SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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RACHEL SABBAGH, Index No. 162430/2015

Plaintiff

- against - DECISION AND ORDER

GOOD NATURE 1045, INC. d/b/a GOOD NATURE DELI,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff moves for penalties due to defendant's spoliation of a videotape recording of plaintiff's fall over a hose in defendant's store. C.P.L.R. § 3126. Based on defendant's destruction of the video recording, plaintiff seeks dismissal of affirmative defenses, preclusion of evidence supporting affirmative defenses, or an adverse inference instruction at trial: that the jury may infer that the recording would have supported plaintiff's depiction of her fall and of the condition created by the hose over which plaintiff fell. Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007); Alleva v. United Parcel Serv., Inc., 112 A.D.3d 543, 544 (1st Dep't 2013); Strong v. City of New York, 112 A.D.3d 15, 24 (1st Dep't 2013); Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d 570, 571 (1st Dep't 2013). She insists that, despite the absence of any written notice from her to defendant that she intended to institute a claim against defendant for her injury from the fall, the incident itself alerted defendant to a potential claim and thus the need to

preserve evidence.

I. THE EVIDENCE AND ISSUES PRESENTED

Defendant does not dispute that plaintiff informed one or more store employees that she had fallen over the hose, but the evidence at this stage fails to establish that she informed anyone at the store that she was injured to any extent. Defendant also does not dispute that store employees did not view the surveillance videotape recording. Only when one of the employees who was aware of plaintiff's fall notified the store manager about it three days afterward, did the manager attempt to view the videotape recording and find that it already was overwritten, long before plaintiff commenced this action almost two years later or requested defendant to preserve any videotape recording another seven months later.

Plaintiff emphasizes that store employees violated the store's procedure, as described by the store manager at his deposition, by waiting three days to notify the manager and failing to notify him immediately after plaintiff's fall. Defendant's own procedure, however, does not dictate its legal obligation, which was to preserve evidence relevant to a potential claim against defendant of which it had received notice. Malouf v. Equinox Holdings, Inc., 113 A.D.3d 422, 422 (1st Dep't 2014); Strong v. City of New York, 112 A.D.3d at 22. It is unnecessary that plaintiff actually have notified defendant of her claim or requested defendant to preserve evidence, for defendant to have reason to know of a potential claim and be

obligated to preserve evidence relevant to that claim. Malouf v. Equinox Holdings, Inc., 113 A.D.3d at 422. If defendant received a report of a serious injury from a hazardous condition on defendant's premises, these circumstances themselves may be enough to give defendant the requisite notice. Id.

Defendant's obligation to preserve evidence relevant to a potential claim raises two issues in the circumstances here. First, were plaintiff's report to defendant's employees that she had fallen over the hose and any indications to them that she was injured enough to give them notice of a potential claim by her against the store? If so, then they were obligated to preserve defendant's surveillance videotape recording of the area where she fell for the period surrounding when she fell. Second, had they preserved the video recording, would it have shown that plaintiff fell over a hose, whether it created a hazardous condition that caused her to fall, whether her own negligence caused her to fall, and to what extent the fall likely injured her?

II. EVIDENTIARY CONSEQUENCES

If the videotape recording showed any such facts, it would have been probative of defendant's liability and plaintiff's lack of comparative fault, and defendant's destruction of the video recording deprives plaintiff of its use to establish defendant's liability, to overcome a defense of her comparative fault, and to corroborate her account with disinterested evidence. Alleva v. United Parcel Serv., Inc., 112 A.D.3d 543, 544 (1st Dep't 2013);

Strong v. City of New York, 112 A.D.3d at 24; Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 251 (1st Dep't 2011). See Dulac v. AC & L Food Corp., 119 A.D.3d 450, 452=53 (1st Dep't 2014). Plaintiff has been unsuccessful in obtaining disclosure from defendant of the identity and whereabouts of the employees in the store when she fell, who might provide her an alternative source of disinterested evidence.

If the videotape recording was probative of defendant's liability and plaintiff's lack of comparative fault, even negligent destruction of the video recording would warrant an adverse inference. Pegasus Aviation I, Inc. v. Varig Logistics S.A., 26 N.Y.3d 543, 554 (2015); Dulac v. AC & L Food Corp., 119 A.D.3d at 451; Strong v. City of New York, 112 A.D.3d at 24. Since plaintiff has not established that defendant's destruction of the recording was intentional or even reckless, however, and she still may rely on her testimony to depict her fall, the condition that caused her fall, her own care in walking about the store, and her injuries from the fall, the circumstances do not warrant a more severe penalty. Alleva v. United Parcel Serv., Inc., 112 A.D.3d at 544; Strong v. City of New York, 112 A.D.3d at 23-24; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d 481, 482-83 (1st Dep't 2010).

Whatever plaintiff reported to defendant's employees regarding her fall and injury, which they eventually relayed to defendant's manager, he found the circumstances significant or

serious enough to investigate by attempting to view the segment of defendant's videotape recording that depicted plaintiff's fall in defendant's store. The only conceivable purpose for this review was to evaluate defendant's potential liability. This evidence demonstrates that defendant was obligated to preserve the video recording at least until an employee with authority to evaluate defendant's potential liability viewed the recording.

The next question, however, is whether, had the manager viewed the videotape recording, it would have contradicted plaintiff's report and eliminated any reasonable expectation that plaintiff would claim against defendant for a fall over a hose, by showing that she did not in fact fall or that the impact and her subsequent actions belied any injury, for example. Pegasus Aviation I, Inc. v. Varig Logistics S.A., 26 N.Y.3d at 554; Dulac v. AC & L Food Corp., 119 A.D.3d at 452-53; Rivera-Irby v. City of New York, 71 A.D.3d 482, 482 (1st Dep't 2010). See Strong v. City of New York, 112 A.D.3d at 22-23; Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d at 571; VOOM HD Holdings LLC v. Echostar Satellite L.L.C., 93 A.D.3d 33, 36, 42 (1st Dep't 2012); Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d at 482. In sum, if the video recording showed that plaintiff did not sustain an actionable injury, defendant would be relieved of any obligation to preserve the recording.

III. CONCLUSION

In the current record, the evidence of what the videotape recording likely showed is piecemeal and inconsistent. No

evidence demonstrates even whether the surveillance camera was positioned so that it captured the hose on the floor or plaintiff's movements in the store. If it did not, then of course, even if defendant were obligated to preserve the video recording based on plaintiff's report to store employees, destruction of the recording did not prejudice plaintiff. Plaintiff further fails to present any account by her or through any other evidence of her fall and injury to permit assessment of what the video recording likely showed before it was destroyed.

The evidence at trial undoubtedly will elucidate what the videotape recording likely showed and may also elucidate what precise information prompted the manager to attempt to view the video recording and whether defendant received any information before the recording was destroyed, other than plaintiff's report to the store employees on duty, suggesting a potential claim by her. As any adverse inference instruction may include defendant's explanation for the destroyed videotape, Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 255, the evidence adduced at trial will better inform the court's determination regarding both the justification for and the contents of an adverse inference instruction. See C.P.L.R. § 3126(1); Pegasus Aviation I, Inc. v. Varig Logistics S.A., 26 N.Y.3d at 554; Strong v. City of New York, 112 A.D.3d at 24; Rivera-Irby v. City of New York, 71 A.D.3d at 483.

Consequently, the court grants plaintiff's motion for penalties only to the extent of permitting an instruction at

trial that the jury may draw an adverse inference from defendant's destruction of the videotape recording inside its store when plaintiff was there insofar as the justice presiding at the trial determines such an instruction is warranted. C.P.L.R. § 3126(1); Pegasus Aviation I, Inc. v. Varig Logistics S.A., 26 N.Y.3d at 554; Strong v. City of New York, 112 A.D.3d at 24; Rivera-Irby v. City of New York, 71 A.D.3d at 483. The court otherwise denies plaintiff's motion. C.P.L.R. § 3126(2) and (3).

DATED: May 13, 2019

LUCY BILLINGS, J.S.C.

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