Sanchez v Goodwill Indus. of Greater NY and Northern NJ, Inc.
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May 1, 2012
Sup Ct, Queens County
Docket Number: 7741 2009
Judge: James J. Golia
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part ____
Justice

MARILU SANCHEZ, x Plaintiff(s) – against – GOODWILL INDUSTRIES OF GREATER NEW YORK AND NORTHERN NEW JERSEY, INC. AND 42-15 CRESCENT LLC, Defendant(s) x	Index Number 7741 2009 Motion Date February 16, 2012 Motion Cal. Number 26 Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion by defendants Goodwill Industries of Greater New York and Northern New Jersey, Inc. and 42-15 Crescent LLC for an order granting summary judgment dismissing the complaint in its entirety, with prejudice. Plaintiff Marilu Sanchez cross moves for an order striking defendants' answer pursuant to CPLR 3216, on the grounds of spoliation of evidence, and in the alternative granting plaintiff an adverse inference charge at the time of trial and precluding defendants from eliciting testimony regarding the subject chair and observations made by the defendants after the accident.

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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Marilu Sanchez commenced this action on March 27, 2009, alleging that she sustained personal injuries on February 26, 2009 while attending a career counseling program located in Room 206 of the premises known as 42-15A Crescent Street, in Queens County. Ms. Sanchez alleges that as she began to sit down in a chair in said classroom, the chair broke causing her to fall, with the chair seat beneath her, to the floor. Plaintiff alleges that she struck her head on a table prior to falling to the floor. Ms. Sanchez alleges that as a result of the fall she sustained injuries to her neck and back, and underwent a lumbar spinal cord stimulator implantation.

The subject premises are owned by 42-15 Crescent LLC (Crescent), and the sole occupant of the entire second floor is Goodwill Industries of Greater New York and Northern New Jersey (Goodwill). Goodwill provided the career services attended by plaintiff. Defendants served an answer on June 26, 2009, and an amended answer on June 27, 2009, and interposed 14 affirmative defenses.

Defendants now seek an order granting summary judgment dismissing the complaint in its entirety. It is asserted that Goodwill was not negligent in its ownership, management, operation and control of the Crescent Street premises; that it was not responsible for plaintiff's injuries; and that plaintiff's injuries were caused by her own actions. Defendants claim that plaintiff improperly leaned back in the chair so as to cause it to tip over backwards and crash to the floor. Defendants further assert that plaintiff has failed to establish that the chair was defective, and that Goodwill had any prior notice of the chair's alleged defective character. In support of their motion, defendants rely upon the deposition testimony of Ms. Sanchez, Ms. Prescod and Ms. Resnick, as well as affidavits from Ms. Prescod, Galina Shub, Goodwill's Vice President of Workforce Development in Queens County, and Kevin Carter, a custodian employed by Goodwill at the subject premises.

Plaintiff, in opposition, has submitted an affidavit, along with an affidavit of translation. Plaintiff's counsel asserts defendant's allegation that plaintiff was leaning back in the chair and caused the chair to tip over, is based solely on the unsworn hearsay statements of unidentified witnesses, and therefore should be disregarded. It is asserted that plaintiff has submitted unconverted evidence, in admissible form, that (1) the moment plaintiff's buttocks came in contact with the chair, the plastic seat broke off the metal frame and slid backwards, causing her to fall; (2) that at the close of each business day Goodwill locked each classroom, as well as the entire second floor; (3) that the chairs on the second floor were maintained and repaired by Goodwill; (4) that the subject chair was within the exclusive control of Goodwill; and (5) that the subject chair was never inspected prior to the accident.

Plaintiff argues that defendants improperly seek to rely upon Ms. Prescod's affidavit, which contains speculations as to how the accident occurred, rather than submit expert testimony. It is asserted that even if defendants' could establish that plaintiff was leaning back in the chair, such proof would only create an issue of fact as to comparable fault. It is further asserted that defendants have failed to establish a lack of constructive notice, as Goodwill did not have a formal process for inspecting the 20 to 30 chairs in Room 206, as well as the 140 chairs used on the second floor; that these the chairs had been in place for over two years; and Mr. Carter only tightened loose screws on the chair frames on an ad hoc basis. Plaintiff also asserts that summary judgment is not warranted as the doctrine of res ipsa loquitur is applicable here, and the evidence presented is sufficient to submit the matter to a jury.

Plaintiff, in her cross motion, seeks an order striking the defendants' answer on the grounds of spoliation of the evidence. It is asserted that defendants improperly disposed of the subject chair immediately after the accident despite having being aware of the chair's importance and a duty to preserve the chair for a reasonable period of time. It is asserted that Goodwill's disposal of the chair materially prejudices the plaintiff, and therefore Goodwill's answer should be stricken on the grounds of spoliation. In the alternative, plaintiff asserts that it should be granted an adverse interest charge at trial.

Defendants' counsel, in his reply, argues that plaintiff Sanchez has failed to adduce in what manner the chair was defective, and further maintains that the accident occurred due plaintiff's leaning in the chair. Defendants also assert that the hearsay evidence regarding Ms. Sanchez's leaning back in the chair should be admissible as either excited utterances or statements made as present sense impressions, and assert that said hearsay evidence is corroborated by circumstantial evidence. Defendants also assert that expert evidence is not required here. Defendants reiterate their claim that plaintiff failed to establish that Goodwill knew or should have known about the alleged defective character of the chair.

In opposition to the cross motion, defendants assert that at the time Goodwill disposed of the broken chair, it had no reason to believe that plaintiff had sustained a serious injury and that the chair would become a critical piece of evidence that should be preserved for potential litigation. It is therefore asserted that the striking of the pleading or an adverse inference charge is not warranted.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Monrose Knitwear Corp.*, 74 AD2d 768 [1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [1965]). Even the color of a triable issue forecloses the remedy *(Newin Corp. v Hartford Acci. & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a

light most favorable to the one moved against (*Benincasa v Garrubbo*, 141 AD2d 636 [1988]; *Weiss v Garfield*, 21 AD2d 156 [1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 32 923 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee's Div. of Stop & Shop, Inc*., 172 AD2d 504, 505 [1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v Di Napoli*, 134 AD2d 235 [1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v Tallman*, 278 AD2d 811 [2000]).

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Clare's Hosp*., 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851 [1985]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact *(Winegrad v New York Univ. Med. Ctr*., *supra*; *Zuckerman v City of New York*, *supra*; *Silverman v Perlbinder*, 307 AD2d 230 [2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [2002]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*, *supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck* Co., 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerma*n, *supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc*., 93 AD2d 772 [1983], *affd*

62 NY2d 686 [1984]).

Plaintiff Marilu Sanchez testified via a Spanish interpreter at her deposition, and stated that she arrived at the Crescent Street address at approximately 8:00 A.M. on February 26, 2009. She stated that she had been seated for a period of time in Room 206, and that she left the building for approximately 15 minutes in order to purchase a cup of coffee. Ms. Sanchez stated that when she returned to Room 206, it was crowded, and she initially stood along a wall with others. She stated that she spotted a single unoccupied chair in front of a computer terminal that was not working, and moved said chair so that she would be able to see what another person was doing on the computer. She described said chair as having a plastic seat and back, with no arms, and a metal frame. Ms. Sanchez stated that she was in the process of sitting down, and was using her right hand to bring the chair closer, and that when her buttocks touched the seat, the seat separated from the metal frame, and she and the chair fell backwards to the floor with the seat beneath her. She stated that she struck the back of her head on a table, and that she remained on the floor for approximately twenty minutes and may have lost consciousness. She was taken by ambulance to a hospital where she was examined and released the same day.

The affidavits submitted by Ms. Sanchez in opposition to the defendants' motion, as well as the purported affidavit of translation must be disregarded. There is no evidence that Ms. Sanchez can communicate in the English language. An official Spanish interpreter was required at her deposition to translate the questions to her from English to Spanish and her answers from Spanish to English. The affidavit submitted by Ms. Sanchez motion is written in the English language, and states that it was translated into Spanish for her by an employee of her attorney. An accompanying affidavit from a paralegal employed by plaintiff's counsel states that she translated the English affidavit into Spanish, and that Ms. Sanchez indicated that she understood the contents of her affidavit. The paralegal states that she was raised in an English and Spanish speaking household, and that she is fluent in both languages. Ms. Sanchez, however, has not submitted an affidavit in Spanish. Furthermore, the affidavit submitted by the translator does not set forth her qualifications as a translator (*see* CPLR 2101).

Defendant Goodwill's employee Kim Prescod, and its former employee Susan Resnick both testified that they did not observe the plaintiff prior to her accident and that they did not witness the accident. Kim Prescod, a "job developer" stated at her deposition, and in her affidavit, that she was seated at her desk in Room 206, that she did not observe Ms. Sanchez before the accident and she became aware of the accident when she heard a thud and saw a crowd of approximately ten people standing around a woman who was lying on her back on the floor. Ms. Prescod stated that she observed that Ms. Sanchez was still in the chair, which had completely broken off the frame, that there were pieces of plastic still

attached to the frame, and that the chair's chrome legs were parallel to the floor, and not in an upright position. Ms. Prescod left the room to inform her supervisor Alonzo Clark of the accident, who contacted Susan Resnick, the office manager. A receptionist called 911, and Ms. Prescod returned to Room 206, and waited with Mr. Clark for the EMTs to arrive. Ms. Prescod stated that no one ever told her that they observed Ms. Sanchez fall back in the chair, or tip over, or that the chair broke after she fell over. She stated that Ms. Resnick told her that Ms. Sanchez had been leaning back in her chair, but did not know who provided this information to Ms. Resnick.

Ms. Prescod stated that she remained with Ms. Sanchez until she was removed from the premises by an ambulance, and that she did not know what happened to the broken chair after the accident.

Susan Resnick, a former Goodwill employee, stated at her deposition that she was the project office manager and was in her office on the second floor of the Crescent Street premises when the accident occurred. She testified that she did not observe Ms. Sanchez prior to the accident and did not witness the accident. Ms. Resnick stated that an unidentified employee and an unidentified client first informed of her accident and told her that plaintiff was leaning back in the subject chair and fell (Tr.69). She also stated that three unidentified male clients told her after the accident that Ms. Sanchez had been "leaning real back" in the chair before she fell. She stated that she did not take any statements from any witnesses on the date of accident or anytime thereafter. Ms. Resnick further testified that no Goodwill employee told her that they had witnessed the accident, or that Ms. Sanchez was "leaning real back" in the chair prior to the accident (Tr. 103, 120).

Ms. Resnick stated that she entered Room 206, and observed Ms. Sanchez on the floor. She did not speak with Ms. Sanchez, as she was unable to converse with her in Spanish. She waited with Ms. Sanchez, and other employees for the paramedics to arrive, and after they left with Ms. Sanchez, she returned to her office and wrote an incident report. Ms. Resnick testified that she was required, as an officer manager, to write an incident report. She wrote the report by hand and signed it on February 26, 2009. In the incident report, Ms. Resnick stated that she received a telephone call from Jorge Malcia (a Goodwill employee) who told her to go to Room 206; that when she entered the room she saw a woman lying on the floor; that job developers Alonzo Clark and Kim Prescod, along with Jorge Malcia were present and that "they stated that the prone woman-Marilu Sanchez, 38 has banged her head after sitting on a chair. Ms. Resnick stated in her report that an ambulance had been called, that Ms. Sanchez spoke little English; that Malcia acted as her translator; that the paramedics arrived and placed Ms. Sanchez on a stretcher and transported her to Elmhurst Hospital; and that Ms. Sanchez' family was notified. Approximately a week and a half latter, Ms. Resnick amended the incident report, noting that Ms. Sanchez had been

discharged from Elmhurst Hospital, and that there were no fractures.

Ms. Resnick testified that she did not observe the subject chair while she was attending to Ms. Sanchez after the accident; that she was not requested by her employer or anyone else to preserve the chair; and that she did not know what had happened to the chair after the accident.

In an affidavit submitted in support of defendants' motion, Ms. Prescod states, in pertinent part, that the "subject chair was deposed of because the chair could not be repaired and because, from the naked eye, the chair broke as a result of Ms. Sanchez having leaned back in the chair and tipping it over and onto the floor. In fact other staffers and patrons confirmed that Ms. Sanchez had been leaning back in the chair prior to her fall."

The statement made by Ms. Prescod in her affidavit regarding the observations of the "staffers" is wholly unsubstantiated, as the evidence presented fails to establish that any Goodwill employee witnessed Ms. Sanchez leaning back in the chair prior to the accident. Furthermore, Ms. Prescod admittedly did not observe Ms. Sanchez's conduct and did not witness the accident. Rather, she seeks to rely upon hearsay statements made to Ms. Resnick which were then allegedly repeated to her. This double hearsay statement, as well as Ms. Prescod's own conjectures as to how the accident occurred, does not constitute admissible evidence. Statements attributable to unidentified witnesses are considered hearsay and do not rise to the level of evidence (see *Ratut v. Singh,* 186 Misc 2d 350, 352 [2000]). Ms. Prescod's affidavit is based upon hearsay rather than personal knowledge, and thus it is "without evidentiary value" (*Zuckerman v City of New York*, *supra* at 563; *Bielak v Plainville Farms, Inc*., 299 AD2d 900 [2002]).

Contrary to defendants' assertions, said statements do not come within any recognized exceptions to the hearsay rule. In an action to recover damages for personal injuries sustained in an accident, the oral statements of unidentified eyewitnesses are admissible pursuant to the present sense exception to the hearsay rule, if such statements are made "substantially contemporaneously" with the observation (*People v Brown*, 80 NY2d 729, 734 [1993]) and such statements are "sufficiently corroborated by other evidence" (*Rodney v Town of Brookhaven*, 228 AD2d 486 [1996]; *see Irizarry v Motor Vehicle Indemnification Corp*., 287 AD2d 716, 717 [2001]; *Perez v Exel Logistics*, 278 AD2d 213 [2000]; *Solovyev v Smith*, 187 Misc 2d 400 [2000]). Here, even if the statements were made by the unidentified clientele, they are not corroborated by other evidence. Ms. Prescod and defendants' counsel's conjectures as to how the accident occurred, based upon the position of the chair seat and frame immediately after the chair broke, does not constitute corroborating evidence. In addition, the hearsay statement fails to qualify as an "excited utterance," because there is no evidence as to how long a period of time had passed after the

accident, and whether the declarant was under any stress when the information was provided (*see Flynn v Manhattan & Bronx Surface Tr. Operating Auth*., 94 AD2d 617, 619 [1983], *affd* 61 NY2d 769 [1984]; *see also Solovyev v Smith*, *supra* at 403).

Defendants, as the proponent of this motion for summary judgment, are required to establish prima facie, by admissible evidence, its entitlement to summary judgment. This court will not give credence to defendants' hearsay evidence instead of the plaintiff's testimony. "If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted" (*Ritt v Lenox Hill Hospital,* 182 AD2d 560, 562 [1992]).

Defendants contend that they had no actual notice nor constructive notice that the subject chair was in a dangerous or defective condition and that they did not cause or create such a condition. In order for the defendants to be liable, they must have either created or had actual or constructive notice of the defective condition that caused the plaintiff's injuries *(Loiacono v Stuyvesant Bagels, Inc*., 29 AD3d 537, 538 [2006], citing *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). A general awareness that a dangerous condition might exist is insufficient (*Loiacono v Stuyvesant Bagels, Inc*., *supra*, at 538, citing *Piacquadio v Recine Realty Corp*., 84 NY2d 967 [1994]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it" *(Gordon v American Museum of Natural History*, *supra* at 837).

The plaintiff does not contend that defendants had notice of the defective condition. Rather, in opposition to the summary judgment motion, plaintiff argues that the motion must be denied because the doctrine of res ipsa loquitur is applicable to the facts of this case, and therefore lack of notice is not a bar to defendants' liability. The doctrine of res ipsa loquitur creates a prima facie case of negligence sufficient for submission to a jury, and the jury may, but is not required, to draw the permissible inference of negligence (*see Kambat v St. Francis Hospital*, 89 NY2d 489, 495 [1997]). In order for the doctrine of res ipsa loquitur to apply, the following three elements must exist: (1) the event must be of a kind which ordinarily does not occur in the absence of negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution of the plaintiff. (*Kambat v St. Francis Hospital, supra*; *O'Connor v Circuit City Stores, Inc*., 14 AD3d 676, 677 [2005]).

Defendants argue that the doctrine of res ipsa loquitur is inapplicable here. It is asserted that the subject chair was not completely within the control of Goodwill, as the premises had been open for several hours prior to the accident, there were approximately thirty patrons in the room, and the same number of people had been present for several weeks

and months earlier. Defendants further assert that said doctrine is inapplicable as plaintiff's accident was caused by her own conduct.

As stated above, the evidence presented is insufficient to establish that the accident was caused by the plaintiff's own conduct. The evidence presented, however, establishes that Goodwill purchased the subject chair; that there were approximately 20 to 30 chairs in Room 206; that Goodwill replaced the approximately 140 chairs that were in the second floor classrooms approximately every two and a half to three years; that the make and model of the subject chair was purchased approximately two and half years prior to the accident; that at the end of each day Goodwill locked the classrooms on the second floor, as well as the entrance to the second floor of the building; and that only Goodwill's clientele utilized the chairs located in the classrooms.

Goodwill's custodian, Kevin Carter, states in his affidavit that he moved and stacked the chairs on a daily basis in order to vacuum the carpet in Room 206, and made repairs to chairs on an ad hoc basis, he did not remove for repair or replaced any chairs in Room 206 due to a maintenance problem. There is no evidence that the custodian or any other Goodwill employee ever inspected the classroom chairs in a systematic manner or that Goodwill maintained an inspection schedule for these chairs.

The court finds that the degree of control exercised over the chairs in the classroom by defendant Goodwill meets the exclusive control requirement. Therefore, a triable issue of fact exists as to the liability of Goodwill under the doctrine of res ipsa loquitur (*see Finocchio v Crest Hollow Club*, 184 AD2d 491[1992]; *Crispo v Art Student League*, 180 Misc 2d 54 [1999]; *cf. Lawrence v Rockland County Bd. of Coop. Educ. Servs*., 93 AD3d 776 [2012]; *Raimondi v New York Racing Assn*., 213 AD2d 708 [1995]). Defendant Goodwill's motion for summary judgment dismissing the complaint, therefore, is denied.

Defendant property owner 42-15 Crescent LLC has established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that it neither created nor had notice, actual or constructive, of the defective condition of the chair. As there is no evidence that this defendant had exclusive control over the subject chair, plaintiff may not invoke the doctrine of res ipsa loquitur (*Lawrence v Rockland County Bd. of Coop. Educ. Servs*., *supra*; *Miles v Hicksville U.F.S.D.*, 56 AD3d 625, 626 [2008]; *Dulgov v City of New York,* 33 AD3d 584, 585 [2006]; *Loiacono v Stuyvesant Bagels, Inc*., *supra* at 538 [2006]). Therefore, that branch of defendants' motion which seeks summary judgment dismissing the complaint is granted as to 42-15 Crescent LLC.

Defendants' request, in the alternative, that the court direct the plaintiff to appear for

an orthopedic IME is denied, as moot. It is noted that defendants failed to properly seek such alternative relief in their notice of motion and only requested said relief in their counsel's affirmation. Plaintiff, however, has agreed to appear for said IME.

Defendants' objections to plaintiff's service of a supplemental bill of particulars is improperly raised in its reply papers and will not be addressed at this time (*Dannash v Bifulco*, 184 AD2d 415 [1992]).

Turning now to plaintiff's cross motion, it is well established that "[t]he Supreme Court is empowered with broad discretion in determining the appropriate sanction for spoliation of evidence" (*De Los Santos v Polanco*, 21 AD3d 397, 397 [2005]; *see Iamceli v General Motors Corp*., 51 AD3d 635 [2008]; *Dennis v City of New York,* 18 AD3d 599, 600 [2005]; *Barahona v Trustees of Columbia Univ. in City of N.Y.*, 16 AD3d 445, 445-446 [2005]). "When a party negligently losses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading" (*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007]; *see Baglio v St. John's Queens Hosp*., 303 AD2d 341, 342-343 [2003]; *Madison Ave. Caviarteria v Hartford Steam Boiler Inspection & Ins. Co.*, 2 AD3d 793, 796 [2003]). The party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and "fatally compromised its ability to defend [the] action" (*Lawson v Aspen Ford, Inc*., 15 AD3d 628, 629 [2005]; *see Kirschen v Marino*, 16 AD3d 555, 555-556 [2005]). However, "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct," and, thus, the courts must "consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness (*Iannucci v Rose*, 8 AD3d 437, 438 [2004]; *see Favish v Tepler*, 294 AD2d 396, 397 [2002]). When the moving party is still able to establish or defend a case, a less severe sanction is appropriate (*see De Los Santos v Polanco,* 21 AD3d at 398; *Iannucci v Rose*, 8 AD3d at 438; *Favish v Tepler*, 294 AD2d at 397)" (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718-719 [2009]).

Kevin Carter, Goodwill's custodian states in his affidavit that after the incident, he placed the chair in the garbage, as the chair could not be repaired. Mr. Carter does not state how long after the incident the chair was disposed of, and counsel's claim that it was discarded right after the incident is not supported by the evidence submitted herein. Plaintiff, however, has failed to establish that the defendants disposed of the subject chair intentionally or in bad faith, or that loss of evidence leaves her without a means to establish her claim (*see Utica Mut. Ins. Co. v Berkoski Oil Co., supra; Cohen v Jordan Servs., Inc.*, 49 AD3d 680, 681 [2008]; *Kerman v Martin Friedman v C.P.A., P.C.*, 21 AD3d 997, 999 [2005]; *Lawson v Aspen Ford, Inc*., 15 AD3d at 629-630; *Vaughan v City of New York*, 201 AD2d 556, 558

[1994]). Defendant Goodwill's custodian states in his affidavit that after the incident, he placed the chair in the garbage as it could not be repaired. Goodwill's negligent disposal of the subject chair prejudiced all parties, but does not prevent the plaintiffs from establishing her claim against Goodwill. The parties do not dispute that the seat of the subject chair broke off from its metal frame. Under these circumstances, the plaintiff's request to strike the defendants' answer is denied (*see Lentz v Nic's Gym, Inc*., 90 AD3d 618, 618-619 [2011]; *Molinari v Smith,* 39 AD3d 607, 608 [2007]).

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint is granted solely as to 42-15 Crescent LLC and is denied in all respects as to defendant Goodwill. Plaintiff's cross motion to strike the defendants' answer is denied, and the request for an adverse inference charge is denied, with leave to renew at the time of trial.

Dated: May 1, 2012

James J. Golia, J.S.C.