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SHORT FORM ORDER **INDEX NO.: 03177/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 02/23/17
Motion Seq #: 001 MD

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JANET FISCHETTI,

Plaintiff,

-against-

SAVINO'S HIDEAWAY, INC.,

Defendant.

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PLAINTIFF'S ATTORNEY:
Levine & Gilbert
By: Harvey A. Levine, Esq.
115 Christopher Street
New York, NY 10014

DEFENDANT'S ATTORNEY':
Armienti DeBellis Gugliemo & Rhoden, LLP
By: Michael J. Paglino, Esq.
170 Old Country Road, Suite 607
Mineola, NY 11501

Upon the reading and filing of the following papers in this matter: (1) Plaintiff's Notice of Motion and Affirmation in Support dated January 5, 2017 and supporting papers; (2) Defendant's Affirmation in Opposition dated February 14, 2017 and supporting papers; (3) Plaintiffs' Reply Affirmation in Further Support dated February 20, 2016; ~~(and after hearing counsels' oral arguments in support of and opposed to the motion);~~ and now it is

ORDERED that plaintiff's motion seeking the sanction of spoliation against defendant for failing to keep, preserve or retain discoverable evidence and seeking entry of an order for an adverse inference as the remedy for the same is hereby **DENIED** in accord with the following discussion.

Plaintiff Janet Fischetti (hereinafter "plaintiff" or "Fischetti") brought this premises liability negligence action against defendant Savino's Hideaway, Inc. ("defendant" or "the restaurant") seeking the recovery of damages for personal injuries she allegedly sustained on the premises of defendant's restaurant located in Mt. Sinai, New York.

The action was commenced with plaintiff's filing of a summons and complaint on February 24, 2015. Issue was joined with defendant's interposition of its answer dated March 16, 2015. Discovery is ongoing and the parties have conferenced this matter concerning compliance most recently on May 18, 2017, and will return for further conference on June 22, 2017.

In sum and substance, plaintiff alleges that on November 7, 2014 at or around 5:00 p.m., she was a patron at defendant's restaurant on North Country Road in Mt. Sinai, Suffolk County,

New York. Her husband had passed away the day prior, and plaintiff and her children and grandchildren were having dinner to plan the funeral. Fischetti further avers that on exiting the restaurant she descended the steps and make a left-hand turn taking a concrete and paved pathway in the direction she believed would take her to the restaurant's parking lot. In so doing, plaintiff fell and sustained a tibial and fibula fracture requiring surgical intervention and the implantation of steel plating and screws. She was transported by ambulance to Stony Brook University Medical Hospital and was admitted for surgery. The Suffolk County Police Department also responded and prepared a field report of plaintiff's injury.

Plaintiff's theory of liability as against defendant is that defendant is liable for negligence as the proximate cause of her injuries insofar as defendant had inadequate exterior artificial lighting and/or no adequate warnings or signage of a drop from the pathway to the landscaped area below. Plaintiff asserts that at the time of her accident it was dark out and thus she could not readily observe or see the drop so as to have prevented her fall.

Defendant disputes the facts cited and relied upon by plaintiff. To its part, defendant contends that plaintiff's fall occurred sometime earlier in the day, at approximately or near 4:00 - 4:30 p.m. According to defendant, this distinction matters as defendant claims in opposition that plaintiff's incident took place while still daylight, and thus exterior lighting was not yet lit. Further, defendant has offered corroboration of this point in the form of the deposition testimony of two separate non-party witnesses who succinctly summarized state that it was either daylight out, or dusk at the time of plaintiff's incident.

Additionally, defendant argues that plaintiff did not fall as much as she intentionally or volitionally jumped off a concrete rock retaining wall and injured herself in the process. Moreover, defendant states that the path plaintiff took in exiting the restaurant did not conclude with access or entry to the parking lot. Lastly, defendant emphasizes that exterior artificial light was present in or around the shrubbery and landscaping of defendant's premises, but was not lit due to it being daylight out at time of the occurrence.

After commencing the action, plaintiff sent a form demand letter dated December 4, 2013, wherein plaintiff's counsel advised defendant that they believed that plaintiff's incident was due to defendant's negligence. The correspondence went on to request that defendant forward information pertaining to plaintiff's claim to defendant's liability insurance carrier. The letter however does not make any demands or requests that defendant preserve or maintain any evidence of any kind pertaining to the claim.

During discovery, of the several depositions conducted by the parties, Joseph Seguera was produced for an examination before trial on February 23, 2016. Mr. Seguera's is the son of Rita and Savino Seguera owners of defendant's restaurant, and like his sister, is in the family's employ in management of the family business. He works in the restaurant bar area. He has a background in computers and audio-visual equipment. With this skillset, he contracted for the installation of an electronic digital video recorder ("DVR") and surveillance camera system for anti-theft purposes. The restaurant employs the use of 9 such cameras, one of which is situated in such a way to capture surveillance video of the restaurant's entrance and exit and concrete patio and walkway; the area forming plaintiff's accident scene.

Mr. Seguera testified that the DVR system storage capacity holds 2 weeks' worth of footage. Defendant's ordinary protocol is to view the footage on an *ad hoc* basis, responding to allegations of theft or vandalism. Seguera was present on defendant's premises within his work capacity and was aware of plaintiff's accident when it happened. However, Seguera did not review the surveillance footage at the time, and on receipt of plaintiff's demand letter, after consultation with his video contractor, confirmed that the footage had been erased or recorded over, since the request came well after two weeks from the incident.

Based upon all of this, plaintiff has moved seeking sanctions against defendant in the nature of spoliation of evidence. Plaintiff asserts that defendant negligently allowed for the destruction of the electronic DVR surveillance video. Fischetti further argues that the video evidence is relevant and material to her claim of premises liability since the question of available light and lightning condition is a disputed question of fact between the parties. Plaintiff asserts that it was dark out, while defendant counters it was light. Thus, plaintiff argues the question of available light at the date, time and location of plaintiff's incident could be answered definitively with viewing of the video, but for its destruction. Therefore, plaintiff argues that it has been prejudiced in the presentation of its theory of liability and case against defendant by defendant's negligent destruction, or failure to retain video evidence. Plaintiff thus proposes as a remedy that it be awarded an instruction to be used at time of trial calling for an adverse inference before the jury against defendant.

Arguing in opposition to plaintiff's motion, defendant asserts that the plaintiff's request should be denied in its entirety. As an initial matter, defendant argues that plaintiff's application for noncompliance is premature with this Court's rules requiring pre-motion conferences.[1] This Court disagrees and will consider the merits of the pending application, if only for the fact that Joseph Seguera appeared for and gave sworn deposition testimony. Thus, defendant cannot now reasonably argue that the question of possible spoliation is an utter surprise in this case.

Defendant then argues that plaintiff's motion must fail on the grounds of relevance. Essentially, defendant claims that the destruction of the surveillance video is of no moment and does not weaken plaintiff's case as claimed. In furtherance of this point, defendant argues that if the video did exist, it could conclusively depict daylight, thus hurting and not helping plaintiff's case.

Lastly, defendant disputes plaintiff's ability to make out the *prima facie* elements required for spoliation. Chiefly, defendant advocates that since plaintiff cannot demonstrate how unavailability hurts its case, plaintiff cannot show significant and unfair prejudice. Furthermore, defendant also argues that since plaintiff did not send out a fair notice of claim or other correspondence putting defendant on reasonable notice of impending litigation, defendant was under no duty to preserve or retain the video evidence. Lastly, defendant argues that the surveillance video footage was destroyed pursuant to defendant's ordinary course of business and protocol, thus making plaintiff's requested discovery sanction unwarranted or inappropriate in this case.

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1 Defendant argues that despite this case having appeared before this Court's compliance conference calendar on 13 separate occasions, with at least one pre-motion conference being held, that plaintiff has failed to avail itself and exhaust its request at conference. Thus, defendant argues it lacked reasonable notice or awareness of the grounds for plaintiff's motion.

The Court of Appeals has recently reaffirmed the lower courts inherent authority to mete out punishment and sanctions for parties' failure to retain evidence relevant and material to claims or defenses in litigation stating:

> [S]tate trial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action

Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 551 [2015]

It is well settled that a trial court has broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]).

New York courts have clearly held that the common law regarding spoliation allows that a party may be sanctioned where it negligently loses or intentionally destroys key evidence. "The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (***Morales v City of New York***, 130 AD3d 792, 793, 13 NYS3d 548, 550 [2d Dept 2015]).

The determination of a sanction for spoliation is within the broad discretion of the court, and a court may impose a sanction less severe than the striking of the responsible party's pleading or no sanction "where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" (***Hughes v Covey***, 131 AD3d 581, 583, 15 NYS3d 195, 196–97 [2d Dept 2015]).

In connection with sanctions for spoliation of evidence, "[w]hile reluctant to dismiss a pleading absent willful or contumacious conduct, courts will consider the extent of prejudice to a party and whether dismissal is necessary as a matter of elementary fairness" (***Lawson v Aspen Ford, Inc.***, 15 AD3d 628, 629, 791 NYS2d 119, 120 [2d Dept 2005]). The burden is on the party requesting sanctions to make the requisite showing (***Duluc v AC & L Food Corp.***, 119 AD3d 450, 451–52, 990 NYS2d 24, 26 [1st Dept 2014]).

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, 46 NE3d 601, 602 [2015]; *see also* ***VOOM HD Holdings LLC v EchoStar Satellite L.L.C.***, 93 AD3d 33, 45, 939 NYS2d 321, 330 [1st Dept 2012][determining *inter alia* that a "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence]).

Based on precedent, it has also been previously ruled that a sanction for spoliation of evidence may be warranted even if the evidence was destroyed before the spoliator became a party to the subject lawsuit, provided it was on notice that the evidence might be needed for future litigation (***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 610, 611, 933 NYS2d 735, 737 [2d Dept 2011]). In those instances, movant requesting sanctions for spoliation of evidence has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised the movant's ability to prove a claim or defense" (***Pradlik v Valvoline Instant Oil Change GE6604-White Plains***, 120 AD3d 774, 775, 991 NYS2d 368, 369 [2d Dept 2014]).

However, with every rule comes an exception and this matter is no different. As defendant has argued, the Appellate Division has recognized that defendant who destroys documents in good faith and pursuant to normal business practice should not be sanctioned unless the defendant is on notice that the evidence might be needed for future litigation" (***Ravnikar v Skyline Credit-Ride, Inc.***, 79 AD3d 1118, 1119, 913 NYS2d 339, 341 [2d Dept 2010]).

Based on the foregoing precedent, this Court determines that the salient inquiry here is whether defendant possessed sufficient knowledge or reasonable awareness of impending litigation from plaintiff's incident on its premises such that it was duty bound or obligation to preserve, retain or keep the video surveillance of the incident. Despite vigorous advocacy on this point by both sides, this Court answers that question in the negative.

As a threshold matter, this Court disagrees with defendant's characterization. The parties' arguments concerning the lighting condition of the patio and concrete walkway at the time of plaintiff's occurrence only highlight its importance and relevance in this case. However, the disputed and triable issue of fact concerning whether it was light or dark out is not the proper scope of the pending application. Nor is it the Court's duty to make credibility determinations or assessments on whether plaintiff fell or jumped at this junction.

Rather, the present inquiry before the Court is whether or not defendant should be punished for the unavailability of the surveillance video. Here, as indicated in the motion record, plaintiff commenced the action filings its complaint against defendant on February 23, 2015, for plaintiff's injury which occurred on November 7, 2014. Plaintiff sent a demand letter seeking defendant to put its liability insurance carrier on notice dated, December 4, 2013 but not received by defendant until sometime between 45 - 60 days after plaintiff's incident. According the Joseph Seguera's sworn deposition testimony, the surveillance video footage was erased or otherwise rendered unavailable on or about November 21, 2014, two weeks thereafter. Thus, as defendant has argued, by the time plaintiff had putative sought to put defendant on notice of litigation, the pertinent video evidence had already been destroyed. Thus, to the extent that plaintiff's demand letter was intended to be a reasonable notice of litigation for document preservation/retention purposes, it was ineffective. Further taking the correspondence on its face, it was wholly inadequate or insufficient to put defendant on notice for spoliation purposes. It neither cites knowledge or awareness of the subject video, nor requests that it be preserved.

Thus given the deficiencies noted above, this Courts finds and determines that defendant was not on notice of the reasonable possibility of future litigation so as to be under a duty to suspend its regular 2 week video retention policy. Furthermore, to this particular point, plaintiff

has not adduced any argument or proof countering established Second Department precedent that a party, such as defendant here, should not be sanctioned for following its ordinary course of business concerning the retention of records. Thus, as Joseph Seguera testified that its surveillance videos would be reviewed contemporaneously in instance of theft or vandalism, otherwise would be recorded over after 2 weeks' time, defendant has ably demonstrated that the destruction of the surveillance video of plaintiff's incident was within the norms of defendant's established business practices.

Accordingly, plaintiff's motion for sanctions for spoliation and her request for an adverse inference at time of trial against defendant is hereby **DENIED**; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendant within 30 days of receipt.

The foregoing constitutes the decision and order of this Court.

Dated: June 12, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**