Leon v City of New York
2021 NY Slip Op 30874(U)
March 18, 2021
Supreme Court, Kings County
Docket Number: 513343/2017
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
---X
JOYCE LEON AND RALPH LEON,

Plaintiffs,

-against-

THE CITY OF NEW YORK and ABM INDUSTIES INCORPORATED,

Defendants.
---X

Index No.: 513343/2017
Motion Date: 3-15-21
Mot. Seq. No.: 2, 3

DECISION/ORDER

The following papers, which are e-filed with NYSCEF as items 31-54, were read on these motions:

In Mot. Seq. No. 2, the defendants, THE CITY OF NEW YORK and ABM INDUSTIES INCORPORATED, move for an order pursuant to CPLR 3212(a) granting them summary judgment dismissing plaintiffs' complaint. In Mot. Seq. No. 3, the plaintiff cross-moves for an order (a) pursuant to CPLR §3126(3), striking defendants' answer for the spoliation of evidence; or, in the alternative, (b) pursuant to CPLR §3126(2), precluding defendants from offering any testimony with respect to the contents of a video of plaintiff's accident, due to its spoliation of the video, and (c) pursuant to CPLR §3212, granting plaintiffs partial summary judgment on the issue of liability against defendants. The two motions are consolidated for disposition.

This action arises from an accident that occurred on April 14, 2016, when the plaintiff, JOYCE LEON, tripped and fell when her foot came into contract with a rolled-up carpet located on the floor underneath a windowsill/ledge which she was sitting on just prior to the accident. The accident occurred in the main lobby by the entrance to the Science and Medicine Middle School, located at 965 East 107th Street in Brooklyn, New York. The evidentiary materials submitted by the defendants in support of their motion include plaintiff's deposition testimony, a copy of a photograph of the area of the accident and the deposition testimony of Dennis Herring, the Principal of the Science and Medicine Middle School.

Plaintiff testified that at the time of the accident, she was employed as a paraprofessional with the New York City Department of Education. On the day of the accident, she was assigned to the Science and Medicine Middle School and was in charge of checking in students who

arrived by bus. After arriving at work that morning, she went to the main office, clock in and picked up the student bus schedule which listed the students who would be arriving by bus that day. She then went to the main lobby by the entrance to the building to wait for the buses to arrive. While waiting for the buses, she sat on the windowsill/ledge, which is located at the bottom of a large window through which she was able to see the buses when they would arrive. The plaintiff identified a photograph of the windowsill/ledge as depicting the area where she was seated. The windowsill/ledge appears to be about 1.5 feet off the floor and is several feet in length.

While seated on the windowsill/ledge, she turned and looked out the window and saw one of the buses arriving. She then stood up, picked up a clipboard which she had placed on a bench to her left and turned to her right. She then took a single step with her right foot and as she stepped, her foot tripped over a carpet that was rolled up and placed on the floor parallel to the windowsill/ledge. As a result of her foot coming into contact with the rolled-up carpet, she was caused to fall backwards.

Plaintiff first saw the rolled-up carpet when she entered the lobby that day and sat down next to it. The rolled-up carpet was about three feet in length and was seven inches in diameter. Plaintiff recalled seeing a rolled-up carpet at that location on at least one prior occasion within the year before the accident. She testified that that the maintenance staff custodian would place a carpet in the lobby when it rained.

Dennis Herring testified at his deposition that he did not witness the accident but that he had reviewed a videotape of the accident immediately thereafter which was captured on security camera. Mr. Herring testified that the video was not retained.

Mr. Herring testified that on wet weather days, the custodial staff would put down mats in the lobby. He did not recall seeing a rolled-up carpets or mat in the lobby area before the day of the accident and was unsure where the mats/carpets were stored. He recalled from his review of the video seeing the plaintiff in the lobby area and seeing her looking out the window. He also saw her take two steps backwards and falling. With respect to whether he saw the rolled-up carpet by the window, he gave the following testimony:

> Q. In the video that you saw, was there a carpet laying on the floor by the window?

> A. I don't remember particularly a carpet by the window, but I believe there was the runner going down the middle.
>
> Q. The runner, was it rolled up or was it laid out?
>
> A. It was laid out.

Plaintiff claims that the lobby was not in a reasonably safe condition because rolled-up carpet constituted an inherently dangerous condition. The defendants contend that the they had no duty to protect or warn against this condition because, as a matter of law, it was open and obvious and not inherently dangerous.

Discussion:

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the movant makes such a showing, in order to defeat the motion "the burden shift[s] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers" (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York,* 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership,* 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.,* 12 A.D.3d 344, 783 N.Y.S.2d 661).

In *Masker v. Smith,* __ N.Y.S.3d __, 2020 WL 6601923, 2020 N.Y. Slip Op. 06519, the Appellate Division, Second Department recently affirmed an order which granted a defendant's motion for summary judgment in a premises liability case. The Court stated:

> A landowner has a duty to maintain his or her premises in a reasonably safe condition, but has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous (*see Swinney v. Nassau County,* 179 A.D.3d 731, 113 N.Y.S.3d 595; *Robbins v. 237 Ave. X, LLC,* 177 A.D.3d 799, 113 N.Y.S.3d 235; *Locke v. Calamit,* 175 A.D.3d 560, 104 N.Y.S.3d 908). In order to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous (*see Karpel v. National Grid Generation, LLC,* 174 A.D.3d 695, 106 N.Y.S.3d 99; *Crosby v. Southport, LLC,* 169 A.D.3d 637, 94 N.Y.S.3d 109). In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property (*see Crosby v. Southport, LLC,* 169 A.D.3d at 640, 94 N.Y.S.3d 109; *Cupo v. Karfunkel,* 1 A.D.3d 48, 767 N.Y.S.2d 40).

(*Id.).* The pivotal issue presented is therefore whether the defendants established as a matter of law that the rolled-up carpet was open and obvious and not inherently dangerous.

Here, not only was the rolled-up carpet open and obvious, the plaintiff admitted seeing it shortly before her accident. Whether a condition is inherently dangerous is a separate issue, the resolution of which depends on the totality of the specific facts of each case (*see Russo v. Home Goods, Inc.*, 119 A.D.3d 924, 925–26, 990 N.Y.S.2d 95, 97, *Clark v. AMF Bowling Ctrs., Inc.,* 83 A.D.3d at 762, 921 N.Y.S.2d 273; *Mazzarelli v. 54 Plus Realty Corp.,* 54 A.D.3d at 1009, 864 N.Y.S.2d 554; *Mauriello v. Port Authority of N.Y. & N.J.,* 8 A.D.3d at 200, 779 N.Y.S.2d 199). Viewing the evidence in the light most favorable to the plaintiff, as the Court must, the Court finds that the defendants failed to eliminate all triable issues of fact as to whether the rolled-up carpet was inherently dangerous (*see Salomon v. Prainito,* 52 A.D.3d 803, 805, 861 N.Y.S.2d 718). A jury could infer that the rolled-up carpet which was placed in an area where people are known to sit constituted a tripping hazard and was therefore inherently dangerous. The defendants therefore failed to establish prima facie that they maintained the premises in a reasonably safe condition (*see Gradwohl v. Stop & Shop Supermarket Co., LLC,* 70 A.D.3d at 636–637, 896 N.Y.S.2d 85; *Schloss v. Stew Leonard's Yonkers, LLC,* 24 A.D.3d 223, 804 N.Y.S.2d 922). For the above reasons, defendants' motion for summary judgment must be denied regardless of the sufficiency plaintiff's opposing papers.

Turning to the cross-motion, "to support a determination of sanctions pursuant to CPLR 3126, the moving party must demonstrate that the responsible party's actions were 'willful and

contumacious' ” (*Falcone v. Karagiannis,* 93 A.D.3d 632, 633, 939 N.Y.S.2d 561, quoting *Denoyelles v. Gallagher,* 40 A.D.3d 1027, 1027, 834 N.Y.S.2d 868). “Similarly, under the common-law doctrine of spoliation, ‘when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading’ ” (*Denoyelles v. Gallagher,* 40 A.D.3d at 1027, 834 N.Y.S.2d 868, quoting *Baglio v. St. John's Queens Hosp.,* 303 A.D.2d 341, 342–343, 755 N.Y.S.2d 427). A less severe sanction or no sanction may be appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense *(Denoyelles v. Gallagher,* 40 A.D.3d 1027, 1027, 834 N.Y.S.2d 868). “The determination of a sanction for spoliation is within the broad discretion of the court” (*Falcone v. Karagiannis,* 93 A.D.3d at 634, 939 N.Y.S.2d 561).

Here, it has not been demonstrated that the defendant’s failure to maintain the videotape was willful and contumacious. Further, the missing video tape does not deprive the plaintiff of her ability to establish her case. Under the circumstance the Court finds that an appropriate sanction would be to preclude the defendants from calling any witnesses to testify as to the content of the videotape at the time of trial.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint is **DENIED**, and it is further

ORDERED that plaintiff’s cross-motion is **GRANTED** to the extent that the defendants are precluded from calling any witnesses to testify as to the content of the videotape at the time of trial.

This constitutes the decision and order of the Court.

Dated: March 18, 2021

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020