

<b>Montag v Maryam's Mart</b>
2021 NY Slip Op 33417(U)
September 28, 2021
Supreme Court, Nassau County
Docket Number: Index No. 606863/2019
Judge: Christopher G. Quinn
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER****SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU CIVIL TERM PART 23**

**Present: HON. CHRISTOPHER G. QUINN**  
Justice of the Supreme Court

---

**JONATHAN MONTAG,**

Plaintiff,

INDEX NO: 606863/2019

-against-

MOTION SEQ. No. 2 - MD

MOTION SEQ. No. 3 - Decided

**MARYAM'S MART and MARYAM'S MART**  
**HALAL FOODS & GYRO,**

Defendants.

---

The following papers were read on this motion:

- 1) Notice of Motion/Affirmation/Exhibits/Attachments
- 2) Notice of Cross Motion/Affirmation/Exhibits/Attachments
- 3) Affirmation in Opposition/Exhibits
- 4) Reply

Defendants seek an Order granting them summary judgment dismissing the Complaint pursuant to CPLR § 3212. Plaintiff opposes and seeks sanctions against the defendants due to their deliberate spoliation of evidence, in particular a video tape of the premises.

This matter arises out of a March 2, 2019 altercation inside MARYAM'S MART and MARYAM'S MART HALAL FOODS & GYRO ("MARYAM'S"). Plaintiff claims that on March 2, 2019, the plaintiff was a paying customer at MARYAM'S in Binghamton, New York when he was struck in the face by a security employee of the defendant who was performing security services at MARYAM'S.

Plaintiff appeared for a deposition in this matter on March 11, 2020. He testified that on the day of the incident he was visiting his brother in Binghamton, NY for a St. Patrick's Day parade. He went to his brother's fraternity house and then went to MARYAM'S to get food. While he was at MARYAM'S someone started an altercation. At the time, MARYAM'S was a

little bit crowded with mostly students. There were about ten customers in addition to the Plaintiff and the two people he was with. There were six or seven people working in the kitchen and there was a person behind the counter. All of the workers were wearing blue "MARYAM'S" shirts. One of the individuals plaintiff was with got into a fight. (NYSCEF No. 52).

Plaintiff went to check what was going on and saw a MARYAM'S worker coming towards him. He testified that the next thing he knew he woke up outside. He had been knocked out. He is not sure what hit him. He did not see who hit him. His friend did not see who hit him. (NYSCEF No. 52).

The police were contacted. The plaintiff testified that they never contacted him to advise they found the person who punched him. He never spoke with anyone after the day of the assault who told him what happened.

The testimony of the witness for MARYAM'S, Hamza Khan, was taken on July 10, 2020. He testified that there was an altercation at the store around 3pm or 4pm that day. He testified no MARYAM'S employees were involved. He knew there was an altercation because he heard some yelling and screaming from the back of the store. He went around the register and by the time he got there the people were walking away. At the time of the incident, he states there were between twenty five to thirty customers inside MARYAM'S. He did not speak to anyone involved in the altercation. (NYSCEF No. 53).

As a result of the assault, the City of Binghamton Police Department investigated the subject incident. An affidavit from Investigator Matthew Lewis who was the lead investigator from the City of Binghamton Police Department was provided. A certified copy of the City of Binghamton Police Department investigation file from the subject incident was also provided to the Court.

As part of his investigation, Investigator Lewis attempted but was unable to recover the security camera footage from MARYAM'S from the date of the incident. Investigator Lewis attests the Police Department's attempted to obtain the surveillance footage. On the same date of the incident, Police Officer O'Brien attempted to retrieve the security footage, but was advised by

Hamza Khan, that a manager needed to be contacted for the store security footage. (NYSCEF No. 43).

Two days after the incident on March 4, 2019, Investigator Lewis attempted to check the MARYAM'S security cameras, but wasn't able to do so. He was informed that only the owner, Solil Khanz, had the pass code for the camera footage. On March 5, 2019, Investigator Lewis received the pass code and attempted to review the camera footage. He learned that the system only had three days of footage; March 3 - March 5, 2019.

Investigator Lewis's investigation revealed that MARYAM'S security DVR records five days of video footage in a five day loop. When the police received the footage, either the settings were changed to only record three days in a three day loop, or at some point on March 3, 2019, the security DVR was reset, erasing all prior footage.

Investigator Lewis states that his opinion based on his experience and investigation. He concluded that on Sunday March 3, 2019, the security DVR was reset, erasing all prior footage, including the footage from the date of the incident. Lewis's opinion, based on his experience and the investigation he conducted, the DVR security footage, was intentionally erased, obstructing the investigation into this incident. (Lewis aff., NYSCEF No. 43).

Within six days of the incident Plaintiff served a notice on defendant to preserve videotape of the premises.

Defendants acknowledge that the videotape was destroyed. Mr. Hamza Khan testified that the store's video cameras were not recording at the time of subject incident because the "store was real busy, and the phones kept on ringing, so I turned off the main power" ( NYSCEF No. 53).

Based on the proof and arguments presented the motion for summary judgment is Denied. The Court finds that there are triable issues of fact in dispute regarding the defendants' negligence and/or whether their actions and/or inactions resulted in the assault on the plaintiff and his injuries.

The motion of the plaintiff is Granted to the following extent. As counsel for the plaintiff notes, courts have broad discretion in determining what sanctions should be imposed for spoliation of evidence [*Dennis v. City of New York*, 18 AD3d 599 (2<sup>nd</sup> Dept 2005); *Iannucci v. Rose*, 8 AD3d 437 (2<sup>nd</sup> Dept 2004)].

Although the defendants rely on dicta from a previous decision, wherein Justice Arthur M. Diamond opined that he did not find any indication of spoliation for the lack of a security video, there was no motion for spoliation before the Court at that time. Thus, this opinion does not control.

Based on the claims asserted in the Complaint and Bill of Particulars, the evidence regarding the conduct of the parties, and the testimony of the Mr. Khan, the Court finds that the loss of the tape is central to the case, and its alleged destruction is prejudicial. The application for any sanctions Is Granted to the extent that the plaintiff is entitled to an Adverse Inference charge against the defendants at the time of trial.

It is **SO ORDERED**.

  
HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: SEP 28 2021

**ENTERED**

Sep 30 2021

NASSAU COUNTY  
COUNTY CLERK'S OFFICE