To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

----------x
MARY E. RUTLEDGE,

Plaintiff,

DECISION AND ORDER
Index No. 54497/2013
Motion Sequence 2 & 3

-against-

THE STOP AND SHOP SUPERMARKET CO., LLC AHOLD USA, INC., KEEBLER CO., KELLOG USA, INC., and JOHN DOE,

Defendants.
----------x

The following papers were considered on the plaintiff's motion seeking an order granting it summary judgment, dismissal of the defendants' affirmative defenses and sanctions for spoilation; and on the defendants' motion seeking an order granting it summary judgment:

PAPERS	**NUMBERED**
Notice of Motion/Affirmation/Exhibits A-K	1-13
Affirmation in Opposition	14
Reply Affirmation/Exhibits A-B	15-17
Notice of Cross-Motion/Affirmation/Exhibits A-I	18-28
Affirmation in Opposition to Cross-Motion/Exhibits a-e	29-34
Reply Affirmation on Cross-Motion/Exhibits A-B	35-37

Based on the foregoing papers, the plaintiff's motion is granted in part and denied in part and the defendant's motion is denied.

This is a personal injury action asserting negligence against the defendants regarding an incident that occurred at the Stop and Shop Supermarket on September 25, 2012. The plaintiff alleges that she was shopping for groceries, when an employee of the Keebler Co/Kellogg USA, Inc. was using a U-boat owned by the Stop and Shop Co.("Stop&Shop"). The plaintiff alleges that the U-boat was loaded with cases of products and that the employee negligently failed to secure said load and failed to avoid the plaintiff, causing approximately three cases to fall from the top of the U-boat, striking the plaintiff on her left shoulder, arm, hip, leg and causing serious injury to the plaintiff.

The plaintiff commenced this action by filing a Summons and Complaint on March 29, 2013 against the defendants Stop & Shop and Ahold USA, Inc. ("Ahold"). Such defendants interposed an Answer, with seven Affirmative Defenses, on May 17, 2013. The plaintiff then commenced a separate action against the defendants Keebler Company, Kellogg USA, Inc. ("Keebler & Kellogg"), and John Doe, on January 20, 2014. Keebler & Kellogg interposed an Answer with fourteen Affirmative Defenses, on March 17, 2014. The two matters were subsequently consolidated under index number 54497/2013 by Stipulation to Consolidate, which was so ordered by the Court (Hon. Lefkowitz) on August 4, 2014.

The parties participated in and completed discovery and the Court issued a Trial Readiness Order, requiring the plaintiff to serve and file a Note of Issue and Certificate of Readiness within twenty days of the entry of the Order and directing that any motion

for summary judgment be served within sixty days following the filing of the Note of Issue, with opposition papers to be served within thirty days of service of the motion papers and reply papers, if any, to be served within ten days following service of any opposition papers.

Pursuant to the Order, the plaintiff filed the Note of Issue on February 3, 2015 and a motion for summary judgment on April 3, 2015. The defendants (Stop & Shop, Ahold, Keebler & Kellogg) filed a cross-motion, also seeking summary judgment and dismissal of the Complaint.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979). A failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez,* 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718.

The plaintiff argues that she is entitled to summary judgment on her negligence claim, based upon the doctrine of *"res ipsa loquitur"*. When this doctrine is invoked, 'an inference of negligence may be drawn solely from the happening of the accident upon the theory that "certain occurrences contain within themselves a sufficient basis for an inference of negligence"' *Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 1204, 501 N.Y.S.2d 784, 788 (1986). "Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence. *Id.* 'In New York it is the general rule that submission of the case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff"' *Id.* A plaintiff may win summary judgment, only in the rarest of res ipsa loquitur cases, which "would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable. *Id.*

Here, there are questions of fact as to whether the U-boats were under the exclusive control of the plaintiff prior to being used to carry the cases, some of which allegedly fell onto the plaintiff. Therefore, the Court denies summary judgment based upon res ipsa loquitur.

The plaintiff argues that even if the res ipsa loquitur theory is not satisfied, the plaintiff is entitled to summary judgment based upon a general negligence theory. 'To establish a prima facie case of negligence, a plaintiff must "demonstrate the existence of a dangerous or defective condition that caused her injuries, and that the defendants either created or had actual or constructive notice of that condition"' *Caldwell v. Pathmark Stores, Inc.*, 29 A.D.3d 847, 816 N.Y.S.2d 514, 515 (2d Dept. 2006).

Here, the employee, Medina who was operating the U-boat, testified that one of the wheels on the U-boat was sticky causing the load to shake slightly and that the slightly shaking load caused the product to fall from the U-boat. The defendants argue that they had no actual notice of the dangerous condition because there is no evidence that they created the sticky wheel and that all of the U-boats were accessible and available to outside vendors. While such argument succeeds on the res ipsa loquitur theory, it fails here. Although, the defendants may not have actually created the sticky wheel, the fact is that the defendants' employee, Medina testified that the wheel was sticky, that he observed that the wheel was sticky and that the sticky wheel was causing the load to slightly shake. However, even though Medina noticed the wheel was shaking, there is a question of fact as to if Medina noticed the shaky wheel in sufficient time to put him and defendants on notice of the dangerous condition. Although, Medina noticed the shaky wheel, he may not have noticed it with sufficient time to stop using the U- boat and prevent the accident. Therefore, the Court denies the plaintiff's motion for summary judgment.

Since the Court has found issues of fact on the plaintiff's motion for summary judgment, the Court also denies the defendants' motion for summary judgment for the same reason.[1]

The Court now turns to the plaintiff's request to dismiss the defendants' affirmative defenses. The first to be addressed is the assumption of risk defense. It cannot be construed, by any stretch of the imagination, that the plaintiff assumes a risk of injury by shopping in a supermarket. That defense is appropriate when a plaintiff was engaging in dangerous activities and was aware of the risk involved. Such is not the case here. Therefore, this affirmative defense is dismissed. The second defense addressed is culpable conduct/contributory negligence of the plaintiff. In this case, the plaintiff did not contribute in any way to the falling of the cases, either by reaching for one of them or climbing on anything to make the cases fall on her. She was simply shopping in the supermarket and in the vicinity of the U-boat. Additionally, the employee, Medina testified that the plaintiff did not hit the U-boat to cause the cases to fall. Therefore, this affirmative defense is dismissed. The defense of statute of limitations is also dismissed, since the plaintiff asserts claims for negligence and negligent hiring and retention, which both have three year statute of limitations.

---

[1]"An untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" *Grande v. Peteroy*, 39 A.D.3d 590, 591-592, 833 N.Y.S.2d 615, 616 (2d Dept. 2007). Since the issues in the defendants' motion are nearly identical to that sought by the timely motion, this Court considered the defendants' motion. The plaintiff's opposition was also considered, since the Trial Readiness Order provided for thirty days to file opposition papers to any motion for summary judgment.

Lastly, the plaintiff argues that she is entitled to sanctions for the spoilation of evidence.

> "A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence ... before the adversary ha[d] an opportunity to inspect them', thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice." _*Kirschen v. Marino*, 16 A.D.3d 555, 792 N.Y.S.2d 171 (2nd Dept., 2005), *quoting*, *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173, 666 N.Y.S.2d 609 (1st Dept., 1997) (other citations omitted)

Where spoliation occurs, the decision to impose sanctions on the guilty party lies within the sound discretion of the trial court; discretion predicated upon the two-fold considerations of whether the sanctions are warranted, in the first instance, and if so the degree of the severity, *Dennis v. City of New* York, 18 A.D.3d 599 (2d Dept.2005]; *Barahona v. Trustees of Columbia University in the City of New York*, 16 A.D.3d 445 (2d Dept.2005); *Allstate Ins, Co. v. Kearns,* 309 A.D.2d 776, 765 (2d Dept.2003).

In exercising such discretion, sanctions have been held appropriate "even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoilator became a party [but] was on notice that the evidence might be needed for future litigation". *DiMonenico v. C & S Aeromatic Supplies,* 252 A.D.2d 41,53 (2d Dept.1998); *Iannucci v. Rose*, 8 A.D.3d 437 (2d Dept.2004); *Favish v. Tepler*, 294 A.D.2d 396 (2d Dept.2002); *Baglio*, supra.

Although courts are reluctant to dismiss a pleading absent willful or contumacious conduct, it may be warranted as a "matter of elementary fairness". *Favish v. Tepler*, 294 A.D.2d 396, 741 N.Y.S.2d 910(2nd Dept., 2002), *citing*, *Puccia v. Farley*, 261 A.D.2d 83,

85, 699 N.Y.S.2d 576 (3d Dept., 1999). Dismissal has been held to be appropriate if the evidence which was negligently disposed was crucial to the underlying action and the adversary was not given an opportunity for inspection. *Puccia v. Farley, supra.* Nevertheless, the striking of a party's pleading is a drastic remedy and should be used sparingly and only in the most severe cases. Thus, in order to warrant the imposition of such a drastic sanction, the destroyed evidence must have been so essential to the movant's case that the party is irreparably prejudiced, that their cause of action or defense is "fatally compromised" and [that] such party is "prejudicially bereft of appropriate means of presenting [or confronting] a claim with incisive evidence" (*DiMonenico, supra* at 53; *See also, Canaan v. Costco Wholesale Membership, Inc.,* 49 A.D.3d 583 [2d Dept.2008], which are facts not present in the case at bar.

Here, the plaintiff requests striking of the defendants' Answer as a sanction. The plaintiff contends that both the notes that the Stop & Shop employee, Ms. Colon took on a pad, when the plaintiff reported the incident to her that same day and the video surveillance of the incident were not preserved by the defendants, despite the fact that the defendant Stop & Shop employs a company specifically to assist its employees in making accident reports with regard to claims by customers and was clearly on notice of the importance of the videotape evidence which would depict exactly how the incident occurred. The plaintiff contends that this is a clear case of spoilation, requiring a sanction.

The Court however, declines to impose such a sanction. The destroyed evidence is not so essential to the plaintiff's case that she is irreparably prejudiced, or cause of action fatally compromised nor is the plaintiff prejudicially bereft of appropriate means of

presenting a claim with incisive evidence. *DiMonenico v. C & S Aeromatic Supplies,* 252 A.D.2d 41,53 (2d Dept.1998). While the video surveillance and the employee's notes would have been a welcome addition to the plaintiff's case, the plaintiff is well able to make her case without such evidence, by her own testimony and the testimony of witnesses, including the defendants' employee(s). Therefore, the plaintiff's request for sanctions, is denied.

The parties are directed to appear before the Settlement Conference Part, on October 27, 2015 at 9:15am in Courtroom 1600. To the extent any relief requested in Motion Sequence 2 and 3 was not addressed by the Court, it is hereby deemed denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2015

HON. SAM D. WALKER, J.S.C.