Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
**Justice**

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IOSIF DAVYDOV,

Plaintiff,

-against-

MARK MARINBACH,

Defendant.

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Index No. 24301/08

Motion
Date May 11, 2010

Motion
Cal. No. 8

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Defendant's motion for an order dismissing plaintiff's Complaint on the grounds that (i) plaintiff is unable to state with specificity what caused his alleged accident; (ii) defendant was an out-of-possession landlord with no contractual obligation to maintain the staircase involved in plaintiff's accident; (iii) defendant did not create the condition that caused plaintiff's accident and did not have actual or constructive notice of any hazardous condition; and (iv) the sole proximate cause of plaintiff's accident was his reckless conduct in attempting to jump down six or seven steps.

This is a negligence action to recover for personal injuries resulting from an alleged trip and fall on an interior staircase which occurred on July 5, 2007. Pursuant to plaintiff's Bill of Particulars, as he was descending the staircase located in the premises known as 221 Hempstead Turnpike, he tripped as the result of a defective, torn, misplaced, curled floor mat thereat.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman,* 278 AD2d 811 [4th Dept 2000]).

Defendant established a prima facie case that there are no triable issues of fact. In support of the motion, defendant presented, inter alia, the examination before trial transcript testimony of non-party witness, Glenn Draudt, a former co-worker of plaintiff, the examination before trial transcript testimony of Dennis DioGuardi, a former co-worker of plaintiff, the examination before trial transcript testimony of defendant who testified that: he is the sole-shareholder of Nu-Life, that Nu-Life did not own the subject building, that he owns the building in his personal capacity, that there was a lease for Nu-Life's occupancy of the building, via which plaintiff's employer, Nu-Life, not defendant, was responsible for the maintenance of the staircase involved in plaintiff's accident. Non-party witness, Glenn Draudt testified that he observed plaintiff jump down the steps, that he was walking down the stairway, when plaintiff hurried past him and jumped from about six or seven steps from the bottom, landing poorly and injuring himself, that there was no debris on the stairwell, and no problem with the lighting, and that plaintiff leaped down the steps. Non-Party witness, Dennis DioGuardi, testifies that he was walking down the stairs, when

plaintiff passed him and jumped down the last seven steps injuring his leg, there was no debris on the stairway and there was no problem with lighting, and there was no mat lying over the bottom step at the time of plaintiff's accident; and plaintiff's own examination before trial transcript testimony, wherein when plaintiff was asked what he slipped on, he said "I don't know. I cannot say."

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff presents the examination before trial transcript testimony of plaintiff himself; the examination before trial transcript testimony of defendant himself; and an affidavit of the plaintiff himself wherein the plaintiff avers that: "When I was approximately five steps from the bottom, my left foot slipped. After I began to slip, I could not plant my right foot at the bottom of the steps because a loose mat was draped over the steps at the bottom. . . Contact with this mat caused my right foot to twist." In his affidavit, plaintiff also avers that: "On at least 10 occasions prior to my accident I saw the mat draped over the bottom steps. For 2-3 months prior to my accident the mat was not affixed or attached to the floor in any manner. Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury." (*Trincere v. County of Suffolk*, 90 NY2d 976 [1997]). Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendant had either actual or constructive notice of a defective condition, whether defendant created a defective condition causing plaintiff's accident, and whether defendant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant's motion for summary judgment is denied.

That branch of plaintiff's cross motion for an order striking defendant's Answer pursuant to CPLR 3126 due to their failure to preserve crucial evidence is hereby denied.

Plaintiff contends that defendant testified at his examination before trial that there was video surveillance that captured the plaintiff's accident, which surveillance runs on a 24-hour loop, and that defendant testified that surveillance showing the accident was not preserved because . . .what happened was nothing, no big deal, and there was no reason that anybody saw to keep a copy of the tape and it just records over every 24 hours." Plaintiff also contends that defendant testified that

the video images were digitally recorded, with the images stored on a computer, but less than one week prior to his examination before trial, defendant replaced the hard drive that contained the images of the subject accident. Defendant concedes that for at least 10 months prior to his EBT, he was aware of the lawsuit.

Defendant contends that defendant testified that there was never any footage of plaintiff's accident saved as the surveillance system in place on the date of plaintiff's accident recorded over itself every 24 hours unless footage was saved and stored, which was never done concerning plaintiff's accident. Defendant testified that he did not learn of plaintiff's accident until a week or two after the accident, well after the 24 hour period to retrieve the surveillance before the system recorded over itself. Defendant asserts that since plaintiff can testify at trial about how the accident happened, he has not been left without means to prove his case.

> Spoliation is the destruction of evidence whether intentional or by accident. ... Sanctions for spoliation are appropriate 'where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has had an opportunity to inspect them.' Dismissal of an action, or the striking of pleadings, while severe, is an appropriate remedy when the evidence spoiled is a 'key piece of evidence', (emphasis added) whose destruction precludes inspection by an adverse party. In determining the severity of the spoliation sanction, it is important to ascertain what prejudice if any the party seeking the sanction has incurred by the absence of the spoiled evidence. . . . [I]n cases where the spoiled evidence is not crucial to a litigant's case, such that its absence does not prevent the outright prosecution or defense of a case, preclusion of evidence, rather than outright dismissal of pleadings, is the preferred remedy *(Shea v. Spellman*, 2004 NY Slip Op 50785U, [Sup Ct, Bronx County 2004][internal citations omitted]).

"If the Court in its analysis concludes that because of the

spoiled evidence one party has destroyed critical physical proof, such that its opponents are 'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence', the spoliator's pleading is properly stricken in order to obviate a trial that is 'based on rank swearing contests" (emphasis added) (*Id.*) (Citations omitted). While a spoliator of key evidence can be punished by the striking of its pleading, the court must determine whether such a drastic remedy is necessary as a matter of fundamental fairness, or whether a less drastic sanction is appropriate (*Iannucci v. Rose*, 8 AD3d 437 [2d Dept 2004]).

The main question that must be answered in order to determine whether spoliation sanctions are appropriate is whether the alleged spoliator was on notice of the litigation at the time of the destruction of the evidence (*Hennessy v. Restaurant Associates, Inc.*, 25 AD3d 340 [1st Dept 2006]; *Montiero v. R.D. Werner Co.. Inc.*, 301 AD2d 636 [3d Dept 2003) Such notice creates a duty to preserve the evidence. (*Id.*).

In the instant case, according to defendant the video surveillance system in operation at the time of plaintiff's accident functioned by "recording over itself after a 24 hour period". Defendant asserts that he did not learn of the accident until a week or two after the accident and after the recording system had recorded over itself several times without saving the prior 24 hour recording. Thus, at the time the alleged destruction of the surveillance video, defendant, the alleged spoliator, was not on notice of the litigation. Therefore, defendant's duty to preserve the surveillance video evidence did not arise until after the system's automatic function recorded over it. Plaintiff submitted no evidence to dispute these facts. Furthermore, the alleged spoliation does not leave plaintiff "prejudicially bereft" of the means of prosecuting his case against defendant (*see, Jenkins v. Proto Property Services, LLC*, 54 AD3d 726 [2d Dept 2007]; *Canaan v. Costco Wholesale Membership, Inc.*, 49 AD3d 583 [2d Dept 2008]) as plaintiff can testify at trial about how the accident occurred (*Barone v. City of New York*, 52 AD3d 630 [2d Dept 2008]).

That branch of plaintiff's cross motion for summary judgment is denied as the Court has determined in the main motion that there are triable issues of fact.

This constitutes the decision and order of the Court.

Dated: July 29, 2010

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**Howard G. Lane, J.S.C.**

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