

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on November 4, 2005, when she was struck by a cart (U-boat), while shopping in Bogopa's supermarket. While it is undisputed that plaintiff was struck by the U-boat, it is not clear from the record whether the cart was being pushed by an employee of Bogopa or by Zheng, an employee of Lucky Star. Plaintiff seeks to dismiss or alternatively to sever the third-party complaint, to amend the complaint in the main action to name third-party defendants as direct defendants, and for a lesser burden of proof under the Noseworthy doctrine. The third-party defendants cross-move to dismiss the third-party action and plaintiff cross-moves to strike Bogopa's answer. Bogopa opposes the motion and cross motion to dismiss the third-party complaint.

Motion to Dismiss/Sever Third-Party Complaint

The motion to dismiss the third-party complaint is denied as plaintiff cites no proper grounds for the same.

The motion to sever, in the alternative, is granted. Severance of a third-party action is within the discretion of the trial court (Andresakis v Lynn, 236 AD2d 252 [1997]). However, severance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced. (Id.) To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together (Shanley v Callanan Indus., 54 NY2d 52 [1981]), such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury (Dolce v Jones, 145 AD2d 594 [1988]). In a case where the main action was trial-ready but still-outstanding discovery on the third-party action would unreasonably delay bringing the plaintiff's case to trial, a joint trial of the main and the third-party actions could prejudice the plaintiff (Pena v City of New York, 222 AD2d 233 [1995]). Here, the third-party action was not commenced until over two years after commencement of the main action and the now eighty-one year old plaintiff fears substantial prejudice if the two actions are tried together.

Plaintiff also argues that Bogopa learned the identity of third-party defendants such that Bogopa could have commenced the third-party action earlier, and that their delay was unnecessary. While plaintiff did not know the name of the employee who allegedly pushed the cart into her, an incident report prepared by Bogopa indicates that plaintiff was struck by a cart pushed by another

customer; and at examination before trial, store employee Silvia Vasquez testified that this other customer was an employee of a local Chinese restaurant (Lucky Star), and that she presented this customer's name and work address on a piece of paper which Bogopa's attorney confiscated and would not allow it to be marked by the court reporter. Subsequently, however, on September 23, 2007, defense counsel produced a piece of paper and alleged the same to be the paper produced but not marked at the Vasquez deposition. The paper contained the name of the customer who allegedly pushed the cart into plaintiff, his cellular telephone number and the restaurant name and address. The paper containing the said information was obtained by Bogopa on the date of the occurrence.

Moreover, in its letter dated January 30, 2006, York Claims Service, Inc., on behalf of Bogopa disclaimed coverages as follows:

"We have carefully examined the circumstances surrounding the alleged occurrence of November 18, 2005, and we have sufficient information to make a proper decision regarding your client We find no liability against the insured. As reported, your client sustained injury by another customer. In your client's statement, she reported that another customer pushed her to the floor."

Furthermore, CPLR 1007 requires that "[t]he defendant shall serve a copy of such third-party complaint upon plaintiff's attorney simultaneously upon issuance of service of the third-party complaint on third-party defendant." Here, plaintiff only learned of the third-party action upon receipt of a letter dated January 28, 2008, from Community Mutual Insurance Company, on behalf of third-party defendants. Also, plaintiff was served with the verified answer to the third-party complaint and, under the same cover, said answer contains numerous discovery demands and a notice for deposition of plaintiff. This may result in third-party defendant moving to strike plaintiff's note of issue.

The compliance conference order of Justice Ritholtz dated November 14, 2007, provides that "any further third-party actions shall be commenced promptly upon discovery of the identity of the third-party defendants but no more than thirty (30) days after the completion of depositions, unless for good cause show." Plaintiff submits that defendant failed to comply with the said order; although Bogopa knew from the outset that it would blame Lucky Star and Zheng, Bogopa did not commence the third-party action until after plaintiff was deposed and had submitted to a defense physical

and numerous depositions were conducted. After Bogopa deposed Zheng as a non-party witness on November 30, 2007, it waited to purchase an index number and or file the third-party summons and complaint until January 10, 2008.

These circumstances (see Freeland v New York Communications Ctr. Assocs., 193 AD2d 511 [1993]; Miro v Branford House, 174 AD2d 363 [1991]), together with the delays that will necessarily attend prosecution of the third-party action, including third-party defendants' own need for disclosure, warrant a severance of the third-party action in order to avoid prejudice to plaintiff (see Attie v City of New York, 221 AD2d 274 [1995]). While the main and third-party actions do involve common issues, any prejudice thereby caused to Bogopa is less than the prejudice caused to plaintiff by further delay (see Pena v City of New York, 222 AD2d 233 [1995]). In the latter regard, a judgment against Bogopa in the main action will not impede its ability to obtain a judgment against third-party defendants in a severed third-party action (see Ravo v Rogatnick, 70 NY2d 305 [1987]).

Motion to Strike

A videotape of the area where the incident occurred was allegedly in existence at some point but not saved. Pursuant to stipulation, defendant was to provide, inter alia, an affidavit regarding video surveillance cameras indicating the details of the search, location, and stating if the location of plaintiff's fall was in the view of the camera and, if cameras did cover the area of the fall, an explanation was to be provided as to what happened to the video. Plaintiff moves to strike defendant's answer based upon defendant's failure to comply with the said order. Alternatively, plaintiff seeks a PJI missing evidence charge.

The Kenny Shin affidavit states that a search was made to determine if videotapes exist, specifically showing the location of the supermarket near the cashiers, bag check area and exit doors. The affiant went on to state that "[he] reviewed the surveillance camera angles and determined that a surveillance camera does capture portions of the front area by the cashiers and exist; that [he] personally searched the files in the managerial office located inside the supermarket where any such videos would be maintained and have determined that no videos were extracted and saved from November 4, 2005." Furthermore, Shin states that "the surveillance camera videos are automatically overwritten every ten days unless the camera images are extracted and saved onto a video storage device."

Plaintiff alleges that she was struck by an overloaded cart, piled high with boxes, pushed by an employee of Bogopa. Defendant/third-party plaintiff Bogopa contends that it was another customer, a Mr. Zheng, buying wholesale in bulk for a Chinese restaurant, that pushed a store shopping cart into plaintiff. Defendants in the main action and defendants in the third-party action contend that plaintiff does not know what caused her to fall. Plaintiff contends that whether it was an employee of Bogopa or Lucky Star who was pushing the cart that struck her, Bogopa would still be liable; that Bogopa's bill of particulars alleges a litany of actions by Zheng constituting negligent operation of the shopping cart and, in any event, Bogopa's store manager admitted that it was part of the supermarket's duty to assist customers in piloting carts so as to prevent injuries to other customers.

It is well established that in order to invoke the drastic remedy of striking a pleading pursuant to CPLR 3126 for noncompliance with a court order for disclosure, the court must determine that the parties' failure to comply was the result of willful, deliberate and contumacious conduct or its equivalent (see Scharlack v Richmond Mem. Hosp., 127 AD2d 580 [1987]; Horowitz v Camp Cedarhurst & Town & Country Day School, 119 AD2d 548 [1986]; Battaglia v Hofmeister, 100 AD2d 833 [1984]). In seeking such relief, plaintiff must demonstrate that the defendants "destroy[ed] essential physical evidence" leaving the plaintiff without appropriate means to confront a claim with incisive evidence (Foncette v LA Express, 295 AD2d 471, 472 [2002]; see also DiDomenico v C & S Aeromatik Supplies, 252 AD2d 41 [1998]; Marro v St. Vincent's Hosp. & Med. Ctr. of N.Y., 294 AD2d 341 [2002]). Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading (Madison Ave. Caviarateria v Hartford Steam Boiler Inspection & Ins. Co., 2 AD3d 793, 796 [2003]; see also Kirschen v Marino, 16 AD3d 555 [2005]). An answer may be stricken by reason of spoliation of evidence where there is a clear showing that the party seeking that evidence is "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (Foncette v LA Express, 295 AD2d 471 [2002], quoting New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec., 280 AD2d 652, 653 [2001]). The determination of spoliation sanctions is within the broad discretion of the court (Denoyelles v Gallagher, 40 AD3d 1027 [2007] [internal citations omitted]). In view of the circumstances, the court concludes that the sanction of striking Bogopa's answer is inappropriate (see Zletz v Wetanson, 67 NY2d 711 [1986]).

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 or defense (see e.g. Barnes v Paulin, 52 AD3d 754 [2008]). Here, the branch of the cross motion which seeks a missing evidence charge at trial is granted to the extent of allowing an adverse inference to be drawn against the defendant at trial, as the missing evidence does not deprive plaintiff of the ability to establish her case (see Yechieli v Glissen Chem. Co., Inc., 40 AD3d 988 [2007]; E.W. Howell Co., Inc. v S.A.F. La Sala Corp., 36 AD3d 653 [2007]; Ifraimov v Phoenix Indus. Gas, 4 AD3d 332 [2004]; Allstate Ins. Co. v Kearns, 309 AD2d 776 [2003]; Marro v St. Vincent's Hosp. & Med. Ctr. of N.Y., 294 AD2d 341 [2002]). Indeed the record indicates that an incident report was prepared on the date of the said accident, which can be produced along with other evidence to document the happening of events. Accordingly, the cross motion to strike is denied; the branch of the cross motion which seeks a missing evidence charge is granted.

The branch of the motion which seeks to amend the complaint to name the third-party defendants as direct defendants is denied. A party may amend her pleadings once by right before the time to serve a responsive pleading expires or within twenty (20) days after the service of the responsive pleading (CPLR 3025[a]). Thereafter, plaintiff must seek leave of the Court or a stipulation of the parties (CPLR 3025[b]). In determining whether plaintiff may amend her complaint, the Court considers the merits of the proposed amendment as well as prejudice to the adverse parties (see Sidor v Zuhoski, 257 AD2d 564 [1999]). Moreover, on an application, pursuant to CPLR 3211 (subd. [e]), for leave to serve an amended pleading, it is incumbent on a party applying for such relief not only to submit a proposed pleading supplying deficiencies in pleading but also evidence, by affidavit that could properly be considered upon a motion for summary judgment, which satisfies the court that the moving party has good ground to support the cause of action (see Cushman v Wakefield, Inc. v John David, Inc., 25 AD2d 133 [1966]). It is not enough that a party may be able to state a cause of action; there must be some evidentiary showing that the claim can be supported. Here, plaintiff has not complied with these requirements.

To date, there has been substantial discovery exchanged. To wit, plaintiff has been deposed, along with six employees of Bogopa and Zheng was deposed before the commencement of the third-party action, as a non-witness. Neither plaintiff nor Bogopa can identify Lucky Star or Zheng as the cause of plaintiff's accident. Plaintiff was allegedly struck from behind with a Bogopa shopping cart and did not see the cart coming toward her before the

accident. Also, plaintiff was present at Zheng's deposition and did not recognize Zheng as the person pushing a cart that struck her.

The branch of plaintiff's cross motion which seeks a lesser burden under the Noseworthy doctrine is denied. Aside from citing her age, plaintiff has provided no evidence to support her request. The Noseworthy doctrine may only be applied when a plaintiff demonstrates by clear and convincing (medical) evidence, that the injuries alleged in the lawsuit caused plaintiff to suffer amnesia or a loss of recall of the happening of the accident (see Schechter v Klanfer, 28 NY2d 228 [1971]; Noseworthy v New York, 298 NY 76 [1948]). Specifically, "the limitation that the accident must have been a substantial factor in causing the loss of memory is predicated on the rationale of the Noseworthy case, which is not merely plaintiff's inability to present proof, but the unfairness of allowing the defendant, who has knowledge of the facts, to benefit by standing mute when plaintiff's inability results from defendant's acts" (Schechter v Klanfer, supra at 232).

Furthermore, it is well settled that "[a]bsent any medical proof of amnesia ... or causation [the] plaintiff will not be entitled to the more lenient standard of proof" (McGuire v Laier, 281 AD2d 401 [2001], citing Costa v Hicks, 98 AD2d 137, 146 [1983]; see also, Sawyer v Dreis & Krump Mfg. Co., 67 NY2d 328 [1986]; Nahvi v Urban, 259 AD2d 740, 741 [1999]).

Cross Motion

The cross motion by Lucky Star and Zheng for summary judgment in their favor dismissing the third-party complaint is denied. While these defendant submit that they were not involved in plaintiff's mishap except to the extent that Zheng stopped to inquire and assist plaintiff after her fall, plaintiff maintains that Zheng's cart may have struck her. In addition, Susan Chicaisa, a former employee of Bogopa, testified that she was working at the baggage check area near the exit door at the time of the incident; that prior to the accident, plaintiff approached Chicaisa for the returned of her checked items; that Chicaisa returned plaintiff's items and turned to help another customer; approximately one and a half minutes later, Chicaisa heard someone say that a person had fallen; when Chicaisa turned around, she observed plaintiff on the floor approximately two or three feet in front of Zheng's shopping cart; Zheng was standing behind the card, and that other customers had told Chicaisa that Zheng had struck plaintiff with his cart. Recognizing, as the court must, that summary judgment must be denied if issues of credibility remain (see Mounsey v Mounsey, 40 AD3d 1293 [2007]), and giving plaintiff

as the nonmoving party, the benefit of all favorable inferences, the court finds that triable issues of fact remain as to who struck plaintiff with the cart causing her to fall in the supermarket.

Conclusion

The motion to dismiss the third-party complaint is denied. The motion to sever the third-party complaint is granted.

The branch of the cross motion by plaintiff which is to strike defendant's answer is denied. The branch of the cross motion which is to amend the complaint to name the third-party defendants as direct defendants is denied. The branch of the cross motion by plaintiff for a lesser burden of proof under the Noseworthy doctrine is denied.

The cross motion by Lucky Star and Zheng to dismiss the third-party complaint is denied.

Dated: September 8, 2008

J.S.C.