedly tripped and fell on a lobby floor mat that moved as he stepped on it. The court there found that it was "undisputed that the resident superintendent witnessed the plaintiff being taken by emergency services from the building, and while waiting for the ambulance, [the superintendent] had a conversation with either plaintiff or with his co-worker concerning the specific allegation here, that plaintiff slipped and fell inside the lobby." (*Id.* at *6.) Further, according to deposition testimony from the building's owner, the same superintendent told him that he later reviewed the surveillance footage of the plaintiff's fall and chose not to preserve the footage. (*Id.* at *3-4.)

The Supreme Court, Bronx County, found that these events put the defendant on notice of a credible probability of litigation, and found that the video was relevant to the plaintiff's claim. (*Id.* at *4.) However, the court there found that defendant's spoliation of the video did not fatally compromise the plaintiff's ability to prove his claim. (*Id.*) As such, the court determined that the appropriate sanction was to provide an adverse inference charge at trial. (*Id.*)

Here, however, Plaintiff was not removed by ambulance, but rather the ambulance call report states that she refused transportation to the hospital. In addition, unlike the superintendent in *Macias* who reviewed footage of the plaintiff's accident chose not to preserve said footage, Mr. Then stated that he never reviewed footage of Plaintiff's alleged accident and that, as a matter of practice, he only reviewed surveillance footage of events occurring in the cashier areas.

For all the foregoing reasons, this Court finds that Plaintiff has failed to establish that Defendant spoliated evidence by not preserving potential surveillance footage of her accident. Further, this Court finds that the request for an adverse inference charge, under the facts herein, is best left for the trial court to rule on based upon the testimony to be elicited at the trial. (*See Lilavois v JP Morgan Chase and Co.*, 151 AD3d 711, 712 [2d Dept 2017]; *Pennachio v Costco Wholesale Corp.*, 119 AD3d 662, 665 [2d Dept 2014]; *Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011].)

II. Defendant Shall Be Precluded from Calling, at Trial, Any Current or Former Employees Not Previously Produced for Deposition and That Were Working on the Date of Plaintiff's Accident, Unless Said Employee Is Produced for Deposition Within 60 Days at Defendant's Expense.

Defendant has now—belatedly—produced the attendance records from the date of Plaintiff's accident. Defendant seeks to excuse its behavior on the ground that their grocery store "is not the most sophisticated operation." (Oral Arg. Tr. at 19:10-20.) Plaintiff however complains that "giving us the witnesses five years after the accident, two years after we asked for it, basically precludes us from any meaningful discovery of the defendants." (Oral Arg. Tr. at 10:05-20.)

As a preliminary matter, this Court notes that the issue here is whether Defendant has failed to timely respond to discovery demands under CPLR 3126—not whether Defendant has spoliated evidence based on CPLR 3126 and the common law doctrine of spoliation. Here, there is no indication that Defendant destroyed or failed to preserve any evidence. At most, there is a speculative question of whether Defendant's failure to timely turn over the subject attendance records has prevented Plaintiff from obtaining favorable testimony from one of these previously undisclosed potential witnesses. This question would necessarily involve the even more speculative sub-question of what the difference would have been if the attendance records had been timely provided after they were first requested on April 20, 2015—roughly 33 months after the accident.

CPLR 3126 states as follows:

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court." (*Schiller v Sunharbor Acquisition I, LLC*, 152 AD3d 812, 813 [2d Dept 2017].) "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious." (*Brandenburg v County of Rockland Sewer Dist. #1*, 127 AD3d 680, 681 [2d Dept 2015].) The courts however are encouraged to provide litigants with reasonable latitude before imposing the "ultimate sanction" of striking a pleading. (*See CDR Creances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009].) Moreover, there is a strong preference in this state that, wherever possible, actions be decided on their merits and a discovery sanction lesser than striking a pleading be imposed. (*See Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012].)

Nonetheless, the bar and bench has been repeatedly admonished by the Court of Appeals and the Appellate Division that discovery non-compliance has an insidious effect on the legal system and should not be tolerated:

> As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture

> in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well.

(*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted].) To this end, as Chief Judge Kaye explained, CPLR 3126 was designed to give the Supreme Court the tools to combat discovery abuse:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action."

(*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999], quoting CPLR 3126.)

Moreover, that a party eventually provides long-overdue discovery does not excuse that party's failure to disclose that evidence in a timely manner. (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] ["A party that permits discovery to trickle in with a cavalier attitude should not escape adverse consequence."] [quotation marks and emendation omitted]; *see also Kihl*, 94 NY2d at 123 ["[C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully."].)

This Court finds that Defendant's proffered explanation that it "is not the most sophisticated operation" and Mr. Then's explanation that he lacked the sophistication to access his attendance records is lacking. Mr. Then's affidavit fails to provide an explanation as to why it was so complicated for him to find and retrieve data from his store's computer—or why he could not at least ask or temporarily retain a more technologically savvy individual to help him with a task that, on its face, would appear to be very simple.

Due to Defendant's failure to timely disclose the names of these potential witnesses for more than two years, the Court will not allow Defendant to call any

of these recently disclosed employees as witnesses at trial without affording Plaintiff an opportunity to depose them. As such, Defendant is hereby precluded from calling the individuals disclosed in its Second Supplemental Response to Plaintiff's Fourth Notice for Discovery and Inspection, dated May 23, 2017, unless the witness that Defendant intends to call at trial has been produced for deposition within sixty (60) days of this order.

To the extent that Plaintiff wishes to depose any of the said individuals, Defendant shall disclose to Plaintiff which of the said individuals are still employed by Defendant; and Defendant shall disclose the last known address, email, and telephone number any of the said individuals no longer employed by Defendant. Defendant must disclose said information within twenty (30) days of this order, and Defendant is reminded that it must undertake a diligent search for this information. To the extent that Defendant is unable to provide any of the aforesaid information, Defendant will provide a search affidavit explaining the areas searched for the information and—in light of Defendant's self-professed lack of sophistication—affidavits from any forensic experts that may have been retained to assist in the search.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Plaintiffs Josefina Hurtado and Hamlet Hurtado, pursuant to CPLR 3126 and 3212, to strike the answer is granted in part to the extent that the question of whether to issue an adverse inference charge with regard to the lack of video surveillance footage of the accident is reserved for the trial court; and it is further

ORDERED that Defendant 96 Dan Meat Market, Inc. shall be precluded from calling as witnesses at trial any of the individuals disclosed in its Second Supplemental Response to Plaintiff's Fourth Notice for Discovery and Inspection, dated May 23, 2017, unless the said individual is produced for a deposition within sixty (60) days of this order; and it is further

ORDERED that within thirty (30) days of this order, Defendant shall provide the last known address and any other contact information (including phone number and email) for the employees disclosed in its Second Supplemental Response to Plaintiff's Fourth Notice for Discovery and Inspection, dated May 23, 2017; and it is further

ORDERED that the instant motion is otherwise denied.

This constitutes the decision and order of this Court.

Dated: November 8, 2017
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE