

Melendez v WFP Tower D Co. L.P.
2021 NY Slip Op 31538(U)
May 6, 2021
Supreme Court, New York County
Docket Number: 156604/2019
Judge: Margaret Pui Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET PUI CHAN PART IAS MOTION 33EFM

Justice

-----X

INDEX NO. 156604/2019

LEONOR MELENDEZ,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. (MS) 001; 002

- v -

WFP TOWER D CO. L.P., BROOKFIELD FINANCIAL
PROPERTIES, L.P., ABM ONSITE SERVICES, INC., SOS
SECURITY OF NEW YORK LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

ABM ONSITE SERVICES, INC.

Third-Party
Index No. 595993/2020

Plaintiff,

-against-

SOS SECURITY LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for JUDGMENT - DEFAULT.

In this personal injury matter, plaintiff Leonor Melendez moves in MS1 to strike the answer of defendants WFP Tower D Co. L.P. (WFP) and Brookfield Financial Properties, L.P. (Brookfield) (collectively, owner defendants) or, in the alternative, for a finding in favor of plaintiff on the issue of notice of the defective condition at the subject accident site (NYSCEF # 17). The owner defendants oppose the motion.

Plaintiff also moved in MS2 for entry of default judgment against defendant SOS Security of New York, LLC (SOS) (NYSCEF # 60). However, plaintiff and SOS submitted a "Stipulation to Withdraw Motion for Default" dated March 5, 2021 (NYSCEF # 65). As such, the motion for default judgment is withdrawn.

BACKGROUND

Plaintiff alleges that on February 4, 2019, she was injured when she slipped and fell on a slippery substance on the floor of the lobby at the owner defendants' premises located at 250 Vesey Street, New York, New York 10281. The owner defendants generated an accident report of the incident on February 11, 2019 (NYSCEF # 23). Plaintiff's accident was recorded on video.

Plaintiff claims that a letter was sent to Brookfield on February 18, 2019, requesting that it preserve any videos of the lobby on the date of the accident, specifically any video from 8:00 am through the time of the accident at 2:30 pm (NYSCEF # 24).

The owner defendants deny receipt of plaintiff's letter and proffer the affidavit of Ana Guzman, Senior Paralegal for Brookfield, which detailed Brookfield's record keeping for litigation correspondence (NYSCEF ## 48-49). Guzman avers that Brookfield never received the February 2019 letter, and, if it had, it would have contacted its outside security vendor to preserve the tapes (*id.* at ¶¶ 11-12).

Plaintiff initiated this action on July 3, 2019, and filed an amended summons and complaint on November 13, 2019 (NYSCEF ## 1-2, 21).

Plaintiff again demanded the video in a September 19, 2019 discovery demand (NYSCEF # 26). The September 2019 Demand requested "[a]ny and all photographs and videos depicting the subject accident, subject accident scene and anything related to the subject accident" (*id.*, ¶ 11). This court's November 20, 2019 preliminary conference order required the owner defendants to respond to the September 2019 discovery demand (NYSCEF # 43).

On July 20, 2020, the owner defendants produced a short video of plaintiff's incident. On August 14, 2020, plaintiff faxed and mailed a letter to the owner defendants stating "[i]t has come to our attention that there exists a video of the incident... Please give this matter your immediate attention" (NYSCEF # 27). Plaintiff also sent an email on September 8, 2020, again requesting the video for the entire day, but was informed by the owner defendants that the videos are erased after three months, and therefore the accident-day footage was deleted on May 4, 2019 (NYSCEF # 55).

However, on October 1, 2020, the owner defendants provided plaintiff with a flash drive containing another slip and fall from the same day as plaintiff's accident.

Interestingly, plaintiff offers in her reply papers a statement made by SOS's employee Niesha Whittingham to Brookfield's insurance company (NYSCEF # 54).

Whittingham was the security guard on duty on the date of plaintiff's accident. In the recorded telephonic statement, dated August 28, 2019, Whittingham states that there were multiple slip and falls on the date of plaintiff's accident and that there were many complaints about the slippery floors (*id.*). Whittingham also stated that the weather conditions were wet and snowy (*id.*).

DISCUSSION

Plaintiff now moves to strike the owner defendants' answers for spoliation of evidence or to find conclusively in plaintiff's favor on the issue of notice pursuant to CPLR 3216.

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense'" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal citations omitted]).

Here, the record shows that plaintiff immediately attempted to contact the owner defendants to preserve the videotape. The owner defendants denied receiving the notice. Even absent the notice from plaintiff, the owner defendants were aware of the risk of litigation as they generated an accident report and saved footage of plaintiff's incident. Unfortunately, defendants failed to save video footage of the accident site leading up to plaintiff's fall, leaving her without potentially valuable evidence.

Nevertheless, plaintiff still has the means to prove her case. The statement of defendant's employee, Niesha Whittingham, indicates that plaintiff will have the opportunity to establish that the owner defendants had constructive notice of the slippery condition. As plaintiff retains an ability to prove her case without the video evidence, the drastic sanction of striking the owner defendants' answers or for finding in favor of plaintiff on the issue of notice is unwarranted (*see Hilfiger v Commonwealth Trucking, Inc.*, 300 AD2d 58, 60 [1st Dept 2002]; *Barone v City of New York*, 52 AD3d 630, 631 [2d Dept 2008]).

Accordingly, it is ORDERED that plaintiff's motion to strike the owner defendants' answer or to find conclusively in plaintiff's favor on the issue of notice is denied; it is further

ORDERED that plaintiff's motion for default judgment (MS2) is withdrawn pursuant to the March 5, 2021 "Stipulation to Withdraw Motion for Default" (NYSCEF # 65); and it is further

ORDERED that plaintiff file notice of entry within ten (10) days of this Order.

This constitutes the Decision and Order of the court.

5/6/2021
DATE


MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE