At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the _____ day of _____2023

JAN 30 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION AND ORDER

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SOLANGE ISAAC,

Plaintiff,

-against-

Index No.: 500495/2018
Motion Date: 1/11/2023
Motion Cal. No.: 21
Mot. Seq. 3

NORTH CORE ASSOCIATES, L.P., EAST NEW YORK URBAN YOUTH CORPS, INC., LAWRENCE WILLIAMS and ROMEO LAZARO,

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendant East New York's Motion for Summary Judgment and to Strike the Complaint, Attorney Affirmation in Support of Motion affirmed by Sim R. Shapiro, Esq. on August 28, 2020, Exhibits, Memorandum of Law in Support of Defendant East New York's Motion filed on August 28, 2020.....	34-44
Plaintiff's Attorney Affirmation in Opposition to Motion affirmed by Jason S. Steinberger, Esq. on February 11, 2021, Exhibits.....	48-55
Defendant East New York's Amended Reply Affirmation affirmed by Sim R. Shapiro on February 26, 2021.....	58

In an action to recover from a slip and fall injury, defendant East New York Urban Youth Corps HDFC, Inc. s/h/a East New York Urban Youth Corps. Inc. ("East New York") moves this court for an order granting summary judgment to East New York, pursuant to CPLR 3212, and striking the complaint for spoliation, pursuant to CPLR 3126.

Solange Isaac ("plaintiff") was a home health aide, employed by Personal Touch. Plaintiff was assigned to render services to non-party Faison, a resident in East New York's facility. Mr. Faison lived on the fourth floor of the facility at the time of the alleged accident. At around noon, on May 3, 2017, plaintiff exited Mr. Faison's apartment and allegedly slipped and fell on the fourth floor, approximately three feet from Mr. Faison's apartment. Plaintiff alleges that her fall was caused by the presence of a waxing agent on the floor. Plaintiff claims she smelled a glue-like chemical smell when she fell and the floor waxing agent left residue on the jacket and pants plaintiff was wearing at the time of the accident. NYSCEF # 39 pp 39, 133. However, plaintiff threw away the jacket, pants and shoes, which may have also contained residue of the wax, she wore on the day of the accident. *Id* at pp 94, 132-134. This action was commenced by plaintiff filing the summons and verified compliant on January 10, 2018. Issue was joined by defendant East New York interposing an answer on March 8, 2018.

Jimmy Mateo, a security guard who worked at the facility, testified for defendant at a deposition. Mateo worked five days a week from 8 AM to 4 PM. NYSCEF # 40 p 34. Mateo testified that in his capacity, he never performed maintenance, repair or cleaning work at the facility. *Id* at p 38. It is uncontroverted that Mateo did not see the alleged accident, or the floor before plaintiff slipped and fell. Matteo testified that he went to the fourth floor after the accident and saw a wet floor sign. *Id* at p 43-44. Matteo testified that he checked the floor in question hours after the incident. *Id* at p 62. Matteo further testified that while floor waxing was "rare," the floor of the facilities was waxed once or twice a year. *Id* at p 57. East New York never submitted maintenance records.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dep't 1999); *Tassone v. Johannemann*, 232 A.D.2d 627, 628 (2d Dep't 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dep't 1964). The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. *Alvarez v. Prospect Hosp,* 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York, supra at 562; Friends of Animals, Inc v. Associated Fur Mfrs, Inc,* 46 N.Y.2d 1065 (1979).

East New York moves for summary judgment on the ground that an alleged slippery condition by itself is insufficient to demonstrate negligence. "[W]ax, polish, or paint to a floor, making the floor slippery, will not support a negligence action unless the manner of application was itself negligent." *Walsh v. Super Value, Imc.*, 76 A.D.3d 371, 374 (2d Dep't 2010). "[H]owever, that the question of whether the wax, polish, or paint was in fact applied in a nonnegligent manner depends, in part, on the knowledge of those who cause the wax, polish, or paint to be applied." *Id* at 374-375. East New York relies on *Villa v. Property Resource Center Corp.*, 137 A.D.454 (1st Dep't 2016), where summary judgment was granted in a slip and fall case, which plaintiff claimed was caused by wax on the floor that caused the plaintiff to fall down a flight of stairs. In *Villa,* a superintendent gave testimony that the floor was never waxed and the Appellate Division, First Department held that plaintiff's conclusory claim that she felt wetness on her pants and hand which smelled like "wax or ammonia" was insufficient to defeat defendant's motion for summary judgment.

East New York's reliance on *Villa* is misplaces. In the present case, East New York's witness, Mateo, was not responsible for cleaning or maintenance of the facility. Even if the court were to credit Mateo's testimony, Mateo concedes that the facility's floor was waxed approximately once or twice annually, so the alleged waxy condition does not conflict with the facility's purported maintenance procedure. Additionally, courts have held that summary judgment should be denied where plaintiff claims a wax condition caused the accident, and residue of the wax was found on plaintiff's clothes or person. *See Garrison v. Lockhead Aircraft Service-New York, Inc.*, 24 A.D.2d 998 (2d Dep't 1965). In *Boyea v. Pyramid Champlain Co.*, 251 A.D.2d 855 (3rd Dep't 1998), the Appellate Division, Third Department held that plaintiff's submission of photos of stains on the leg and seat of her pants was sufficient to raise a triable issue of fact as to whether defendant's application of wax to the floor was negligent. In *Ullman v. Cohn,* 248 A.D.2d 200 (1st Dep't 1998), the Appellate Division, First Department held that summary judgment should have been denied where after plaintiff fell down stairs, plaintiff's daughter ran her hand over the stairs and

"found it to have an accumulation of a waxy substance encased in the grooves." Plaintiff's daughter also stated that "there was wax on [the plaintiff's] shoes and coat immediately after the fall." Similarly, in *Santos v. Temco Services Industries, Inc.*, 295 A.D.2d 218 (1st Dep't 2002), the Appellate Division, First Department ruled that the testimony of plaintiff and affidavit of plaintiff's witness was adequate to defeat defendant's motion for summary judgment, where plaintiff claimed she slipped on waxy residue on area of flooring that had no warnings or barricades. Moreover, in *Santos,* the First Department found that "issues as to witness credibility are not appropriately resolved on a motion for summary judgment." *Id* at 218-219. Accordingly, East New York's motion for summary judgment is DENIED.

Turning now to the issue of sanctions, East New York moves to strike the complaint, because plaintiff engaged in spoliation by discarding her pants, jacket and shoes. As indicated above, stains on these articles would evidence plaintiff's theory of the case. East New York argues that plaintiff had notice of the significance of these items, because she had submitted a Workers' Compensation claim before she commenced this action. A party that seeks sanctions for spoliation of evidence, pursuant to CPLR 3126, must show: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction; (2) that the evidence was intentionally or negligently destroyed; and (3) that the destroyed evidence was relevant to the party's claim or defense. *Pegasus Aviation I, Inc. v. Varing Logistics S.A.*, 26 N.Y.3d 543, 547 (2015). An obligation to preserve evidence arises when the party having control of the evidence has a reasonable anticipation of litigation, meaning "party is on notice of a credible probability that it will become involved in litigation." *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 44 (1st Dep't 2012). "The determination of a sanction for spoliation is within the broad discretion of the court." *Gotto v. Eusebe-Carter,* 69 A.D.3d 566, 567-568 (2d Dep't 2010). Since "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." *Iannucci v. Rose,* 8 A.D.3d 437, 438 (2d Dep't 2004). "A less severe sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case." *Id.*

In the case at bar, plaintiff meets all the elements for spoliation of evidence under *Pegasus Aviation I, Inc., Supra.* However, East New York submitted no evidence that plaintiff's disposal of her pants, jacket and shoes was willful or contumacious. Nor does East New York demonstrate that it has been severely prejudiced or left without a means to counter plaintiff's claims because these items are lost. ie. Maintenance records, testimony from employee who was responsible for the maintenance of the floor. Accordingly, the branch of the motion for sanctions for spoliation is GRANTED to the extent that the trial court may consider a negative inference charge or other appropriate relief at trial with respect to plaintiff's pants, jacket and shoes. *See Barone v. City of New York,* 52 A.D.630 (2d Dep't 2008) holding that a negative inference charge was the appropriate sanction when a surveillance video was misplaced. For the forgoing reasons it is

ORDERED that the branch of defendant East New York's motion for summary judgment is DENIED; and it is further

ORDERED that the branch of defendant East New York's motion for the imposition of sanctions for spoliation is GRANTED to the extent that defendant may request the trial court to charge the jury with a negative inference charge or other appropriate relief with respect to plaintiff's missing pants, jacket and shoes.

This constitutes the decision and order of the court.

ENTER

Hon. Richard J. Montelione, J.S.C.