

King v Damiano Corp. of Canarsie

2023 NY Slip Op 34897(U)

April 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 501703/2020

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, Brooklyn, NY 11201, on the ___ day of _____ 2023.

APR 11 2023

**DECISION
and
ORDER**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

-----X
ANNETTE KING,

Plaintiff,

-against-

DAMIANO CORP. OF CANARSIE D/B/A MCDONALD'S
RESTAURANT #2528,

Defendant.

-----X

Index No.: 501703/2020
Motion Date: 3/15/2023
Motion Cal. No.: 22
Mot. Seq. 3

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	NYSCEF DOC. #
Notice of Motion/Order to Show Cause/Affidavits/Affirmations/Exhibits.....	43-58
Answering Affirmations/Affidavits/Exhibits.....	83-90
Reply Affirmations/Affidavits/Exhibits.....	96,98
Other.....	

MONTELIONE, RICHARD J., J.

This action involves claims for personal injuries as a result of a slip and fall while entering a McDonald's restaurant located at 1467 Rockaway Parkway, Brooklyn, New York on June 13, 2019. It was raining at the time. The plaintiff moves to strike the answer for spoliation of evidence, or alternatively for an adverse inference at trial, based on the unavailability of the surveillance tape which recorded the incident.

Plaintiff served its Notice to Preserve upon the McDonald Corporation by regular mail on June 26, 2019, "well within thirty (30) days of the accident" (§14 of plaintiff's statement of material facts). The McDonald's Corporation then forwarded an acknowledgment of receipt of the notice to plaintiff's counsel and its local franchisee, the defendant Damiano Corp. of Canarsie d/b/a McDonald's Restaurant #2528, on July 9, 2019, which is 26 days after the accident. The principal of defendant, Douglas Damiano, Sr., testified there is a 30-day loop of the recordings and if requested the recording should be available. (Transcript, 81:10-82:5, NYSCEF#50). Douglas Damiano, Sr., also testified, "And if it's within a 30-day period, she (secretary) would know to call our security person and ask for a copy of the tape." (Transcript,

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82,18-20, NYSCEF#50). The security person is Douglas Damiano's son, Douglas Damiano, Jr., who testified that he received a call on July 9, 2019 to save the recording of the June 13, 2019 incident but at the time there was an old video recording system in place that only recorded for a period of 14 days. (Aff. ¶6, NYSCEF#86). In other words, on the one hand the testimony given by Damiano, Sr., is that the procedures in effect at the time of the accident was to re-record after 30-days and the testimony of Damiano, Jr., is that the specific recording was part of an older system that only recorded for 14 days. The court is being asked by the plaintiff to infer that Sr. could only be talking about the 30-day cycle being in effect because he was specifically asked about the time frame of the accident (NYSCEF#50, Transcript, Sr., p. 132:18-133:4):

Q. Now July 8th, 2019, that would be within thirty days of June 13th. So if it had been received that day, would the video presumably be available?

A. The date shown on the letterhead is well within the thirty days. Whether I received any kind of written notice, verbal or any other, is in question right now. I cannot ascertain as to when my company, not me personally, was given notice.

Damiano, Sr. also testified that his son was the security person who would handle any request for recordings and upon notice his secretary would immediately call his son to preserve the tape (NYSCEF#50, Transcript, Sr., p. 82,18-20). "Well, the way procedure works is that if the office gets notified, the office, then don't wait for me...upon receiving written notice, would notify me and also notify them to go and pull the video." (NYSCEF#50, Transcript, Sr., p. 82,18-20). Damiano, Sr. spoke exclusively about the 30-day recording retention and procedures and Damiano, Jr., about the specific request for the recording.

The plaintiff never filed an accident report and there is nothing in the record that indicates that any of defendant's employees knew of the accident to independently give defendant notice that the video should be preserved.

The court in *Phelps-Vachier v Genovese Drug Stores, Inc.*, 207 AD3d 582, 583-84, 169 NYS3d 854, (Mem)-855, 2022 NY Slip Op 04571, 2022 WL 2709387 [2d Dept 2022], considers the following factors in assessing motions for spoliation sanctions:

" '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 a trier of fact could find that the evidence would support that claim or defense' " (*Sarris v. Fairway Group Plainview, LLC*, 169 A.D.3d 734, 736, 94 N.Y.S.3d 103, quoting *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218, 46 N.E.3d 601)... " 'The Supreme Court is empowered with broad discretion in determining the appropriate sanction for

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spoliation of evidence' ” (*Halcyon Constr. Corp. v. Strong Steel Corp.*, 199 A.D.3d 898, 900, 159 N.Y.S.3d 59, quoting *Sarris v. Fairway Group Plainview, LLC*, 169 A.D.3d at 736, 94 N.Y.S.3d 103; see CPLR 3126; *Lilavois v. JP Morgan Chase & Co.*, 151 A.D.3d 711, 712, 54 N.Y.S.3d 664).

Given the testimony by defendant's principal that defendant had a 30-day video retention policy at the time of the accident, but no first-hand knowledge of any search for the video after receipt of the Notice to Preserve within the 30-day retention period, whether the video in fact existed at the time the Notice to Preserve was actually received by the defendant which is 26 days after the date of the incident, that plaintiff did not report the incident on the date of the incident and there is no evidence that defendant otherwise had notice of the incident, the court cannot determine whether the evidence existed at the time of defendant's receipt of the Notice to Preserve, or whether it was intentionally destroyed after such notice, but given the retention policy, will grant plaintiff's motion for spoliation damages to the extent that PJI 1:77.1, as appropriately modified by the trial justice, shall be instructed to the jury. See *Phelps-Vachier v. Genovese Drug Stores, Inc.*, supra.

Further, the court finds that plaintiff can prove her case through her own testimony and through other evidence. It appears that only the plaintiff is a witness to this incident and credibility is an issue that should be decided by a jury, and therefore the court denies the plaintiff's motion for a liability determination in its favor. See *Baab v HP, Inc.*, 211 AD3d 783, 181 NYS3d 124, 2022 NY Slip Op 07042, 1, 2022 WL 17660423 [2d Dept 2022]:

A motion for summary judgment “ ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’ ” (*Abdenbi v Walgreen Co.*, 197 AD3d 1140, 1140 [2021], quoting *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010]).

Based on the foregoing, it is

ORDERED, that the branch of plaintiff's motion for partial summary judgment in its favor on liability is DENIED; and it is further

ORDERED, that the branch of plaintiff's motion for spoliation sanctions is GRANTED to the extent that PJI 1:77.1, as may be further modified by the trial justice, shall be charged at trial and the jury will determine whether an explanation proffered by the defendant is sufficient, as follows:

PJI 1:77.1 General Instruction—Evidence—Spoliation—Where Pre-Trial Determination was Made—Issue of Fact Regarding Notice of Impending Lawsuit [Supplemental Instruction]

[Where the court concludes there is an issue of fact as to whether the alleged spoliator was on sufficient notice of an impending

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lawsuit, the following may be charged:]

As you have heard, plaintiff ANNETTE KING claims that defendant DAMIANO CORP. OF CANARSIE D/B/A MCDONALD'S RESTAURANT #2528, failed to preserve a SURVEILLANCE VIDEO TAPE of the incident of JUNE 13, 2019, and that this defendant should have preserved the evidence because, at the time the evidence was destroyed by being overwritten, this defendant was on notice of an impending lawsuit. Plaintiff ANNETTE KING further claims that the SURVEILLANCE VIDEO TAPE, if preserved and produced to plaintiff, would have been important to the issues of HOW THE ACCIDENT HAPPENED AND LIABILITY.

Defendant DAMIANO CORP. OF CANARSIE D/B/A MCDONALD'S RESTAURANT #2528 DENIES THE SURVEILLANCE VIDEO EXISTED AT THE TIME IT RECEIVED notice of an impending lawsuit inasmuch as the SURVEILLANCE VIDEO was OVERWRITTEN.

If you find that Defendant DAMIANO CORP. OF CANARSIE D/B/A MCDONALD'S RESTAURANT #2528 failed to preserve the SURVEILLANCE VIDEO TAPE of the incident of JUNE 13, 2019, and that IT WAS IN EXISTENCE AT THE TIME IT was on notice of an impending lawsuit, and that if the SURVEILLANCE VIDEO TAPE had been preserved and produced to plaintiff ANNETTE KING, the evidence would have been important to the issues of HOW THE ACCIDENT HAPPENED AND LIABILITY, then you may, but are not required to, conclude that if it had been produced it would not have supported defendant DAMIANO CORP. OF CANARSIE D/B/A MCDONALD'S RESTAURANT #2528's position on the issues of HOW THE ACCIDENT HAPPENED AND LIABILITY and would not contradict the evidence offered by plaintiff on these issues. Additionally, you may, but are not required to, draw the strongest inference against Defendant on the issues of HOW THE ACCIDENT HAPPENED AND LIABILITY that the opposing evidence permits.

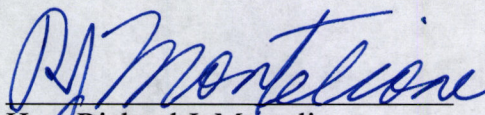
On the other hand, if you conclude that Defendant DAMIANO CORP. OF CANARSIE D/B/A MCDONALD'S RESTAURANT #2528 was not on notice of an impending lawsuit at the time the SURVEILLANCE VIDEO WAS OVERWRITTEN AND DESTROYED, then the absence of this evidence should have no bearing on your deliberations.

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and it is further

ORDERED, that any other requests for relief are DENIED.

This constitutes the decision and order of the Court.



Hon. Richard J. Montelione

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