SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 47

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CORINNA RAINERI,

Plaintiff,

- against -

ARCADIA GROUP (USA) LIMITED,

Defendant.

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DECISION AND ORDER

Index No. 158637/2015

PAUL A. GOETZ, J.:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Corinna Raineri when she fell inside Topshop, a retail store located at 478 Broadway, New York, New York. Defendant Arcadia Group (USA) Limited, the lessee of the subject premises, moves (Mot. Seq. # 001), pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Corinna Raineri cross-moves for an order striking defendant's answer as a sanction for spoliation of evidence. For the reasons that follow the motion and cross motion are denied.

BACKGROUND

Plaintiff testified that on March 16 or March 17, 2015, she, along with her son and one of her employees, Karin Susser (Susser), were shopping at Topshop[1] (affirmation of defendant's counsel, exhibit G [plaintiff tr] at 13 and 25). Plaintiff was strolling in an aisle or a walkway near the shoe department when she stepped into an empty shoe box and fell to the ground (*id.* at 43, 47-48). Plaintiff did not see the shoe box prior to the accident (*id.* at 48), and she did not see any other shoe boxes or box lids in the area where she fell (*id.* at 45). Plaintiff maintained the accident occurred several meters past the shoe department (*id.* at 49).

[1] Initially, plaintiff alleged that the accident occurred on March 12, 2015 (affirmation of defendant's counsel, exhibit B (complaint), ¶ 13). In the verified bill of particulars and amended verified bill of particulars, plaintiff alleged that the accident occurred on March 11, 2015 (affirmation of defendant's counsel, exhibit E, ¶ 4 and exhibit F, ¶ 4).

At her deposition, plaintiff viewed three photographs of the accident area that Susser had taken, two of which depicted a lidded shoe box on the floor. Plaintiff, though, could not identify the specific location of where she fell in any of the photographs. Plaintiff also testified that she never complained about the condition of the store prior to the accident (*id.* at 38).

Victoria Farrell (Farrell) testified that her duties as an operations manager at Topshop included overseeing maintenance and technology services for the building where the store was located (affirmation of defendant's counsel, exhibit D [Farrell tr] at 7-8). Farrell explained that the health and safety section of Topshop's employee manual outlined a protocol for reporting incidents involving customers (*id.* at 13-14). In addition to obtaining the customer's information and witness statements, an employee will review the surveillance video. If the incident was recorded, the footage is transferred onto a CD for Topshop's records (*id.* at 15). Farrell testified that Kerin Thorpes, the loss prevention manager in charge of the surveillance system, provided a CD containing the footage to then-deputy general manager Issy Hussein (Hussein) (*id.* at 21 and 27). Hussein then gave the CD to Farrell for filing in an accident recording binder (*id.* at 20 and 27). Farrell never viewed the CD, and surveillance video is kept for only three months (*id.* at 14).

Farrell also testified that the employee manual discussed cleaning procedures at the store. Although there was no specific procedure for cleaning the shoe department, the manual provided that all employees must keep their work stations and pathways clean (*id.* at 30). Farrell also explained that a manager "rotates throughout the building to ensure customer service and cleanliness at all times" (*id.* at 26, lines 3-4).

An excerpt from the employee manual reads, "[e]nsure that you abide by the 'clean as you go' policy, pickup up items that have fallen on the floor as soon as you see them rather than walking past" (affirmation of defendant's counsel, exhibit I at 1). Another excerpt states that

employees must "[e]nsure that wherever you are working that you keep a clear walkway available at all times and you clean up immediately once you have completed your task" (*id.*).

DISCUSSION

A. Defendant's Motion for Summary Judgment

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

Defendant argues that plaintiff cannot show that defendant either created or had actual or constructive notice of the condition complained of, asserting that "a customer in the store would have put it there" (affirmation of plaintiff's counsel, ¶ 15). In addition, defendant argues that it lacked notice of the alleged condition because there were no prior similar accidents or complaints in the area where plaintiff fell and because plaintiff cannot demonstrate how long the condition existed. Defendant also contends that its motion should be granted because plaintiff did not know what caused her to fall.

A property owner has a duty to exercise reasonable care in maintaining its property in a reasonably safe condition (*see Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). To prevail on a common-law negligence claim for an injury resulting from a dangerous premises condition, a plaintiff must demonstrate that an owner either created the allegedly dangerous condition or had actual or constructive notice of it (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-561 [1st Dept 2010]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [citations omitted]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]).

"A lone . . . box in . . . [an] aisle is, by definition, easily overlooked creating a hazard which can, and ought to be, removed" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75 [1st Dept 2004]). Farrell testified that Topshop employees were responsible for cleaning their work stations, but absent from the motion is evidence of when the aisle was last cleaned or inspected prior to the accident (*see Vargas v Riverbay Corp.*, 157 AD3d 642, 642 [1st Dept 2018]). Defendant's argument that a customer must have left the empty shoe box on the floor amounts to nothing more than speculation. Furthermore, although defendant argues that plaintiff cannot establish how long the empty shoe box had been on the floor, defendant cannot show its lack of constructive notice "merely by pointing to gaps in plaintiff's proof" (*McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]). In any event, plaintiff testified that she been walking on the second floor where the shoe department was located for 20 or 30 minutes before the accident. Thus, it cannot be said that defendant did not have "a sufficient opportunity, with

the exercise of reasonable care, to remedy the situation" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [citations omitted]). Lastly, defendant's contention that plaintiff did not know what caused the accident lacks merit. Plaintiff testified unequivocally that she stepped into an empty shoe box, which caused her to fall. Accordingly, defendant's motion for summary judgment dismissing the complaint is denied, without regard to the sufficiency of plaintiff's opposition.

B. Plaintiff's Cross Motion to Strike Defendant's Answer

Plaintiff cross-moves for an order striking defendant's answer or for an adverse inference at the time of trial as a sanction for spoliation of evidence.[2]

By letter dated April 1, 2015, nearly five months before this action was commenced, plaintiff's counsel requested that defendant preserve all surveillance video and reports related to the accident (affirmation of plaintiff's counsel, exhibit B at 1). In response to plaintiff's discovery demands, defendant replied that it was "not in possession of any photographs or videotapes of the subject incident" (affirmation of plaintiff's counsel, exhibit E, ¶ 3). Farrell, though, testified that surveillance footage of the incident had been transferred onto a CD, and that she had passed the CD to defendant's attorney (Farrell tr, 22-23). Defendant's counsel stated that he was in possession of the CD, but the CD was "completely blank" when he viewed it (*id.* at 23, lines 6-7). Plaintiff argues that spoliation is appropriate because defendant was aware that it should have preserved the surveillance video, but it negligently or willfully failed to do so.

Defendant contends that the striking of its answer or a spoliation sanction is not warranted because the surveillance cameras would not have captured plaintiff's accident. Submitted with defendant's opposition is an affidavit from Ahmed Aly (Aly), a loss prevention team leader at Topshop. Aly avers that on March 12 or March 13, 2015, Farrell, his supervisor,

[2] The court notes that plaintiff's cross motion is not accompanied by an affirmation of good faith, which is required on all motions concerning discovery disputes (*see* 22 NYCRR 202.7).

asked him to review footage from the three surveillance cameras situated in the shoe department area for the incident (Aly aff, ¶ 5). Aly states that "the only footage found was of a customer walking with a sales associate to the personal shopping area of the store" and that he burned the footage onto a CD (*id.*, ¶ 6). When he copied the footage onto the CD, he had no reason to suspect that the equipment he used was malfunctioning (*id.*, ¶ 8). Thus, plaintiff cannot establish that defendant acted intentionally or in bad faith regarding the surveillance video.

Additionally, defendant maintains that the absence of the surveillance video has not impaired her ability to establish her claim. Plaintiff produced three photographs Susser had taken of the area where the accident occurred. Defendant previously exchanged a statement from Melissa Soto (Soto), an employee at Topshop, describing her response to plaintiff's accident, along with the last known addresses for Soto, Aly, who was identified as "the actual disc burner," and Stephanie O'Neill, Topshop's manager on duty at the time of the accident (affirmation of defendant's counsel, exhibit D at 1).

When crucial evidence has been intentionally or negligently destroyed before an opposing party has had a chance to inspect it, sanctions for spoliation are appropriate (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). The loss of evidence must be "fatal to the other party's ability to present a defense" (*Squitieri v City of New York*, 248 AD2d 201, 203 [1st Dept 1998]), thereby leaving that party "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (*Kirkland*, 236 AD2d at 174 [internal quotation marks and citation omitted]). Therefore, a party seeking spoliation sanctions must establish the following:

> "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that 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"

(*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012], citing *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]). Where evidence has been "intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). Where evidence has been "negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense" (*id.* at 547-547). Sanctions for spoliation may include striking the offending party's pleadings (*Melcher v Apollo Med. Fund Mgt., L.L.C.*, 105 AD3d 15, 24 [1st Dept 2013] [citations omitted]), or a negative or adverse inference charge at trial (*Strong v City of New York*, 112 AD3d 15, 24 [1st Dept 2013]).

Here, there is no evidence that defendant's failure to preserve the surveillance video was willful or intentional. Defendant's employees followed the procedure Farrell had described pertaining to customer incidents. Although the better practice would have been to view the footage on the CD after the transfer process was complete, the video cameras situated near the shoe department would not have recorded the area where plaintiff fell. Moreover, plaintiff has not established that the absence of the surveillance video has left her "'prejudicially bereft of appropriate means to [present] a claim with incisive evidence'" (*Cataudella v 17 John St. Assoc.*, LLC, 140 AD3d 508, 509 [1st Dept 2016], quoting *Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 313 [1st Dept 2003]). Consequently, plaintiff's motion for an order striking defendant's answer or for an adverse inference at trial as a spoliation sanction is denied.

Accordingly, it is

ORDERED, that defendant's motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that plaintiff's cross-motion to strike defendant's answer or for an adverse inference at trial as a sanction for spoliation of evidence is DENIED.

Dated: October 29, 2018

ENTER: