Spears v Cumberland Farms, Inc.
2020 NY Slip Op 34636(U)
April 22, 2020
Supreme Court, Orange County
Docket Number: Index No. EF008107-2018
Judge: Sandra B. Sciortino

To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CHERYL SPEARS,

Plaintiff,

-against-

CUMBERLAND FARMS, INC.

Defendant.

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DECISION AND ORDER

INDEX NO.: EF008107-2018
Motion Date: 2/26/2020
Sequence Nos. 1-2

SCIORTINO, J.

The following papers numbered 1 to 25 were considered in connection with the defendant's application for an order granting summary judgment and dismissing the complaint (Seq 1), and the plaintiff's cross-motion for an order striking the defendant's answer on the grounds of spoliation (Seq. 2):

PAPERS	NUMBERED
Notice of Motion (Seq. #1)/Affirmation (Rausch/Exhibits A-F/ Memorandum of Law	1 - 9
Notice of Cross-Motion (Seq. #2) Affirmation (Del Duco)/ Exhibits 1 - 9	10 - 21
Affirmation in Opposition (Rausch)/Exhibits G-I	22 - 25

Background and Procedural History

This is an action for personal injuries arising out of a slip and fall accident which allegedly occurred at the Cumberland Farms store located at 251 Highland Avenue, Wallkill, New York on August 9, 2015. Plaintiff commenced this action by the filing of a Summons and

Complaint (Exhibit A) on July 31, 2018. Issue was joined by the service of defendant's Answer (Exhibit B) on September 6, 2018.

In her Complaint and Verified Bill of Particulars, the plaintiff alleges that, on August 9, 2015, at approximately 11:00 a.m., after entering the Cumberland Farms store, she slipped on a puddle of water and fall to the ground. Plaintiff alleges that the defendant was negligent in causing, creating, and/or allowing a hazardous condition to exist; in allowing the dangerous condition to remain; in maintaining the premises in an unsafe and dangerous condition; in failing to maintain the premises in a safe condition; in failing to give proper warning of the dangerous condition. (Exhibit C). Plaintiff alleges that she suffered serious and permanent personal injuries as a result (Exhibit A).

Plaintiff's Deposition Testimony

Plaintiff was deposed on July 31, 2019. (Exhibit D) On August 9, 2015, she entered the premises and walked past the "Chill Zone" machine located in the middle of the store. When she reached the rear of the machine, her left leg suddenly slipped and twisted, causing her to fall to the floor. Her left wrist hit a display of cases of beer as she fell, causing an open bottle of water which was on the top of the beer to fall. After she fell, she noticed a patch of water which she described as a puddle, estimated to be 1-2 inches wide. The water was limited to the described puddle, and did not appear to be leaking from the soda machine.

After the accident, plaintiff reported the fall to an employee named Skylar. Skylar allegedly told the plaintiff that some "girls were over there messing, she didn't go check." (Exhibit D, p. 33, lines 23-24).

Agustina Rodriguez Deposition Testimony

Agustina Rodriguez was deposed on July 31, 2019 (Exhibit F). Ms. Rodriguez is the store manager of the Cumberland Farms store; she was not working on the day of the accident. As manager, Ms. Rodriguez is and was responsible for virtually all the day-to day operations of the store. She learned of the plaintiff's incident when she received a call from an employee named Skylar who reported the incident to her. She recalled Skylar reporting there was many kids in the store and there was water on the floor. " She didn't mention that [the kids were] involve[d], but there was water on the floor." (*Id.* at p. 32, lines 2-3)

According to Rodriguez, employees regularly walk the store when not working with customers, keep an eye out for any potential slipping or tripping hazards, and immediately address them. The "Chill Zone" machine is in the center of the store, a highly-trafficked area. Ms. Rodriguez was not aware of any problems or complaints with the machine at the time of the incident or of any reports that anyone had previously slipped or fallen in the vicinity.

Defendant's Motion

Defendant seeks summary judgment dismissing the Complaint, asserting that the defendant lacked notice of the water on the floor and took reasonable measures to care for the store and maintain it in a safe condition.

Ms. Rodriguez's testimony demonstrates the defendant's practices for routine maintenance and inspection. Employees walk the store when not busy with customers and specifically watch for any conditions that might pose a hazard. The plaintiff has failed to produce any proof to the contrary with respect to the defendant's cleaning and inspection practices; plaintiff's claims regarding same are pure speculation.

Defendant further argues that there is no evidence that the defendant created the

condition. The testimony of plaintiff and Ms. Rodriguez both confirm that water was not leaking from the soda machine, and there had been no prior problems with the machine. There had been no prior problems, accidents, or complaints in that area of the store.

Defendant also argues that there is no proof that defendant had actual or constructive notice of any dangerous condition. Ms. Rodriguez received a call from Skylar, a former employee, but Ms. Rodriguez was not told that any children were involved in the incident. Any alleged statement between the former employee and plaintiff does not show that the defendant was aware of the presence of water in the area.

Furthermore, the small size of the patch of water does not lead to an inference of constructive notice. The one to two inch puddle of water was a trivial defect, legally insufficient in size to constitute notice.

On that basis, defendant asserts to have made its *prima facie* showing of entitlement to summary judgment.

Plaintiff's Cross-Motion

By Notice of Cross-Motion, plaintiff seeks an order pursuant to CPLR § 3126, striking the defendant's answer. The plaintiff alleges the defendant's destruction of video footage after receiving notice of the plaintiff's claim and before plaintiff had a chance to inspect the video. In the alternative, the plaintiff asks that the defendant be precluded from offering evidence of the existence or nonexistence of a hazardous condition at the time of the accident, and whether there was notice of the condition. Finally, again in the alternative, the plaintiff asks for a jury instruction (PJI 1:77) pertaining to missing evidence with an adverse inference concerning the

missing evidence that the defendant destroyed or failed to preserve.

In opposition to defendant's motion, plaintiff argues, through affirmation of counsel, that Skylar, defendant's former employee, implied to both plaintiff and Ms. Rodriguez, that the water on the floor was from kids in the area, and that Skylar had been too busy to properly inspect the area of the plaintiff's fall. Skylar has nor been deposed. Furthermore, the question of whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case. Despite defendant's contention, there is no minimum dimension test with respect to the amount of water which constitutes a dangerous condition.

Plaintiff argues that defendant has failed to meet its *prima facie* burden. Defendant did not submit any evidence as to when the last inspection or cleaning had occurred prior to the accident. Ms. Rodriguez testified as to general inspection procedures, but did not testify as to when the last specific inspection of the area occurred prior to the accident. Plaintiff argues that Ms. Rodriguez' testimony demonstrates that employees are expected to inspect the floor only when there are no customers.

Plaintiff argues that defendant's premises is equipped with video cameras that faced the area in which the incident occurred. Ms. Rodriguez and defendant's claims adjuster reviewed store surveillance footage which captured plaintiff's accident. Ms. Rodriguez testified that she initially reviewed the video of the accident on August 10, 2015 and viewed the video again with the claims investigator from Gallagher Bassett (Exhibit 1 to Cross-Motion). The video was the most probative physical evidence as to the condition of the premises when the plaintiff fell; the nature of the condition, and notice that the defendant may have had to the condition. Plaintiff

argues the video would show when the area was inspected prior to plaintiff's fall, and when the water was deposited on the floor.

A claims letter was sent to defendant on or about August 13, 2015. A Letter of Representation was sent on or about August 19, 2015; the receipt was acknowledged by the Claims Adjuster by letter dated August 27, 2015. Despite these notices, defendant and defendant's claims adjuster made no effort to preserve the video.

Opposition to Cross-Motion

In opposition, the defendant argues plaintiff's cross-motion is untimely and should be rejected. Although plaintiff's motion is labeled a cross-motion for spoliation, the relief plaintiff is seeking is dispositive and would essentially result in a finding of summary judgment on liability. Defendant further argues that this cross-motion is an untimely motion for summary judgment as this Court's Individual Part Rules require summary judgment motions to be submitted within 60 days of filing the note of issue. The Note of Issue was filed on November 15, 2019, and the cross-motion was filed on February 19, 2019, over 30 days after the deadline for summary judgment motions. Even if the cross-motion is accepted, it should be denied. Plaintiff's claim that the video was intentionally and willfully destroyed and would have demonstrated the conditions that caused plaintiff's fall are based on speculation.

Defendant further reiterates its argument as entitlement to summary judgment on liability and as plaintiff has failed to present proof sufficient to deny defendant's entitlement to summary judgment.

The Court has fully considered the submissions before it.

Motion for Summary Judgment (Seq. #1)

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact." (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To be awarded judgment as a matter of law, the movant must show that there is no rational process by which a jury could find for the other party. (*Nestro v. Harrison*, 78 AD3d 1032 [2d Dep't 2010]) The evidence must be construed in the light most favorable to the non-moving party, and such a motion may not be granted where the facts are in dispute, where different inferences may be drawn from the evidence; or where the credibility of evidence is in question. (*Id.* at 1033) The moving party's failure to meet its burden of proof requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v. New York University Medical College*, 64 NY2d 851, 853 [1985])

On a summary judgment motion in a slip-and-fall case, defendant must show that "it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it." (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-75 [2d Dept 2012]; *Molloy v Waldbaum, Inc.*, 72 AD3d 659, 659-660 [2d Dept 2010]; *Milano v Staten Is. Univ. Hosp.*, 73 AD3d 1141 [2d Dept 2010] To meet its initial burden on the issue of lack of constructive notice, the moving defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. (*Steele v. Samaritan Found., Inc.*, 176 AD3d 998 [2d Dept 2019])

In the instant matter, defendant failed to satisfy this initial burden. Ms. Rodeiguez, the defendant's manager, claimed to lack personal knowledge of the relevant facts, merely describing the general cleaning practices at the store. The defendant failed to present any evidence regarding specific cleaning or inspection of the area in question at the time the accident occurred. Furthermore, Skylar, the employee on the scene, acknowledged to both the plaintiff and Ms. Rodriguez that there were many children in the store in the area of plaintiff's fall.

Therefore, the Court finds that defendant has failed to establish a *prima facia* case. Triable issues of fact exist.

Cross-Motion for Spoliation (Seq. #2)

Section 3126 of the Civil Practice Law and Rules provides that, if a party wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, including an order deeming the issues to which the information is relevant to be resolved in accordance with the claims of the other party; an order of preclusion; or an order striking the pleadings of the disobedient party.

Under the common law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR §3126. (*Samaroo v. Bogopa Service Corp.*, 106 AD3d 713 [2d Dep't 2013]) The trial court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence; and a sanction may be appropriate even when destruction occurs through negligence rather than wilfulness. (*Id.* at 714)

The nature and severity of the sanction depends on a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party. (*Id.*, citing Weinstein-Korn-Miller, N.Y. Civ. Prac. CPLR ¶3126.05) Where the destruction of key evidence deprives its opponent of an appropriate means to confront a claim with incisive evidence, striking of the pleading of the spoliator may be appropriate. (*DeLosSantos v. Polanco*, 1 AD3d 397 [2nd Dep't 2005]) (where both parties equally affected by spoliation of evidence, sanction was appropriate only to the extent of precluding defendant from offering evidence on the issue; and directing that a negative inference instruction be given at trial regarding the destruction of the evidence)

The Court of Appeals has held that the sanction should be "commensurate with the particular disobedience it is designed to punish, and go no further than that." (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Global Strat Inc.*, 22 NY3d 877 [2013])

Plaintiff seeks an order striking the pleadings of defendants as a sanction for the acknowledged spoliation of the video surveillance tape. In the alternative, plaintiff asks that the defendant be precluded from offering evidence of the issues of whether a hazardous condition existed at the time of the accident, and whether there was notice of those conditions.

Striking a pleading is a drastic sanction to impose for spoliation, in the absence of willful or contumacious conduct. (*Iannucci v. Rose*, 8 AD3d 437 [2d Dep't 2004]) This Court must consider the prejudice inuring to plaintiff from the spoliation before determining that such a severe sanction is necessary as a matter of fundamental fairness. Where the missing evidence

does not deprive the moving party of the ability to establish her case, a less severe sanction is appropriate. (*Id.* at 438) (motion to strike pleading denied where there was no evidence that spoliation was willful or contumacious and plaintiff was not deprived of the means to prove his case)

In the matter, it is without question that a video of the incident existed. Ms. Rodriguez reviewed the video the day after the accident and again with a claims representative in November or December of the same year. The tape was then taped over. (Seq 2, Exhibit 1, pages 36 - 38).

The Court finds that the destruction of the video surveillance tape was, at worst, negligent, and neither willful nor contumacious. Plaintiff has established that the destroyed documents were relevant to her claim. However, inasmuch as plaintiff has not been left "prejudicially bereft", as she can testify about how and where the incident occurred and call other individuals who may have witnessed the incident, the Court finds that an appropriate sanction is to direct that a negative inference charge be given at trial with respect to the unavailable videotape. (*Id.*)

On the basis of the foregoing, it is thus ORDERED that:

1. The defendant's applicationt for summary judgment is denied.
2. Plaintiff's application for sanctions against defendant for the spoliation of video surveillance evidence is granted. The Court shall give a negative inference charge to the jury at the conclusion of trial on liability

The foregoing constitutes the Decision and Order of the Court. Issues not

addressed in this Decision are deemed denied.

Dated: April 22, 2020
Goshen, New York

~~ENTER~~

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*