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SHORT FORM ORDER

INDEX No. 08-28734
CAL. No. 10-01803OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-27-11
ADJ. DATE 3-31-11
Mot. Seq. # 001 - MotD
002 - MD

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JOSEPH MESSANA,

Plaintiff,

- against -

SEARS ROEBUCK & CO. d/b/a "SEARS" and JOHN DOE,

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment and cross motion for an order of preclusion; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 26 - 32 ; Answering Affidavits and supporting papers 19 - 23, 33 - 36 ; Replying Affidavits and supporting papers 24 - 25, 37 - 41 ; Other memorandum of law 17 - 18 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against it is granted to the extent of dismissing the plaintiff's second cause of action sounding in premises liability, and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiff Joseph Messana for an order pursuant to CPLR 3126 precluding the defendant from producing or introducing certain evidence at trial or, in the alternative, resolving the issues of notice and the creation of a hazardous condition in the favor of the plaintiff, is denied.

This is an action sounding in negligence and premises liability to recover damages for personal injury allegedly suffered by the plaintiff while at a store owned and operated by defendant Sears Roebuck & Company d/b/a Sears (Sears) located in Commack, New York. On November 23, 2007, the

plaintiff purchased a vacuum at the Sears store. Thereafter, he was directed to the customer pickup window to obtain his purchase. After handing in his receipt indicating payment for the vacuum, a Sears employee emerged from the warehousing area carrying the vacuum box from a single hand-hold or hole in the box located on one of its sides, essentially carrying it in a vertical position. The plaintiff then attempted to carry the box in the same fashion to his motor vehicle. While doing so, the hand-hold in the box ripped, causing the plaintiff's hand to enter further into the box, and injuring his right index finger. It is undisputed that the box was designed with two hand-holds, one on each side, and that it was intended to be carried in a horizontal fashion, using two hands. The complaint herein sets forth two causes of action. In the first, the plaintiff alleges, *inter alia*, that Sear's employee was negligent in carrying the box in the manner that he did, in presenting it to the plaintiff in that manner, and that it negligently hired its employees, failed to properly train its employees, and failed to warn, instruct and assist the plaintiff in the proper carrying of the subject box. In the second, the plaintiff alleges that Sears failed to properly maintain the subject premises, created a dangerous condition on its premises.

Defendant Sears now moves for summary judgment dismissing the complaint on the grounds that there was no defective condition existing at the time of plaintiff's accident, that there is no record of previous incidents of boxes breaking, and that it had no prior notice of the allegedly defective condition. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***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]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

At his deposition, the plaintiff testified that he and his girlfriend, Erin Novak, traveled to the Sears store in Commack to purchase a vacuum. He had never been to that store before, and immediately after choosing a vacuum, he was directed to the customer pickup area on the main floor. A Sears employee brought the vacuum box out from around a counter and placed it next to him. The employee set the box down on its "side." The box appeared new and undamaged. He described the box as approximately three to three and one-half feet tall, and 12 to 15 inches square. The plaintiff testified that he used the four fingers of his right hand to lift the box from a single "cutout" in the topside of the box, and that he moved several feet before the box ripped and started to fall. He instinctively tried to catch the box and his index finger hit the vacuum inside the box, injuring him. He did not know that there was a second "cutout" on the other side of the box until after his accident.

Karen Paccione (Paccione), the loss prevention manager at the Sears store, was deposed on May 8, 2009. She testified that, the day after the plaintiff's accident, she was told what had occurred by Carol Figueroa (Figueroa), one of the loss prevention detectives at the store. She stated that Figueroa, who was in charge of the case, would review the security camera video and burn a DVD of the video to be placed in the loss prevention (LP) file kept by her office. It was Sears policy that customers could choose to have the merchandise that they had purchased brought out to the store or to a merchandise pickup area, and that, if the customer requested it, a Sears employee would assist them in carrying the item to the customer's car. Paccione further testified that it is the job responsibility of Sears employees

to advise customers on the correct way to carry a box, to inform customers of potential dangers, and to keep the customer from getting injured. She stated that, based on the training that she received while working for Sears, the only safe way to carry the subject box is with both "handles," and that one of the risks of lifting the box by one handle is that the box could break. Paccione indicated that, months after the plaintiff's accident, she received an e-mail request from the claims adjuster on the file asking for the DVD containing the video of the plaintiff's accident. She stated that this was the first such request for a DVD that she had received as an employee of Sears. Because she could not make a copy of the DVD in her store, she sent the only copy to the claims adjuster by regular mail. In addition, she indicated that the original video no longer exists because it was stored on a computer hard drive for 30 days and then overwritten.

At her deposition, Figueroa testified that the Sears employee who had helped the plaintiff told her of the accident, and the date and time that it occurred. She was able to find the relevant video footage, reviewed it, and make one copy on a CD. She stated that the video was taken by a camera which covers only a part of the parking lot near the merchandise pick up area. When she reviewed the video, she saw Kevin O'Brien (Kevin), the Sears employee, holding the box with his right hand only. Kevin extended his right arm, and the customer used his right hand to grab the box. The box dropped a little bit, hit the ground, and the customer grabbed it again and walked away out of the camera's view. Figueroa further testified that the box was handed to the customer without being placed on the ground.

Erin Novak (Novak), the plaintiff's girlfriend and a nonparty witness, was deposed on May 24, 2010. She testified that she accompanied the plaintiff to the Sears store in Commack, where a sales associate demonstrated vacuums for them. After they purchased a vacuum, they were directed to a merchandise pickup area. At the pickup area, a Sears employee brought out the vacuum in a box, holding it with one hand in a hole in the top of the box, and placed it on the ground in front of the plaintiff. She described the box as new and undamaged, and standing three to three and one-half feet tall, two to two and one-half feet wide, and one to one and one-half feet deep. The plaintiff put his hand into the hole to lift the box, walked a couple of feet, and his hand went into the box and hit the vacuum inside. She then carried the box to the plaintiff's car and drove him to the hospital. They returned to Sears that night to report the accident and to fill out an accident report.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *also see* ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]; ***Elliot v Long Island Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2007]). In negligence cases, an award of summary judgment is usually inappropriate since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances can rarely be resolved as a matter of law (*see,* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Alotta v City Hospital Center at Elmhurst***, 134 AD2d 391, 520 NYS2d 867 [1987]). Here, Sears submission in support of its motion reveals, *inter alia*, multiple issues of fact regarding whether its employees acted reasonably under the circumstances.

Turning to the cause of action sounding in premises liability, generally, owners have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the

likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]; ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Lee v Bethel First Pentecostal Church of Am.***, 304 AD2d 798, 762 NYS2d 80 [2d Dept 2003]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 434, 739 NYS2d 186 [2d Dept 2002]). The issue of whether a dangerous or defective condition exists on the property of another is generally dependent upon the peculiar circumstances of each case (*see* ***Portanova v Kantlis***, 39 AD3d 731, 833 NYS2d 652 [2d Dept 2007], *citing* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]). Here, the adduced evidence reveals that the plaintiff's injury did not arise from a defective condition on property owned and operated by Sears.

Accordingly, Sears' motion for summary judgment dismissing the complaint against it is granted to the extent of dismissing the plaintiff's second cause of action sounding in premises liability, and is otherwise denied.

The plaintiff cross-moves for an order pursuant to CPLR 3126 precluding Sears from producing or introducing evidence at trial contesting that Kevin O'Brien (O'Brien) had actual notice that the box was ripping when he handed it to the plaintiff, that O'Brien did not carry and walk with the box in a manner that weakened it, and/or offering evidence concerning the manner in which O'Brien presented the box to the plaintiff. In the alternative, the plaintiff asks this Court to resolve the issues of notice and creation of a hazardous condition in his favor which, it is admitted, essentially amounts to an order of preclusion. The plaintiff bases his claim for spoliation of evidence on the fact that the DVD/CD created by Figueroa, and mailed by Paccione to the claims adjuster, was never received by the addressee and is now unavailable.

A party seeking the drastic sanction of striking a pleading or preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Conciatori v Port Auth. of N.Y. & N.J.***, 46 AD3d 501, 846 NYS2d 659 [2d Dept 2007]; ***Shapiro v Kurtzman***, 32 AD3d 508, 820 NYS2d 311 [2d Dept 2006]). However, it is clear that when a party is merely negligent in losing key evidence, the responsible party may be sanctioned under CPLR 3126 (*see* ***Holland v W.M. Realty Mgt.***, 64 AD3d 627, 629, 883 NYS2d 555 [2d Dept 2009]; ***Ingoglia v Barnes & Noble Coll. Booksellers***, 48 AD3d 636, 637, 852 NYS2d 337 [2d Dept 2008]).

The determination of spoliation sanctions lies within the broad discretion of the court (***Dennis v City of New York***, 18 AD3d 599, 795 NYS2d 615 [2d Dept 2005]). In the present case, the plaintiff has failed to demonstrate that the loss of the video was the result of intentional spoliation. Therefore, the drastic sanction of precluding Sears from offering evidence on the subject issues is inappropriate. In addition, considering the testimony by Figueroa as to what the video contained, it is not clear that the loss of the video would resolve the relevant issues in this action. The affidavits submitted in support of the plaintiff's cross motion contain conclusory statements regarding the issues that would be resolved by

the subject video, or raise issues that are no longer relevant considering the Court's dismissal of the plaintiff's second cause of action herein. Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or even no sanction at all, may be appropriate (*see* ***Denoyelles v Gallagher***, 40 AD3d 1027, 834 NYS2d 868 [2d Dept 2007]; ***E.W. Howell Co., Inc. v S.A.F. La Sala Corp.***, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]; ***De Los Santos v Polanco***, 21 AD3d 397, 799 NYS2d 776 [2d Dept 2005]; ***Iannucci v Rose***, 8 AD3d 437, 778 NYS2d 525 [2d Dept 2004]).

The Court notes that the affidavits of Melissa Sullivan and Carl Cephus, from the office of the claims adjuster, submitted in support of Sears' motion for summary judgment, and the affidavit of Michael Herren, the manager of loss prevention technology at Sears, submitted in opposition to the plaintiff's cross motion, have not been considered herein. The subject affidavits are deficient on their face in that they were notarized in the State of Illinois, and they were not accompanied by certificates verifying that the manner in which they were taken conforms with Illinois law (*see* CPLR 306 [d], 2309 [c]; Real Property Law § 299-a [1]; ***PRA III v Gonzalez***, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]; ***Barbaro v Eastman Kodak Co.***, 26 Misc3d 1224A, 2010 NY Slip Op 50246U [Sup Ct, Nassau County 2010]; ***Discover Bank v Kagan***, 8 Misc 3d 134[A], 803 NYS2d 18 [App Term, 1st Dept 2005]; ***Ford Motor Credit Co. v Prestige Gown Cleaning Serv.***, 193 Misc 2d 262, 748 NYS2d 235 [Civ Ct, Queen's County 2002]). Absent a certificate of conformity, the affidavits are, in effect, unsworn (*see* ***Worldwide Asset Purch. v Simpson***, 17 Misc 3d 1128A, 851 NYS2d 75 [Auburn City Ct 2007]).

Accordingly, the Court declines to preclude Sears from offering any evidence as to the relevant issues in this action, and the plaintiff's cross motion is denied.

Dated: June 15, 2011

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**