Ranieri-Certain v King Kullen Grocery Co., Inc.
2019 NY Slip Op 34779(U)
February 19, 2019
Supreme Court, Nassau County
Docket Number: Index No. 606474/2015
Judge: Karen V. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 7 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

JOAN RANIERI-CERTAIN,

Plaintiff,

-against-

KING KULLEN GROCERY CO., INC.,

Defendant.

Index No. 606474/2015

Motion Submitted: 12/14/18
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause..... XX
Answering Papers..... XX
Reply..... XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant King Kullen moves this Court for an Order granting summary judgment in its favor and dismissing the complaint (Motion Sequence 1).

Plaintiff opposes Motion Sequence 1 and cross-moves for an Order striking defendant's answer pursuant to CPLR § 3126 based upon alleged spoliation of evidence and failure to identify alleged eyewitnesses (Motion Sequence 2). Defendant opposes Motion Sequence 2.

The incident giving rise to this action occurred on September 2, 2014, at approximately 5:00 p.m., in a King Kullen grocery store located in Hampton Bays, New York. Plaintiff alleges that she slipped on a piece of lettuce and turned her right foot and ankle, resulting in a fractured right ankle.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any

[*1]

material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

It is axiomatic that the owner of an establishment to which the general public is invited is charged with the duty to maintain those premises in a reasonably safe condition (*see generally*, ***Peralta v. Henriquez***, 100 NY2d 139 [2003]; ***Gradwohl v. Stop &Shop Supermarket Company, LLC***, 70 AD3d 634 [2d Dept 2010]).

In order to be entitled to summary judgment, a defendant property owner must establish that it maintained its property in a reasonably safe manner, and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be present on the premises (***Gradwohl***, ***supra*** at 636).

Of course, a property owner may be held liable for damages resulting from a hazardous condition on its premises if it created the hazardous condition or had either actual or constructive notice of the condition in sufficient time to remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837 [1986]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. (***Borenkoff v Old Navy***, 37 AD3d 749, 750 [2d Dept 2007]).

To meet its initial burden on a summary judgment motion with respect to constructive notice, a defendant must tender some evidence establishing when the area in question was last cleaned or inspected prior to the plaintiff's slip and fall (***Lombardo v. Kimco Central Islip Venture, LLC***, 153 AD3d 1340 [2d Dept 2017]; ***Zambri v. Madison Square Garden***, 73 AD3d 1035, [2d Dept 2010]; ***Birnbaum v. New York Racing Association, Inc.***, 57 AD3d 598 [2d Dept 2008]).

Plaintiff testified that she slipped on a piece of lettuce on the supermarket floor within minutes of entering the store on September 2, 2014. According to her testimony, she was in the main aisle that separates the cash registers from the grocery aisles when the incident occurred. She had nothing in her hands and had not yet selected any grocery items. Plaintiff was on her way to the frozen food section. She was looking straight ahead just before her right foot slipped and "seemed to turn in." Plaintiff did not fall completely to the ground because she put her right hand down. After she fell, she turned to see what had caused her to slip and observed a piece of dark green lettuce that she described as being under four inches long and approximately three-and-one-half inches wide. Nothing else was on the floor near the lettuce. Plaintiff did not see the lettuce leaf before she slipped.

Plaintiff was embarrassed because there were other customers in the area, store employees in the produce area, and cashiers behind her. Plaintiff testified that she is not aware if any of those people witnessed her accident. She spoke with no one afterward, leaving the store quickly and in pain. Plaintiff did not report the incident to any store employee on September 2, 2014. Six days later, on September 8, 2014, plaintiff returned to the store to report the incident to the store manager.

The written "Customer's Report of Incident" is dated September 8, 2014, and it was placed into evidence at deposition. Plaintiff described the incident in her own words as follows: "As I walked into the Hampton Bays King Kullen I slipped on a piece of lettuce closer towards the cash register and sprained my right ankle on 9-2-2014 a little after 5 p.m." At the time that plaintiff reported the incident to King Kullen, she had not yet sought medical attention. After she sought medical attention on or about September 11, 2014, she learned that her right ankle was actually broken, not sprained.

Defendant's store manager, Joseph Notaro, testified only to the general cleaning practices of the store, but failed to offer any evidence, testimonial or documentary, as to any specific cleaning or inspection of the area of plaintiff's accident on the date of the incident, September 2, 2014. Notably, Mr. Notaro testified that a piece of lettuce on the floor would be a condition that he and other store employees are instructed to remedy by picking it up. Moreover, he testified that he has seen lettuce on the supermarket floor, generally, and he has picked it up.

Although there is no evidence that defendant had actual notice of the lettuce leaf on the floor at the time of plaintiff's accident, or that defendant created the condition, defendant has failed to make a *prima facie* showing of lack of constructive notice of the alleged dangerous condition on the supermarket floor. Accordingly, defendant's summary judgment motion must be denied regardless of the sufficiency of plaintiff's opposition papers (***Lombardo***, ***supra***; *see also* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

The Court now considers plaintiff's cross-motion to strike defendant's answer for spoliation of evidence and failure to identify eyewitnesses.

"When a party negligently loses 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" (***Baglio v. St. John's Queens Hosp.,*** 303 AD2d 341, 342 [2d Dept 2003]; *see also* ***Madison Ave. Caviarteria v. Hartford Steam Boiler Inspection & Ins. Co.***, 2 AD3d 793, 796 [2d Dept 2003]).

"To impose a sanction for spoliation of evidence, it must be established that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when he was on notice that such

evidence might be needed for future litigation" (***Haviv v. Bellovin***, 39 AD3d 708 [2d Dept 2007]; *see also* ***Kirschen v. Marino***, 16 AD3d 555, 556 [2d Dept 2005]).

The Court "may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation'" (***Iannucci v. Rose***, 8 AD3d 437, 438 [2d Dept 2004], *quoting* ***DiDomenico v. C & S Aeromatik Supplies***, 252 AD2d 41, 53 (2d Dept 1998); *see also* ***Samaroo v. Bogopa Service Corp.***, 106 AD3d 713 [2d Dept 2013]).

"Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed [internal citation omitted]. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense [internal citation omitted]" (***Pegasus Aviation I, Inc., v. Varig Logistica S.A.***, 26 NY3d 543, 547-548 [2015]).

"However, 'striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct' and, thus, the courts must 'consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" (***Utica Mutual Insurance Company v. Berkoski Oil Company,*** 58 AD3d 717, 718 [2d Dept 2009], *citing* ***Iannucci v. Rose, supra*** at 438). "When the moving party is still able to establish or defend a case, a less severe sanction is appropriate" (***Utica Mutual Insurance Company, supra*** at 718); *see also* ***De Los Santos v. Polanco***, 21 AD3d 397, 398 [2d Dept 2005]; ***Fossing v. Townsend Manor Inn, Inc.***, 72 AD3d 884 [2d Dept 2010]; ***Iannucci, supra***, at 438; ***Favish v. Tepler***, 294 AD2d 396 [2d Dept 2002]).

"Precluding a party from presenting evidence at trial is also a drastic sanction [internal citation omitted] which generally requires a showing that a party's lack of cooperation with discovery was willful, deliberate, or contumacious [internal citation omitted]. Less severe sanctions for spoliation of evidence are appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case [internal citations omitted]" (***Jennings v. Orange Regional Medical Center***, 102 AD3d 654 [2d Dept 2013]).

Here, there is no evidence that a video of the incident actually existed, and plaintiff's counsel's affirmation with annexed photographs (purportedly depicting the locations of video cameras in the store) that were never offered or introduced into evidence at depositions do not establish that those camera were present at those locations on September 2, 2014, nor do they establish which portions of the store were within the field of view of those cameras at the time of the subject incident.

On the other hand, defendant's store manager's testimony supplies a factual basis for the likelihood that such a video may have existed at the time that plaintiff reported the incident to him on September 8, 2014. According to Mr. Notaro, the store had motion-activated security cameras on September 2, 2014, and the video footage is retained anywhere from "a week to two weeks," depending upon how much activity occurs in the store. Notaro testified that, "the more motion, the more space it uses so the less time it holds." If there is no motion, the camera does not record. Further according to Notaro, the cameras "cover a lot of the front. [m]ost of the doorways," but he did not know if the security cameras covered the areas depicted in certain photographs introduced into evidence by plaintiff at her deposition.

Plaintiff testified that her accident occurred just past the cashiers located in the front of the store, and in the main aisle running directly in back of the cashiers, at or near the beginning of the produce aisle.

Moreover, although Mr. Notaro testified that he has a custom and practice to see if an accident is captured on security cameras upon learning of an accident, he testified that he did not remember checking for footage in this case. He later testified that he would have made a notation if he checked the security cameras, but there was no notation about this matter, and that he did not check the cameras. He also stated that, "I don't always check the cameras;" "Sometimes I have time to do it and other times I don't." Mr. Notaro also testified that King Kullen does not have a policy with respect to whether or not the company wants employees to check the security cameras when there is an accident. According to Mr. Notaro, that decision is left to his discretion.

When Mr. Notaro has reviewed video footage in the past and wanted to have it preserved, he would contact the security or risk management department and they would preserve the requested footage. When asked if it was possible to have video footage from September 2, 2014 preserved if he wanted/requested it be done, Mr. Notaro answered, "Yes." When asked, Mr. Notaro could not supply any reason why he did not check the security footage for the subject incident; he simply answered, "I don't know." He also did not conduct any investigation at all when plaintiff reported the incident to him on September 8, 2014. Notaro simply retained one copy of the written report at the store, and he sent the other copy "to the [King Kullen] office."

Mr. Notaro did not know if King Kullen office personnel investigated this incident, although he testified that he was somewhat familiar with the nature of an investigation that might be conducted. According to Mr. Notaro, "they come to the store and see if we have video." He did not, however, remember if defendant's office personnel did an investigation in this case.

Mr. Notaro's testimony does not establish that potential evidence was intentionally or willfully destroyed, but his failure to even attempt to check if there was any footage smacks of carelessness and negligence. In this regard, this matter is akin to the factual scenario presented in ***Jennings***, ***supra*** wherein defendant's actions in stapling a written evidence preservation request to the back of plaintiff's file resulted in the request never being forwarded to defendant's risk management department. "As a result, *any* videotape footage of the incident that *may have existed* was, in the ordinary course of business, overwritten by new videotape footage . . ." (emphasis added) (***Id***. at 655).

The Court further finds that when plaintiff made a written report of the incident on September 8, 2014, there was a reasonable likelihood of litigation regarding this incident, and the highly relevant nature of any video evidence to potential future litigation, of which King Kullen's store manager should have been aware (*see* ***Rokach v. Taback***, 148 AD3d 1195 [2d Dept 2017]).[1]

In any event, plaintiff has not been deprived of the ability to prove her case. She may testify at trial and introduce any and all photographs that she can authenticate as depicting the store/scene/conditions as they existed on the date/time of her accident.

It is in this Court's broad discretion to provide proportionate relief to a party due to lost or destroyed evidence (***Eksarko v. Associated Supermarket***, 155 AD3d 826 [2d Dept 2017]). The striking of defendant's answer is too harsh a sanction to be imposed in the absence of any evidence of willful or contumacious conduct by defendant and in view of plaintiff's continued ability to prosecute this action.

Taking into account that there may have been video footage of the incident given its occurrence near the front of the store, and defendant's unexplained failure to check the security cameras six days later despite being familiar with the procedure to preserve video, this Court finds that a defendant's actions regarding video evidence were negligent, warranting a negative inference charge being given at trial with respect to unavailable video footage (*see* ***Jennings***, ***supra*** at 656).

Plaintiff's contention concerning defendant's other employees (cashiers and produce employees) is unavailing. Plaintiff's claim that these people were in a position to witness her accident and had "a plain view" of the accident location is pure speculation, as is plaintiff's contention that one of the produce employees "may have created the dangerous condition." Thus, her contention that the defendant's answer should be stricken on the basis that defendant has "failed to identify or produce these

[1] It is undisputed that plaintiff's counsel's September 22, 2014 letter requesting preservation of recordings was received by defendant by October 3, 2014, and that defendant responded to combined demands by stating that it is not in possession of, *inter alia*, videotapes or motion pictures depicting the plaintiff's accident scene on September 2, 2014.

eyewitness employees" is baseless. Moreover, defendant responded in writing on July 25, 2017 that the "only known witness known to King Kullen at this time is Joe Notaro, King Kullen store manager." During the entire time that this matter was pending before this Court, prior to the Court's issuance of a trial Certification Order on March 29, 2018, plaintiff never moved to compel discovery of these purported witnesses, nor did plaintiff ask for sanctions prior to the instant cross-motion. Instead, plaintiff filed her Note of Issue and Certificate of Readiness on June 20, 2018, certifying, *inter alia*, that "[t]here are no outstanding requests for discovery." That branch of plaintiff's motion seeking to strike defendant's answer on this basis is denied.

The foregoing constitutes the Order of this Court.

Dated: February 19, 2019
Mineola, NY

Karen V. Murphy
J. S. C.

ENTERED
FEB 20 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE