SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

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TEDDY CHATTAH,

Plaintiff,

- v -

THE BUTTER GROUP, 244 WEST 14TH LLC D/B/A UP & DOWN, XYZ D/B/A THE BUTTER GROUP, BUTTER MANAGEMENT, LLC, AJ MELINO & ASSOCIATES, INC., JOHN DOE,

Defendants.

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INDEX NO. 158288/2016

MOTION DATE 09/09/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to STRIKE PLEADINGS

The Law Offices of Robert S. Gitmeid & Assoc., PLLC (Yevgeny Rabinovich of counsel), for plaintiff.
Frenkel Lambert Weiss Weisman & Gordon, LLP (Todd E. Weisman of counsel) for the Butter Group defendants.

Gerald Lebovits, J.:

This action arises out of an altercation that occurred in a downtown Manhattan nightclub on May 15, 2016, between club patrons seated at adjoining tables. Plaintiff Teddy Chattah was allegedly injured in the altercation. He sued the club and the club's ownership,[1] and the club's security contractor, defendant AJ Melino & Associates, Inc., alleging that they were negligent in various ways that led to him being injured.

In this discovery-related motion, Chattah seeks an order that (i) directs the Butter Group to produce additional employees for depositions; and (ii) imposes spoliation sanctions against the Butter Group for failing to preserve video footage that might have showed the circumstances of the altercation in which Chattah has alleged he was injured.

[1] Defendants Butter Group, Butter Management, 244 West 14th LLC, and XYZ (collectively, the Butter Group).

DISCUSSION

I. The Branch of Plaintiff's Motion Seeking the Deposition Testimony of Additional Butter Group Employees

A corporation ordinarily "may select in the first instance the person through whom it is to be examined." (*Federal Natl. Mtge. Assn. v New York Prop. Ins. Underwriting Assn.*, 90 AD2d 787, 787 [2d Dept 1982].) Once the deposing party has examined the corporation's chosen witness (or witnesses), it may take additional employee depositions only if it makes a detailed showing that such depositions are necessary because (i) "the employees already deposed had insufficient information," *and* (ii) "there [is] a substantial likelihood that those sought to be deposed possess information necessary and material to the prosecution of the case." (*Alexopoulos v Metropolitan Transp. Auth.*, 37 AD3d 232, 233 [1st Dept 2007].)

Here, Chattah previously deposed the club's then-assistant manager and the server who was responsible for Chattah's table on the night of the incident. Chattah now argues that those witnesses lacked adequate knowledge of the incident. He therefore seeks to depose the bartender (Jay Bavarro) and busboy (Bodril Hoque) responsible for his table that night. But Chattah has failed to demonstrate the necessary substantial likelihood that Bavarro and Hoque possess information that is necessary and material to his action.

As an initial matter, this additional-deposition issue was thoroughly argued—and decided adversely to plaintiff—at an April 2019 status conference. (*See* Order, NYSCEF No. 63.) Chattah is thus, in effect, asking this court to reconsider its prior determination. But he has not shown that reconsideration is warranted.

With respect to the busboy, Hoque, Chattah relies heavily on the deposition transcript of a nonparty witness named Joseph Chehovah, who was seated at plaintiff's table on the night in question. Plaintiff contends that this transcript was not available to him at the April 2019 conference, and that it shows that Hoque is likely to have information to provide about the circumstances of the altercation. But even if Chehovah's testimony were previously unavailable to plaintiff,[2] plaintiff's reliance on the transcript is unavailing.

Chehovah testified in relevant part that "throughout the night" the patrons at the adjoining table (some of whom were later involved in the altercation at issue) were encroaching into the space of those at Chattah's table. (NYSCEF No. 88, at Tr. 126.) When asked whether "any busboys [were] in the vicinity of where this was happening," Chehovah answered that he was "not sure." (*Id.* at 127.) When asked whether "any servers or waiters or waitresses [were] in that vicinity," Chehovah answered that he was "sure at certain points that some of the staff was walking through the area or seen the area," though he could not "tell you specifically who was where at what exact times." (*Id.*) And when asked whether "any of those people, whether they be servers, whether they be busboys[,] observed what was going on with the encroachment,"

[2] It appears to be undisputed that plaintiff's counsel was present for the Chehovah deposition, which was taken prior to the April 2019 conference.

Chehovah testified that he saw club staff observe the encroachment "at least twice." (*Id.* at Tr. 127-128.)

Thus, Chehovah testified at most that at two unspecified times on the relevant evening, unidentified club staff had observed Chattah's party being crowded by individuals at the adjoining table. That testimony does not establish a substantial likelihood even that *any* club busboy possessed material information about the altercation in which Chattah was injured—let alone that Hoque, in particular, had such knowledge.

As to the bartender, Bavarro, Chattah relies on the fact that Bavarro was responsible for preparing drinks requested by the patrons at Chattah's table and the adjoining table. Chattah argues that Bavarro might thereby have material information on topics such as, for example, whether club bartenders improperly continued to serve visibly intoxicated patrons. But Chattah has not identified any evidence indicating that the bartender ever interacted with or observed the patrons at the two tables involved in the altercation—as opposed to merely filling orders given to him by a server. Chattah thus cannot establish a substantial likelihood that Bavarro could provide necessary and material evidence at a deposition.

Chattah's motion to require the Butter Group to produce additional witnesses for depositions is denied.

II. The Branch of Plaintiff's Motion Seeking Spoliation Sanctions Against the Butter Group

Chattah also seeks sanctions for the Butter Group's alleged spoliation of evidence—specifically footage that he alleges showed the altercation between Chattah's party and the adjoining table, but which was erased before he could see it.[3]

Under New York's common-law doctrine of spoliation, courts "possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence." (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015].) A party seeking such relief must show that (i) the party against whom relief is sought had control over the evidence; (ii) the party with control over the evidence had an obligation to preserve it at the time of its destruction; (iii) the evidence was destroyed with a culpable state of mind, which may include negligence (*see Strong v City of New York*, 112 AD3d 15, 21 [1st Dept 2015]); and (iv) the destroyed evidence was relevant to the moving party's claim or defense. (*See Pegasus Aviation*, 26 NY3d at 546.)

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[3] The Butter Group contends that Chattah's motion papers did not establish that he had previously demanded the production of video recordings of the incident. But as Chattah correctly points out, Chattah *did* make request all "video/audio recordings . . . of the Incident or any events leading up to the Incident" in his January 9, 2017, Notice for Discovery and Inspection (*see* NYSCEF No. 93, at 10 [¶ 9]); and the Butter Group responded that upon information and belief there was no video (*id.* at 3 [¶ 9]).

Here, Chattah has submitted evidence that his counsel mailed multiple pre-suit notices to the Butter Group demanding that they preserve any "surveillance video depicting the subject incident" that occurred on May 15, 2016. (*See* Letter of June 7, 2016, NYSCEF No. 89.)[4] And a Butter Group employee has acknowledged receipt of at least one of those notices. (*See* Aff. of Jacqueline Akiva, NYSCEF No. 107, at 3.) The Butter Group was thereby placed on notice of an incident that could potentially give rise to litigation.[5] And it is undisputed that the Butter Group did not preserve any video from the night of the incident.

Thus, the question is whether the Butter Group ever in fact possessed video footage of the altercation. If one or more security cameras in the club did take video of the altercation (and the immediately preceding circumstances), the Butter Group breached its obligation to preserve that video pending subsequent litigation. (*See Macias v ASAL Realty, LLC*, 148 AD3d 622 [1st Dept 2017].)

There is, however, a clear factual dispute about whether any security cameras were positioned to observe and record video of the altercation here. The contemporaneous incident report, prepared by the head of security at the club (Fabio Reyes), indicated that there was no camera coverage of the incident. (*See* NYSCEF No. 20, at 6.) Reyes similarly testified at his deposition that he made that notation in the incident report because he knew that "the angle of the camera doesn't capture th[e] area" where the altercation occurred. (*See* NYSCEF No. 80, at Tr. 75-80.)

During a joint site inspection by the parties in March 2019, however, plaintiff's counsel viewed and photographed what appears to be a security videocamera positioned directly above where the altercation occurred. (*See* NYSCEF No. 92, at 3-4.) Plaintiff's counsel also viewed and photographed monitors showing input from the club's various cameras, including a view of the location of the incident. (See NYSCEF No. 92, at 5-6), Chattah relies on the presence of this camera to argue that Butter Group possessed—and wrongly destroyed—video of the incident.[6] (NYSCEF No. 71, at ¶¶ 40-41.)

That the camera was present in March 2019 does not, of course, establish by itself that the camera was present and operational in May 2016. Indeed, at his deposition, Reyes was shown photographs of the club taken in April and June 2018, was able to identify the area of the incident within that photograph, but also testified that he did not know where the closest camera to that area was located. (*See* NYSCEF No. 80, at Tr. 81.)

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[4] *See also* Letter of August 16, 2016, NYSCEF No. 90; Letter of September 6, 2016, NYSCEF No. 91. The preservation demands in these letters is (in relevant part) materially identical to the June 7 letter.

[5] The Butter Group was also placed on notice by the fact that the altercation generated a contemporaneous incident report prepared by security at the club (*see* NYSCEF No. 20, at 5-6). *See Malouf v Equinox Holdings, Inc.*, 113 AD3d 422, 422 (1st Dept 2014).

[6] Chattah does not contend that his counsel's site inspection identified any other videocameras that would have covered the location where the incident occurred.

That said, plaintiff's brother, Robert Chattah, has supplied an affidavit in support of the spoliation motion in which he avers clearly and specifically that on the night of the incident, he had noticed the camera that appears in the March 2019 photograph. (*See* NYSCEF No. 85, at 98.)

The Butter Group assails this affidavit as a recent fabrication. They note (correctly) that at his deposition in 2018, Robert Chattah merely referred generally to his view that a "[c]lub like this, definitely have camera[] footage," and his belief on the night of the incident that the incident must have been captured on camera (NYSCEF No. 85, at Tr. 171, 171-173)—but never mentioned a security camera directly over the incident itself. There is some force to the Butter Group's argument that had such a camera been present at the time, one would have expected Robert Chattah—or for that matter anyone else—to mention it during the deposition.

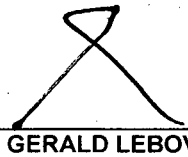
Ultimately, though, the question whether to accept the version of the facts given by Fabio Reyes in his incident report and deposition testimony, or Robert Chattah in his spoliation-motion affidavit, is one of credibility. This court declines to decide this significant credibility issue on a cold record. Instead, the court concludes that the most appropriate step is to refer the discrete factual question of the presence of a camera on the night in question to a judicial hearing officer to hear and report, and reserve any final determination on the spoliation issue until after receiving the hearing officer's report.

Accordingly, it is

ORDERED that the branch of plaintiff's motion to compel the deposition testimony of additional Butter Group employees is denied; and it is further

ORDERED that the branch of plaintiff's motion for spoliation sanctions is granted only to the extent that a judicial hearing officer (JHO) or special referee shall be designated to hear and report to this court on the following issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose: the issue of whether as of May 15, 2016, a security videocamera was positioned between and above the two tables in the club where the underlying altercation occurred; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk in the General Clerk's Office (60 Centre Street, Room 119) for placement at the earliest possible date upon the calendar of the Special Referees Part.



11/01/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[X]	REFERENCE