

<b>Lopez v SF 878 E. 176th LLC</b>
2020 NY Slip Op 35320(U)
May 5, 2020
Supreme Court, Bronx County
Docket Number: Index No. 32052/2018
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
PART 11 - DCM

Index No. 32052/2018

MADELINE LOPEZ,

Plaintiff,

**DECISION/ORDER**

-against-

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

SF 878 E. 176<sup>th</sup> LLC, MOSHE STAHL, JISSACHAR FESSEL,  
and DEBORAH FESSEL,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to dismiss complaint and related relief:

**Papers**

**Numbered**

<b>Defendants’ Notice of Motion, Affirmation of Matthew Solomon, Esq. dated November 20, 2019 in Support of Motion, and Exhibits (“A” through “F”)....</b>	<b>1</b>
<b>Affirmation of Melisande Hill, Esq. dated January 21, 2020 in Opposition to Motion and Exhibits (“A” through “D”).....</b>	<b>2</b>
<b>Reply Affirmation of Matthew Solomon, Esq. dated February 12, 2020 and Exhibits (“A” and “B”).....</b>	<b>3</b>

*Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:*

The defendants seek an order pursuant to CPLR § 3126 dismissing the plaintiff’s complaint as a penalty for her purported spoliation of certain evidence or, alternatively, precluding her from offering evidence at trial regarding the cause of her alleged fall. The motion is denied in its entirety.

The plaintiff seeks monetary damages for personal injuries allegedly sustained on May 5, 2017 following a trip and fall on an exterior stair at an apartment building owned and/or operated by the defendants. At her deposition, the plaintiff testified that she was caused to fall when the heel of her shoe was caught in a crack on the second to last step while descending an exterior staircase. She identified the subject crack on certain photographs. She described her shoes as having heels that were

two inches high and one inch wide. She stated that half of one heel was caught in the crack and caused her to fall. She admitted that she threw out the shoes after the accident, so they were not made available for inspection by the defendants. The issue is what penalty, if any, should be assessed against the plaintiff for her failure to preserve the shoes.

In support of their motion, the defendants submit an affidavit dated November 13, 2019 from Herbert Weinstein (“Weinstein”), an engineer who inspected the subject stairs on the defendants’ behalf. Weinstein inspected the stairs and measured the crack on June 24, 2019, including its depth and width, and took several photographs depicting it. The defendants formally disclosed Weinstein as an expert witness by CPLR § 3101(d) notice dated November 11, 2019. Weinstein avers that if he were able to inspect the heel of the plaintiff’s shoe relative to the crack, he would be able to state with absolute certainty if the accident occurred as described by the plaintiff. Therefore, the defendants contend that the shoes are crucial evidence whose spoliation warrants the imposition of penalties.

In opposition, the plaintiff submits an affidavit dated January 21, 2020 essentially restating her deposition testimony that she does not recall the brand of the shoe, that she threw them away before she learned that her ankle was broken, that she was not contemplating a lawsuit at the time, and that she was unaware of the need for the shoes in the event of a lawsuit. The plaintiff contends that spoliation sanctions are not warranted, since there were other hazards that caused the accident, including improper lighting and a lack of handrails at the stairs. She argues that she had no reason to believe that the shoes were crucial evidence, since she discarded them prior to seeking medical treatment and contemplating litigation. She testified that she disposed of the shoes prior to departing for the hospital on the morning after the accident because they were damaged as a result of the fall. She notes that at that time, she was unaware that she had broken her ankle as a result of the accident. Finally, the plaintiff contends that the defendants have not demonstrated that the shoes would have supported their defense and, in any event, the shoes would have been equally meaningful evidence for both parties. Therefore, the defendants have not been unduly prejudiced by their unavailability.

A party seeking sanctions for spoliation must demonstrate that the party controlling the evidence had a duty to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that missing evidence was relevant to the party’s claim such that a factfinder could find that the missing evidence could support the party’s claim (*Pegasus Aviation I, Inc. v. Varig Logistica, S.A.*, 26 NY3d 543 [Ct App 2015]). Here, the plaintiff was under a duty to preserve the shoes and can be penalized for disposing of the shoes in a negligent, yet unintentional, manner (*see Amaris v.*

*Sharp Electronics Corp.*, 304 AD2d 457 [1<sup>st</sup> Dept 2003]). Having immediately and unequivocally linked her shoes to the proximate cause of her accident, the plaintiff should have preserved them.

The question then becomes what penalties are appropriate under these circumstances. The defendants seek imposition of the harshest sanctions - dismissal of the action or preclusion of the plaintiff's testimony. Such severe penalties are reserved for those instances where the failure to preserve evidence has been shown to have been intentional or where the opposing party has been left without appropriate means to confront the offending party's claims (*see Strong v. City of New York*, 112 AD3d 15 [1<sup>st</sup> Dept 2013]). There is no indication that the plaintiff in the instant case discarded the shoes with the intent to prevent the defendants from examining them in this litigation.


Which, if any, penalty to apply then turns on the effect that the absence of the shoes has on the defendants' ability to challenge the plaintiff's claims. Unlike traditional spoliation cases, here the item that is missing is not alleged to have been defective or the defendants' responsibility (*see Squitieri v. City of New York*, 248 AD2d 201 [1<sup>st</sup> Dept 1998] (missing street sweeper claimed to have been defective) and *Kirkland v. New York City Housing Authority*, 236 AD2d 170 [1<sup>st</sup> Dept 1997]) (allegedly defective stove discarded prior to inspection)). There is no indication that the shoes were flawed in a manner that caused the accident. Under these circumstances, the only material information that could be gleaned from an examination of the shoe would be the dimensions of the heel. In fact, the defendants explicitly argue that it was physically impossible for the heel of these shoes to have lodged in this crack, stating that "Based on the measurements of the shoe and the alleged crack, this accident did not happen as described by the plaintiff" (*see Solomon Reply Affirmation*, paragraphs "20", "29", and "30"). This defense must be based upon the plaintiff's own measurements, since there is no other evidence indicating the possible dimensions of the heel.

Here, the plaintiff has provided the measurements of her heels and Weinstein and the various photographs have revealed the dimensions of the crack. While the defendants would normally be justified in questioning the veracity of the plaintiff's measurements, here the very measurements given by the plaintiff appear to support the defendants' claims. Weinstein does not explain why these measurements do not supply a valid formula upon which to render a conclusion. Since the defendants are aware of the size of the heel and size of the crack, it is not clear what else the actual shoes would contribute, beyond a visual and tangible piece of demonstrative evidence. As a substitute, the defendants may be able to avail themselves of the use of an exemplar shoe as a demonstrative aid (*see Kreusi v. City of New York*, 40 AD3d 820 [2<sup>nd</sup> Dept 2007]). The plaintiff's description of the shoe may

permit the defendants to obtain an exemplar to present to the trier of fact. Since the absence of the shoes has not left the defendants without adequate means to challenge the plaintiff's claims, the drastic remedies sought are not justified.

The foregoing constitutes the Decision/Order of this Court.

DATED: May 5, 2020  
Bronx, New York

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