

**Ellis v JP Morgan Chase Bank, N.A.**

2019 NY Slip Op 32796(U)

September 23, 2019

Supreme Court, New York County

Docket Number: 156426/2017

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

*Justice*

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INDEX NO. 156426/2017

ROXANNE ELLIS,

MOTION DATE 08/12/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,  
JPMORGAN CHASE & CO., 383 MADISON, LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion and cross-motion for SUMMARY JUDGMENT/SPOLIATION SANCTIONS.

*Reingold & Tucker* (Jordan W. Tucker of counsel), for plaintiff.

*Stagg Wabnick Law Group LLP* (Thomas E. Stagg and Michael C. Dombrowski of counsel), for defendants.

Gerald Lebovits, J.:

This is a personal-injury action brought by plaintiff, Roxanne Ellis, against defendants, JP Morgan Chase Bank, N.A. (JP Morgan), and 383 Madison, LLC (383 Madison).

Ellis, then a delivery driver for nonparty Sysco, was injured while attempting to make a delivery of dry goods to JP Morgan's offices at 383 Madison. Ellis was attempting to maneuver a heavily loaded pallet of dry goods down a ramp from her truck to the floor of JP Morgan's loading dock. While Ellis was going down the ramp, she lost control of the pallet and was caught between it and a number of loose items standing out from the wall of the loading dock; she sustained serious injuries as a result.

Ellis brought this action against defendants, alleging among other things that they were negligent in failing to maintain a clear space between the edge of JP Morgan's offloading ramp and the wall of the loading dock. Defendants move for summary judgment on Ellis's claims against them; Ellis cross-moves for spoliation sanctions. Defendants' summary-judgment motion is denied; plaintiff's spoliation motion is granted in part.

**I. Spoliation**

Because resolving Ellis's request for spoliation sanctions bears on defendants' motion for summary judgment, this court addresses spoliation first. Ellis's spoliation claim relates to video

footage from several security cameras in the loading dock that was taken on the day of the incident but was overwritten before Ellis could obtain it. Ellis asserts that this video footage contained relevant and probative information relating to her negligence claims and that JP Morgan had a duty to preserve it.

Under New York's common-law doctrine of spoliation, courts "possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence." (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015].) A party seeking such relief must show that (i) the party against whom relief is sought had control over the evidence; (ii) the party with control over the evidence had an obligation to preserve it at the time of its destruction; (iii) the evidence was destroyed with a culpable state of mind, which may include negligence (*see Strong v City of New York*, 112 AD3d 15, 21 [1st Dept 2015]); and (iv) the destroyed evidence was relevant to the moving party's claim or defense. (*See Pegasus Aviation*, 26 NY3d at 546.)

Here, it is undisputed that JP Morgan had control over the cameras and video footage at issue; and that the lost footage is relevant to Ellis's negligence claims. But JP Morgan strenuously contests Ellis's claim that JP Morgan culpably failed to satisfy its obligation to preserve the footage. JP Morgan argues that the incident itself did not provide notice of the possibility of future litigation, thereby giving rise to a duty to preserve; and that JP Morgan was not otherwise put on notice of an obligation to preserve until well after the video footage had been overwritten pursuant to JP Morgan's standard retention policies. This court disagrees.

The First Department has made clear that a defendant's contemporary knowledge that an individual has been injured in an accident on the defendant's premises can give rise to an obligation to preserve video footage for potential future litigation even in the absence of a damages claim or pre-action litigation-hold notice. (*See Macias v Asal Realty, LLC*, 148 AD3d 622, 622 [1st Dept 2017]; *Maiorano v JPMorgan Chase & Co.*, 124 AD3d 536, 536 [1st Dept 2015].) Here, as in *Macias* and *Maiorano*, a security manager for JP Morgan (Francis Brennan) was at the scene of the incident within minutes after it occurred and was informed both of the circumstances of the incident and that Ellis had been injured. JP Morgan was thereby placed on notice of Ellis's accident and possible future litigation, such that JP Morgan had an obligation to preserve video surveillance footage relating to the incident.

To be sure, as JP Morgan argues, Ellis refused JP Morgan's offers of medical attention at the scene and did not require a call to EMS. But Brennan testified at his deposition that Ellis told him what had happened to her and that she had hurt her shoulder; that Ellis said her company would be sending another driver to pick up Ellis and take her and her truck back; and that Brennan had assumed based on his conversation with Ellis that she was being picked up because she was sufficiently hurt or shaken up by the incident that she did not feel able to drive her own truck. In short, JP Morgan was aware at the time of the incident, through its security manager, that an individual had been involved in an accident on its premises and had sustained more than trivial injuries as a result. JP Morgan thereby was placed on notice of the potential for future litigation involving this accident, even if Ellis did not require immediate treatment at a hospital.

Additionally, Brennan was undisputedly aware not only that the loading dock's security cameras would have recorded the incident and the period prior to the incident, but also that JP Morgan regularly overwrote such surveillance footage as a matter of routine policy. The burden on JP Morgan to preserve at most a few hours of video footage from a few security cameras also is not substantial. JP Morgan's failure nonetheless to preserve was negligent. (*Macias*, 148 AD3d at 622.)

Since Ellis has not established that JP Morgan acted out of a more culpable motive than ordinary negligence, and since the loss of the video footage is not, standing alone, fatal to Ellis's ability to prove her case, this court declines to grant Ellis's requested relief of striking defendants' answer or granting judgment altogether. Instead, the court concludes that the proper sanction is to impose an adverse inference on the issue of prior notice regarding the items in the loading dock against which Ellis was pinned by her pallet of goods. (*See Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 47 [1st Dept 2012].)

## II. Summary Judgment

Defendants have filed a combined motion for summary judgment dismissing Ellis's complaint under CPLR 3212. JP Morgan argues that it is entitled to summary judgment because Ellis cannot make out a prima facie case of negligence against it. 383 Madison seeks summary judgment on the ground that it was an out-of-possession landlord with no duty to maintain the loading dock where Ellis was injured.

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact. If the movant fails to make this showing, the motion must be denied (*See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. (*See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied." (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992].)

### A. JP Morgan's motion

JP Morgan argues that it is entitled to summary judgment because it neither created nor had notice of a hazardous condition on its loading dock. This argument is without merit. As to notice, JP Morgan fails to make out a prima facie showing of lack of notice. As to the presence of a hazardous condition, Ellis has established the presence of a triable issue of material fact. JP Morgan's summary-judgment motion is denied.

## 1. Notice

A defendant moving for summary judgment on lack-of-notice grounds bears the burden of establishing its lack of notice as a matter of law. Where defendant lacked actual notice of the condition at issue, defendant must demonstrate the lack of evidence “regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed.” (*Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001].)

JP Morgan’s principal argument is that it lacked notice of a potentially hazardous buildup of items at the back wall of the loading dock because its security officer managing the dock (Latoya Rhoden) testified at her deposition that she had not previously received any complaints of clutter on the loading dock, and because the facility-management company for the building found no hazardous conditions when conducting bi-annual inspections of the dock. But any hazard resulting from the buildup of such items is a transient condition; that it had not previously been identified as a problem during an inspection, or been the source of a complaint does not establish *as a matter of law* that JP Morgan had no notice that such a condition could occur.

To the contrary, Rhoden testified that items (such as old office furniture and the like) were commonly deposited at the back wall of the loading dock when construction or redevelopment work occurred in office space in the building, and that such work occurred quite often. Rhoden also testified that a security guard was stationed inside the loading dock and frequently coordinated with delivery drivers to connect their trucks with JP Morgan’s offloading ramp. Additionally, Rhoden’s supervisor, Brennan, had access to security cameras giving a view of the back of Ellis’s truck as it was parked in a bay of the loading dock—and therefore of the area in which Ellis was injured.

The record thus indicates that the alleged hazardous condition in this case was one that could occur regularly if not prevented; that it was a readily apparent, indeed obvious condition; and that JP Morgan had multiple means by which its security employees could (or should) have been aware of the condition when it occurred.

To be sure, as JP Morgan notes, Ellis has not introduced evidence demonstrating how long the condition was present before her injury. But that lack of evidence is due among other things to JP Morgan’s destruction of video evidence that could have established how long the buildup of items on the loading dock had existed—or at the very least that the buildup had been present for enough time that JP Morgan had an opportunity to ameliorate it. As discussed above, in light of JP Morgan’s spoliation of evidence, a jury may draw the adverse inference that the video evidence, had it been preserved, would have established that JP Morgan had sufficient advance notice to address the condition that Ellis alleges led to her injury.

## 2. Hazardous Condition

JP Morgan also argues that it has established as a matter of law that the buildup of loose items on the loading dock was not hazardous. Again, this court disagrees.

JP Morgan relies heavily on an expert affidavit provided by an architect, Scott Cameron. Cameron stated that he had found that the presence of the items on the loading dock reduced the usable space on the dock from 6 feet to 4 feet. He nonetheless opined that the presence of boxes and other items on the dock here was typical for loading docks and did not create a hazardous condition, in part because a typical cargo pallet would be 30 or 36 inches wide, leaving 12 to 18 inches of clearance.<sup>1</sup>

But a reasonable jury would not *necessarily* be required to credit Cameron's expert opinion. (*See Nin v Bernard*, 257 AD2d 417, 418 [1st Dept 1999] [noting, in decision reversing the grant of summary judgment to defendant, that a statement of defendant's expert "hardly constitute[d] a conclusive refutation of plaintiff's case].) To the contrary, where a plaintiff introduces evidence of dangerousness, the question whether a given condition indeed qualifies as dangerous is generally one for the jury at trial, not the court at summary judgment. (*See Trincere v. County of Suffolk*, 90 NY2d 976, 977 [1997].)

Here, a reasonable jury could, for example, credit Ellis's photographic evidence indicating that she had been pinned between the pallet and the items present on the loading dock before the back wheels of the pallet had even left the ramp, and conclude that *contra* Cameron's affidavit, there was not sufficient room between the ramp and the wall of the dock to safely unload a heavy pallet off the ramp. In reaching that conclusion, a reasonable jury could also take into account the testimony by Brennan and Rhoden that the buildup of items shown in the photographs was not suitable or acceptable and should have been promptly corrected.

On this record, a dispute of material fact exists that should be decided by a jury. JP Morgan's motion for summary judgment is denied.

### **B. 383 Madison's motion**

383 Madison argues that it is entitled to summary judgment because it was merely the owner of the building, and lacked control of the loading dock where the accident occurred. But, as plaintiff points out, 383 Madison's papers do not cite any admissible *evidence* to that effect.<sup>2</sup> At most, on reply, 383 Madison submits a letter from defendants' counsel stating that JP Morgan's insurance company had accepted 383 Madison's tender of its defense to Chase as an additional insured on Chase's insurance policy. But that letter does not indicate the terms of the policy, or the circumstances under which the defense came to be tendered and accepted. Absent some additional showing that 383 Madison did indeed lack control of and responsibility for the site of the accident, this court declines to grant 383 Madison's motion for summary judgment.

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<sup>1</sup> Cameron's affidavit did not address whether that 12-to-18" space would be sufficient for a person to stand behind a loaded, heavy pallet and maneuver it off an inclined ramp. Nor did he explain the basis by which he, as an architect, had expert knowledge regarding the typical dimensions of cargo pallets.

<sup>2</sup> Defendants' memorandum of law in support of summary judgment refers cryptically to testimony by JP Morgan indicating that JP Morgan and its contractors were "solely responsible for keeping the Dock in clean and safe condition." But it provides no citation to that testimony, leaving this court unsure of the evidence to which defendants mean to refer.

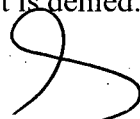
Accordingly, it is

ORDERED that Ellis's cross-motion for spoliation sanctions is granted to the extent of imposing an adverse inference regarding defendants' notice of a hazardous condition; and it is further

ORDERED that defendants' motion for summary judgment is denied.

9/23/2019

DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE