SHORT FORM ORDER

INDEX No. 17-608242
CAL. No. 19-01198OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

P R E S E N T :

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 11-20-19 (001 & 002)
ADJ. DATE 03-04-20
Mot. Seq. # 001 - MD
002 - XMD

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ANGELA JEREMIC,

Plaintiff,

- against -

SCOTTO SMITHTOWN RESTAURANT CO., D/B/A WATER MILL CATERERS, SCOTTO SMITHTOWN HOTEL, LLC., D/B/A WATER MILL CATERERS, SCOTTO'S SMITHTOWN RESTAURANT CO., D/B/A WATER MILL CATERERS and WATER MILL CATERERS,

Defendants.

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Upon the following papers read on this motion for summary judgment and cross motion for sanctions ; Notice of Motion and supporting papers by defendant Scotto's Smithtown Restaurant Corp., filed October 15, 2019 ; Notice of Cross Motion and supporting papers by plaintiff, filed November 5, 2019 ; Answering Affidavits and supporting papers by plaintiff, filed November 15, 2019; by defendant, filed February 11, 2020 ; Replying Affidavits and supporting papers by defendant, filed February 14, 2020 ; Other NYSCEF documents numbered 8, 9, 10, 11, 12, 31, 32, 33, 34, 40, respectively filed on 3/12/2018, 1/17/2019, 6/11/2019, 6/11/2019, 6/19/2019, 11/12/2019, 12/4/2019, 12/19/2019, 1/9/2020, 2/18/2020 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendant Scotto's Smithtown Restaurant Corp., d/b/a Watermill Caterers, for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the cross motion of the plaintiff for an Order imposing sanctions, pursuant to CPLR 3126, is denied, with partial leave to renew at trial.

The present action was commenced by the plaintiff, Angela Jeremic, to recover damages for injuries that she allegedly sustained as a result of falling while dancing on the dance floor at a catering facility operated by defendant Scotto's Smithtown Restaurant Corp., d/b/a Watermill Caterers (hereinafter Watermill), while she was a guest at a reception. Ms. Jeremic contends that she slipped either on a small amount of liquid or on a soft, waxy substance, both of which purportedly were present on the dance floor. Watermill, however, maintains that it neither created nor permitted such a condition on its floor. Alternatively, it asserts that if indeed any extraneous substance was present on the dance floor, it had no actual or constructive notice of the existence of such condition prior to Ms. Jeremic's alleged fall. Thus, argues Watermill, it was not negligent in failing to warn of or remedy the condition prior to the fall and is not liable for any resultant injuries that Ms. Jeremic may have sustained.

Ms. Jeremic opposes Watermill's motion and cross-moves for an Order striking the answer, or, alternatively, for an adverse inference charge, upon the ground of spoliation of evidence, to wit: the alleged failure to preserve and produce surveillance video. She contends the video would establish the truth of her allegations as to the occurrence of the alleged accident, as well as its cause. For the following reasons, the Court now denies the motion for summary judgment, and denies the cross motion with partial leave to renew.

In regard to Watermill's motion, a party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who must proffer evidence in admissible form, and must show facts sufficient to require a trial of any issue of fact, in order to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). A defendant moving for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of the condition for a sufficient length of time to discover and remedy it (*see* ***Petersel v Good Samaritan Hosp of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; ***Johnson v Culinary Inst. of Am.***, 95 AD3d 1077, 944 NYS2d 307 [2d Dept 2012]; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]). To constitute constructive notice, the condition must be visible and

apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; *see* ***Schubert-Fanning v Stop & Shop Supermarket Co., LLC***, 118 AD3d 862, 988 NYS2d 245 [2d Dept 2014]; ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]). Proof of the defendant's general awareness that a dangerous condition may be present is insufficient to establish notice of the condition (*see* ***Gonzalez v Jenel Mgt. Corp.***, 11 AD3d 656, 784 NYS2d 135 [2d Dept 2004]).

Review by the Court of the parties' papers, including annexed exhibits comprising transcripts of examinations before trial of both party and non-party witnesses, establishes that multiple material issues of triable fact exist, such that summary judgment does not lie. Specifically, contradictory factual testimony exists as to whether Watermill had actual notice of the existence of the alleged hazardous condition upon its premises, and whether such condition was visible, apparent, and existed for a sufficient period prior to Ms. Jeremic's alleged fall to have permitted Watermill to discover, warn of, and remedy it, *i.e.*, whether it had constructive notice of such a condition. Accordingly, summary judgment dismissing the complaint is denied.

As to Ms. Jeremic's application for the imposition of sanctions, "[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation 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 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, 26 NYS3d 218 [2015]; *see* CPLR 3126). When the evidence was destroyed willfully, its relevancy is presumed (***Pegasus Aviation I, Inc. v Varig Logistica S.A.***, *supra*). However, when the evidence was negligently destroyed, a party seeking spoliation sanctions must demonstrate that such evidence was relevant to his or her claim or defense (***Pegasus Aviation I, Inc. v Varig Logistica S.A.***, *supra*). "The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence and may, under appropriate circumstances, impose a sanction even if 'the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation'" (***Smith v Cunningham***, 154 AD3d 681, 682, 62 NYS3d 434 [2d Dept 2017], quoting ***Biniachvili v Yeshivat Shaare Torah, Inc.***, 120 AD3d 605, 606, 990 NYS2d 891 [2d Dept 2014]).

Ms. Jeremic has failed to establish clearly that Watermill had notice of any claim prior to its receipt of correspondence from her counsel, which was not sent to Watermill until some three weeks after the date of the alleged incident. Further, deposition testimony indicates that any relevant surveillance video would have been taped over automatically within three weeks of the date upon which Ms. Jeremic alleges that she was injured. Thus, there has been no showing that Watermill intentionally or negligently failed to preserve vital evidence after it was placed on notice that the evidence might be needed for any future litigation (*see* ***Tanner v Bethpage Union Free Sch. Dist.***, 161 AD3d 1210, 78 NYS3d 433 [2d Dept 2018]; ***Aponte v Clove Lakes Health Care and Rehabilitation Ctr., Inc.***, 153 AD3d 593, 59 NYS3d 750 [2d Dept 2017]). Furthermore, Ms. Jeremic has not demonstrated any prejudice fatal to her cause of action (*see generally* ***Kirschen v Marino***, 16 AD3d 555, 792 NYS2d 171 [2d Dept 2005]; ***430 Park Ave. Co. v Bank of Montreal***, 9 AD3d 320, 781 NYS2d 67 [1st Dept 2004]).

Accordingly, Ms. Jeremie's cross motion seeking sanctions pursuant to CPLR 3126 is denied, with leave to renew at trial to the extent of a request for an adverse inference charge, should an adequate factual showing be made at that time.

Dated: June 4, 2020

J.S.C.

__ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION