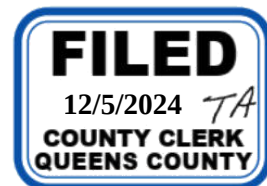


Flowers v Whole Foods Mkt.
2024 NY Slip Op 35482(U)
December 4, 2024
Supreme Court, Queens County
Docket Number: Index No. 723135/2021
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



TIFFANY FLOWERS,

IAS Part - 42

Plaintiff,

Index No.: 723135/2021

-against-

Motion Date: 10/26/23

WHOLE FOODS MARKET,

Motion Cal. No. 11

Defendant.

Motion Seq. No. 2

The following electronically filed (“EF”) documents read on this motion by Tiffany Flowers (“Ms. Flowers” or “plaintiff”) for an order: (a) pursuant to CPLR § 3126, imposing any of the following sanctions on the Defendant for Defendant's spoliation and/or failure to preserve and produce the surveillance video footage of the site of occurrence: (i) striking Defendant’s Answer; (ii) finding that Defendant created, exacerbated and/or had actual or constructive notice of the split beer condition plaintiff slipped and fell on; or (iii) precluding Defendant from contending that it did not create, exacerbate and/or make the hazardous condition upon which Plaintiff slipped and fell; and/or (iv) in the event of trial, directing the jury to draw adverse inference against Defendant; and/or (b) granting such other and further relief as to this Court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation in Support-Exhibits.....	EF 31 – 41
Affirmation in Opposition-Exhibits-Service.....	EF 42 – 45
Affirmation in Reply-Exhibits.....	EF 48 – 50

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

This is an action to recover damages for personal injuries Ms. Flowers allegedly sustained at Whole Food Market located at 95 East Houston Avenue, New York, NY 10002 (“subject premises”). In particular, the plaintiff alleges that on April 28, 2021, she was caused to slip and fall while lawfully at defendant’s store. As a result, on October 15, 2021, the plaintiff

commenced the instant action; and on February 7, 2022, issue was joined wherein, the defendant interposed an answer. Now, the plaintiff seeks the above-described relief. In support of the instant motion, the plaintiff submits, among other things, the pleading, conference order, discovery demands, and photographs. Based upon these submissions, the plaintiff argues that on November 27, 2022, she served a supplemental discovery demand requesting surveillance video or an affidavit confirming the absence of footage from the aisle where she fell. She also demanded the defendant's appearance for a deposition. Despite these requests, the defendant failed to produce the required discovery or a witness. Following a prior motion by the plaintiff, the court ordered the defendant on March 31, 2023, to provide surveillance video of the incident by May 25, 2023. The plaintiff asserts that the defendant did not comply, instead submitted previously provided video covering only a remote part of the store. Further, the plaintiff claims her investigation revealed the existence of a camera directly covering the aisle where the fall occurred; and she contends that video from this camera would show who spilled the beer and how long it was on the floor before her fall. The plaintiff argues that the defendant's refusal to produce or failure to preserve the surveillance video has caused her prejudice, given the severity of her injuries, multiple surgeries, and inability to work for over two years.

In opposition, the defendant submits discovery responses and an affidavit from its Assistant Store Team Leader, Justin Ortiz ("Mr. Ortiz"). The defendant argues that on November 23, 2022, it provided the complete surveillance video of the incident location to the plaintiff. Mr. Ortiz, in his affidavit, states that he reviewed the store's surveillance system on the day of the alleged accident and downloaded footage from the one camera capturing the relevant portion of the aisle: The footage includes moments before, during, and after the plaintiff's alleged fall. Mr. Ortiz avers that the defendant's surveillance system records real-time footage from various cameras throughout the store, saving it to a secure server. He explains that no other camera captured views of the aisle in question. The footage Mr. Ortiz downloaded was retained in the store's leadership office and accurately depicts the events as seen by the security camera, including the area of the spill, its cause—when a vendor knocked over a can of beer—and the plaintiff's subsequent fall within minutes. The defendant claims this video was shared with the plaintiff, alongside a witness made available for deposition on June 19, 2023. It contends the video reflects all relevant details and rebuts the plaintiff's claim that additional footage exists. Additionally, the defendant explains that ceiling domes in retail stores may house dummy cameras for deterrence, may have been non-operational, or may not have been directed

at the accident location on the date in question.

It is well settled that “[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” (*Squillaciotti v. Independent Group Home Living Program, Inc.*, 167 AD3d 673 [2d Dept 2018] citing *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d 543 [2d Dept 2015] [internal quotation marks omitted]; see also *Eksarko v. Associated Supermarket*, 155 AD3d 826 [2d Dept 2017]; *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 AD3d 33 [2d Dept 2012]). “Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed” (*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d at 547; *Eksarko v. Associated Supermarket*, 155 AD3d at 826; *UMS Solutions, Inc. v. Biosound Esaote, Inc.*, 145 AD3d 831, 832 [2d Dept 2016]).

“On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party’s claim or defense” (*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d at 547-548; see *Eksarko v. Associated Supermarket*, 155 AD3d at 828; see also *Amos v. Southampton Hospital*, 198 AD3d 947 [2d Dept 2021]). Moreover, the Supreme Court has broad discretion to determine a sanction for the spoliation of evidence (see *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d at 551; see also *Samaroo v. Bogopa Service Corp.*, 106 AD3d 713 [2d Dept 2013]). Striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court “will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness” (*Eksarko v. Associated Supermarket*, 155 AD3d at 829, quoting *Iannucci v. Rose*, 8 AD3d 437 [2d Dept 2004]; see *UMS Solutions, Inc. v. Biosound Esaote, Inc.*, 145 AD3d 831, 833 [2d Dept 2016]; *Jennings v. Orange Regional Med. Ctr.*, 102 AD3d 654, 655 [2d Dept 2013]). By contrast, where the moving party has not been deprived of the ability to establish his or her case or defense, a less severe sanction is appropriate (see *Eksarko v. Associated Supermarket*, 155 AD3d at 828; *Peters v. Hernandez*, 142 AD3d 980, 981 [2d Dept 2016]; *Jennings v. Orange Regional Med. Ctr.*, 102 AD3d at 656; *Tapia v. Royal Tours Serv., Inc.*, 67 AD3d 894, 896 [2d Dept 2009]; *Iannucci v. Rose*, 8 AD3d at 438). Where

evidence has been found to have been negligently destroyed, adverse inference charges have been found to be appropriate (*see Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d at 554; *Eksarko v. Associated Supermarket*, 155 AD3d at 828).

Here, the court finds that the plaintiff failed to establish that the defendant intentionally or negligently failed to preserve or produce the surveillance video of the alleged accident. Mr. Ortiz averred that he reviewed the store's surveillance system on the day of the alleged accident and downloaded footage from the only camera capturing the relevant portion of the subject aisle. Additionally, Mr. Ortiz averred that the surveillance video includes moments before, during, and after the plaintiff's alleged fall, and that no other camera recorded views of the aisle in question. Consequently, the plaintiff has failed to demonstrate that the defendant's preservation of the provided surveillance video is indicia of a culpable state of mind (*see M.B. v. St. Francis Preparatory Sch.*, 219 AD3d at 140). Furthermore, the plaintiff did not establish that the defendant's failure to preserve the surveillance video compromised her ability to prove her claim (*see M.B. v. St. Francis Preparatory Sch.*, 219 AD3d at 1401; *Sanders v. 210 N. 12th St., LLC*, 171 AD3d at 968). The plaintiff's assertion that the surveillance video from the camera, which she investigated, would show who spilled the beer and how long it remained on the floor before her fall is conclusory. The plaintiff's claim that this footage could establish constructive notice to the defendant is speculative at best when the plaintiff may rely on witness testimony to support her claims. Finally, the plaintiff neglects to specify or articulate whether footage from ten minutes, one hour, or one day would have been crucial to her claims. As a result, the plaintiff failed to establish her entitlement to the striking of the defendant's answer or sanctions emanating therefrom (*see McGlynn v. Burns & Harris, Esq.*, 223 AD3d 733, 735-736 [2d Dept 2024]; *Olivares v. Pollack 111 Bruce, LLC*, 197 AD3d 481, 482 [2d Dept 2021]).

Accordingly, it is hereby

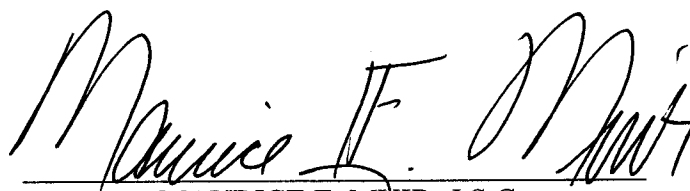
ORDERED, that the plaintiff's motion is denied, in its entirety; and it is further,

ORDERED, that defendant shall serve a copy of this decision and order with notice of entry upon the plaintiff on or before December 20, 2024.

The foregoing constitutes the decision and order of the court.

Dated: December 4, 2024

Long Island City, New York


MAURICE E. MUIR, J.S.C.

