

**Dechert v Romar Realty Corp.**

2023 NY Slip Op 32399(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 150811/2020

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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WILLIAM DOUGLAS DECHERT,

Index No. 150811/2020

Plaintiff

- against -

DECISION AND ORDER

ROMAR REALTY CORP., WYDOWN MANAGEMENT  
CORP., and MICHAEL LEHMAN,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

Plaintiff moves for penalties against defendants for their spoliation of part of their videotape depicting the hours leading up to and following plaintiff's fall and injury in defendants' building. C.P.L.R. § 3126.

I. PLAINTIFF'S DEMAND AND DEFENDANTS' RESPONSE

Three days after plaintiff's injury, his attorney mailed a demand to defendants to preserve any video surveillance of the injury site for the entire day of the injury, from at least midnight to midnight December 20, 2019. Contrary to the authority on which defendants rely, Jackson v. Whitson's Food Corp., 130 A.D.3d 461, 463 (1st Dep't 2015), plaintiff clearly indicated he wanted defendants to retain the surveillance footage for the hours preceding and following plaintiff's fall. The demand was never returned in the mail to plaintiff's attorney. Defendants do not acknowledge receipt of the demand, but neither

do they deny receipt. They do contend, through an expert, that the video recorder overwrote recordings every seven days. While the expert does not fully explain how he reached that conclusion or whether defendants' video recording system maintained any back-up copy of video footage, the timing of the erasure before or after defendants' receipt of plaintiff's demand to preserve the footage is of little consequence. The deposition testimony by defendants' building superintendent demonstrated his awareness of the need to preserve the footage, as he did preserve footage of the day of plaintiff's injury before the video recorder overwrote the footage.

According to the superintendent's own testimony, however, the superintendent made his own, unilateral determination of what parts of that day's footage to preserve and what to destroy, when it was not his prerogative to do so. Aff. in Opp'n of Jeffrey D. Fippinger Ex. C, at 124-25. Defendants may not determine what is relevant or material to plaintiff's claims.

## II. THE EVIDENCE

The parts of the videotape that defendants preserved and produced depict 2.25 minutes leading up to and including plaintiff's fall and a clip approximately 45 minutes later depicting emergency medical personnel and an ambulance attending to plaintiff. The parties agree that plaintiff's fall occurred at 5:00 p.m. December 20, 2019. The central dispute concerns the

condition of the floor on which plaintiff claims he slipped because it was wet from mopping by defendants' employees. Defendants insist that their employees mopped with a wet mop earlier in the day and that, while the video surrounding plaintiff's fall at 5:00 p.m. depicts defendants' employee mopping, his mop was dry. Therefore the video footage of the hours, not just the minute or two, leading up to plaintiff's fall, to show when defendants' employees were mopping and whether the mop was wet or dry, is critical to plaintiff's claim. Even if the mop being used at 5:00 p.m. was dry, presumably it was to mop up liquid on a wet floor. Otherwise the employee would have used a broom.

Plaintiff further claims that, during the 45 minutes between his fall and the ambulance's arrival, defendants' employee threw a towel to plaintiff to dry the area underneath him. The absence of the video footage depicting the actions by defendants' employees and the condition of the floor during this period also prejudices his claim.

### III. THE REMEDY

Because plaintiff is not bereft of all evidence to prove his claim, the court denies his motion for the ultimate penalty of striking defendants' answer and granting him a default judgment on liability. C.P.L.R. § 3126(3); Clarke v. Povella, 210 A.D.3d 581, 582 (1st Dep't 2022). Nevertheless, defendants are not

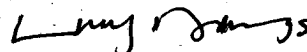
entitled to use their selected clips of the videotape and deny plaintiff use of the remainder. Therefore the court grants plaintiff's motion to preclude use, at trial or in support of or opposition to any motion, of any of defendants' videotape recording of the injury site December 20, 2019, and any testimony about the recording's contents, unless the parties stipulate otherwise or plaintiff seeks to introduce any of the recording or testimony about the recording's contents. C.P.L.R. § 3126(2); Wyatt v. Sutton, 185 A.D.3d 422, 422 (1st Dep't 2020); Crooke v. Bonofacio, 147 A.D.3d 510, 510-11 (1st Dep't 2017); Vandashield Ltd v. Isaacson, 146 A.D.3d 552, 556 (1st Dep't 2017); Mehta v. Chugh, 99 A.D.3d 439, 439 (1st Dep't 2012).

Plaintiff also requests preclusion of evidence contradicting plaintiff's claim that defendants' received actual or constructive notice of the wet floor. The parties' dispute, however, is not whether defendants received notice of the floor's condition. They admit their regular presence at the injury site. The dispute is what that condition was. Defendants may not use the videotape recording's contents to prove that condition except as provided above.

Defendants' vague explanation that their superintendent destroyed the parts of the videotape recording he considered unimportant raises the inference that those parts were not useful to defendants and useful to plaintiff. Clarke v. Povella, 210

A.D.3d at 582. When defendants have not produced documentary evidence, plaintiff is entitled to an adverse inference as well as preclusion. Barlow v. Skroupa, \_\_\_ A.D.3d \_\_\_, 2023 WL 4239667, at \*1 (1st Dep't June 29, 2023). Therefore, unless the parties stipulate otherwise, the factfinder at trial and the court upon any motion also may infer that the missing videotape recording would support plaintiff's claim regarding whether defendants' employees were mopping with a wet mop or on a wet floor and whether the floor was wet. Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007); Barlow v. Skroupa, \_\_\_ A.D.3d \_\_\_, 2023 WL 4239667, at \*1; Clarke v. Povella, 210 A.D.3d at 582; Alleva v. United Parcel Serv., Inc., 112 A.D.3d 543, 544 (1st Dep't 2013).

DATED: June 30, 2023



LUCY BILLINGS, J.S.C.

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