

Davis v Pathmark

2019 NY Slip Op 32271(U)

June 11, 2019

Supreme Court, Bronx County

Docket Number: 22997/2012

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 22997/2012

ADINE DAVIS,

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

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

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for an order striking the plaintiff’s complaint and motion to strike note of issue and related relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendant Bruckner Plaza Shopping Center, LLC, Good Faith Affirmation of Michael V. Mantovani, Esq. dated April 24, 2019, Affirmation of Michael V. Mantovani, Esq. dated April 24, 2019 in Support of Motion, and Exhibits (“A” through “N”).....	1
Affirmation of Brian J. Isaac, Esq. dated April 30, 2019 in Opposition to Motion and Exhibits (“A” through “C”).....	2
Reply Affirmation of Michael V. Mantovani, Esq. dated May 1, 2019.....	3
Defendants’ Notice of Motion, Affirmation of Alexander J. Drago, Esq. dated January 30, 2019 in Support of Motion, and Exhibits (“A” through “G”).....	4
Affirmation of Brian J. Isaac, Esq. dated April 1, 2019 in Opposition to Motion and Exhibits (“1” through “9”).....	5
Reply Affirmation of Alexander J. Drago, Esq. dated May 1, 2019 and Exhibit (“A”).....	6

These motions are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on these motions is as follows:

Defendant Bruckner Plaza Shopping Center, LLC (“Bruckner Plaza”) seeks an order penalizing the

plaintiff for her failure to provide certain discovery, including failing to appear for a deposition and physical examination, and extending its deadline to seek summary judgment. The defendants also move for an order striking the note of issue and certificate of readiness. The motions are granted solely as ordered below and are denied in all other respects.

The plaintiff seeks monetary damages for personal injuries allegedly sustained as a result of a slip and fall on premises operated by defendants Pathmark and/or Pathmark Store, Inc. (collectively, "Pathmark") and owned by Bruckner Plaza. Video surveillance maintained by Pathmark depicted the area of the plaintiff's fall. However, the available footage was limited to a single camera's view and began just 31.76 seconds prior to the fall.

At issue is whether Bruckner Plaza is entitled to discovery in light of the holding by the Appellate Division, First Department, affirming the Order of Hon. Lizabeth Gonzalez, J.S.C. striking the answer of defendants Pathmark and Pathmark Store, Inc. (*see Davis v. Pathmark*, 162 AD3d 563 [1st Dept 2018]). Judge Gonzalez found that Pathmark was guilty of spoliation of certain video footage and granted summary judgment on the issue of liability as a result. In pertinent part, the Appellate Division's decision states: "Order, Supreme Court, Bronx County (Lizabeth Gonzalez, J.), entered September 20, 2017, which granted plaintiff's motion to strike the answer of defendants Pathmark and Pathmark Store, Inc. pursuant to CPLR 3126, and thereupon granted plaintiff summary judgment on the issue of liability, unanimously affirmed, without costs."

The plaintiff does not dispute that the appellate decision affirmed the spoliation sanction specifically against defendants Pathmark and Pathmark Store, Inc. (*see Isaac Affirmation*, p. 1). That is, no mention is made of defendant "Bruckner Plaza Shopping Center, LLC". However, the plaintiff argues that the interests of Bruckner Plaza and Pathmark were united by their decision to appear in this action by the same attorney (distinct counsel has since appeared for each defendant) and present a joint defense. Consequently, the plaintiff contends that Bruckner is not entitled to further discovery since its answer was effectively stricken (*see Servais v. Silk Nail Corp.*, 96 AD3d 546 [1st Dept 2012]). On or about January 22, 2019, the plaintiff filed a note of issue placing this case on the trial calendar, since discovery proceedings had been completed/waived.

The plaintiff's deposition and physical examination(s) are the major items that remain outstanding. The plaintiff does not dispute that the requested discovery has not been furnished and does not object to the requested items on any other grounds.

The plain reading of the First Department's decision is that Bruckner Plaza was not the intended subject of the spoliation sanctions. The decision's opening sentence clearly names Pathmark, and only Pathmark, as the party whose answer was stricken. The caption of the Appellate Division's decision does not name Bruckner Plaza as an appellant, but simply as a defendant. In her Decision/Order, Judge Gonzalez makes clear that references to "Pathmark" are meant to indicate defendants Pathmark and Pathmark Store, Inc., and not Bruckner Plaza. In fact, no specific mention is made of Bruckner Plaza in her entire Decision/Order. In explaining that there was an obligation to preserve the video footage, Judge Gonzalez states that "[i]t is unrebutted that the Pathmark defendants were aware of plaintiff's alleged slip and fall accident in its Bronx location on 8/29/12." No such finding was made against Bruckner Plaza.

The First Department's denial of the defendants' motion for clarification of the decision does not require a different result. There simply was nothing to clarify. Alternatively, the motion to clarify was denied for the reason propounded by the plaintiff - that the appropriate remedy was for Bruckner Plaza to move in the Supreme Court for an order compelling the plaintiff to furnish the outstanding discovery and appeal any order denying such relief (see Isaac Affirmation, Exhibit "B"). That is precisely what is presently before this Court.

The plaintiff named these defendants as distinct entities in commencing this lawsuit. Initially, Pathmark Stores, Inc. answered on its own and subsequently served a later answer jointly with Bruckner Plaza by the same law firm (see Mantovani Affirmation in Support, Exhibit "B"). In a slip and fall case, it is often the case that liability is held against the storekeeper, while the landlord is absolved of liability (see *Erikson v. J.I.B. Realty Corporation*, 12 AD3d 344 [2nd Dept 2004] and *Santos v. 786 Flatbush Food Corporation*, 89 AD3d 828 [2nd Dept 2011]). Here, the bar to further discovery arises from the failure to preserve certain video surveillance footage. A spoliation sanction against a commercial tenant does not automatically apply against the commercial property owner, unless the property owner was also on notice to preserve the item and shared some control over the store (see *Rookwood v. Busy B's Child Care Daycare, Inc.*, 147 AD3d 561 [1st Dept 2017]). Such was not the case here. While a conflict of interest may be presented, the plaintiff does not set forth any caselaw that applied a severe discovery-related sanction to all distinct parties represented by a single attorney. In fact, no mention is made in the Appellate Division's decision, the Supreme Court's decision, or the original motion papers of either side of any significance of the fact that the same law firm represented all of the defendants.

Notably, plaintiff's counsel agreed to unconditionally furnish updated authorizations for the release

of certain records even after the Appellate Division decision (*see* Drago Affirmation in Support, Exhibit “G”). This is inconsistent with the belief that no further discovery was owed to either defendant.

Under these circumstances, Bruckner Plaza was entitled to the discovery that the plaintiff refused to provide and the note of issue will be stricken. Consequently, the deadline to seek summary judgment has been extended (*see Marks v. Model*, 53 AD3d 533 [2nd Dept 2008]).

Accordingly, it is hereby

ORDERED that the note of issue filed by the plaintiff on or about January 22, 2019 is stricken; and it is further

ORDERED that the plaintiff shall provide the outstanding discovery items to Bruckner Plaza no later than 60 days following service of a copy of this Order with notice of entry.

The foregoing constitutes the Decision and Order of this Court.

DATED: 6-11-19
Bronx, New York

LGD
HON. LAURA G. DOUGLAS
J.S.C.