2020 WL 1035692

District Court of Appeal of Florida, Third District.

Hortensia PENA, Appellant,

v.

BI-LO HOLDINGS, LLC, etc., et al., Appellees.

No. 3D19-0581

|

Opinion filed March 4, 2020.

Synopsis

Background: Patron, who slipped and fell, striking her head on the floor, brought premises-liability action against owner of supermarket. The Circuit Court, Miami-Dade County, Rodolfo A. Ruiz, J., granted owner's motion for summary judgment. Patron appealed.

Holdings: The District Court of Appeal, Miller, J., held that:

[1] owner's failure to maintain hourly inspection logs and direct security cameras to record the area of patron's slip and fall did not constitute spoliation of evidence and thus did not warrant adverse-inference jury instruction;

[2] owner's failure to retain bag of rice did not constitute spoliation of evidence and thus did not warrant adverse-inference jury instruction; and

[3] customer service manager's failure to identify employee in photograph that was taken after patron's fall did not show nefarious intent and thus did not warrant adverse-inference jury instruction regarding spoliation of evidence.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Request for Instructions.

West Headnotes (13)

[1] Appeal and Error Instructions

Appellate court reviews a trial court's decision to grant or deny an adverse inference jury instruction under an abuse of discretion standard.

[2] Judgment Absence of issue of fact

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.

[3] Appeal and Error De novo review

Appellate court conducts a de novo review of summary judgment.

[4] Pretrial Procedure Failure to Comply; Sanctions

When a party fails to preserve evidence in its custody the appropriate sanction depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice.

[5] Trial Failure of party to testify or to call witness or produce evidence

Because adverse inferences can invade the province of the jury, adverse-inference jury instructions are reserved for circumstances where the normal discovery procedures have gone seriously awry.

[6] Pretrial Procedure Failure to Disclose; Sanctions

Where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate.

[7] **Torts** Spoliation, Destruction, or Loss of Evidence

The essential reason for a spoliation of evidence claim is its deterrent effect on miscreant defendants, and this purpose is served only when an actual duty owed by a defendant to a plaintiff has been willfully or recklessly disregarded.

[8] **Pretrial Procedure** Failure to Comply; Sanctions

Prior to exercising any leveling mechanism due to spoliation of evidence, a court must address a three-part threshold inquiry: (1) whether the evidence existed at one time, (2) whether the spoliator had a duty to preserve the evidence, and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense.

[9] **Torts** Spoliation, Destruction, or Loss of Evidence

Because a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request.

[10] **Evidence** Presumptions of fact

The adverse inference jury instruction regarding spoliation of evidence does not relieve a party from its burden of proof at trial.

[11] **Trial** Failure of party to testify or to call witness or produce evidence

Failure of supermarket's owner to monitor area where patron slipped and fell by either camera or logged inspections did not constitute spoliation of evidence, and thus adverse-inference jury instruction based on spoliation of evidence was unwarranted in premises-liability action; failure to create evidence did not warrant sanction.

[12] **Trial** Failure of party to testify or to call witness or produce evidence

Failure of supermarket's owner to retain a perforated bag of rice that was observed by patron's sister-in-law on a temporary display after patron slipped and fell did not constitute spoliation of evidence and thus did not entitle patron to an adverse inference jury instruction in premises-liability action, where condition of bag of rice was readily observable and uniformly described by all witnesses.

[13] **Trial** Failure of party to testify or to call witness or produce evidence

Failure of supermarket's customer service manager to identify employee featured in photograph that was taken after patron fell in supermarket did not show nefarious intent and thus did not warrant adverse-inference jury instruction regarding spoliation of evidence in premises-liability action, where photograph depicted only lower leg and foot, attired in dark-colored pant and sneaker, along with bottom of broom, and customer service manager attested that absence of distinguishing characteristics within photograph fatally impeded her ability to identify employee.

An appeal from the Circuit Court for Miami-Dade County, Rodolfo A. Ruiz, Judge. Lower Tribunal No. 18-1667

Attorneys and Law Firms

Law Office of Keith Chasin, and Keith Chasin, for appellant.

Cosio Law Group, and Eduardo Cosio, and Julie Bork Glassman, for appellees.

Before LOGUE, LINDSEY, and MILLER, JJ.

Opinion

MILLER, J.

***1** Hortensia Pena appeals from a final summary judgment rendered in favor of Bi-Lo Holdings, LLC and Winn-Dixie

Stores, Inc. d/b/a Fresco Y Mas (collectively referred to as "Winn-Dixie") in her negligence action below. On appeal, Pena contends the trial court reversibly erred in denying her motion for an adverse inference jury instruction following the purported spoliation of evidence, and that, such inference would have precluded the entry of summary judgment. For the reasons set forth below, we discern no abuse of discretion and affirm.

FACTS AND BACKGROUND

On October 21, 2017, while shopping at a local supermarket with her future sister-in-law, Eduvina Rego, Pena slipped and fell, striking her head on the floor. Rego rushed to her side and observed uncooked rice strewn beneath Pena, ostensibly sourced from a perforated bag perched on a temporary display. She snapped several photographs, one of which purportedly depicted a store employee sweeping up grains of rice. Pena was transported by ambulance to a nearby hospital.

Mere days later, Pena furnished Winn-Dixie with a written request to preserve all video surveillance recorded within the store in the hour surrounding the incident. In early 2018, she filed suit in the lower tribunal, and the parties engaged in discovery.

Ensuing evidentiary exchanges revealed the closed-circuit recording system within the store failed to capture the area in which the mishap occurred. [1] Winn-Dixie either discarded or misplaced the errant bag of rice and did not maintain hourly inspection logs. Further, the identity of the claimed employee depicted in the photograph could not be ascertained.

In late-2018, Winn-Dixie moved for summary judgment, alleging that, as the rice was pristine, admittedly devoid of discoloration, there was no indication it had been present on the floor for a sufficient length of time prior to the fall to impute actual or constructive notice of a dangerous condition. In response, Pena filed a motion seeking to allow the trier of fact to draw an adverse inference. In support thereof, Pena contended that, by failing to direct its surveillance at the scene of the fall, preserve the sack of rice, maintain inspection logs, and identify the unknown employee, Winn-Dixie thwarted her ability to demonstrate notice.

The trial court denied the request for adverse inference and, finding the record lacked any indicia of actual or constructive notice, granted summary judgment in favor of Winn-Dixie. The instant appeal ensued.

STANDARD OF REVIEW

***2** **[1]** **[2]** **[3]** We review the decision to grant or deny an adverse inference jury instruction under an abuse of discretion standard. See Toll v. Korge, 127 So. 3d 883 (Fla. 3d DCA 2013); Lowder v. Econ. Opportunity Family Health Ctr. Inc., 680 So. 2d 1133, 1135 (Fla. 3d DCA 1996). Moreover, "[s]ummary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (citing Menendez v. Palms W. Condo. Ass'n, 736 So. 2d 58 (Fla. 1st DCA 1999)). Thus, we review an order granting summary judgment de novo. Id.

LEGAL ANALYSIS

[4] **[5]** **[6]** **[7]** "[W]hen a party fails to preserve evidence in its custody [the appropriate sanction] depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice." Sponco Mfg., Inc. v. Alcover, 656 So. 2d 629, 630 (Fla. 3d DCA 1995) (citations omitted) (footnote omitted). "Chief among these sanctions are the adverse evidentiary inferences and adverse presumptions found in the case law." Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251, 1256 (Fla. 4th DCA 2003) (citations omitted). "Because adverse inferences can invade the province of the jury, such instructions are reserved for circumstances where the normal discovery procedures have gone seriously awry." Bechtel Corp. v. Batchelor, 250 So. 3d 187, 194 (Fla. 3d DCA 2018). "Where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate." Thomas v. Chase Manhattan Bank, 875 So. 2d 758, 760 (Fla. 4th DCA 2004) (citation omitted). This is because, "[t]he essential reason for a spoliation claim is its deterrent effect on miscreant defendants. This purpose is served only when an actual duty owed by a defendant to a plaintiff has been willfully or recklessly disregarded." Perez v. La Dove, Inc., 964 So. 2d 777, 780 (Fla. 3d DCA 2007) (citations omitted). "[T]he law, in hatred of the spoiler, baffles the destroyer, and thwarts

his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong." Pomeroy v. Benton, 77 Mo. 64, 86 (1882).

[8] **[9]** **[10]** Consequently, prior to "exercising any leveling mechanism due to spoliation of evidence," in Florida, a court must address a three-part threshold inquiry: "1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, and 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense." Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 781 (Fla. 4th DCA 2006) (citing Jordan ex rel. Shealey v. Masters, 821 So. 2d 342, 347 (Fla. 4th DCA 2002)). Moreover, "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request." Gayer v. Fine Line Const. & Elec., Inc., 970 So. 2d 424, 426 (Fla. 4th DCA 2007) (citation omitted). Finally, "[t]he adverse inference instruction does not relieve a party from its burden of proof." Golden Yachts, Inc., 920 So. 2d at 780 (citation omitted).

[11] In the instant case, we wholly embrace the position that upon receipt of the presuit notice, Winn-Dixie was obligated to preserve the surveillance video. Indeed, as was acknowledged by the lower tribunal and fully borne out by the record below, all requested footage was maintained and later furnished in discovery. Nonetheless, existing spoliation jurisprudence does not sanction punishment for the failure to create evidence. Thus, the mere fact that the area of the fall remained unmonitored by either camera or logged inspection cannot serve as a basis for relief. See Osmulski v. Oldsmar Fine Wine, Inc., 93 So. 3d 389, 394 (Fla. 2d DCA 2012) (An adverse inference "allows counsel to argue to the jury the inference that the evidence was *lost* because it was damaging to the opposing party's case.") (emphasis added) (quoting Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc., 881 So. 2d 565, 582 (Fla. 3d DCA 2004)).

***3** **[12]** Pena further asserts the act of failing to retain the bag of rice constituted spoliation. Although it is self-evident that the presuit request solely referenced closed-circuit television footage, there is some precedent supporting the proposition that notification of potential litigation triggers the obligation to preserve crucial evidence. See Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303, 1311-12 (N.D. Fla. 2002) (noting Florida "recognizes a duty to preserve evidence *after* a lawsuit has been filed," and observing that two cases from Florida's Fourth District Court of Appeal "may have expanded that duty to much earlier stages in litigation") (citations omitted); see also Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 127 (S.D. Fla. 1987) ("Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information.") (citation omitted); GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 900 P.2d 323, 325 (1995) ("[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.") (quoting Fire Ins. Exch. v. Zenith Radio Corp., 103 Nev. 648, 747 P.2d 911, 914 (1987)). Nonetheless, here, the record contains only conjecture as to the fate of the bag of rice. Moreover, the condition of the bag was readily observable, and uniformly described by all witnesses, thus, any value associated with retention was speculative. Hence, we cannot conclude the lower court erred in rejecting this ground in support of spoliation.

[13] Finally, Pena contends her stymied and fruitless efforts to identify the store employee featured in her sister-in-law's photograph improperly hampered her ability to prove notice. The photograph in question depicts only a lower leg and foot, attired in a dark-colored pant and sneaker, along with the bottom of a broom. In deposition, Winn-Dixie's customer service manager attested that the absence of distinguishing characteristics within the photograph fatally impeded her ability to identify the employee. Given the lack of any further formal discovery regarding this issue, there is no indication that the lower court overstepped its authority in tacitly rejecting any evidence of nefarious intent.

Accordingly, we reject the contention that the judicial action in denying an adverse inference was "arbitrary, fanciful, or unreasonable [or that] ... no reasonable man [or woman] would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted). As the summary judgment evidence was insufficient to charge Winn-Dixie with notice of a dangerous condition, we affirm the final order under review.

Affirmed.

All Citations

--- So.3d ----, 2020 WL 1035692, 45 Fla. L. Weekly D506

Footnotes

1 Winn-Dixie produced thirty-two individual videos encapsulating events in the two-hour period surrounding the incident. Pena contends, here, that she should have been permitted to inspect the surveillance security system to verify the nonexistence of further relevant footage. The record is devoid of either: (1) evidence contradicting Winn-Dixie's assertion that the fall occurred beyond the reach of the cameras; or (2) any formal request to facilitate inspection. See Fla. R. Civ. P. 1.350.