FILED Jul 09 2013 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM: IA PART: 11

ANGELA MAIORANO,

Plaintiff,

Index No. 304752-2011

- against -

DECISION AND ORDER

JPMORGAN CHASE & CO.,

Defendants.

HON. LAURA G. DOUGLAS:

Plaintiff has moved for an order seeking spoliation sanctions against defendant. Specifically, plaintiff seeks an order striking defendant's Answer or, in the alternative, an order precluding defendant from introducing the missing evidence at trial and an adverse inference charge.

Plaintiff alleges that on March 6, 2010, she tripped on the carpet inside the lobby of the JPMorgan Chase branch located at 2402 Arthur Avenue. During the course of this litigation, plaintiff has demanded (1) a copy of the video surveillance footage of the lobby at the time of the accident and (2) the carpet runner plaintiff allegedly tripped over. Plaintiff submits that defendant was on notice of possible future litigation with respect to the subject accident and its duty to preserve the video surveillance footage and the carpet runner based upon defendant's own Security/Emergency Incident Report regarding the accident (Plaintiff's Exhibit C) and the EMS report regarding this accident. (Plaintiff's Exhibit D). To date neither the video surveillance footage nor the subject carpet runner has been provided.

Defendant maintains that no sanction is warranted in this case as defendant was not placed on notice of future litigation regarding the subject accident and, therefore,

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had no duty to preserve the requested evidence. In this regard, defendant maintains that they were first notified about possible litigation in this case through a letter from plaintiff's counsel dated September 30, 2010 and received on November 22, 210 advising them that plaintiff tripped and fell at the Arthur Avenue branch on March 6, 2010 and, as a result, required hip and knee replacement surgery. (Defendant's Exhibit 1). Defendant notes that said letter does not state that plaintiff tripped on carpeting nor does it request any video surveillance footage.

With respect to the video footage, defendant submits that plaintiff's first request for said video was contained in an e-mail from plaintiff's counsel dated January 14, 2011, more than 10 months after the alleged accident. Defendant has provided an affidavit from Patricia York, Vice President and Security Manager for defendant dated February 19, 2013 (Defendant's Exhibit 2) which states it is the policy of defendant to retain surveillance video footage from the various branches for no more than 90 days unless it depicts criminal activity or fraud or is expressly requested by legal counsel. Ms. York further states that following notice of representation, a search for the requested video footage was undertaken, and only footage for the period from 9:45 - 11:15 could be found. The footage for approximately 12:00 p.m., the time of the alleged accident, had been overwritten.

With respect to the carpet, defendant states that plaintiff first made reference to the carpeting as being the cause of her accident in her Verified Bill of Particulars dated September 9, 2011, more than a year and a half after the alleged accident. Defendant notes that plaintiff's complaint is devoid of any allegations that she tripped on carpeting and, in plaintiff's First Notice of Discovery and Inspection and Combined Discovery

Demands dated July 7, 2011, plaintiff did not request defendant to preserve any carpeting nor did plaintiff demand an inspection of the carpeting or the premises. At a preliminary Conference held on August 9, 2012, plaintiff was advised that the branch had been remodeled in 2010.

Defendant asserts that, contrary to plaintiff's contentions, it was not placed on duty to preserve the carpeting based on its own incident report as the report merely states that plaintiff tripped in the lobby not that she tripped on carpeting. The defendant further maintains that the EMS report did not put them on notice that plaintiff claimed that she tripped on carpeting as defendant never received a copy of that report.

In Reply, plaintiff has submitted an affidavit from her son, Daniel Maiorano, dated March 7, 2013 (Plaintiff's Reply, Exhibit A) which states the following: On March 6, 2010 at approximately 12:00 p.m., he drove his mother to the bank. While waiting outside in his car, a Chase employee told him his mother had fallen inside the bank. When he entered the bank he was met by manager Joseph Monaco who called an ambulance. . When EMS personnel arrived, Mr. Monaco was present when plaintiff told them she tripped over the carpet in the lobby. Prior to leaving, Mr. Monaco told plaintiff's son to submit her medical bills to Chase for payment.

It is well established that the Supreme Court has broad discretion in determining sanctions for spoliation of evidence. *De Los Santos v. Polanco*, 21 AD3d 397 (2d Dept. 2005). The party requesting a sanction for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence and "fatally compromised" its ability to prosecute or defend the action. *Lawson v. Aspen Ford*, 15 AD3d 628, 629 (2d Dept. 2005). "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." *Utica Mutual Insurance Company v. Berkoski Oil Company*, 58 AD3d 717 (2d Dept. 2009). If the moving party is still able to prosecute or defend its case, a less severe sanction is appropriate. *Kugel v. City of New York*, 60 AD3d 403 (1st Dept. 2009).

The Court finds that Plaintiff has not been deprived of her ability to establish her case through defendant's failure to preserve either the relevant video surveillance footage or the subject carpet runner as plaintiff is able to testify regarding the condition of the carpeting on the date of her fall as well as the other circumstances surrounding her accident. Thus, the sanction sought by plaintiffs, i.e., the striking of defendant's Answer, is too drastic. *See Quinn v. City University of New York*, 43 AD3d 679, 680 (1st Dept. 2007).

However, the Court finds that defendant was on notice of plaintiff's accident and possible future litigation regarding same, as evidenced by its own incident report noting plaintiff's fall in the lobby and her subsequent transport to St Barnabas Hospital, and was thus obligated to preserve the relevant video surveillance footage. Accordingly, some sanction is warranted with respect to the loss of the video footage. The Court concludes the appropriate sanction for the loss of this evidence to be an adverse inference against defendant at trial.

The issue of when defendant was placed on notice of plaintiff's claim that her fall was caused by the carpeting cannot be resolved through the motion papers. Therefore,

the determination as to whether any sanction is warranted over defendant's failure to preserve the carpet/carpet runner plaintiff allegedly tripped over is "a matter best left to the discretion of the trial court and should be made on the basis of the record before it at the time." Quinn v. City University of New York, 43 AD3d 679, 680 (1st Dept. 2007); see also Kugel v. City of New York, supra.

Accordingly, plaintiff's motion is granted to the extent that an adverse inference will be given against defendant at trial for their failure to preserve the video surveillance footage of the subject accident; the issue of whether any sanction is warranted for defendant's failure to preserve the carpet/carpet runner allegedly tripped over by plaintiff is referred to the trial court for decision.

This constitutes the decision and order of the court.

Dated: July 2, 2013

LAURA G. DOUGLAS
J.S.C.