Zuniga v TJX Cos., Inc.
2017 NY Slip Op 32484(U)
November 21, 2017
Supreme Court, New York County
Docket Number: 159647/2015
Judge: Norman St.George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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GLORIA ZUNIGA,

Plaintiff,

Index No. 159647/2015
Motion Sequence 001

-against-

Decision and Order

THE TJX COMPANIES, INC. and T.J. MAXX,

Defendants.

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ST. GEORGE, J.S.C.:

This action arises from a slip and fall accident that occurred on October 6, 2012, inside the TJ Maxx Store, located at 136-05 20th Avenue, Queens, New York, which resulted in injuries sustained by plaintiff Gloria Zuniga.

Presently before the Court is plaintiff's motion to strike defendants' answer or preclude defendants from offering evidence on the grounds that defendant failed to produce a surveillance video depicting the subject accident as well as a handwritten incident report prepared by the store manager at the time of the accident. In the alternative, plaintiff requests that this Court schedule a spoliation hearing. Plaintiff also seeks to extend the note of issue deadline until the spoliation issue is resolved. In support of her motion, plaintiff relies on the deposition testimony of defendants' store manager, Natasha Jacobs, who testified that the subject store was equipped with surveillance video throughout the store. Plaintiff's counsel further claims that he was not aware of a handwritten incident report prepared by Ms. Jacobs until her deposition. Ms. Jacobs testified that she generated a handwritten incident report in connection with plaintiff's accident. According to Ms. Jacobs, the report was kept in a binder in her office for the retention period which she believed was at least

one year. Plaintiff further states that Ms. Jacobs testified that she believed the report in question was still being maintained in her office when she stopped working at the store in 2015. Plaintiff also alleges that Ms. Jacobs admitted that her ability to testify was compromised by not having the handwritten incident report in front of her.

Defendants oppose, asserting that the video never existed in the first place. In support of that contention, defendants rely on the testimony of Ms. Jacobs, who testified that there were areas of the store that were not captured by the surveillance video and that the coverage areas changed from time to time. Ms. Jacobs further testified that she recalled asking the loss prevention associate on duty whether plaintiff's fall was captured on video and he indicated that it was not captured by the cameras. Defendants argue that that striking of its answer, is inappropriate here because, there was no obligation to preserve the footage even if any video had existed because plaintiff failed to serve a timely demand. Specifically, defendants note that a letter of representation was not sent to the store until four months after accident. Defendants allege that the letter did not include a demand for the preservation of evidence. In addition, defendants contend that the lawsuit was not commenced until two and a half years after the accident and a demand for the video itself was not served until three years later. To the extent that plaintiff implies that Ms. Jacobs' believed her testimony to be compromised, defendants counter that she was referring to the precise time of the accident and not the totality of her testimony. Defendants maintain that Ms. Jacobs was uncertain of the retention period.

Courts have broad discretion with respect to spoliation remedies pursuant to CPLR § 3216. Spoliation sanctions are appropriate where after being placed on notice that such evidence might be needed for further litigation, "a litigant intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them"

(Kirkland v. New York City Hous. Auth., 236 AD2d 170, 173 [1st Dept 1997]; *New York Hous. Auth. v. Pro Quest Security Inc.*, 108 AD3d 471 [1st Dept 2013]).

To prevail on a motion seeking sanctions for spoliation, the movant must establish that: 1) the party having control over the evidence had a duty to preserve the evidence; (2) "the evidence was destroyed with a 'culpable state of mind;'" and (3) "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 [2015]). In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether the particular sanction is "necessary as a matter of elementary fairness" (*see Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]). An extreme sanction, such as the court's striking a party's pleading, is appropriate only when the missing evidence deprives a moving party of the ability to establish the party's case (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998]). "Preclusion, also a relatively severe sanction, is appropriate where the defendants destroy[ed] essential physical evidence leaving the plaintiff without the appropriate means to confront a claim with incisive evidence" (*Strong v City of New York*, 112 AD3d 15, 24 [1st Dept 2013]).

Here, although plaintiff contends that the loss of the surveillance video and the handwritten incident report due to defendants' conduct "severely prejudices" her ability to establish the merits of her claims, the Court does not find that plaintiff has been deprived of her ability to prove her case. By letter dated July 19, 2017, defendants responded to plaintiff's post-EBT demand stating it was not in possession of any surveillance video capturing any portion of plaintiff's accident. Although plaintiff relies on the testimony of Ms. Jacobs, who initially testified that there were video surveillance cameras throughout the store, plaintiff overlooks the rest of Ms. Jacobs'

testimony. Significantly, where she testified that some areas of the store were not captured by the surveillance cameras and how the loss prevention associate conveyed to her that plaintiff's fall was not captured on video. Given the lack of concrete evidence that the accident was even recorded in the first place and that plaintiff is still able to pursue her claim through deposition testimony, the drastic remedies or striking defendants' answer and preclusion regarding the lack of surveillance videos is unwarranted (*see Scansarole v Madison Sq. Garden, L.P.*, 33 AD3d 517, 518 [2006]; *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]; *Christian v City of New York*, 269 AD2d 135 [2000]).

In regard to the handwritten accident report, plaintiff fails to establish the elements of spoliation sufficient to support the severe sanctions of striking a pleading or precluding an affirmative defense. Defendants' July 19, 2017 letter stated that it was not in possession of the handwritten incident report prepared by Ms. Jacobs. The letter further explained that such reports are retained temporarily at each individual TJ Maxx store location and that the subject store has such reports dating back 2014 only. While plaintiff asserts that the absence of the handwritten report compromised Ms. Jacobs' ability to testify, defendants exchanged a typewritten incident report prepared by the insurance company prior to Ms. Jacobs' deposition. Ms. Jacobs testified that she believed the information contained within the typewritten report prepared by the insurance company was the information she observed at the scene. Plaintiff may still rely on the typewritten incident report prepared by the insurance company in addition to her own testimony to prove her claims. For these reasons, the alleged spoliation of the handwritten incident report does not leave plaintiff "prejudicially bereft of appropriate means to confront a claim [or a defense] with incisive evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174 [1st Dept 1997]). However, while striking of the answer is not warranted, plaintiff may seek an adverse inference charge at

trial as to the handwritten incident report only, a more appropriate remedy in this case (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]). Accordingly, it is

ORDERED that plaintiff's motion to strike defendants' answer for spoliation is denied; and it is further

ORDERED that plaintiff's motion to preclude defendants from offering any evidence or testimony as to its defense that the condition of the subject floor where plaintiff slipped was not dangerous and defective at the time of the subject accident is denied; and it is further

ORDERED that plaintiff's request for a spoliation hearing is denied; and it is further

ORDERED that plaintiff's request to extend the Note of Issue date is granted, however, the parties shall appear for a status conference on December 21, 2017 at 2:15p.m. in Part 34, 80 Centre Street, Room 308, to discuss the new Note of Issue date.

Dated: November 21, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.