# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

*Justice*

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JOSEPH DUNN,

Plaintiff,

- v -

NEW LOUNGE 4324, LLC, JOHN DOES 1-7,

Defendants.

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**INDEX NO.** 151462/2013

**MOTION DATE** 01/30/2019

**MOTION SEQ. NO.** 004

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

were read on this motion to/for SUMMARY JUDGMENT.

*The Law Office of Eric B. Richman* (Natascia Ayers, of counsel), for plaintiff.
*Lester Schwab Katz & Dwyer, LLP* (Kelli A. McGrath, of counsel), for defendant New Lounge 4324, LLC.

Gerald Lebovits, J.:

In this personal injury case, defendant New Lounge 4324, LLC (Bounce) moves for an order granting summary judgment under CPLR 3212. Plaintiff cross-moves for an order (1) striking Bounce's answer or granting a negative inference at trial based upon the destruction of video surveillance footage; and (2) precluding Bounce from offering into evidence additional cell phone video footage.

## BACKGROUND

Plaintiff's claim arises from an incident that occurred at and outside of Bounce, a restaurant and club, on the late evening of Super Bowl Sunday, February 3, 2013, and into early February 4, 2013.

In his deposition, plaintiff testified that, while searching for a bathroom in the club, he accidentally walked into a kitchen area—was grabbed, hit, and forcefully removed by defendant Bounce's security employees. Plaintiff testified that during the removal, these employees forcefully stomped on and fractured plaintiff's foot and punched him in the face— causing plaintiff to pass out on the sidewalk outside the club.

The testimony of club employees is in sharp contrast to plaintiff's testimony; Bounce's employees testified that plaintiff's removal was peaceful and that plaintiff was unharmed when

escorted out of Bounce. Bounce manager Thomas Kiernan, testified that after being removed from Bounce, the agitated plantiff walked 30 feet down the block, and engaged in a fight with an unknown attacker—where plaintiff was tackled to the ground and severely beaten. Kiernan further stated that he rescued plaintiff from the attacker.

An NYPD detective testified plaintiff maintained he was attacked by Bounce's security employees (*see* McGrath, exhibit J at 12, 33, 52). However, neither plaintiff nor Bounce immediately called the police. Several weeks after the incident, there was changeover in NYPD staff who handled plaintiff's case. Some police reports and testimony appear consistent with Kiernan's testimony about what occurred, but inconsistent with testimony concerning the police's viewing of club video surveillance footage of the night of the incident.

Plaintiff testified that he spoke with Kiernan by telephone, the day after the incident, where Kiernan informed him that plaintiff was attacked by an unknown person. Plaintiff believes that a police report of the incident incorrectly incorporated a false description of the incident, different from plaintiff's complaint that he had been beaten by Bounce employees.

During his deposition, Bounce owner Cole Bernard testified that he found a video of plaintiff on his phone that had been emailed to him earlier by Kiernan. The video appears to show plaintiff outside of Bounce, behind a barrier facing the club, moving around and making rude comments. Bernard testified that he found the video while searching his phone for emails during the deposition, and that the video was labeled as "Marco" on the email to which it was attached, which may have been why it had not been located before the deposition. Bernard further testified that the video may have been labeled "Marco" because Bounce did not know plaintiff's name.

The email to which the video is attached does not contain any discernable identifying text concerning Dunn or this case. Prior to producing the email and the telephone video (the Telephone Video), Bernard had twice exchanged affidavits stating that video surveillance could not be located.

Bounce also had a video surveillance system in the club, which recorded from cameras located both inside and in front of the club. Kiernan testified that the view of outside cameras did not include the area where plaintiff was assaulted, but this appears predicated upon Kiernan's testimony as to where plaintiff was assaulted. Bernard testified that he witnessed the incident and the club's video, or part of it, and that it did not show plaintiff being assaulted by a Bounce employee.

Although demanded by plaintiff, Bounce's video footage (Bounce Video) has not been exchanged. Kiernan testified that the video did not show plaintiff being injured and was not preserved. Bernard testified that the video was not preserved because the video system automatically recorded over older video either after the passage of weeks, or when the system's memory capacity was reached (McGrath affirmation, exhibit L, at 78). He also testified that there was no reason to keep the video after the police viewed it and determined that it did not implicate Bounce's employees' conduct, and that he believed that NYPD was given a copy of the video on an external (USB) drive (*id.* at 78-79).

While the NYPD closed the case without arrests, two NYPD detectives investigating the incident testified that they either did not see the video or did not recall seeing it. One retired detective who investigated plaintiff's case testified that video obtained on a USB or zip drive that could not be downloaded to a police file would be kept in a detective's desk drawer. (*id.*, exhibit J at 34-36).

Plaintiff provides a February 16, 2013 letter addressed to Bounce, requesting that video surveillance be preserved. The submission includes a post office receipt for certified mail, which indicates that the letter was mailed on February 20, 2013. Although the receipt reflects payment for a return receipt, plaintiff has not submitted such a receipt, or evidence of tracking information to demonstrate when the letter was delivered to Bounce. The time the club's video surveillance was lost or erased is also not ascertainable with certainty from the vague record.

**DISCUSSION**

**I. The Spoliation Motion**

Under the common law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence (*see Strong v City of New York*, 112 AD3d 15, 21 [1st Dept 2013]). Under that standard, spoliation sanctions may be imposed if the spoliator was "on notice that the [evidence] might be needed for future litigation" and the evidence is relevant to that litigation (*id.* at 22).

Bounce undoubtedly became aware of the summons and complaint on February 26, 2013, approximately 23 days after the incident (Ayers affirmation, exhibit D [February 26 email from Tara Young]). There is no dispute that plaintiff had a cast on his arm at Bounce, and that Kiernan knew this at the time, and that plaintiff was removed from Bounce by security. Bernard testified that, while being removed, plaintiff was "whaling his arms trying to get back into the venue" and that Bounce's manager's notes about the event are that plaintiff "screamed profanities" outside the bar and "mouthed off" to another person in the street who could have been "a patron of ours" (McGrath affirmation, exhibit L at 39, 43, 55, 67).

Bernard further testified that he knew that plaintiff had been assaulted and that, within a week, police visited Bounce in regard to the incident (*id.* at 58, 63]). Bernard's view of why the police visited was that they were, *upon plaintiff's complaint*, reviewing whether criminal acts by Bounce's management or security had been committed (*id.* at 62 [emphasis supplied]).

This evidence shows that Bounce had notice that plaintiff, a patron wearing a cast in the club (*id.* at 36), had an encounter with security at the club, was injured that night, and that the club's owner believed that a police visit soon after was related to plaintiff's complaint about the club's conduct. Under those circumstances, a reasonable inference may be drawn that Bounce had notice of potential future litigation, and that the Bounce Video would be related to the potential future litigation.

Bernard also testified that the video was automatically deleted in 30 to 45 days, and that it might be recorded over earlier based upon the video system's memory capacity, but that it usually would not be (*id.* at 62, 82-83). Therefore, defendant is only speculating that it was wiped out prior to February 26, 2013. While, in reply, Bounce argues that the police did not request that they save the video, this is not dispositive of preservation requirements.

Plaintiff's repeated contention that Bounce purposely destroyed the club footage by erasing it is speculative. Bernard testified that there was no reason to preserve the video because the police reviewed it with him, and found nothing implicating the club, and he watched plaintiff escorted out and nothing happened in Bounce (*id.*, exhibit L at 78-79, 83, 96-97, 118).

Plaintiff submits no evidence to demonstrate the intentional destruction of evidence, as opposed to simple negligence in failing to prevent the video's automatic self-destruction. "Nothing in the record supports an inference that the erasure of the audio recording sought here was willful or in bad faith such as would justify the striking of a pleading[,]" but the First Department has imposed sanctions in accordance with common law where evidence was negligently rather than willfully destroyed (*see Strong*, 112 AD3d at 22, 24; *Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 16 [1st Dept 2000] ["willfulness or bad faith may not be necessary predicates"]).

Certainly nothing in the record demonstrates or suggests that the video existed at the time that any order of this court was issued, (the first of which was the preliminary conference order, dated October 16, 2013). In addition, while the video may have been of value to plaintiff's case, it is not the only evidence of what occurred, as there were several testifying witnesses (including plaintiff) to the incident. Under these circumstances, an adverse inference charge to be determined by the trial judge is appropriate (*see Strong,* 112 AD3d at 24; *Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013]).

Plaintiff also seeks to preclude Bounce from offering the Telephone Video into evidence at trial. Bernard testified that he discovered the video on his phone during the deposition, referenced as "Marco." The video was exchanged at Bernard's deposition.

Plaintiff points to Bernard's earlier affidavits stating that there was no video footage. Plaintiff provides only suspicion, however, to rebut Bernard's testimony that he believed that he did not locate the video earlier because the name Marco does not have any relationship to this case. Indeed, the email to which the video was attached does not contain any apparent indication that the video concerns this matter, or Dunn. Plaintiff notes that Bernard asserted that there was no text in the email capable of being searched, so as to permit location of the email or video through a word search.

Plaintiff does not demonstrate that the Telephone Video was purposely withheld. Bernard was not asked if he had already viewed the video, prior to finding it at the deposition, and if so, why he did not know that he had it.

Furthermore, plaintiff does not demonstrate prejudice that is directly attributable to the late disclosure, as opposed to the content of the video. Whether the video will be admitted into

evidence at trial will not be determined here. However, plaintiff has not demonstrated entitlement to a preclusion sanction concerning the telephone video. In *Tai Tran v New Rochelle Hosp. Med. Ctr.* (99 NY2d 383 [2003]), cited to by plaintiff, the question was whether a defendant could purposely withhold video footage until after a plaintiff's deposition, as had been permissible under law prior to relevant amendments to the CPLR. *Young v Knickerbocker Arena* (281 AD2d 761 [3d Dept 2001], upon which plaintiff also relies, concerns surveillance conducted by the defendants after the plaintiff commenced her action. In *Young*, the intentionality of the defendants' failure to timely turn the video over was established without conjecture.

Plaintiff also has not demonstrated entitlement to a sanction against Bounce relating to the video of an alleged prior incident at the club, in January 2013, involving plaintiff Robert O'Neil in a separate personal injury case.

Plaintiff provides a letter from a Bounce manager, Tara Young, dated February 7, 2013, stating that footage from the incident was "saved in a file" (Ayers affirmation, exhibit M). However, the O'Neil incident was a separate incident, and plaintiff has not adequately demonstrated a basis for notice to defendants of the need for preservation of that video for this case. There was no court order requiring defendants to exchange the footage until June 18, 2014.

Regarding plaintiff's showing, his counsel appears to state that, "[i]n response" to several orders about producing documents and videos, Kiernan testified that there had been no prior complaints of assault (Ayer affirmation, ¶¶ 44-45). However, Kiernan testified on February 4, 2014, prior to the dates of those orders. By letter of its counsel, dated June 14, 2018, Bounce advised plaintiff that Bounce did not have video concerning prior incidents at Bounce (*id.*, exhibit K). On September 9, 2014, Bounce responded to the June 18, 2014 court order for video of prior incidents with the February 7, 2013 letter of Tara Young, discussed above.[1] Tara Young later left Bounce's employment.

Plaintiff does not demonstrate purposeful destruction of the video from that event. Plaintiff's counsel, in her moving affirmation on the cross motion, notes that Bernard testified that he believed that Bounce had the O'Neill footage, but omits that he also testified that he did not know if Bounce still had footage (*see* McGrath affirmation, exhibit L at 132-133).[2]

Plaintiff's counsel also does not provide sufficient evidence to support the assertion that O'Neil suffered memory loss and was diagnosed with "skull and orbital fractures, just like plaintiff" (*see* Ayer affirmation, ¶¶ 46; ¶ 46 n 5; compare Ayer affirmation exhibit L at 27, 41-42). In addition, there is eyewitness testimony of the January incident at Bounce, of O'Neil's friend, who does not describe O'Neil as being punched or kicked (*id.* [testimony that O'Neill

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[1] The June 18, 2014 discovery order concerns videos about prior incidents. Item number eight of the earlier, February 5, 2014 order, while referenced in later orders, does not concern videos and the preliminary conference order contains nothing about other incidents.

[2] Plaintiff mistakenly cites to Bounce's moving exhibit E at 133, but Bernard's testimony is located at exhibit L.

injured his head after being picked up and thrown to the ground outside of Bounce, by a man dressed in black that the witness believed was Bounce security, after O'Neil jumped over Bounce's external barricade and went inside the club to retrieve his coat]).

## II. The Summary Judgment Motion

On a motion for summary judgment, the movant must, through admissible evidence, make a prima facie showing of entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial "or [to] tender an acceptable excuse for [the] failure to do so" (*Zuckerman*, 49 NY2d at 560).

Defendants argue that summary judgment should be granted in their favor because plaintiff's testimony is implausible and incredible based upon the Telephone Video evidence showing plaintiff uninjured, witness testimony to that effect and about plaintiff's assault by a passerby—as well as evidence that plaintiff could not remember what occurred.

For purposes of this motion, the Telephone Video was not sufficiently authenticated (*see National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 921 [2d Dept 2012] [trial court properly declined to consider DVD video, absent showing that it "truly and accurately represented what the defendants purported it to show"]; *Young v Ai Guo Chen*, 294 AD2d 430, 431 [2d Dept 2002] [unauthenticated photographs were inadmissible]). No expert affidavit about the video has been provided and Bernard's testimony about the video is not dispositive as to whether he witnessed what occurred outside of the club, as shown in the video, and, thus, does not demonstrate that the video is a true and accurate recording of the events (McGrath affirmation, exhibit L at 56-57, 77, 90-95, 121).

While Bernard testified that he received the Telephone Video from Kiernan, Bounce does not point to anything in Kiernan's testimony to authenticate the video. As the basis for authentication of the video is not discernable in defendant's moving papers, the video will not be considered on this motion. Consequently, any discrepancy between plaintiff's testimony about the events and the content of that video is not dispositive.

The other admissible record evidence about the incident also is not dispositive, as plaintiff's testimony contradicts that of the Bounce witnesses and, assuming arguendo without determining the admissibility of their contents, the police reports. Credibility issues are not determined on summary judgment (*Rawls v Simon*, 157 AD3d 418, 419 [1st Dept 2018]).

That plaintiff's companion did not see plaintiff get hit, or his foot stomped upon in the club, is also not dispositive. There is no dispute that plaintiff was removed from the club by Bounce security, but his companion also testified that she did not see that occur. Evidence demonstrates fact issues based upon sharply contrasting evidence about the incident.

"The court's role in deciding a motion for summary judgment is issue finding, not issue determination [and courts are] required to accept the plaintiff's pleadings, as true" and accord the nonmoving party the favor of reasonable inferences based upon the facts. (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403 [1st Dept 2017] [internal quotation marks and citation omitted].) Whether plaintiff ultimately will be able to prevail at trial is not what is determined at this juncture. As summary judgment is denied, it is unnecessary to address plaintiff's expert witness testimony concerning the effects of plaintiff's injury on his testimony.

Accordingly, it is

ORDERED that Bounce's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's cross-motion to strike the answer, to preclude, or for an adverse inference at trial is granted only to the extent that plaintiff is granted an adverse inference at trial relating to Bounce's failure to preserve video surveillance recorded on its video system.

4/11/2019
DATE

GERALD LEBOVITS, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
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| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |