

Kaschel v Home Goods
2020 NY Slip Op 35050(U)
October 16, 2020
Supreme Court, Ulster County
Docket Number: Index No. EF2018-4226
Judge: Richard Mott
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X
MARY KASCHEL,

Plaintiff,

DECISION/ORDER

-against-

Index No. EF2018-4226
R.J.I. No. 55-19-1209
Richard Mott, J.S.C.

HOME GOODS,

Defendants.

-----X
Motion Return Date: August 17, 2020

APPEARANCES:

Plaintiff: John G. Rusk, Esq.
Rusk, Wadlin, Heppner & Martuscello, LLP
255 Fair Street
PO Box 3356
Kingston, NY 12402

Defendant: Mary C. Azzaretto, Esq.
McAndrew, Conboy & Prisco, Esqs.
1860 Walt Whitman Road, Suite 800
Melville, NY 11747

Mott, J.

Defendant moves for summary judgment dismissing this negligence action to recover for personal injuries. Plaintiff opposes and cross-moves to strike Defendant’s answer for spoliation of evidence.

Background

Plaintiff was injured when struck on the arm by an ottoman that fell from a shelf at Home Goods. Immediately prior thereto, Plaintiff and her daughter heard a noise and the latter saw the shelf move. Plaintiff raised her arms in an attempt to prevent the ottoman from falling and immediately reported the incident to the store manager, Leah A. Pollack

(Pollack). The latter prepared a report and thereafter, photographed the location. The next day, Plaintiff photographed the incident area and requested a copy of the incident report, which was denied.

This action was commenced 16 months after the incident. The complaint alleges liability by Defendant's creation of a dangerous condition and/or *res ipsa loquitur*. Plaintiff alleges Defendant failed to store large/bulky items at a lower level and/or against a wall, provide protective netting or monitor inventory to ensure items were properly placed and secured, thereby permitting the ottoman to fall.

Defendant's Motion/Parties' Contentions

Defendant claims it breached no duty to Plaintiff as it neither created the alleged dangerous condition nor had actual or constructive notice thereof. Further, it avers a lack of evidence that a dangerous condition existed, as there had been no prior incidents or complaints. It posits that Plaintiff merely speculates the ottomans were displayed in an unsecure manner and that the evidence is equally consistent with Plaintiff having caused it to fall. Defendant cites Pollack's deposition that the ottoman would not have been placed above head-height per verbal instructions she received, that it would not have fallen on its own and posed no evident danger.

Plaintiff contends that Defendant has failed to meet its burden since it did not establish that the 25 lb., 3'-5' L x 2' W ottoman was otherwise secured after being placed on its side on a 5' H x 1.5'-depth shelf, with its opening face-front, as depicted Plaintiff's photographs and described in her deposition. Further, Plaintiff insists that Defendant's speculative assertion that she caused the ottoman to fall is insufficient to satisfy its burden.

Alternatively, Plaintiff maintains that triable issues of fact remain as to Defendant's constructive notice of the dangerous display and/or Pollack's actions contributing to the accident. She cites, *inter alia*, her daughter's deposition that shelf movement was caused by placing or removing items in the abutting aisle and Pollack's admitted presence in the immediate vicinity at the time of the accident. Moreover, Plaintiff denies touching the ottoman prior to its fall and notes that Pollack fails to state when the ottoman was placed or last inspected.

Discussion/Summary Judgment

Summary judgment is a drastic remedy and should be granted only when no material facts are sufficiently disputed as to warrant a trial. *Gaddani v. Dormitory Auth. of State of N.Y.*, 43 A.D.3d 1218, 1219 (3d Dept. 2007) citing *Matter of LaBier v. LaBier*, 291 A.D.2d 730, 732 (3d Dept. 2002). The totality of the evidence should be viewed in the light most favorable to the non-moving party and the Court should accord it the benefit of every reasonable inference. *Tenkate v. Tops Mkts.*, 38 A.D.3d 987, 989 (3d Dept. 2007).

Here, Defendant has failed to meet its burden establishing that the ottoman display did not create a dangerous condition. Although Pollack states that the ottoman would have been displayed in accordance with a verbal instructions that it not be placed above head-height, she does not establish its proper placement or a written policy. By contrast, Plaintiff's photographs depict a top-tier shelf which appears consistent with her height estimate. Moreover, Pollack's conclusory statement that Plaintiff's proof of a dangerous condition is lacking, is insufficient to meet Defendant's summary judgment burden. *Kucera v. Waldbaums Supermarkets*, 304 AD2d 531 [2d Dept 2003] (movant does not carry its initial burden merely by citing gaps in plaintiff's case). Thus, unlike *Chaslon v Waldbaum*,

Inc., 266 AD2d 177 [2d Dept 1999] (no evidence that the subject display was defective, contributing to the bottle falling), a jury may reasonably conclude that placing an ottoman of the subject dimensions unsecured on an 5'-high 1.5-deep shelf created a dangerous condition. *New York Tel. Co. v Harrison & Burrowes Bridge Contractors, Inc.*, 3 AD3d 606, 608 [3d Dept 2004] (*prima facie* negligence may be based on circumstantial evidence showing it is more likely or more reasonable that defendant's negligence, and not another's agency, caused the injury)

Defendant's reliance upon *Fontanelli v Price Chopper Operating Co., Inc.*, 89 AD3d 1176 [3d Dept 2011] (precariously placed water bottles establish only that they were placed on the shelf by *someone* in an unsafe manner) is unavailing, as the defendant in that case established a practice of hourly aisle inspections, including one 5 minutes before the accident without noting a dangerous condition, and of a policy of ensuring employees properly stocked goods, unlike here. See also, *Hagin v Sears, Roebuck and Co.*, 61 AD3d 1264, 1266 [3d Dept 2009] ("Proof of regular inspections and maintenance of the area in question—including an inspection and any remedial action just prior to the incident—is ordinarily sufficient to satisfy a defendant's burden of showing no notice of a dangerous condition"); cf., *Ruggiero v Waldbaums Supermarkets, Inc.*, 242 AD2d 268 [2d Dept 1997] (evidence equally consistent with the conclusion that plaintiff or another customer jostled the cans shortly before they fell, rendered proof speculative precluding a finding of constructive notice). Consequently, Defendant's motion is denied. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985) (failure to make *prima facie* showing as a matter of law on summary judgment requires denial of the motion, regardless of the sufficiency of opposing papers).

Plaintiff's Motion/Parties' Contentions

Plaintiff claims that Defendant's answer should be stricken for failure to preserve the report, photographs and security video, despite having investigated the incident. She avers she was not aware of Pollack's photographs or security video until the latter's February 2020 deposition and cites Defendant's early refusal to provide the report. Plaintiff maintains that the loss of these materials is prejudicial because they show how the accident occurred and that she is prejudiced thereby.

Defendant avers that the requested spoliation sanction is not merited because Plaintiff failed to make a demand for preservation, no discovery order was disobeyed and no action was pending when the video was filmed over. Further, it claims there is no evidence it captured the accident or of any prejudice to Plaintiff. Finally, it avers that the delay in commencing this action and the lack of intent or malice in the loss of same precludes such relief.

Discussion

Where a party destroys key evidence depriving the opposition of "means to confront a claim with incisive evidence" the extreme sanction of striking a pleading may be appropriate." *De Los Santos v Polanco*, 21 AD3d 397, 398 [2d Dept 2005]. A lesser sanction is merited, "where the missing evidence does not deprive the moving party of the ability to establish his or her case..." but the movant is unfairly prejudiced by its loss. *Id.*

Here, the unavailability of the report, photographs and video does not deprive Plaintiff of all means to prove the ottoman was improperly stored and thus, to prove her case. Indeed, there is no indication that the video captured the accident or ottoman placement, or that Pollack's photographs are more probative than Plaintiff's. *Atilas v Golub*

Corp., 141 AD3d 1055, 1056 [3d Dept 2016] (plaintiff retained burden of proving the relevancy of unavailable video). Therefore, the extreme sanction of striking Defendant's answer is not merited. However, this decision does not preclude Plaintiff's ability to seek lesser sanctions via a motion in *limine*.

Accordingly, the motion and cross-motion are denied.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Plaintiff, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
October 16, 2020



RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion, Statement of Material Facts, Memorandum of Law and Affirmation of Mary C. Azzaretto, Esq., dated July 2, 2020 with Exhibits A-H;
2. Notice of Cross-Motion, Response to Statement of Material Facts, Memorandum of Law and Affirmation of John G. Rusk, Esq., dated July 8, 2020, with Exhibits A-D, and Affidavit of Mary Kaschel, dated June 29, 2020;
3. Reply Affirmation and Opposition to Cross-Motion of Mary C. Azzaretto, Esq., dated August 3, 2020;
4. Reply Affirmation of John G. Rusk, Esq., dated August 13, 2020.