Hill v Capsule NYC LLC
2020 NY Slip Op 30337(U)
February 5, 2020
Supreme Court, New York County
Docket Number: 150002/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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ROSIE COX HILL et ano.,

Plaintiffs,

- v -

CAPSULE NYC LLC et al.,

Defendants.

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INDEX NO. 150002/2017

MOTION DATE 09/26/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 113, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for PRECLUDE.

Motion by Plaintiffs Rosie Cox Hill ("Plaintiff") and Samuel Hill, Jr. for an order imposing sanctions against defendant Capsule NYC LLC ("Capsule") for spoliation of evidence and for an order requiring Capsule to disclose all statements and written or oral notes as to statements or interviews of non-party witness and former Capsule employee John Vega is denied as to the issue of sanctions and resolved as to the request for disclosure to the following extent.

BACKGROUND

Plaintiff commenced the instant trip-and-fall personal injury action on December 30, 2016. Plaintiff alleges in the instant matter that she tripped and fell on October 6, 2016, on an upturned grab handle attached to a closed sidewalk cellar door leading to the cellar of 383 West 125th Street (the "Premises") due to the negligence of Defendants. As is relevant here, Plaintiff alleges that Capsule, a subtenant at the Premises, kept certain merchandise in the cellar and maintained a restroom there. Capsule interposed its answer on February 22, 2017. An affidavit of service submitted in the reply papers indicates that two copies of process were left for Capsule with the secretary of state on January 5, 2017, with the intention of effectuating service of process upon Capsule pursuant to Limited Liability Company Law § 303. (NYSCEF Doc No. 123.)

Spoliation

In sum and substance, Plaintiff has sought certain surveillance video from Capsule allegedly captured from a camera that would have given a close, clear view of Plaintiff's fall and the subject door handle. Capsule claims that, while such video may have been captured at some point on its systems, the underlying data was overwritten or destroyed as part of its routine practice and based upon the storage limitations of its video capture system.

Plaintiff argues, in sum and substance, that Capsule was aware of Plaintiff's fall on the date of the accident through its store security person, Mr. John Vega, and store manager, Mr. Ramadan Dialo.

Mr. Dialo stated that he never knew there was a video of the accident. (Dialo tr at 55, line 2.) Mr. Dialo was asked how long the video footage could be stored in memory and responded "[t]he most maybe two months, the most, three, I don't know." (*Id.* at 55, lines 11–12.) Mr. Zakkour testified that video was stored on a DVR that records for two weeks. Mr. Zakkour further testified that he learned of the accident two or three days after the event. (Zakkour tr at 60, lines 20–23.) Moreover, Mr. Dialo and Mr. Zakkour both testified that they did not view any video of Plaintiff's fall themselves. Specifically, Mr. Dialo said that he "never looked 'cause I never knew it was going to be this serious." (Dialo tr at 55, lines 15–16.) Mr. Zakkour indicated he did not look on the security camera to see the accident. (Zakkour tr at 60, lines 24–25; at 61, line 2.) Mr. Zakkour further indicated he did not know if any of his employees had viewed video of the accident. (*Id.* at 61, lines 11–19.)

Plaintiff, in discovery, demanded the name and model number of Capsule's video system, and this was memorialized in this Court's December 18, 2018 compliance conference order directing Capsule to provide such information to Plaintiff. On March 20, 2019, Capsule informed Plaintiff that "Eyemax" was the name of the camera system in place when Plaintiff allegedly tripped and fell. Capsule did not provide a model number. Capsule denies having video of the subject accident.

Capsule argues in opposition that Plaintiff has failed to show that Capsule willfully failed to preserve the subject video. Capsule asserts that no ambulance was called after Plaintiff's accident and that Plaintiff was standing after the accident, indicated she was fine, walked away from the accident and to her apartment nearby, and did not file an incident report. Capsule further argues that the record demonstrates that no Capsule personnel saw the subject video.

Capsule argues, in sum and substance, that it was unaware the matter would be litigated prior to the subject video being erased due to Capsule's normal business practices. Capsule argues that Plaintiff has failed to show that Capsule was given formal notice to preserve the subject video. Capsule argues that Plaintiff did not commence the action until over two months after the accident and never requested that Capsule save any video. Capsule further argues that Plaintiff has failed to show Capsule had any policy for the preservation of video or evidence of a failure to follow anything but its normal procedure which was that any given video data could be stored for up to two weeks after which it would be overwritten on the DVR pursuant to Capsule's normal business practices.

Capsule further argues that Plaintiff will not face great prejudice in not having the subject video as plaintiff Samuel Hill, Jr. and Capsule's witnesses were able to be deposed. Capsule then argues that Plaintiff has claimed a crossing guard was at the scene of the accident and also observed the subject handle being in an upright position, and that it would be for Plaintiff to take steps to obtain the crossing guard's testimony but this has not been done.

Last, Capsule argues that it has provided Plaintiff with the model number of the Eyemax camera system in use on the date of the accident in a letter dated August 12, 2019. The letter states that "[t]he model of the camera was UIB 2022-B28 and the DVR was UVST MAGIC-XL16." (Villegas affirmation, exhibit B.)

Plaintiff argues in reply that a sanction is warranted for Capsule's failure to provide the model number information order at the December 18, 2018 compliance conference until August 12, 2019, approximately seven months after its response with the name and model number was originally due and about a month after the filing of the instant motion. Plaintiff further reiterates her arguments in her moving papers.

Disclosure as to Mr. Vega

Plaintiff has further sought the testimony of Mr. Vega, an eyewitness to the aftermath of Plaintiff's accident whom plaintiff Samuel Hill, Jr. spoke with upon entering the Capsule store and looking for an employee after Plaintiff's fall. Mr. Dialo testified that Vega was no longer working at Capsule as of approximately December 2017, and perhaps December 2016 and prior to when the lawsuit began, while Mr. Zakkour testified that Mr. Vega called Mr. Zakkour indicating that counsel for Capsule had contacted Mr. Vega regarding the accident around September 2018.

On or about January 28, 2019, Plaintiff subpoenaed Mr. Vega for a deposition to be held on February 25, 2019. It is undisputed that, on the day of the deposition, Mr. Vega failed to appear at the appointed time in the morning but did appear at the site in the afternoon after counsel had departed.[1] Plaintiff alleges that Mr. Vega claimed in a phone call and video sent to him (but not made a part of the record before the Court) that he has memory loss and that any deposition as to this accident would be of no use.

Plaintiff argues based on email from Capsule and statements at a June 18, 2019 court conference that counsel for Capsule has had prior conversations with Mr. Vega and that Mr. Vega may have interviewed with counsel for Capsule as to Plaintiff's accident. Plaintiff argues that she has a substantial need for any prior statements of Mr. Vega to counsel for Capsule including their notes of any conversations with him and that such disclosure is warranted in light of the unavailability of this witness and the potential importance of his testimony as to the status of the subject door handle.

Capsule argues in opposition that Mr. Vega was employed by Capsule when the action was commenced and, as such, any statements, notes, etc. obtained by counsel are attorney work product and are absolutely privileged pursuant to CPLR 3101 (c). Capsule further argues that it indicated in response to Plaintiff's December 17, 2018 Demand for John Vega's Statements that it "is not [in] possession of any such statements." (Villegas affirmation, exhibit C.)

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[1] Pursuant to an email sent to the Court from Plaintiff, Plaintiff sent a further letter to Mr. Vega requesting a further date for the deposition of February 4, 2020, but the mailing records indicated the letter was not received by Mr. Vega, and Mr. Vega did not appear. The Court has directed Plaintiff to e-file a letter to NYSCEF along with exhibits containing the attachments annexed to Plaintiff's email for the record. They are not yet online as of this writing.

Capsule further argues in the alternative that if such communications are not attorney work product Plaintiff has failed to demonstrate substantial need and that she is unable without undue hardship to obtain the substantial equivalent of the materials by other means pursuant to CPLR 3101 (d) (2). Capsule argues that it should not be penalized for Mr. Vega's lack of cooperation or failure to appear pursuant to the subpoena of Plaintiff and that Plaintiff could move to compel his deposition testimony.

Plaintiff argues in reply that any statements or records of statements of Mr. Vega should be considered conditionally privileged as he is a former employee of Capsule, and Capsule has failed to meet its burden in asserting the attorney-client privilege by specifying when Mr. Vega ceased to be employed by Capsule or when, if at all, counsel for Capsule communicated with Mr. Vega. Plaintiff further argues that any interview of Mr. Vega by counsel for Capsule was an interview of a non-party witness and is, at best, material prepared in anticipation of litigation.

DISCUSSION

Spoliation

"On a motion or spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing." (*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451–452 [1st Dept 2014].)

Here, the Court finds based upon the papers submitted that Plaintiff has failed to show that Capsule had an obligation to preserve the subject video at the time it was destroyed, whether that time was two weeks after the accident or up to three months as Mr. Dialo, who stated he did not know how long video was held, surmised it might have been up to three months. The record is plain that the accident occurred on October 6, 2016, while Capsule was not served with process until January 5, 2017, by which time the outside date of three months based on the facts presented had already elapsed. Further, Plaintiff has failed to show, or even allege, that she made any request to Capsule to preserve anything in connection with the subject accident. Rather, Plaintiff commenced the action nearly three months after the subject accident and served Capsule with process by means of the secretary of state three months later. As such, Plaintiff having failed to meet the first prong of the *Duluc* test, the Court need not reach the remaining prongs.

As to any argument made by Plaintiff that Capsule should have preserved the video because it was aware that she had fallen and because Mr. Dialo observed Plaintiff in a sling three or four days after the fall, as the Appellate Division, First Department stated in *Duluc*, a plaintiff's entitlement to inspect tapes "does not translate into an obligation on a defendant to preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a plaintiff's request for them. That obligation would impose an unreasonable burden on property owners and lessees." (119 AD3d at 452; *see also Cataudella v 17 John St. Assocs.*,

LLC, 2015 WL 4602344 *7 [Sup Ct, NY County 2015, Edmead, J.], *affd* 140 AD3d 508 [1st Dept 2016];) Here, the burden was on Plaintiff to notice Capsule timely as to the need to preserve the subject video either through a pre-action demand or through notice of commencement of litigation but this was not done. Further, Plaintiff has failed to show that litigation could reasonably have been anticipated by Capsule as a result of the subject accident.

Moreover, while the Court does not condone that Capsule did not provide model number information as to the subject camera system until about seven months after the response was due initially, Plaintiff has failed to demonstrate in her papers how this information might bear upon the issue of when the subject video was erased as a matter of course by the system's DVR. Indeed, the record is bereft of any technical information as to the video storage capacity of Capsule's systems during the relevant period. Plaintiff had certain model number information from Capsule and could have ascertained this information or sought further disclosure from Capsule prior to submitting its reply papers and the instant motion for consideration if it would have had a bearing on the outcome, but this, too, was not done, and the testimony of Mr. Dialo and Mr. Zakkour as to the video retention timeframe is all that is before the Court in the instant application. As such, the branch of the motion seeking spoliation sanctions is denied.

Disclosure as to Mr. Vega

Turning to the branch of the motion that seeks disclosure of statements or notes of such communications of Mr. Vega made to counsel for Capsule, the Court finds based upon the papers submitted that the issue is moot as to the motion to the extent that Capsule has indicated in its discovery response that it has no statements signed by Mr. Vega. Specifically, at the June 18, 2019 status conference, counsel for Capsule stated that

> "Mr. Vega was our employee during the time of the accident and that does not mean we never spoke to him. Sometime while he was under our employment, someone from my office may have spoken to him, of course, to get knowledge about the accident, but other than our firm's notes, we don't have any other statements, written statements, that were signed by Mr. Vega."

(NYSCEF Doc No. 111 [June 18, 2019 tr] at 5, lines 13–19.)

As Capsule's counsel's opposition does not address whether it has the "firm's notes," pursuant to the rule in *Spectrum Systems Intern. Corp. v Chemical Bank*, (78 NY2d 371, 378 [1991], the Court will require that Capsule send to this Court for in camera review "all statements and all notations of statements/interviews, whether written or oral, whether signed or unsigned, whether memorialized by notes, or memorialized in any other form, had by defendant Capsule's counsel or insurer[2], of non-party witness John Vega." (Affirmation of Gedan at 20.) If there are no such records, Capsule shall provide affirmations or affidavits to that effect, and the issue becomes academic. If there are such records, the Court will review them in camera and rule accordingly as to disclosure forthwith.

[2] Capsule offers no specific opposition as to the request of Plaintiff for such statements or notes in the possession of Capsule's insurer.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiffs Rosie Cox Hill and Samuel Hill, Jr. for an order imposing sanctions against defendant Capsule NYC LLC for spoliation of evidence and for an order requiring Capsule to disclose all statements and written or oral notes as to statements or interviews of non-party witness and former Capsule employee John Vega is resolved to the extent that it is

ORDERED that the branch of the motion for sanctions is denied; and it is further

ORDERED that Capsule shall submit to the Court the documents requested for in camera review or any necessary affirmations or affidavits indicating there are no such documents on or before Wednesday, February 19, 2020, at 3:00 p.m.; and it is further

ORDERED that Capsule shall deliver any documents to be reviewed in camera to the Clerk of Part 29 or, in the event Capsule will submit affirmations or affidavits indicating there are no such documents, shall e-file such affirmations or affidavits to NYSCEF and fax a copy of each to the Court at (212) 618-5242; and it is further

ORDERED that the parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, March 10, 2020, at 9:30 a.m., for a status conference.

The foregoing constitutes the decision and order of the Court.

2/5/2020
DATE

HON. ROBERT D. KALISH, J.S.C.

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