Livingston v Sahara Dreams LLC
2019 NY Slip Op 30855(U)
April 4, 2019
Supreme Court, New York County
Docket Number: 156432/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JEVOHAN LIVINGSTON,

Plaintiff,

- v -

SAHARA DREAMS LLC D/B/A DREAM DOWNTOWN, *et al*.,

Defendants.

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INDEX NO. 156432/2016

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39-60, 62-76 were read on this motion to dismiss.

By notice of motion, defendant Sahara Dreams LLC d/b/a Dream Downtown (Dream) moves pursuant to CPLR 3212 for an order granting it summary dismissal of the complaint and all cross claims against it, and granting it judgment on its cross claim for contractual indemnification against co-defendant Allstar Security & Consulting, Inc. Plaintiff opposes and, by notice of cross motion, moves pursuant to CPLR 3126 and common law spoliation for orders: (1) striking defendants' answers; (2) providing that issues related to certain undisclosed evidence shall be deemed resolved against defendants for purposes of this action; (4) directing an adverse inference charge to be given at trial against defendants; and (5) denying Dream's motion for summary judgment in its entirety. Allstar submitted no opposition to either motion.

I. SPOLIATION

A. Pertinent background

In this action, plaintiff claims that on August 21, 2015, while at a hotel owned by Dream called Dream Downtown (hotel), he was assaulted, battered, and unlawfully detained by security

guards employed by defendant Allstar. He advances claims for assault and battery, unlawful detention, negligent hiring, training, retention, and supervision, negligent and intentional infliction of emotional distress, and negligence. (NYSCEF 1). The security guard who allegedly assaulted plaintiff was later identified as a Walter Grant. (NYSCEF 67).

According to plaintiff, there are photographs or a video which shows the altercation, and by letter dated September 10, 2015, and sent to "Sahara Dreams LLC c/o Robinson Brog Et Al," he demanded that defendants preserve and retain "all photographs or videotape of any area within 100 feet of the accident location for the period of two hours before up to and including the time of accident. The accident occurred between 4:15 am and 4:35 am." (NYSCEF 65). Although the certified mail receipt is signed, neither it nor the mailing receipt reflects a date of mailing or delivery. (*Id.*).

Once discovery commenced in this matter, defendants were directed to produce any video of the incident or an affidavit as to the video's whereabouts. (NYSCEF 67). By affidavit dated January 30, 2018, the hotel's area managing director states that while the hotel has a surveillance video system which would capture events occurring at the its front entrance, video is not preserved beyond 30 days and the hotel does not possess a video of the incident. (NYSCEF 67). By affidavit dated March 20, 2018, Allstar's president states that although Allstar does not maintain or control the hotel's video system, he unsuccessfully searched for the video, and that he never received, and does not maintain a copy of, any video of the incident. (NYSCEF 68).

During discovery, the hotel produced a Dream hotel injury report, prepared by Grant on August 22, 2015 at 4:01 am. It reflects that

> [Grant] was posted at the entrance at the dream hotel only allowing hotel guests in the building. During this time a black, unknown male attempted to push his way pass me to enter the hotel I move him back and explained that only hotel guest are allowed in hotel. He started cursing and put his hand in my face I explained to this guy that he was in my

> personal space, I requested him to move his hands out of my face, however he continued doing the same action, finally when his hand touched my face I put my palms up trying to protect my head, he didn't like this reaction and he grabbed me by my suit, we began to tussle we fell to the ground and security officer Abdul Dairo separated us. The guy called the police and when they arrived they spoke to the guy and they spoke to me and told me and the rest of our security staff to take a picture of the guy and keep him off the premises.

Included in the report, is Grant's statement that he had notified an Allstar employee and the hotel manager about the incident. (NYSCEF 47).

At his deposition, Grant testified that the incident with plaintiff did not result in any injuries to either of them, and that plaintiff had called the police, who arrived at the scene but took no further action. He never saw a video of the incident and did not know if one existed. Grant subsequently prepared an incident report and sent it to Allstar. No Allstar supervisors were present when the incident occurred, and no one from Allstar or Dream followed up with him about the incident. (NYSCEF 51).

At a deposition held on June 14, 2016, the hotel's general manager testified that he first learned of the incident involving plaintiff in late September 2015. He never saw a video of it and did not search for one. Allstar had access to security videos, which are located in a room in the loading dock area. Videos are kept for 30 days and then automatically erased. By the time he had received a request for the video, it had already been erased. He explained that in the event of an altercation at the hotel, he or a senior manager would be notified. He first learned about the incident in late September 2015, upon which he contacted Allstar for information about it. Allstar sent him a copy of the incident report. When he inquired as to video footage, he was told that it had been erased. (NYSCEF 49).

Allstar's president testified at his deposition in June 2017 that Allstar had a security office in the hotel where the video monitors were set up, but the video equipment and tapes are

owned by Dream. The videos are automatically erased after 30 days. He does not remember when he received a copy of the incident report and was unaware of any policy regarding the retention of videotapes at the time of plaintiff's incident. Now, however, a policy exists. (NYSCEF 49).

B. Contentions

Plaintiff asserts that defendants were given formal notice to preserve the video footage by the September 10 letter which was allegedly "signed [for] sometime during the week of September 14, 2015." And through Grant's incident report, they were also on notice of plaintiff's claims as soon as one day after the incident. (NYSCEF 64).

Defendants deny having spoliated the video, absent notice of the need to preserve it before it was erased as a matter of their usual business practice, and assert that even if spoliated, plaintiff has not shown that he is left without a means of proving his claim, given his ability to testify about the incident. (NYSCEF 72).

C. Analysis

A party may be sanctioned for negligently losing or intentionally destroying key evidence. Sanctions may be imposed only if the alleged spoliator was on notice that the missing evidence might be needed for future litigation. (*Strong v City of New York*, 112 AD3d 15 [1st Dept 2013]). The party seeking spoliation sanctions bears the burden of establishing that a litigant intentionally or negligently disposed of critical evidence and fatally compromised the movant's ability to prove a claim or defense. (*Mendez v La Guacatala, Inc.*, 95 AD3d 1084 [2d Dept 2012]). CPLR 3126 is inapplicable as no discovery order relating to the video is alleged to have been violated by defendants related to the missing evidence. (*Strong*, 112 AD3d at 15).

As it is undisputed that no preservation demand letter was sent to Allstar, plaintiff cannot

rely on the September 10 letter to prove that Allstar was put on notice to preserve the video footage. Plaintiff also submits no proof as to when the September 10 letter was sent to or received by Dream, or any evidence to rebut Dream's testimony that it received the letter after the footage was erased. Plaintiff thus fails to establish that defendants were formally placed on notice as of September 10, 2015, or anytime within 30 days after the incident, to preserve and maintain video footage of the incident.

There is also no evidence that the hotel's general manager or Allstar's president were notified about the incident before the video was erased, nor is there evidence that anyone reviewed the video or conducted any investigation into the incident. The incident report itself contains no indication of anything other than a "tussle" between plaintiff and Grant, no injuries are reflected therein and no ambulance was called, and while the police were summoned, no arrests were made. Based on the absence of details regarding an alleged assault and battery, plaintiff does not establish that defendants had notice of the incident or that the incident report itself should have given defendants notice of his claims here. (*See eg, Page v Niagara Falls Mem. Med. Ctr.*, 167 AD3d 1428 [4th Dept 2018] [defendant had no notice that adverse event experienced by plaintiff related to pump malfunction such that it had obligation to act beyond usual business practice to sequester pump]; *Bill's Feed Svce., LLC v Adams*, 132 AD3d 1400 [4th Dept 2015] [absent pending litigation or notice of specific claim, defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices]).

There is also no evidence that defendants had a policy for the preservation of videotapes and thus, no evidence of a failure to follow it, or that the video was not erased automatically within 30 days pursuant to defendants' normal business practices. (*See Raymond v State of New York*, 294 AD2d 854 [4th Dept 2002] [spoliation sanction unwarranted as defendant destroyed

videotapes in good faith before litigation pending, pursuant to normal business practices]).

Plaintiff thus fails to meet his burden of establishing that defendants were, or should have been, on notice that the videotape may be needed in future litigation or that they negligently or intentionally erased it. (*See Elmaleh v Vroom*, 160 AD3d 557 [1st Dept 2018] [as defendant not on notice that car or car recorder would be needed for future litigation, failure to preserve them did not constitute negligent spoliation]; *compare SM v Plainedge Union Free School Dist.*, 162 AD3d 814 [2d Dept 2018] [nature of plaintiff's injuries and immediate documentation and investigation into cause of accident by defendant's employees put defendants on notice of possible litigation, thereby creating obligation to preserve evidence]).

In any event, plaintiff also fails to demonstrate or allege that the missing video fatally compromises his ability to prosecute his claims. As plaintiff may testify about what occurred and call Grant and other witnesses to testify based on their observations of the incident, he possesses other evidence to prove his claims. (*See eg, Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654 [2d Dept 2013] [record did not demonstrate that plaintiff left without means to prosecute claims as she could testify as to how and where accident occurred and subpoena others who may have witnessed accident]; *Barone v City of New York*, 52 AD3d 630 [2d Dept 2008] [plaintiff who can testify at trial as to how accident occurred was not without means to prove claim]).

Plaintiff's request for spoliation sanctions is thus denied. (*See Cataudella v 17 John St. Assocs., LLC*, 140 AD3d 508 [1st Dept 2016] [even if defendant should have maintained video footage, plaintiff did not establish that failure to preserve it left him prejudicially bereft of means to present claim]).

II. SUMMARY JUDGMENT

Dream denies liability for Grant's actions, contending that he was an employee only of

Allstar, and that Allstar had the sole responsibility and discretion to hire, train, and supervise him. Plaintiff contends that an issue of fact exists as to Dream's supervision of Grant and whether such supervision suffices to impose liability on Dream for his actions.

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

To hold a party liable for negligent hiring, retention, and supervision of an independent contractor, a plaintiff must show that the party knew or should have known of the contractor's propensity for the conduct which caused the injury. (*Bellere v Gerics*, 304 AD2d 687 [2d Dept 2003]).

Absent evidence that Dream had a role in or control over Allstar's hiring of security guards for the hotel, including Grant, it may not be held liable for Allstar's alleged negligent hiring. There is also no evidence that Dream or Allstar knew or should have known of Grant's propensity to commit an assault and battery before he was hired by Allstar, or that an investigation into his background would have revealed such a propensity. (See *Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004] [negligent hiring claim requires showing that

employer knew, or should have known, of employee's propensity for conduct which caused plaintiff's injury]; *K.I. v New York City Bd. of Educ.*, 256 AD2d 189 [1st Dept 1998] [negligent hiring claim dismissed as background check would not have revealed propensity to molest minors]).

Moreover, no proof is offered of any prior incidents or complaints involving Grant or other Allstar security guards who worked at the hotel, and thus Dream is not liable for negligent retention or supervision. (*See Weinfeld v HR Photography, Inc.*, 149 AD3d 1014 [2d Dept 2017] [company could not be held liable for contractor's acts as it did not know and had no reason to know of any propensity by contractor to engage in conduct which allegedly caused accident]; *Honohan v Martin's Food of S. Burlington Inc.*, 255 AD2d 627 [3d Dept 1998] [defendant established entitlement to dismissal of negligent supervision claim by showing it never received complaint about guard and guard received favorable employment reviews]).

Thus, even if Dream had supervised Grant, absent any knowledge of his propensity to commit an assault and battery, it may not be held liable for negligent supervision. (*See eg, N.X. v Cabrini Med. Ctr.*, 280 AD2d 34 [1st Dept 2001] [necessary element of negligent supervision claim is that defendant knew of employee's propensity to commit tortious act]; *see also Vicuna v Empire Today, LLC,* 128 AD3d 578 [1st Dept 2015] [negligence claims dismissed against employer as no evidence that it had notice that employee had engaged in physically violent behavior or had made threats before, or that he had propensity to do so]).

In any event, as in *McLaughlan v BR Guest, Inc.*, evidence of general supervisory control, including the authority to decide the number of guards needed and where to post them or to instruct them on how to perform their work is insufficient to render Dream liable for Grant's alleged assault. (149 AD3d 519, 520 [1st Dept 2017]).

As Dream establishes its freedom from negligence here, it also demonstrates its entitlement to dismissal of Allstar's cross claims against it. And, as plaintiff's claims against Dream are dismissed, there is no need to determine its cross claims against Allstar. (*See Canty v 133 E. 79th St., LLC*, 167 AD3d 548 [1st Dept 2018] [as defendant could not be held liable to plaintiff, its cross claims for contribution and common law denied as moot]; *Di Giulio v City of Buffalo*, 237 AD2d 938 [4th Dept 1997] [as complaint and cross claim dismissed against one defendant, its motion for conditional summary judgment on its cross claim against another defendant properly denied as moot]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Sahara Dreams LLC d/b/a Dream Downtown's motion for summary judgment is granted to the extent of dismissing the complaint and all cross claims against it, and the complaint is severed and dismissed as against said defendant, with costs and disbursements to it upon submission of an appropriate bill of costs; and its motion is denied as to its cross claims and they are dismissed; and it is further

ORDERED, that plaintiff's motion cross motion is denied in its entirety.

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4/4/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE