

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION**

GLEND A CARTER : **CIVIL ACTION NO. 2:16-cv-1540**

VERSUS : **JUDGE SUMMERHAYS**

DOLGENCORP, LLC : **MAGISTRATE JUDGE KAY**

MEMORANDUM ORDER

Before the court is a Motion for Order Compelling Discovery; and Alternatively, Motion for Adverse Interference Pursuant to FRCP 37(e) filed by plaintiff, Glenda Carter. Doc. 44. The motion is opposed by defendant DG Louisiana, LLC (hereafter “Dollar General”). Doc. 52. For the following reasons, the motion will be **DENIED**.

**I.
BACKGROUND**

On October 22, 2015,¹ plaintiff was shopping at a Dollar General store located in Lake Charles, Louisiana, when she allegedly tripped and fell on several pieces of clothing that had been left on the floor by Dollar General employees. Doc. 1, att. 2, p. 2. Allegedly, plaintiff was thereafter furnished with a customer copy of a “Customer Incident” form (hereafter “Customer Copy,”) which indicated she would be contacted by a claim representative regarding the incident.

¹ There are inconsistencies in the record as to the exact date of the incident. The petition asserts the incident occurred on October 24, 2015. Doc. 1, att. 2, p. 2. However, in the instant motions both plaintiff [doc. 44, att. 1, p. 4] and defendant [doc. 52, p. 1] have indicated the incident allegedly occurred on October 22, 2015. A receipt dated October 22, 2015, is attached to plaintiff’s instant motion [doc. 44, att. 4] which plaintiff asserts evidences purchases made on the day in question. Doc. 44, att. 1, p. 4.

Doc. 44, att. 3. It is unclear how plaintiff obtained the Customer Copy in this case.² Nevertheless, according to a representative of Dollar General, a Customer Copy generally evidences a more comprehensive incident report was created. *See* Doc. 44, att. 15, p. 10.

By letter dated November 19, 2015, Dollar General notified plaintiff that her claim was being denied because their investigation had not revealed “any negligence on behalf of the store.” Doc. 44, att. 5. On February 17, 2016, plaintiff, a Louisiana citizen, filed suit in the 14th Judicial District Court, Calcasieu Parish against Dollar General,³ a citizen of Tennessee,⁴ based on injuries she claims to have sustained when she fell. Doc. 1, att. 2, pp. 2-5. On November 2, 2016, defendant removed this suit to this court based on diversity jurisdiction. Doc. 1.

Prior to filing suit, plaintiff sent a letter to Dollar General advising it to preserve “[a]ny and all surveillance videos for the entire day of October 22, 2015.” Doc. 44, att. 6. The letter also requested “a copy of any incident/accident report generated as a result of the fall.” *Id.* Initially, defendant indicated that it “[was] determining if an incident report was prepared,” [doc. 44, att. 8, p. 4] and that it would “produce the incident report if one was prepared.” Doc. 44, att. 9, p. 5. However defendant ultimately notified plaintiff that it was “not in possession of any incident report for the incident that Plaintiff alleges happened on October 22, 2015.” Doc. 44, att. 12, p. 2.

² Defendant indicates that plaintiff produced the Customer Copy as part of discovery. Doc. 52, p. 7. However in the instant motion plaintiff indicates the Customer Copy was given to her before she paid for her items and left the store on October 22, 2015. Doc. 44, att. 1, p. 4. This is inconsistent with the creation date listed on the Customer Copy as October 24, 2015. Doc. 44, att. 3.

³ In the original petition plaintiff incorrectly referred to defendant as “Dolgenercorp, LLC,” [doc. 1, att. 2, p. 2] however on April 28, 2016, she was granted leave to file an amended petition [*id.* at 8] which named defendant as “DG Louisiana, LLC.” *Id.* at 9.

⁴ For purposes of determining diversity, “the citizenship of a LLC is determined by the citizenship of all of its members.” *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) (citations omitted). For removal purposes “a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business.” 28 U.S.C. § 1332(c)(1). DG Louisiana, LLC’s sole member is Dolgenercorp, LLC; Dolgenercorp, LLC’s sole member is Dollar General Corporation, a corporation incorporated under the laws of Tennessee, with its principal place of business in Tennessee. Doc. 1, p. 2.

In response to plaintiff's request for production of the surveillance video [doc. 44, att. 9, p. 6], defendant has provided plaintiff with all the surveillance footage it allegedly has pertaining to the incident. Doc. 44, att. 13; Doc. 44, att. 14. Allegedly this includes video from October 22, 2015 between 6:16 p.m. and 8:16 p.m. on the relevant store cameras. Doc. 52, att. 8, p. 3. However, although the video depicts plaintiff⁵ interacting with a Dollar General employee at the cash register on October 22, 2015, the video does not feature plaintiff falling. Doc. 44, att. 14.

On February 18, 2019, plaintiff filed the instant Motion for Order Compelling Discovery; and Alternatively, Motion for Adverse Interference Pursuant to FRCP 37(e). Doc. 44. Plaintiff asserts it is "undisputed that a Customer Incident Report of Ms. Carter's incident was completed by Dollar General," [doc. 44, att. 1, p. 12] and seeks its production. Additionally, plaintiff seeks access to additional surveillance video from the incident. *Id.* at 14. Alternatively, if defendant is unable to provide the incident report or the video evidence depicting her fall, plaintiff asserts that defendant must have destroyed them, and therefore plaintiff seeks adverse interference pursuant to FRCP 37(e). Doc. 44. Defendant opposes plaintiff's motion. Doc. 52. It asserts an incident report was never drafted [*id.* at 2] and that there is no video evidence depicting plaintiff's fall because the fall did not occur. *See* Doc. 52, p. 4.

II. LAW & ANALYSIS

Rule 37 of the Federal Rules of Civil Procedures allows either party to move for an order compelling disclosure or discovery. The rule also covers circumstances in which "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it." FED. R. CIV. P. 37(e). If a party

⁵ Plaintiff executed an affidavit on February 18, 2019, in which she identified herself as a woman depicted in the video. Doc. 44, att. 17.

is prejudiced by this loss, the court may order measures necessary to cure the prejudice, and if “the party [responsible for the loss] acted with the intent to deprive another party of the information’s use” the court may take adverse action against the party responsible for the loss. FED. R. CIV. P. 37(e)(1)-(2).

Plaintiff maintains that an incident report is being withheld by Dollar General. She points to Dollar General’s standard operating procedures [doc. 44, att. 11] as evidence an incident report should have been drafted in relation to this incident [doc. 44, att. 1, pp. 11-12] and she asserts the existence of the Customer copy “proves an incident report exists.” Doc. 44, att. 1, p. 7. However, defendant maintain no incident report exists. *See* Doc. 52, p. 2. As evidence, Dollar General provides an affidavit of Millette E. Milliken, the claims representative assigned by Dollar General to plaintiff’s case.⁶ In this affidavit, Ms. Milliken indicates that, although she reviewed and searched the store records, her “review and search did not locate any customer incident report for this incident.” Doc. 52, att. 5, p. 2.

Plaintiff also maintains that a surveillance video depicting her fall must exist. Specifically, she takes issue with the fact that “only six minutes and thirty-three seconds of footage [depicts] the aisle where [her] incident occurred.” Doc. 44, att. 1, p. 16. Defendant asserts that the lack of footage is because the surveillance cameras are motion activated. *See* Doc. 52, p. 2. It maintains that “[t]he surveillance camera was operating at the time of the Plaintiff’s alleged incident, but showed no incidents occurring as described and alleged by Plaintiff.” Doc. 44, att. 10, p. 2. Dollar General provides an affidavit from Aisha Hopkins, an employee of the third-party vendor used by Dollar General to secure and obtain surveillance video from incidents that are reported in Dollar General stores. Doc. 52, att. 8, p. 1. She indicates all of the store surveillance video available on

⁶ *See* Doc. 44, att. 3 (Customer Copy noting “Claim Worker: Millette Milliken.”)

the relevant store cameras for the date of the alleged incident between 6:16 p.m. and 8:16 p.m. was retained. *Id.* at 3. She and Ms. Milliken have both testified that no one has erased footage related to the incident. Doc. 52, att. 10, p. 3; Doc. 52, att. 5, p. 3. Accordingly, defendant asserts it cannot provide the requested video because it does not exist. Doc. 52, p. 4.

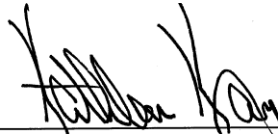
We deny plaintiff's motion to compel given defendant's representation that the evidence requested by plaintiff is not in defendant's possession. Just because it is Dollar General's standard practice to prepare an incident report does not mean automatically that it did so. It has, by sworn affidavit, provided affirmative proof that no incident report was prepared. Additionally, how plaintiff had a "Customer Copy" when no full report was prepared would certainly be puzzling but that fact still does not lead to the inexorable conclusion that a larger report exists. Defendant cannot be ordered to produce that which it does not have and therefore this request is denied.

Plaintiff has alternatively requested adverse interference pursuant to FRCP 37(e), arguing that Dollar General must have destroyed evidence related to this case. Doc. 44. As noted *supra*, under 37(e) the court may order adverse action against a party after the loss of information if "the party [responsible for the loss] acted with the intent to deprive another party of the information's use." FED. R. CIV. P. 37(e)(1)-(2). There is no evidence that Dollar General has acted with any intention to deprive plaintiff of information in this case. Accordingly, plaintiff's request for this relief is likewise denied.

III. CONCLUSION

For the reasons stated above, the Motion for Order Compelling Discovery; and Alternatively, Motion for Adverse Interference Pursuant to FRCP 37(e) [doc. 44] filed by plaintiff, Glenda Carter is **DENIED**.

THUS DONE this 10th day of June, 2019.

A handwritten signature in black ink, appearing to read 'Kathleen Kay', is written over a horizontal line.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE