Maliaros v Whole Foods Mkt.
2017 NY Slip Op 31512(U)
July 14, 2017
Supreme Court, New York County
Docket Number: 162796/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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VOULA MALIAROS,

Plaintiff,

-against-

WHOLE FOODS MARKET, *et al.*,

Defendants.

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Index no. 162796/15

Motion seq. no. 001

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion, plaintiff moves for an order striking defendants' answer, precluding them from offering evidence at trial, and/or directing that an adverse charge be given the jury at the trial, as a sanction for their alleged spoliation of evidence. Defendants oppose.

In this action, plaintiff claims that she was injured in defendants' store at Columbus Circle in Manhattan when defendants' employee swung a metal hook in the air and struck her in the head. The same day, defendants' manager viewed a store video recording of the incident and wrote an incident report in which she stated that the video does not show plaintiff being struck, and asked that defendants' computer IT person preserve the video. (NYSCEF 12).

Approximately one month after the incident, plaintiff's counsel put defendants on written notice of the possibility of litigation. (NYSCEF 14). It is undisputed that the video was not preserved, and there is no indication as to its whereabouts. (*Id.*).

Defendants concede that the video no longer exists, but argue that sanctions are unwarranted absent evidence that they intentionally, willfully, or contumaciously destroyed the video, as they attempted to preserve it through the store manager's request that it be preserved, and as plaintiff cannot claim prejudice because the video contradicts plaintiff's claim. They also maintain that they suffer greater prejudice than plaintiff as its spoliation deprives them of exculpatory evidence, whereas plaintiff retains the ability to prove her case through her testimony and that of her sisters, who were present and allegedly observed the incident, and photographs taken of the injury within minutes thereof. Thus defendants argue that the appropriate sanction, if any, is to strike the store manager's testimony regarding the contents of the video. (NYSCEF 25).

In reply, plaintiff contends that as jurors will wonder about the existence and contents of a video showing the incident, at the very least an adverse inference charge is appropriate. She denies as irrelevant whether defendants willfully or contumaciously destroyed or lost the video. (NYSCEF 26).

A party seeking sanctions for spoliation of evidence must establish that the party with control over the evidence at issue was required 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 so 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 [2015]). A culpable state of mind encompasses ordinary negligence. (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]). If the evidence is negligently destroyed, the party must also demonstrate that the destroyed documents were relevant to the

party's claim or defense. (*Pegasus Aviation I, Inc.*, at 547).

Here, it is undisputed that defendants were on notice of potential litigation at the time of the incident (*see Maiorano v JPMorgan Chase & Co.*, 124 AD3d 536 [1st Dept 2015] [although action not commenced for more than year after accident, defendant on notice on day of accident that video may be needed for future litigation]), that the video was destroyed, at least negligently, and that the video is relevant to plaintiff's claim.

Defendant's argument that sanctions are not warranted as the video contradicts plaintiff's claim is self-serving and assumes that it is irrelevant. (*See eg New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 471 [1st Dept 2013] [as plaintiff deleted video of incident, sanction warranted as defendants should not be forced to rely on plaintiff's statement that video footage irrelevant without opportunity to view footage for themselves]; *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248 [1st Dept 2011] [plaintiffs entitled to inspect video tapes to determine whether accident area was depicted, and should not compelled to accept defendant's self-serving statement about tapes' content, especially in light of conflicting evidence in case]). Indeed, as the video allegedly depicted the entire incident, the facts of which are disputed by the parties, it is relevant. (*See Rokach v Taback*, 148 AD3d 1195 [2d Dept 2017] [video allegedly depicting automobile accident highly relevant evidence in action]).

However, striking a pleading is appropriate only when the spoliated evidence is the sole means by which the party can establish its claim, the claim or defense is fatally compromised, or the party is prejudiced in its ability to state its claim or defense. (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607 [1st Dept 2016]). Here, it is undisputed that plaintiff has the means and ability to establish her claim without the video. (*See eg Cataudella v 17 John St.*

Assocs., LLC, 140 AD3d 508 [1st Dept 2016] [plaintiff could not establish that defendant's destruction of video prejudiced his ability to present claim]; *Suazo v Linden Plaza Assocs., L.P.*, 102 AD3d 570 [1st Dept 2013] [while defendants spoliated surveillance video by failing to take steps to prevent it from being recorded over, plaintiff at trial could submit testimony of two deponents who viewed video]; *Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654 [2d Dept 2013] [plaintiff could testify as to circumstances of accident and subpoena other witnesses to testify]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted to the extent of directing that an adverse inference charge shall be given at the trial of this action as to the videotape, with the wording of the charge to be determined by the judge assigned to try the case.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE

DATED: July 14, 2017
New York, New York