SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 32**

Acting Justice

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NY'ANNE MITCHELL,

Plaintiff,

- v -

BOWLMOR LANES LLC, JOHN DOE, NESCTC SECURITY AGENCY, LLC and SJ SOLUTIONS SECURITY & PROTECTION SERVICES INC.,

Defendants.

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INDEX NO. 152011/2017

MOTION DATE

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 138-151, 153-159, 186-199, 201-205

were read on this motion/cross-motion to/for SPOLIATION SANCTIONS.

Upon the foregoing documents, the motion and cross-motion are resolved as follows:

In this matter, Plaintiff alleges that on the evening of July 16, 2016, she went with her family to Bowlmor Lanes at Chelsea Piers, located at Pier 60, New York, New York owned and operated by Bowlmor Lanes LLC ("Bowlmor"). While at this location, a large fight broke out during which time Plaintiff claims she was assaulted by unknown attacker identified as "John Doe." Ultimately, the New York City Police were called to break up the brawl. Defendants NESCTC Security Agency, LLC ("NESCTC"), and SJ Solutions Security & Protection Services Inc.("SJ"), allegedly provided security at this location.

Before Plaintiff commenced this action, on November 10, 2016, Plaintiff's counsel sent a letter to Bowlmor alerting them to the upcoming litigation and to turn over a copy of any surveillance footage taken at the time in question and to not destroy or erase said recordings. On March 2, 2017, Plaintiff filed her summons and complaint. On July 7, 2017, with her initial discovery demands served upon Bowlmor's attorneys, Plaintiff requested that Bowlmor preserve and produce all relevant surveillance footage. However, in its discovery response, dated November 20, 2017, Bowlmor indicated that no video depicting the subject incident existed.

In her amended complaint, dated September 24, 2018, Plaintiff asserts that the Defendants were negligent in the management of the premises as it pertains to the hiring of staff and in providing security therein. Defendants Bowlmor, SJ and NESCTC answered the amended complaint and asserted cross-claims against each other for contribution, common-law indemnification and contractual indemnification.

Plaintiff now moves and SJ now cross-moves pursuant to CPLR §3126 for spoliation sanctions against Bowlmor for the loss of the surveillance footage. Specifically, the movants ask that Bowlmor's answer be stricken[1], that this Court determine as a matter of law that Bowlmor had actual and constructive notice of the conditions which directly caused and/or facilitated the subject assault, that Bowlmor be precluded from offering

[1] SJ asks that Bowlmor's cross-claims for contribution, common-law indemnification and contractual indemnification against SJ be stricken.

any evidence on liability at the trial of this matter, and that an adverse inference charge be given against Bowlmor at the time of trial.

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Parauda v Encompass Ins. Co. of America*, 188 AD3d 1083, 1085 [2d Dept 2020]; *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009]). "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" (*Luzuriaga v FDR Services Corp.*, 189 AD3d 817 [2d Dept 2020] *quoting Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]). A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence (*see Rossi v Doka USA, Ltd.*, 181 AD3d 523, 524 [1st Dept 2020] *citing VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). "Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed [evidence] is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence was] relevant to the party's claim or defense" (*Delmur, Inc. v School Construction Authority*, 174 AD3d 784, 787 [2d Dept 2019] *quoting Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d at 547–548). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case" (*N.H.R. v Deer Park Union Free School District*, 180 AD3d 823, 824 [2d Dept 2020] *quoting Denoyelles v Gallagher*, 40 AD3d 1027 [2d Dept 2007]).

Central to both motions is the identity of Plaintiff's purported assailant. Plaintiff contends that the missing footage would establish Bowlmor's actual notice of negligent hiring and inadequate security since Bowlmor staff participated in the fight. SJ argues that the missing footage would have exonerated its staff from any wrongdoing. In opposition, Bowlmor argues that Movants have not shown that Bowlmor owed them a duty to preserve the surveillance footage and that Plaintiff's pre-suit preservation letter was insufficient to place Bowlmor on notice. Furthermore, Bowlmor contends that the Movants have not shown Bowlmor's culpable state of mind necessary to impose spoliation sanctions.

As a preliminary matter, Bowlmor's contention that SJ improperly cross-moved for spoliation sanctions since it sought relief against non-movant Bowlmor, rather than the movant. However, "such a technical defect may be disregarded where, as here, there is no prejudice and the [opponent] had ample opportunity to be heard on the merits of the relief sought" (*see Sheehan v Marshall*, 9 A.D3d 403 [2d Dept 2004] *citing Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003] *quoting Volpe v Canfield*, 237 AD2d 282 [2d Dept 1997]; *see* CPLR §§2001, 2215).

In support of their motions, Plaintiff and SJ relied on deposition testimony in support of their motions. Omowale St. Juste, President of SJ, testified that after speaking with NESCTC, he learned that the subject assault was committed by unidentified person, but believed to be a Bowlmor manager. Bowlmor's event manager Alejandro Lopez stated under oath that he was present for this incident and that it rose to the level that warranted filling out an incident report by the manager on the floor. Indeed, his co-worker, Jose Hernandez-Lujan, called the police and testified that "Shonee," the manager in attendance that evening needed to fill out an incident report. Both Lopez and Hernandez-Lujan further testified that the premises was equipped with surveillance cameras that fed to a monitor screens in the upstairs liquor room. If the event was captured on surveillance, a manager would have access to the footage.

Former Bowlmor manager Shonee Strother testified at his non-party deposition that he worked for Bowlmor as an Operations Manager. In this capacity, he had access to the security camera footage but did not fill out incident reports. According to Strother, incident reports were filled out by the General Manager only. On the night in question, he was the only manager on duty. After the fight erupted, he stepped out of the cash room and into the middle of the group of individuals to help stop the fighting and in the process was struck several times. At that point, he observed a female on the ground and believed that she tripped over a chair. The woman could not walk, and an ambulance was called to assist her. Mr. Strother indicated that he called and texted Bowlmor General Manager Chloe Leveron to let her know a large fight was taking place on the premises. He further sent all management "a pretty lengthy text of everything that went down so they had it on record and knew what happened."

The following day, Mr. Strother spoke to the General Manager about this incident and told her there was a huge fight and that Bowlmor needed more security. When he asked an Operations Manager, named either Justin or Andrew, for an opportunity to view the security footage, one of these individuals indicated that they had already watched the footage of this incident. Based on that conversation, Mr. Shonee believed Ms. Leveron had also seen the surveillance footage. Mr. Shonee also averred he was told, at that time, that there might not be any footage of this incident.

Contrary to Bowlmor's argument, irrespective of the preservation letter, it was on notice as to the importance of this surveillance given that the police were needed to respond to this incident. The importance of this footage is further demonstrated by the reaction of Bowlmor managers who after being aware of the subject incident, immediately watched or sought to watch the footage. The scale of the incident, that the police were called to quell it, that a woman, believed to be Plaintiff, was injured requiring an ambulance to be called, placed Bowlmor on notice for the potential of litigation and should have resulted in the preservation of this surveillance footage (*see generally New York City Housing Authority v Pro Quest Sec., Inc.*, 108 AD3d 471, 473 [1st Dept 2013] *quoting VOOM HD Holdings LLC,v EchoStar Satellite LLC*, 93 AD3d 33,43 [1st Dept 2012]). "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant [materials]" (*VOOM HD Holdings LLC, v EchoStar Satellite LLC*, 93 AD3d at 41 *quoting Zubulake v UBS Warburg LLC,* 220 FRD 212, 218 [SDNY 2003]).

In this case, other than denying it ever received the preservation letter from Plaintiff's counsel, Bowlmor provided no explanation of its retention/destruction policy. At best, Bowlmor's Jose Hernandez-Lujan, testified that he believed the footage was kept for 60 days, if risk management has not been made aware of an issue. On the whole, the evidence established that Bowlmor was obligated to preserve the surveillance footage of the subject melee, that it was seized and disposed of before the other parties had an opportunity to inspect it, and that the recording was relevant to the litigation (*see Ellis v JP Morgan Chase Bank*, 190 AD3d 413 [1st Dept 2021]; *Richter v BMW of N. Am., LLC,* 166 AD3d 1029, 1030 [2d Dept 2018]). Bowlmor's culpable state of mind for purposes of a spoliation evinces negligence in this regard. Furthermore, the Movants demonstrated that their ability to prove their cases has been affected by the loss of the footage.

"'Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, Courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" (*Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 655–656 [2d Dept 2013] *quoting Iannucci v Rose,* 8 AD3d 437, 438 [2d Dept 2004]). Here, the record does not show Bowlmor acted willfully, deliberately, or contumaciously in not preserving the surveillance footage. Further, that Plaintiff has not been left "'prejudicially bereft'" of the ability to prosecute her case and SJ has not been deprived of the ability to establish its defenses or cross-claims since these parties

can still rely the testimony of the numerous witnesses to this incident (*see Jennings v Orange Regional Med. Ctr.*, 102 AD3d at 656 *citing Fossing v Townsend Manor Inn, Inc.*, 72 AD3d 884, 885 [2010], *quoting Weber v Harley-Davidson Motor Co., Inc.*, 58 AD3d 719, 722 [2009]; *see also Hirschberg v Winthrop–University Hosp.*, 175 AD3d 556, 557 [2d Dept 2019]). As such, Bowlmor's conduct does not rise to the level warranting the striking of its pleading, declaring that Bowlmor had actual and constructive notice of the conditions which directly caused and/or facilitated the subject assault or that Bowlmor be precluded from offering any evidence on liability at the trial of this matter.

Under the circumstances presented, an adverse inference charge should be given against Bowlmor at the time of trial (*see May v American Multi-Cinema, Inc.*, 191 AD3d 657 [2d Dept 2021]; *Suazo v Linden Plaza Associates*, 102 AD3d 570, 571 [1st Dept 2013]).

Accordingly, Plaintiff's motion and Defendant SJ Solutions Security & Protection Services Inc.'s cross-motion are granted to the extent that an adverse inference charge should be given against Bowlmor at the time of trial.

Currently pending before this Court are motions for summary judgment by Defendants Bowlmor, NESCTC and SJ (Motion Seq. 8, 9, 10). These motions were held in abeyance pending this decision. Motion Sequence Numbers 8, 9 and 10 are re-calendared and are returnable on **June 8, 2021**. All parties may supplement their motions and/or opposition to said motions based upon this decision by e-filing same by **May 21, 2021**. Responses shall be efiled by **June 4, 2021**.

4/22/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
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	REFERENCE