

**Davis v Pathmark**

2017 NY Slip Op 33320(U)

September 8, 2017

Supreme Court, Bronx County

Docket Number: 22997/2012E

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 10e

-----X  
ADINE DAVIS,

Plaintiff,

-against-

DECISION and ORDER  
Index No 22997/2012E

PATHMARK, PATHMARK STORE, INC. &  
BRUCKNER PLAZA SHOPPING CENTER, LLC,

Defendants.  
-----X

HON. LIZBETH GONZÁLEZ

The plaintiff commenced a personal injury action alleging that the defendants' negligence caused her to slip and fall and sustain serious injuries. In order to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendants created the condition that caused the plaintiff to trip and fall or that the defendants had actual or constructive notice of the condition (*Uhlich v Canada Dry Bottling Company of New York*, 305 AD2d 107 [1<sup>st</sup> Dept 2003]). Plaintiff asserts that she cannot establish a prima facie case of the defendants' negligence because they lost and/or destroyed the entire video footage recorded on the day of the accident. In the herein motion, plaintiff Davis seeks an Order striking the defendants' answer on spoliation grounds; granting summary judgment on the issue of liability; or in the alternative, deeming notice admitted and/or precluding the defendants from offering any evidence on this issue. Defendants Pathmark and Pathmark Store, Inc. ("Pathmark," collectively) oppose the motion.

Procedural History

Plaintiff Davis alleges that on 8/29/12 she was shopping in the defendants' Pathmark Supermarket located at 1851 Bruckner Boulevard when she slipped on a wet substance and fell. Two days later, by letter dated 8/31/12 addressed to Pathmark, plaintiff's counsel gave notice of Ms. Davis' fall and his representation of her regarding this incident and requested Pathmark to preserve all relevant discovery:

You are hereby directed to maintain any and all witness statements, list of employees working, photographs, original videotapes, recordings and/or reproductions of all surveillance...for the entire day of August 29, 2012. Please allow this to include all video surveillance of both the interior and exterior of this location.

On 4/10/13, a preliminary conference was held. On 4/30/13, defendants served their response to plaintiff's discovery demands. On 5/15/13, the defendants provided plaintiff with a DVD of the surveillance video depicting plaintiff Davis' accident. By letter dated 5/20/13, plaintiff's counsel responded to the defendants' discovery responses and states the following relative to the videotape footage:

We demand the video surveillance taken of the alleged accident within ten (10) days, as plaintiff has sent spoliation letters and the defendant has been ordered to serve such on plaintiff several times. This demand goes to the crux of plaintiff's case, and a copy of such footage is entirely discoverable prior to depositions. Should defendant fail to properly respond within the time constraints listed herein, plaintiff will file a motion and ask for sanctions for defendant willful and contumacious behavior.

On 7/17/13, plaintiff's counsel advised defendants' counsel that the DVD was not working properly (see 7/26/13 email between the parties). On that same day, the defendants forwarded a second DVD of the plaintiff's accident that was apparently operational. By letter dated 8/1/13, plaintiff's counsel requested a complete copy of the entire video footage because the second video was deficient to the extent that it shows one view and starts seconds before plaintiff's accident. On 8/29/13, the parties agreed by stipulation that the defendants shall provide all footage recorded by "every video camera within Pathmark." In the event that no such footage exists, defendants agreed to submit an affidavit from the individual with knowledge of the video system.

#### Plaintiff's Motion

In support of her motion, plaintiff Davis submits the pleadings, supporting documentation, her own affidavit and the affidavit of non-party Jaye Johnson, the plaintiff's health aide. In their respective affidavits, Ms. Davis and Ms. Johnson attest that on 8/29/12 they were shopping in Pathmark when the plaintiff slipped on liquid and fell; there were no

warning signs of a wet floor. The manager wrote down the plaintiff's information for an accident report and stated that he would review the tape/video of what occurred and mail his report to the plaintiff.

The plaintiff submits a copy of an A&E Incident Report that describes the details of the accident including the location and the plaintiff's injuries.

In opposition to the plaintiff's motion, defendants Pathmark maintain that they fully complied with plaintiff's discovery demands by submitting two copies of the video footage depicting the plaintiff's accident. The defendants assert that the plaintiff's dissatisfaction with the footage does not provide a basis to grant summary judgment or to impose sanctions. In support of their position, the defendants submit the 10/17/13 affidavit of Ralph Delellis who conducted the video search.

On August 29, 2012, I conducted an exhaustive search for any surveillance video from that day which would depict the time of the subject accident involving the plaintiff, as well as the period shortly before and shortly after its occurrence.

My search revealed only one (1) camera angle which covered the location of the subject accident and depicted the plaintiff's alleged fall...the period shortly before, during, and shortly after the accident...Pathmark is no longer in possession of any surveillance video depicting the accident situs on August 20, 2012, apart from the footage provided to the corporate office and defense counsel.

By reply, the plaintiff notes that defendants' surveillance video starts 31.76 seconds prior to plaintiff's accident. Plaintiff avers that defendants were noticed - two days after plaintiff's accident - to maintain all relevant discovery and thus should have known that maintaining the video footage was pivotal to plaintiff's case. Significantly, Mr. Delellis' affidavit omits when, how or why the remaining footage was destroyed.

#### CONCLUSION

Plaintiff Davis seeks an Order striking the defendants' answer on spoliation grounds, granting plaintiff summary judgment on liability grounds or alternatively deeming notice admitted and/or precluding the defendants from offering any evidence on this issue.

In seeking relief on spoliation grounds, the plaintiff movant must show that (1) the defendants had an obligation to preserve the evidence at the time it was destroyed; (2) the evidence was destroyed with a "culpable state of mind," which may include ordinary negligence; and (3) the destroyed evidence was relevant to the plaintiff's claim or defense (*Duluc v AC&L Food Corp.*, 119 AD3d 450 [1<sup>st</sup> Dept 2014]). It is un rebutted that the Pathmark defendants were aware of plaintiff's alleged slip and fall accident in its Bronx location on 8/29/12. It is un rebutted that the defendants were noticed on 8/31/12, two days post-accident, to maintain the footage "for the entire day of August 29, 2012." The defendants provided footage that depicts the area where the accident occurred for a mere half-a-minute prior to the plaintiff's fall.

The time period prior to the plaintiff's accident is critical to the plaintiff's claim that the defendants caused, created or had actual or constructive notice of the alleged dangerous condition. Defendants fatally fail to explain how, when or why the video footage was destroyed. After careful consideration, the Court finds that the plaintiff is prejudiced in the absence of the entire video or a reasonably significant segment of the recorded events leading up to plaintiff's fall. Accordingly, the plaintiff's sought relief for summary judgment on the issue of liability is GRANTED.

A copy of this Decision and Order with Notice of Entry shall be served within 30 days.

Dated: September 8, 2017

So ordered,

  
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Hon. Lizbeth González, JSC