Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

CATERINA RANDAZZO,
Plaintiff(s),

- against -

LONG ISLAND JEWISH MEDICAL CENTER,
Defendant(s).

Index
No. 708459 2018

Motion
Date February 23, 2021

Motion
Cal. No. 13

Motion
Seq. No. 5

The following papers read on this motion by plaintiff for an order: (1) striking defendant's answer for spoliation of evidence; (2) awarding her summary judgment on the issue of liability based upon spoilation or, in the alternative, deeming notice admitted and/or precluding defendant from offering evidence in defense of this action.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF100-133
Answering Affirmation - Exhibits.....	EF149-153
Reply.....	EF154-155

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on June 1, 2018, to recover damages for injuries alleged to have been sustained as a result of a slip-and-fall accident due to a liquid accumulation, which occurred on September 26, 2017, at approximately 9:30 a.m. in the lobby of Long Island Jewish Medical Center, Katz's Women's Hospital, at 270-05 76th Avenue, Queens, New York.

In support of this spoliation motion, plaintiff's counsel details the procedural history of this matter. Approximately eight days post-accident, plaintiff's counsel sent preservation of evidence letters to defendant, dated October 4, 2017, indicating thereon that they were sent via certified mail, return receipt requested, regular mail, and FedEx (receipts dated October 5, 2017 attached). Counsel states that the letters were not returned as undeliverable and that people on defendant's behalf signed for them upon receipt. The letters stated, in relevant part: that the within plaintiff sustained personal injuries on the date and at the place noted; that defendant was directed to maintain any and all original video, etc., of the accident, as well as a subsequent accident occurring the next day with respect to another person due to the same condition alleged; that the time period sought to be preserved was from 8:30 a.m. to 10:30 a.m. on September 26, 2017, and from 12:45 p.m. to 2:45 p.m. on September 27, 2017; and that counsel will seek all legal remedies in the event such footage is discarded or spoliated prior to resolution of the matter.

On October 29, 2018, plaintiff served her Combined Demands and Notice for Discovery and Inspection, which included a demand for video footage of the incident. The preliminary conference order, dated November 21, 2018, required defendant to respond to same within 30 days. By good faith letter dated April 4, 2019, plaintiff demanded a response to her Demands and Notice for D&I. The compliance conference order, dated May 13, 2019, ordered defendant to respond to same. Thereafter, plaintiff filed a motion to compel/preclude on July 12, 2019. In response, defendant served a response to plaintiff's demands, which included a video of the subject accident as well as an incident report. The video footage begins two seconds prior to the captured fall and ends less than five minutes after it.

The motion was resolved by so-ordered stipulation dated September 12, 2019 (Latin, J.), wherein which the court ordered the following, in relevant part: by October 14, 2019, defendant was to provide the full video footage for all camera angles covering the subject location for the entire day of September 26, 2017; to the extent defendant is unable to provide same, defendant is to provide all footage which is available, together with an affidavit from a person with personal knowledge, detailing the steps taken to locate the footage and why same cannot be provided.

Defendant responded on November 6, 2019, which included an affidavit from Elizabeth Hatcher, Director of Campus Security, which states that based upon her search, the video which was previously disclosed was the only video defendant has on its security system capturing the accident. Due to the insufficiency of that response, plaintiff filed another motion to preclude (and defendant filed a motion to vacate the note of issue). Both motions were resolved by so-ordered stipulation dated September 10, 2020 (Latin, J.). It stated, in relevant part: that defendant did not possess additional video footage; that by October 9, 2020, defendant will provide an affidavit from a person who conducted a search to verify

video footage from 8:30 a.m. to 10:30 a.m. on the date of the accident; and that said affidavit must identify the policy and procedure with respect to video storage, include the date and time the footage that was provided was extracted, complied, and set aside for exchange. By good faith letter dated October 20, 2020, plaintiff demanded the item sought pursuant to the court's so-ordered stipulation. In response, Ms. Hatcher submitted an affidavit: she conducted a search for any and all video footage from the time frame provided; the footage which was previously exchanged is the only video defendant had on its security system; defendant used a Tru Navigation video surveillance system in 2017, which can be viewed on the application system until it loops over, which can be anywhere from five days to a couple of weeks, depending on the system and the volume; upon request, video surveillance is saved and downloaded to a file on the computer by the person downloading the file, and can then be shared using a flash drive; once downloaded, it can be viewed until it is deleted or the computer crashes; and she did not personally download the video but learned that it was downloaded from the computer onto a flash drive by Charlie Catapano, the then-Assistant Director of Security for Campus Security at the hospital, on October 12, 2017.

Plaintiff's counsel explains that plaintiff focused on the issue of video footage, and more particularly the time frames sought, inasmuch as same was the "crux of plaintiff's case and the only means of which to prove and/or establish notice, a cause and create incident, and/or show some form of leak or potential reoccurring condition," and such evidence was within defendant's exclusive control. Counsel avers that defendant obviously received the preservation letters as, shortly thereafter on October 12, 2017, defendant took affirmative steps to retrieve, review, and decide what portions of the footage it wished to keep and/or discard, whether intentionally or negligently. Additionally, defendant filled out its own incident report on the date of the accident, thereby being put on notice that there was a condition on the floor at the time of plaintiff's fall and that the time frame of video footage sought was critical (i.e., the incident report states that someone was called to clean the area at 9:45 a.m., which is after plaintiff's fall). This failure to preserve key evidence deprived plaintiff of the opportunity to inspect the video and has severely prejudiced plaintiff's ability to prove, inter alia, notice.

In opposition to the motion, defense counsel first contends that plaintiff has failed to establish that defendant had an obligation to preserve the video footage. To that end, defense counsel points out that plaintiff has not established, by way of evidence in admissible form, that the preservation letters dated October 4, 2017 were actually mailed and received; to wit: the receipt only shows that overnight delivery was purchased, the receipt for the certified mailing does not indicate to whom it was addressed (noting also that the letter was not addressed to a specific department), plaintiff does not provide the return receipt which would verify delivery and receipt, and no affidavit of mailing is provided. Simply because Mr. Catapano (who is no longer employed by defendant) copied and saved the video footage does

not prove receipt. Indeed, he responded to plaintiff's accident and was, thus, made aware of it at that time and followed protocol.

Ms. Hatcher submits an affidavit in response to the motion. She explains that any requests to copy and save video surveillance would be sent to the Security Department; that she conducted a search and has no knowledge of the preservation letters being delivered there and did not find any indication that it was received; that when an accident is documented on hospital property, a search is done to see if there is video surveillance of the accident and, if so, the video of the accident is saved; that she believes that Mr. Catapano did so in this instance; and that defendant did not intentionally nor negligently destroy, delete, or fail to preserve video images requested by plaintiff.

Defense counsel further contends that there is no evidence that the video footage was destroyed with a culpable state of mind. Instead, efforts were made to preserve the video after the accident. Moreover, as Ms. Hatcher explained, video can loop over as early as five days, so even assuming the preservation letter was received, same was eight days after the accident.

Finally, defense counsel argues that the video footage alleged by plaintiff to have been destroyed is irrelevant to plaintiff's claim. To date, it is unclear what caused plaintiff to fall. There are at least two documents suggesting that plaintiff tripped (including hospital records indicating that plaintiff reported having tripped over her shoes). This contradicts the claim that she slipped on an accumulation of liquid and undermines plaintiff's claim that the video is necessary and/or relevant to prosecute her claim. Plaintiff has failed to show that the absence of video footage from the time period requested has deprived her of the ability to prove her case against defendant, particularly where no depositions have been held and there is no affidavit from plaintiff or someone else with personal knowledge of the accident.

In reply, plaintiff's counsel states that defendant has the burden of proof to demonstrate that it did not receive plaintiff's preservation letters and that plaintiff's counsel satisfied her burden showing that the letters were sent. In any event, defendant was clearly on notice of the accident and the potential for litigation when the accident occurred. Moreover, intention or not, defendant was put on notice to preserve it and did not. Now, plaintiff is prevented from establishing actual or constructive notice or a cause and create situation without this key evidence. Finally, counsel states that defendant is attempting to grasp at straws simply because its own employee used incorrect verbiage by describing the fall as a trip, when the video clearly depicts it as a slip.

> "[U]nder 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. The determination of a sanction for spoliation is within the broad discretion of the court, and a court may impose a sanction less severe than the striking of the responsible party's pleading or no sanction where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" (*Falcone v Karagiannis*, 93 AD3d 632 [2d Dept 2012] [internal quotations and citations omitted]; *see also Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598 [2d Dept 2011]; *Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009 [2d Dept 2010]).

Further, a party seeking sanctions for spoliation of evidence must show the following: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction; (2) that the evidence was destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense (*see Lilavois v JP Morgan Chase and Co.*, 151 AD3d 711 [2d Dept 2017]).

Here, the record presented to the court creates issue of fact as to whether spoliation of the video footage occurred. Plaintiff has not established her entitlement to a presumption that the preservation letters were mailed which would establish that defendant had an obligation to preserve the video footage for the time period specified therein (*see e.g. Matsil v Utica First Ins. Co.*, 150 AD3d 982 [2d Dept 2017]; *Progressive Cas. Ins. Co. v Metro Psychological Servs., P.C.*, 139 AD3d 693 [2d Dept 2016]). Further, Ms. Hatcher's affidavit states that: (1) she performed a search for the letters, which were not found; and (2) video footage can loop over as early as five days, which could have occurred in this case. However, it should be noted that both parties appear to speculate as to whether there was an intentional or negligent destruction of, versus a mere loss of, footage due to a loop in the video tape. Finally, it would appear that the loss of certain video footage prior to the accident did not fatally compromise plaintiff's ability to prove her prima facie case since plaintiff may testify at trial how she was caused to fall and the conditions at the time (*see Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654 [2d Dept 2013]; *Mendez v La Guacatala, Inc.*, 95 AD3d 1084 [2d Dept 2012]; *Barone v City of New York*, 52 AD3d 630 [2d Dept 2008]). As such, the sanction of striking the pleadings would be too harsh in this circumstance.

Thus, under the circumstances presented herein, it would appear that an adverse inference change may be an appropriate sanction (*see Lilavois*, 151 AD3d at 712; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612 [2d Dept 2011]; *Madkins v State of New York*, 82 AD3d 1174 [2d Dept 2011]; *Gotto v Eusebe-Carter*, 69 AD3d 566 [2d Dept 2010]), but that the Justice assigned to the trial of this matter is in a better position to determine whether same is warranted (especially after hearing the evidence as well as the testimony of the witnesses to be called at trial).

Accordingly, the motion is denied without prejudice and with leave to renew, with respect to a request for an adverse inference charge, before the Justice assigned to try this matter.

Dated: March 31, 2021

J.S.C.