At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of January, 2013

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

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ANALIDES BLANCHARD,

Plaintiff,

- against -

Index No. 500000/09

WHITESTONE LANES, INC., and MAR MAR REALTY, LLC,

Defendants.

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The following papers numbered 1 to 7 herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-6
Reply Affidavits (Affirmations)	7
_____ Affidavit (Affirmation)	
Other Papers:	

Upon the foregoing papers, defendants Whitestone Lanes, Inc. and Mar Mar Realty, LLC (hereinafter "defendants") move for an order, pursuant to CPLR 3212, granting defendants summary judgment dismissing plaintiff's complaint on the grounds that (1) the alleged condition was open, obvious, already known to plaintiff and not actionable as a matter of law, and in the alternative, (2) plaintiff willfully spoliated evidence necessary to the defense of this matter.

Factual History

Plaintiff commenced the present action to recover for bodily injuries that she allegedly sustained in the parking lot at the premises known as Whitestone Lanes, Inc. (the "bowling alley") located in Flushing, New York on December 1, 2008, as the result of a slip and fall accident which occurred when plaintiff was walking to the vehicle owned and operated by her boyfriend at the time, Maneryn Payano ("Mr. Payano"). According to plaintiff, on the evening of the accident, the weather was "very cold" and "freezing," and the entire parking lot of the bowling alley was covered in ice and snow. Plaintiff testified that Mr. Payano parked his vehicle in the parking lot, and when she exited the vehicle she was standing on ice. Plaintiff further testified that she had to walk over ice and snow through the parking lot in order to enter the bowling alley. She stated that there were no shoveled pathways in the parking lot.

Plaintiff's accident allegedly occurred around 1:00 A.M. when she had finished bowling. She testified that, when plaintiff left the bowling alley, she had to walk over the ice and snow filled parking lot again in order to get to Mr. Payano's vehicle. According to plaintiff, she took 10-15 footsteps into the parking lot before she allegedly slipped and fell on the ice and snow. Plaintiff testified that she saw ice all over the parking lot immediately before she fell. Plaintiff also stated that there was not enough light in the parking lot. To that effect, plaintiff asserts that there was only one light directly above exit door to the bowling alley, and no lights in the parking lot.

Plaintiff alleges that, after she fell, she visited Interfaith Medical Center located in Brooklyn at 1:39 A.M., where she was diagnosed with a fractured right wrist. Plaintiff states that, on January 8, 2009, she underwent right wrist surgery to repair said fracture.

At her May 22, 2010 deposition, plaintiff identified black and white photographs that purportedly documented the condition of the parking lot, and plaintiff's counsel marked said photos as exhibits. According to plaintiff, two days after the accident, Mr. Payano returned to the bowling alley with plaintiff's digital camera and took photographs of the parking lot.[1] Plaintiff testified that the ice and snow condition depicted in the photographs showed the condition of the parking lot as it appeared on the date of the accident.

At plaintiff's deposition and through subsequent document requests, counsel for defendants requested the original storage media (the "chip/SD card") that contained the digital photographs be preserved.[2] On May 18, 2011, a further deposition of the plaintiff was held, wherein she testified that the camera broke and she had thrown it away. However, plaintiff submitted an affidavit in opposition to the present summary judgment motion wherein she states that she has since found the camera in a box of items after she moved from Brooklyn to the Bronx, but has been unable to locate the chip/SD card. Plaintiff also avers that she does not know what happened to said chip/SD card.

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[1]Plaintiff avers that she was not with her boyfriend when the photographs were taken.

[2]According to defendants, counsel requested the originally created files on the SD card because said files contain embedded metadata that would identify when the images were created.

The Parties' Contentions

In moving to dismiss plaintiff's complaint, defendants maintain that the alleged condition was open, obvious, and known to plaintiff such that she knowingly and voluntarily encountered the risks of injury, thereby precluding any liability against defendants. In support, defendants cite to plaintiff's testimony that she was aware that the parking lot was covered in ice and snow. Defendants note that plaintiff specifically testified that she stepped out onto ice when she first exited Mr. Payano's vehicle, yet she was nevertheless able to traverse the parking lot to enter the bowling alley. According to defendants, plaintiff clearly observed the ice and snow condition of the alleged parking lot while walking across it and plaintiff subsequently recognized the risks associated with walking upon the alleged condition. According to defendants, plaintiff was aware of the purported ice and snow condition, and she voluntarily decided to encounter such an open and obvious risk when she exited the bowling alley and walked back through the parking lot to Mr. Payano's vehicle.

Defendants contend that plaintiff never complained to personnel within the bowling alley of the alleged condition of the parking lot. To that effect, defendants cite to plaintiff's testimony that, after her accident: (1) plaintiff did not call for an ambulance; and (2) plaintiff and her friends failed to notify the bowling alley of the accident.

In further support, defendants cite to the deposition testimony of Marco Macaluso, Jr. ("Mr. Macaluso, Jr."), who, as manager of Whitestone Lanes, testified on behalf of defendants. Mr. Macaluso, Jr. stated that, in December 2008, there was a front entrance and

a front parking lot, as well as a back entrance and a back parking lot, to enter the bowling alley. Upon review of the photographs at his deposition, Mr. Macaluso testified that Exhibit 4, which was the location where plaintiff purportedly slipped and fell, appeared to be the back entrance to the bowling center and the parking lot as it existed on December 21, 2008. Defendants cite to Mr. Macaluso Jr.'s testimony that, (1) prior to the date of the alleged accident, he had not received any complaints of ice and snow in the parking lots, and (2) the alleged accident was never reported to defendants. Defendants also refer to Mr. Macaluso, Jr.'s testimony that, although the DVR recording system automatically records over prior video of the parking lot every three days, defendants' video of the parking lot on the evening of the alleged accident was not preserved because no one had been informed of the accident.

With respect to the photographs that plaintiff produced, defendants argue that said photographs clearly show that ice and snow covered the parking lot. Accordingly, defendants state that, under all lighting circumstances, the condition plaintiff complained of was palpable to the naked eye.

Next, defendants maintain that plaintiff's complaint must be dismissed on the grounds that plaintiff intentionally deprived defendants of the opportunity to examine the digital camera and chip/SD card on which the photographs had been stored. To that effect, defendants argue that, on numerous occasions, they explicitly requested that the digital camera as well as the digital media containing the original photographic images be preserved. According to defendants, their requests were specifically made at plaintiff's deposition, and

through both demands for production and correspondence with plaintiff's counsel. Defendants state that the chip/SD card contained original photographs with its original metadata that would identify when the photographs were taken, and that the camera itself contained an indexing system that would allow experts to determine the number and approximate date of the photographs taken.

According to defendants, the date of the photographs is a critical issue. Defendants assert that, if said photographs were not taken around the time of the alleged accident, the credibility of plaintiff's claims are called into question. Defendants question plaintiff's credibility because she waited well after litigation had commenced to produce the photographs, and did not offer any explanation for the delay in their production. Further, defendants note that there was significant delay before plaintiff eventually notified defendants that the camera and the chip/SD card were not in her possession.

In opposition, plaintiff contends that defendants breached their general duty to maintain the parking lot of the bowling alley by failing to clear the parking lot of ice and snow. According to plaintiff, defendants have not met their burden of showing that they exercised reasonable care under the circumstances to remedy the ice and snow condition in the parking lot and to make their property safe. She argues that defendants failed to make a pathway for patrons to safely walk upon or an alternative route for patrons to safely reach the entrance of the bowling alley. Plaintiff also notes that, on the night of the accident, she did not see sand or salt on the parking lot. According to plaintiff, defendants only removed ice and snow from the entrance area of the bowling alley.

Plaintiff counters defendants' argument that the ice and snow condition was open and obvious. According to plaintiff, defendants' argument in fact demonstrates that defendants had actual notice of the ice and snow condition, and should have remedied it prior to plaintiff's accident. To that effect, plaintiff argues that, even if the condition was open and obvious, defendant nevertheless had the duty to maintain the premises in a reasonably safe condition.

In support, plaintiff cites to Mr. Macaluso's deposition testimony wherein he states that, in December 2008, (1) if there was less than an inch of snow defendant's maintenance crew would remove the snow from the parking lots and they would use shovels and salt spreaders; and (2) if there was more than an inch of snow Mr. Macaluso would use outside companies to remove ice and snow. Plaintiff cites to Mr. Macaluso's testimony that his employees understood that, at the start of a snowfall, they were instructed to salt the parking lots, and that if the snow accumulated, they were required to shovel the parking lots and salt again. Plaintiff also notes that Mr. Macaluso stated that he did not know of any condition of the parking lot on the day of the occurrence. Defendants further state that Mr. Macaluso testified that, according to the photograph marked as Exhibit 4 into evidence, one of his employees shoveled the entrance area of the bowling alley in the back parking lot.

Plaintiff additionally cites to the affidavit of Mr. Payano, who testified that he witnessed plaintiff's slip and fall on ice and snow in the back parking lot of the bowling alley. Plaintiff points to Mr. Payano's testimony that, when Mr. Payano exited his vehicle on the date of the accident, he observed packed ice and snow over the parking lot. According

to Mr. Payano, he also observed that there were no shoveled pathways from the parking lot to the bowling alley, and no sand or salt. Plaintiff refers to Mr. Payano's stated observation on the night of the accident that it appeared as if cars had driven over the ice and snow in the parking lot, thereby packing it down. In addition, plaintiff refers to Mr. Payano's statement that when he left the bowling alley, the parking lot still had the same ice and snow condition as it did when he entered the bowling alley.

Plaintiff further cites to Mr. Payano statement that, on December 22, 2008, from 9:57 P.M. to 10:13 P.M., he visited the bowling alley parking lot so as to take photographs of the parking lot and the specific area where plaintiff allegedly slipped and fell. Plaintiff points out that, similar to her own testimony, Mr. Payano stated that the photographs fairly and accurately depict the ice and snow condition of the parking lot as it appeared on December 21, 2008 and December 22, 2008.

Lastly, plaintiff states that she did not intentionally spoliate evidence. She indicates that, as per her affidavit annexed to her papers in opposition to the present motion, the camera has been located and is available to defendants for examination. Moreover, plaintiff argues that the uploaded photographs which were handed to counsel for defendants show the date and time when the photographs were taken. In this respect, plaintiff cites to Mr. Payano's affidavit wherein Mr. Payano avers that he emailed copies of the photographs to plaintiff's counsel, who in turn uploaded the photographs on December 29, 2008. According to Mr. Payano, images of counsel's computer screen clearly show that the photographs to be downloaded were dated as "December 22, 2008."

In any event, plaintiff states that the missing chip/SD card was not discarded intentionally or in bad faith. Plaintiff also indicates that defendants's January 25, 2011 Notice to Preserve and Demand for Electronically Stored Date/Information was actually made after plaintiff had already testified that she did not know what happened to the chip/SD card. Further, plaintiff's recent affidavit indicates that the camera has, in fact, been recovered, and is available for review by defendants.

Discussion

Summary judgment is a drastic remedy that should only be employed when no doubt exists about the absence of triable issues (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment is granted in the event that the party sufficiently establishes a cause of action or defense so as to warrant directing judgment in favor of any party as a matter of law (*see* CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]), and the party opposing said motion fails to produce evidentiary proof in admissible form to sufficiently establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition (*Farrar v Teicholz*, 173 AD2d 674 [1991]). The owner or tenant in possession of realty "'must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the

risk'" (*Peralta v Henriquez*, 100 NY2d 144 [2003], quoting *Basso v Miller*, 40 NY2d 233 [1976]). "In a slip-and-fall action, to impose liability upon a defendant, there must be evidence that the defendant created the condition or had actual or constructive notice of it" (*Mauge v Barrow St. Ale House*, 70 AD3d 1016 [2010]). In order to establish constructive notice of a defective condition, a plaintiff must demonstrate that the defect existed for a sufficient amount of time prior to the accident to allow the defendant and his or her employees to discover and remedy it (*see Nelson v Cunningham Assoc., L.P.*, 77 AD3d 638 [2010]; *see also Welles v New York City Hous. Auth.*, 284 AD2d 327, 328 [2001]; *Bernard v Waldbaum, Inc.*, 232 AD2d 596 [1996]; *Masotti v Waldbaum's Supermarket*, 227 AD2d 532 [1996]; *Kraemer v K-Mart Corp.*, 226 AD2d 590 [1996]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

"A landowner has no duty to protect or warn against open and obvious conditions that are not inherently dangerous" (*Losciuto v City Univ.*, 80 AD3d 576 [2011], citing *Weiss v Half Hollow Hills Cent. School Dist.*, 70 AD3d 932 [2010]; *Bretts v Lincoln Plaza Assoc.*, 67 AD3d 943 [2009]; *Schwartz v Hersh*, 50 AD3d 1011 [2008]. Proof that a dangerous condition is open and obvious "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" (*Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061 [2010]. "The determination of 'whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances'" (*Clark v AMF Bowling Ctrs.*, 83 AD3d 761 [2011], quoting *Mazzarelli*, 54 AD3d at 1009). The issue of whether a

dangerous condition is open and obvious is fact-specific, and usually a question for a jury (*Mei Xiao Guo v Quong Big Realty*, 81 AD3d 610 [2011]). Proof that a dangerous condition is open and obvious is relevant to the issue of the plaintiff's comparative negligence (*id; see also Bradley v DiPaterio Mgt.*, 78 AD3d 1096 [2010]).

With respect to spoliation, CPLR 3126 provides that:

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
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> (1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
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> (2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

The court has broad discretion to provide relief to a party that is deprived of lost or missing evidence (*Ortega v City of New York*, 9 NY3d 69 [2007]). "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 [2007]; *see Baglio v St. John's Queens Hosp.*, 303 AD2d 341 [2003]; *Madison Ave. Caviarteria v Hartford Steam Boiler Inspection & Ins. Co.*, 2 AD3d 793 [2003]). However, striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, accordingly, the courts must consider the prejudice that resulted from the spoliation so as to determine whether such drastic relief is actually necessary (*see Iannucci v Rose*, 8 AD3d 437 [2004]; *see also Favish v Tepler*, 294 AD2d 396 [2002]). When the moving party is still able to establish or defend a case in the absence of the missing evidence, a less severe sanction is appropriate (*see Iannucci v Rose*, 8 AD3d at 438; *Favish v Tepler*, 294 AD2d at 397).

At the outset, the court finds that the drastic sanction of dismissing plaintiff's complaint is not appropriate, as defendants have not demonstrated that plaintiff intentionally or negligently disposed of the chip/SD card, nor have they demonstrated that the loss of same has fatally compromised defendants' ability to defend the action (*see Lawson v Aspen Ford, Inc.*, 15 AD3d 628 [2005]; *see also Kirschen v Marino*, 16 AD3d 555 [2005]). Contrary to defendants' contention, the Court finds no record of willful or contumacious conduct. In fact, the allegation of contumacious conduct is belied by plaintiff's affidavit wherein she indicates that the camera has been recovered and the circumstances of such recovery. The camera is available to the defendants for inspection, and accordingly, defendants are not deprived from presenting their defense. As stated by defendants, the camera itself contains

an indexing system that would allow experts to determine both the number and dates of photographs taken. A search of the camera itself will likely indicate said information.

Defendants maintain that the chip/SD card is critical because it "could" call into question the credibility of the plaintiff's claims. Defendants' argument is unpersuasive, as defendants have also used said photographs to support their position for summary judgment. In any event, such credibility issues are decided by the trier of fact.

The Court finds that there are several questions of fact precluding summary judgment, including defendants' negligence as well as plaintiff's purported comparative negligence. "Even if all parties are in agreement as to the underlying facts, the very question of negligence is often a question for jury consideration" (*Hyatt v Messana*, 67 AD3d 1400 [2009]; *see Rivers v Atomic Exterminating Corp.*, 210 AD2d 134 [1994]). Plaintiff has presented evidence that raises a question of fact concerning whether defendant had actual or constructive notice of the snow and ice condition. In addition, plaintiff also raises a question of fact regarding whether the ice and snow condition in the parking lot existed for a sufficient amount of time prior to plaintiff's accident to allow the defendant and his or her employees to discover and remedy it.

Here, defendants raise an issue of plaintiff's comparative negligence by arguing that the ice and snow condition was open and obvious. To that effect, defendants argue that plaintiff knew of the ice and snow in the parking lot prior to walking back from the bowling alley to Mr. Payano's vehicle. The question of plaintiff's comparative negligence also raises

a factual issue for resolution by the trier of fact, precluding an award of summary judgment to defendant (*see Gudenzi-Reuss v Custom Environmental Systems, Inc.*, 212 AD2d 952 [1995]). Indeed, defendants themselves argue whether plaintiff's conduct in traversing back on the ice and snow condition in the parking lot is reasonable, which is itself a jury determination (*see Huff v Rodriguez*, 45 AD3d 1430 [2007]; *see also Smith v Key Bank of Western New York*, 206 AD2d 848 [1994]; *Coluni v Northeast Roller Skating Industries, Ltd.*, 94 AD2d 427 [1983]).

The Court has considered the parties remaining contentions and finds them to be without merit. Accordingly, defendants' motion for summary judgment is denied.

The foregoing constitute the order and decision of this court.

ENTER,

J. S. C.

JAN 17 2013

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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MS#5