

Lev v Eataly USA LLC

2024 NY Slip Op 30830(U)

March 11, 2024

Supreme Court, New York County

Docket Number: Index No. 154470/2020

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART 40

Justice

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INDEX NO. 154470/2020

PAULA LEV, MARK LEV,

MOTION DATE 2/8/2024

Plaintiff,

MOTION SEQ. NO. 003

- v -

EATALY USA LLC, EATALY USA LLC D/B/A EATALY L.A.,
EATALY USA LLC D/B/A EATALY CENTURY CITY,
LLC, EATALY USA LLC D/B/A EATALY NET USA,
LLC, EATALY USA LLC D/B/A EATALY, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for STRIKE CASE FROM CALENDAR

Upon the foregoing documents, and after oral arguments, it is ordered that plaintiff's motion seeking to strike defendants' answer is granted in accordance with the decision below.

In this personal injury action, plaintiff moves to strike defendants' answer for spoliation of evidence. Plaintiff argues that seven (7) days after the slip and fall at issue herein, plaintiff sent a letter to defendants requesting that defendants preserve the video of the accident, demanding the date and timeframe requested to be preserved. Specifically, plaintiff requested that defendants preserve video of the accident on December 17, 2019 between the times of 2:00pm through 4:30pm. It is undisputed that defendants failed to preserve video of such timeframe as noticed in plaintiff's preservation demand. It is further undisputed that defendants produced video of only 12-14 seconds prior to the accident, the time of the video starting at approximately 3:22:47pm rather than at 2:00pm as requested by plaintiff. Two video clips were

produced by defendants, however, the view of the floor was obstructed in one of the videos.

Defendants oppose and plaintiff replies.

“Under the common law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence”. *Hegbeli v TJX Companies, Inc.*, 64 Misc3d 1202(A)(Sup Ct, NY County 2019), citing *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1094-1095 (2nd Dep’t 2018). “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).

Here, plaintiff has established that defendants have negligently lost or destroyed evidence in that it is uncontroverted that plaintiff sent to defendants a demand to preserve the video, defendants acknowledge receipt of such demand, and that defendants failed to preserve the video as requested. In opposition, defendants argue that their surveillance system automatically overwrites video footage after two weeks. Thus, defendants contend that it did not intentionally destroy evidence, rather the video was overwritten in its normal course of business. Moreover, defendants argue that their employees in the IT department at the time of the subject accident are no longer employed such that defendants do not have the evidence plaintiff is requesting.

Despite defendants’ arguments, it is undisputed that defendants received plaintiff’s demand to preserve the video footage 7 days following the subject accident, which would be 7 days prior to the footage having been automatically overwritten. Defendants have provided no explanation as to why the video footage was not preserved upon demand knowing that their

surveillance system would automatically overwrite the footage requested. Furthermore, defendants have also failed to provide any explanation as to how they were able to produce the two videos provided which happened to capture the subject accident with just mere seconds prior.

In affirming the trial court's decision to strike a defendant's answer for failing to preserve a video, the Appellate Division, First Department, held that "[a]lthough it was demanded within days of plaintiff's slip and fall, defendants failed to preserve a video recording of its store that depicted the area of plaintiff's fall prior to it occurring. Instead, a store employee selectively edited the video to retain only that portion showing approximately 30 seconds prior to plaintiff's fall and the fall itself. Without the video recording, plaintiff may be unable to establish the origin of the liquid on the floor that she claims caused her to fall, and thus be unable to establish the requisite notice of the alleged condition". *Davis v Pathmark*, 162 AD3d 563, 563 (1st Dep't 2018). In a recent decision, the First Department held that "the footage from the period before plaintiff's slip and fall was crucial to plaintiff's proof of notice. It would have shown the origin of the substance plaintiff allegedly slipped on, and how long the condition existed." *Wagman v Morgan Stanley Children's Hosp. of N.Y. Presbyterian, et. al.*, 220 AD3d 502, 503 (1st Dep't 2023). Similarly, here, the evidence which was destroyed was relevant to, and could have been used to support, plaintiff's claim and to show notice of the alleged condition. As such, plaintiff's motion is granted.

Accordingly, it is

ORDERED that plaintiff's motion is granted and defendants' answer is hereby stricken.
and it is further

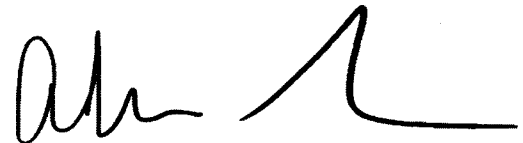
ORDERED that the parties shall appear on April 11, 2024 at 9:30am, in room 422 of 60 Centre Street, New York, NY, for a settlement conference; and it is further

ORDERED that the parties shall appear on June 12, 2024 at 9:30am, in room 422 of 60 Centre Street, New York, NY, for trial; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon all parties to this action a copy of this decision and order, together with notice of entry.

This constitutes the Decision/Order of the Court.

3/11/2024
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE