At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 9th day of May 2025.

P R E S E N T:
HON. INGRID JOSEPH,

Justice.

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LEAH DEUTSCH

Plaintiff,

Index No. 522539/2020

-against-

NEW YORK PRESBYTERIAN-WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., and NEW YORK PRESBYTERIAN FOUNDATION, INC.,

DECISION & ORDER
Motion Seq. Nos. 5-6

Defendants.

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Motion Seq No. 5
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Motion Seq No. 6
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Plaintiff Leah Deutsch ("Plaintiff") commenced this action seeking damages for personal injuries allegedly sustained on November 19, 2019, at approximately 11:30 a.m., when she tripped over the metal base of a stanchion and accompanying straps leading to the security area at the premises located at 525 East 68th Street, New York, NY 10065 (the "Premises"). The Premises are owned and operated by Defendants New York Presbyterian-Weill Cornell Medical Center,

New York Presbyterian Healthcare System, and New York Presbyterian Foundation Inc. (collectively, "Defendants").

The plaintiff alleges that the stanchions were positioned too closely together, creating a dangerous tripping hazard. In her Bill of Particulars, Plaintiff claims "injuries affecting the bones, tendons, tissues, muscles, ligaments, nerves, blood vessels, and soft tissue, with ongoing and potentially permanent effects, including the possible development of arthritis" (NYSCEF Doc No. 118).

Defendants now move for summary judgment, pursuant to CPLR 3212, arguing that there are no triable issues of fact warranting a trial (Motion Sequence No. 5). Plaintiff opposes the motion and cross-moves for an order pursuant to CPLR 3126: (1) striking Defendants' answer for failure to preserve video surveillance evidence, or alternatively, (2) seeking an adverse inference charge against Defendants concerning the missing surveillance footage (Motion Sequence No. 6).

In support, Defendants allege that the condition was not dangerous because it was an open obvious condition. Citing Plaintiff's own testimony and photographs, along with the expert opinion of safety consultant William Marietta, Ph.D., Defendants assert that the stanchion bases were spaced approximately 30 feet apart and did not pose a tripping hazard. Additionally, hospital security officers Jorge Barriga and Jillian Rosado testified that they had never observed anyone tripping or falling due to the stanchions and that the spacing between them was sufficient to accommodate two people. Dr. Marietta opined that there was no evidence that the walkway was too narrow and that the stanchion bases were not hazardous. Defendants contend that the testimony from Plaintiff is speculative and cannot raise a triable issue of fact.

In opposition, Plaintiff counters that triable issues of fact exist regarding whether the arrangement of the stanchions constituted a hazardous condition. She testified that, contrary to the photographs, the stanchions were positioned more narrowly and closer together on the incident date. Plaintiff further testified that no accident report was completed at the time, despite testimony from both Barriga and Rosado indicating that it was their responsibility to do so. Plaintiff also challenges the credibility of Dr. Marietta's testimony, noting that his inspection occurred on April 16, 2024, nearly five years after the incident. She further argues that Dr. Marietta stated that a minimum walkway width of 38 inches is required, while Barriga testified that the actual spacing ranged from 24 to 34 inches. Plaintiff also contends that she had no knowledge of the protruding base of the stanchion prior to her fall.

In reply, Defendants argue that they have met their prima facie burden for summary judgment, having demonstrated that the stanchions conformed to all applicable safety standards, as supported by Dr. Marietta's affidavit. They assert that his opinions were formed based on the deposition testimony of Plaintiff and the security officers, as well as the photographs provided by Plaintiff.

Plaintiff separately moves for relief pursuant to CPLR 3126, seeking to strike the Defendants' answer or, alternatively, for an adverse inference instruction based on the alleged spoliation of video surveillance evidence. Plaintiff argues that Defendants negligently failed to preserve the surveillance footage from the lobby on the day of the incident, which could have confirmed whether the stanchion arrangement created a hazardous condition. Plaintiff states that on December 2, 2019, she served a letter requesting preservation of the footage, but Defendants responded on January 28, 2020, indicating no such footage was available. Plaintiff contends that Defendants had a duty to preserve the footage, especially after Plaintiff was diagnosed at the facility with a fractured left femur. Plaintiff argues that this constituted notice of potential litigation and that Defendants' failure to preserve the footage supports her spoliation claim which should result in sanctions.

Defendants oppose the motion, asserting that striking a pleading due to spoliation is an extreme remedy warranted only in exceptional circumstances. They claim they did not intentionally or willfully destroy the footage; rather, the hospital's policy automatically deletes surveillance video every 15 days. Defendants argue they had no notice of potential litigation until after the footage had been erased and that Plaintiff's preservation letter was received six days after the 15-day retention period had lapsed. They further argue that the deleted video would not have prejudiced Plaintiff and may have, in fact, supported Defendants' case.

In reply, Plaintiff maintains that the Defendants' negligent failure to preserve the surveillance footage constitutes spoliation. Plaintiff contends that the Defendants should have anticipated litigation after the injury was reported and diagnosed with a fracture of the left femur at their own facility. Plaintiff asserts that the Defendants have not met the burden of opposing the motion for spoliation sanctions and reiterates that the missing footage was critical evidence that could have resolved the central factual dispute in this case.

The Court will first address Defendants' motion for summary judgment. "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only

be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where, as here, a plaintiff's action is based on a trip-and-fall accident, the defendant's entitlement to summary judgment is contingent on establishing that it "maintained the premises in a reasonably safe condition and that [it] did not create a dangerous or defective condition on [its] property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it" (*Villano v Strathmore Terrace Homeowners Ass'n, Inc.*, 76 AD3d 1061, 1061 [2d Dept 2010]). "[T]here is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" (*Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 799 [2d Dept 2019]). A condition is open and obvious if it is "readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident" (*Lazic v Trump Vil. Section 3, Inc.*, 134 AD3d 776, 777 [2d Dept 2015]). "Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition, but does not preclude a finding of liability against a landowner for failure to maintain the property in a safe condition" (*Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 636 [2d Dept 2010]). "The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" (*Holmes v Macy's Retail Holdings, Inc.*, 184 AD3d 811, 811 [2d Dept 2020] [internal citations and quotation marks omitted]).

Upon review of the documents submitted by the Defendant, the Court finds that the Defendant has failed to meet its prima facie burden for summary judgment. In a motion for summary judgment, the moving party bears the initial burden of establishing, through admissible

evidence, that there are no triable issues of fact and that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, the Defendant relies primarily on the affidavit of William Marietta, Ph.D., a safety consultant, whose inspection of the accident site was conducted on April 16, 2024, more than five years after the alleged incident. The affidavit does not establish that the conditions present at the time of the inspection accurately reflect the conditions at the time of the accident. Moreover, the photographs submitted in support of the motion were also taken five years post-accident, and no foundation has been laid to show that the physical conditions captured in those images remained unchanged during the intervening period. Given the gap in time and the lack of evidence tying the consultant's observations to the condition of the premises at the time of the incident, the Defendant has failed to eliminate all triable issues of fact. Since the Defendant has not satisfied its burden, the Court need not consider the sufficiency of the Plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The Court next turns to Plaintiff's cross-motion seeking sanctions. The party moving for sanctions for spoliation must establish "[1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a culpable state of mind, and [3] 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] [internal quotation marks omitted]).

Here, Defendant submits an affidavit from Angel Chernes-Rosado, Manager of Security Investigations and the Emergency Management Department at New York Presbyterian Hospital. Mr. Chernes-Rosado affirms that, pursuant to hospital policy, surveillance footage is automatically deleted after 15 days unless a specific request is made to preserve it. Accordingly, the surveillance video related to the incident would have been deleted on or about December 4, 2019. Based on Plaintiff's own documents, they served a letter requesting preservation of the video on December 4, 2019. However, according to the UPS tracking record (NYSCEF Doc. 144, p. 3), the letter was not received by Defendant until December 10, 2019; 21 days after the incident occurred. Plaintiff has not demonstrated that the video was deleted intentionally or willfully. Plaintiff argues that her fall and resulting injuries should have placed the Defendant on notice of potential litigation. However, under *Pegasus Aviation I, Inc.* (26 NY3d 543, 547 (2015), the duty to preserve evidence arises only when a party is on notice that the evidence may be needed for future litigation. In this

case, the Defendant had no such notice before the footage was automatically deleted. Accordingly, Plaintiff's motion for sanctions is denied since Defendant established that it has a 15-day policy for retaining surveillance footage and Plaintiff did not provide notice until after the footage was deleted.

Therefore, it is hereby

ORDERED, that Defendants' motion for summary judgment (Mot. Seq. No. 5) is denied; and it is further

ORDERED, that Plaintiff's cross-motion to strike (Mot. Seq. No. 6) is denied.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice