SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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CHRISTIOPHER MA,

Plaintiff,

- v -

174 GRAND STREET CORP., ONIEAL'S BAR AND RESTAURANT

Defendant.

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INDEX NO. 154220/2021

MOTION DATE 02/07/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISCOVERY.

Plaintiff, Christiopher Ma, as Administrator of the Estate of Paul Wong, deceased (plaintiff), commenced this action against defendant, 174 Grand Street Corp. (174 Grand) and Onieal's Bar and Restaurant (collectively, defendants), for personal injuries stemming from the decedent's alleged April 10, 2021 slip and fall while descending an interior stairway within a bar owned by defendants located at 174 Grand Street, New York, New York (premises). Plaintiff now moves pursuant to CPLR 3126 and 3124 compelling defendants to produce certain discovery, or in the alternative, sanctions for spoliation. Defendants oppose the motion and cross-move pursuant to CPLR 3103 for a proactive order and vacatur of certain discovery demands. For the following reasons, the motion and cross-motion are denied.

On April 14, 2021, counsel for plaintiff furnished a letter of preservation upon defendants directing defendants to preserve, among other items, video surveillance of the area where plaintiff fell. On April 30, 2021, plaintiff commenced this action. Plaintiff thereafter served a notice to produce, dated September 12, 2022, and a second notice to produce and a demand for preservation, dated November 15, 2022, seeking items such as an incident report concerning the accident, documents related to who was employed and working on the shift when the incident occurred, maintenance records, and internal emails regarding the accident. Plaintiff indicates that other than a lease and the declaration page from the insurance carrier, defendants did not provide material discovery in response to plaintiff's demands.

In response to the demand for video footage depicting the premises, defendants furnished the affidavit of Christopher Onieal (Onieal), the president of 174 Grand, wherein he states that the video system was not working at the time of plaintiff's accident. Onieal sates that he purchased a security camera system on March 23, 2020, for use at the premises. On April 27, 2020, the security camera system was installed at the premises by non-party J. Briceno Construction Inc. According to Onieal, on or about April 13, 2021, he received correspondence

from Philip G. Pizzuto, Esq., of PGP Law Group, requesting that, in part, he preserve and save "[t]he actual video surveillance that captured this incident and any and all other recordings, photographs, [and] videotapes" (NYSCEF doc. no. 24, aff at ¶ 8). Onieal states that he went to the office located in the basement of the premises, where the security camera equipment was located, to retrieve any video surveillance for the day of the decedent's fall. Onieal further states that during the course of his search, he "[d]iscovered that the security system had not been recording since on or about September 21, 2020, when the recorded video footage was accessed in regards to a robbery investigation" (*id.* at ¶ 10). Thus, Onieal states, there is no video footage from the date of plaintiff's fall or several months prior. Onieal confirms that he neither destroyed nor instructed another person to destroy video footage from the subject security cameras.

In support of his motion for sanctions for spoliation, plaintiff argues that he is prejudiced in his ability to establish notice in this case due to defendants' failure to save the video footage preceding and after plaintiff's fall. Plaintiff contends that without the footage, he is unable to establish the alleged defective condition of the stairs and the length of time the condition existed. Plaintiff further argues that defendants had a duty to preserve the video footage evidence taken at the time of the accident because employees of the defendants were aware of the accident the moment it happened. Plaintiffs further contend that the Court should conduct an *in camera* review of the DVR used at the premises.

In opposition, defendants argue that they responded to plaintiff's request for video footage, including the Onieal affidavit stating that at no time was there security video footage from April 10, 2021. Defendants further argue that plaintiff's request for access to the hard-drive of the DVR upon which same is held, to verify the absence of the files is meritless, since defendants already denied the existence of the video.

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], quoting *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]).

The Court finds that, at this stage in the litigation, plaintiff failed to demonstrate a basis for sanctions due to spoliation. Specifically, plaintiff failed to demonstrate that the video footage of the subject area leading up to plaintiff's accident or footage of the accident itself ever existed (*see Cuevas v 1738 Assocs., LLC*, 96 AD3d 637, 638 [1st Dept 2012] [denying sanctions for spoliation of video evidence, in part, because of the lack of concrete evidence that the accident was recorded]). Plaintiff relies on the presence of video cameras within the premises to establish that video footage of the incident must exist. However, the existence of video cameras does not establish that the video cameras were operational at the time of the incident such that they were recording at the time of the incident (*see Sachs v Cantwell*, No. 10 CIV. 1663, 2012 WL 3822220, at *7 [SD NY Sept. 4, 2012] ["Specifically with regard to video recordings, courts have found that the mere presence of a video camera does not establish that the camera was in place to record at the time, nor does its presence establish that any recording was made at the

time of the incident]; *Kreyn v Gateway Target*, No. CV05-3175, 2006 WL 3732463, at *2 [ED NY Dec. 17, 2006] ["The testimony by one of the defendant's employees that there are videotape cameras throughout the store does not establish that there was a videotape camera at the stationery aisle and that it was operating at the time of the accident such that a videotape was ever made, much less destroyed"]). Thus, the Court finds that plaintiff failed to demonstrate that defendants intentionally or negligently failed to preserve crucial evidence after being placed on notice that the evidence may be needed for future litigation. Accordingly, plaintiff's motion for sanctions due to spoliation is denied, without prejudice.

Plaintiff cites to *Ellis v JP Morgan Chase* (190 AD3d 413 [1st Dept 2021]) and *Maiorano v JP Morgan Chase & Co*, 124 AD3d 536 [1st Dept 2015]), for the proposition that defendants should have preserved the video prior to the incident especially since the surveillance was created and utilized for the specific purpose of capturing movement within the premises. In both *Ellis* and *Maiorano*, the video footage existed, whereas here, it is anything but certain that the video surveillance system was recording the incident, and thus, those cases are inapposite.

Further, it is unclear from the submissions whether the video camera footage is relevant to plaintiff's claims. Other than the conclusory claim that plaintiff's accident "[s]hould have been captured by security cameras" (NYSCEF doc. no. 19 at ¶ 7), plaintiff does not provide an affidavit or any other proof that the video footage, if it exists, would reveal anything about plaintiff's accident.

The Court further finds that plaintiff is entitled to a supplemental affidavit describing the search of the video surveillance in further detail. From the Court's vantage point, the nature of the search for records remains unsettled. The affidavit should address the specific details of the search, including precisely what and where was searched, and what location(s), the existence of any server print outs, and what would have been located if the cameras were operational prior to and at the time of the incident (*see Roland's Elec., Inc. v USA Illumination, Inc.*, 90 AD3d 483 [1st Dept 2011]; *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]).

Defendants' cross-motion for a protective order as to for any video prior to the date of loss and access to or inspection of any hard-drive, DVR system is denied, without prejudice. Defendants may move to renew after the above addressed supplemental affidavit is furnished, and at the Court's direction. The balance of discovery, including whether the Court should conduct an *in camera* review of the DVR, will be addressed at the upcoming compliance conference.

Accordingly, it is hereby

ORDERED that plaintiff's motion for sanctions is denied; and it is further

ORDERED that defendants' motion for a protective order is denied; and it is further

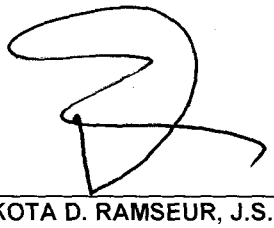
ORDERED that defendants shall furnish a supplemental *Jackson* affidavit concerning the search for relevant video footage as outlined in *Roland's Elec., Inc. v USA Illumination, Inc.* (90

AD3d 483 [1st Dept 2011]) and *Jackson v City of New York* (185 AD2d 768, 770 [1st Dept 1992]), within thirty (30) days; and it is further

ORDERED that the July 25, 2023 conference is adjourned to August 15, 2023 at 9:30 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



7/10/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE