

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-80393-CIV-
MARRA/MATTHEWMAN

CHI NGUYEN and HUYNH NGUYEN, her
husband,

Plaintiffs,

vs.

COSTCO WHOLESALE CORPORATION, a
Foreign Profit Corporation,

Defendant.

_____ /

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SANCTIONS

COSTCO WHOLESALE CORPORATION responds to the Plaintiffs' Motion for Sanctions [DE44] dated 12/18/2019 as follows:

SUMMARY

1. The Plaintiffs' Motion - which seeks sanctions against Costco alleging "extreme irreversible prejudice" because video from a surveillance camera located at the exit door of Costco "is no longer in existence" - is baseless and violates Rule 11 because the Plaintiffs were aware *before* filing their Motion that:

A. There is no video of CHI NGUYEN's slip-and-fall accident because the store did not have video coverage of the area where she fell.

B. The camera at the exit door did not capture CHI NGUYEN's accident because she fell 30 to 40 feet beyond the exit door camera's field of view.

C. Costco produced a complete and unedited copy of the video from the camera located closest to the fall, which is all the video that was preserved after the accident.

D. There is no additional video to produce.

E. Costco had no duty to preserve any video at all, much less video from a distant camera that did not capture the accident, because there was no written request from the Plaintiffs to preserve video information. [*Osmulski v. Oldsmar Fine Wine, Inc.*, 983 So.3d 389, 383 (Fla. 2d DCA 2012)].

F. The Plaintiffs' Request for Production was limited to "video showing the area of the incident" but there is no such video because no cameras in the store show this area.

G. The Plaintiffs' Motion to Compel sought a copy of the in-store surveillance listed on our Privilege Log, which we produced.

H. The Plaintiffs claim "extreme, irreversible prejudice" but never explain how they are prejudiced.

I. The Plaintiffs' claim of prejudice is baseless because the video we produced shows far more than video from the exit camera could conceivably show: The video produced shows CHI NGUYEN immediately before her accident and then, moments after the accident, the video shows Mrs. Nguyen for approximately 22 additional minutes after she re-enters the video. The video from the exit door camera would show none of this. If preserved, video from the exit door camera would only capture CHI NGUYEN briefly as she walked the last 10 or 12 feet to the exit door and this would have been more than 20 minutes after her accident had already occurred.

Background Discussion

2. CHI NGUYEN's accident occurred as she was walking from the checkout lines towards the exit door. She walked past the Food Court and past the Membership Desk before falling.

3. There is no video footage of CHI NGUYEN's accident because there is no video camera coverage for the location where she fell.¹

4. Because there was no video of the accident itself, the company that adjusts claims for Costco (Gallagher Bassett) asked the store's Administrative Manager (William Vasquez) to preserve video from the camera closest to the location of CHI NGUYEN's incident.²

5. The camera closest to CHI NGUYEN's accident was the camera located behind Membership Desk.³

6. Video footage from the Membership Desk camera was preserved as per the request from Gallagher Bassett.⁴

7. A complete, unedited copy of the Membership Desk video was given to the Plaintiffs last June.

8. The Plaintiffs had the Membership Desk video when they deposed William Vasquez (as well as 5 other Costco employees) on July 19 and they had every opportunity to conduct discovery regarding the store's video system in general and the Membership Desk video in particular at that time.

9. The Membership Desk camera video shows the Plaintiff walking past the Food Court and the Membership Desk on her way from the checkout lines to the exit but it does not

¹ See Second Affidavit of William Vasquez, Exhibit "A," at paragraph 9.

² See Affidavit of Peter Teodo, Exhibit "B" at paragraph 6, and Second Affidavit of William Vasquez, Exhibit "A" at paragraph 10.

³ See Second Affidavit of William Vasquez, Exhibit "A," at paragraph 11.

⁴ See Second Affidavit of William Vasquez, Exhibit "A," at page 12.

capture the accident because CHI NGUYEN fell a few steps after walking out of that camera's field of view at 20:08:34.

10. CHI NGUYEN re-enters the Membership Desk video at approximately 20:09:55, after having already fallen.

11. The Membership Desk video then shows Mrs. Nguyen walking back to the Food Court where she sat at a Food Court table for approximately 20 minutes before getting up at 20:31:15 to leave the store. Mrs. Nguyen walks past the Membership Desk (again) on her way to the exit and Mrs. Nguyen leaves the Membership Desk camera's field of view at 20:31:31. Mrs. Nguyen would have reached the exit door shortly after that.

12. The video camera located at the exit door is focused on an area within approximately 10 to 12 feet of the exit door.⁵

13. If preserved, video from the exit door camera would have captured Mrs. Nguyen briefly as she walked across the camera's 10-to-12-foot field of view at approximately 20:32:00, more than 20 minutes after her accident.

14. The video system at that Costco location had the capacity of storing video data for approximately 30 days after which time the video is automatically overwritten/erased.⁶

15. There was no written request from the Plaintiffs to preserve any video data of the day of the accident before it was automatically overwritten/erased.⁷

16. On February 28, 2019, the Plaintiff served a Request for Production (Exhibit "C"). Paragraph 5 of the Plaintiff's request concerns video and the scope of paragraph 5 is limited to video "showing the area of the incident." There was no video which was responsive to this request

⁵ See Second Affidavit of William Vasquez, Exhibit "A" at paragraph 16.

⁶ See Second Affidavit of William Vasquez, Exhibit "A" at paragraph 10.

⁷ Affidavit of Peter Teodo, Exhibit "B," paragraphs 10-11, and Second Affidavit of William Vasquez, Exhibit "A," at paragraph 19.

because the store's video camera system does not include video coverage of the area where this accident occurred. There are no cameras in store that covered the area where Mrs. Nguyen fell.⁸

17. The exit door camera did not capture the area where the accident occurred because the area of the incident was 38 to 40 feet beyond the exit door camera's field of view.⁹

18. No video from the exit door camera was preserved before it was automatically overwritten.

19. When the Plaintiffs deposed William Vasquez on 7/19/2019, he confirmed that there were no cameras that would "see" where the Plaintiff was located¹⁰ and there were no surveillance cameras that could "take a picture of that area."

20. Mr. Vasquez testified that there was no camera located at the exit door would show where the Plaintiff was located [at the time of her accident].¹¹

21. The Plaintiffs were aware of all of this before filing their Motion for Sanctions because the Plaintiffs made these same claims about the "missing" exit door camera video in opposition to our Motion for Summary Judgment¹², we explained everything in our Reply [DE35] and in our Amended Reply [DE40] both of which included an Affidavit from William Vasquez which confirmed (again) that the exit door camera did not capture CHI NGUYEN's accident because the location where she fell is 50 feet from the exit door camera and the exit door camera only covers approximately 10 to 12 feet of the area inside of the exit door.¹³

Argument

⁸ See Second Affidavit of William Vasquez, Exhibit "A," at paragraph 16.

⁹ See Second Affidavit of William Vasquez, Exhibit "A," at paragraph 16.

¹⁰ See 7/19/19 deposition of William Vasquez, Exhibit "D," at page 5.

¹¹ See 7/19/19 deposition of William Vasquez, Exhibit "D," at page 6.

¹² Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment [DE34].

¹³ The Vasquez Affidavit was attached to our Reply to Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment [DE35] and it was also attached to our Amended Reply to Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment [DE40].

22. The Plaintiffs' Motion for Sanctions relating to video from the exit door camera is baseless and should be denied because there have been no Rule 37 discovery violations: 1) there was never video of the accident because there was no video coverage of that area of the store; 2) there was never video showing "the area of the incident,"¹⁴ which is all the plaintiffs asked for in their Request for Production¹⁵ because there was never video coverage of that area; 3) the exit door video was never specifically requested but it could not have been produced if it had been requested because it was automatically overwritten years ago, there being no written request from the plaintiffs to preserve it; 4) the plaintiffs' Motion to Compel sought production of the in-store surveillance video that we identified in our Privilege Log and we produced that video in its entirety; 5) there is no other video to produce because no other video was preserved: and, 6) we are not in violation of any discovery orders. We will elaborate on some of these points briefly below.

23. The Plaintiffs' Motion for Sanctions complains only about video from the camera "located at the exit of the store" but, as established, the exit door camera did not capture Mrs. Nguyen's accident and it does not cover "the area of the incident" because it is focused on 10 to 12 feet inside of the exit and Mrs. Nguyen's incident occurred 38 to 40 feet beyond the exit door camera's field of view.¹⁶

24. There was no written request from the Plaintiffs to preserve video footage from the exit door camera before it was automatically overwritten and so Costco had no duty to preserve any video at all, much less video from a distant camera that did not capture either the accident or any other meaningful information. *Osmulski v. Oldsmar Fine Wine, Inc.*, 983 So.3d 389,

¹⁴ Paragraph 5 of the Plaintiffs' Request for Production, Exhibit "C."

¹⁵ See Second Affidavit of William Vasquez, Exhibit "A" at paragraphs 8, 9, 17 and 18.

We are not splitting hairs here; we disclosed the only preserved video footage in our 5/10/19 Privilege Log and we provided it in June.

¹⁶ Affidavit of William Vasquez, Exhibit "A," paragraph 16.

393 (Fla. 2d DCA 2012) (“A defendant has no duty to obtain and preserve a copy of any relevant information recorded by a video camera unless a written request to do so has been made by the injured party or the injured party’s representative prior to the point at which the information is lost or destroyed in the normal course of defendant’s video operations.”). There is no legitimate basis to sanction a party under Rule 37 for not preserving video it had no duty to preserve.

25. The Plaintiffs’ Motion for Sanctions is premised on the argument that we did not produce video from the exit door camera despite a representation that we would “provide all requested videotaped surveillance.”¹⁷ The plaintiffs’ implication is that we promised to provide exit door video but reneged. This is misleading. The Plaintiffs’ claim that we represented we would provide “all requested videotaped surveillance” is based on paragraph 3 of our Response to the Order to Show Cause [DE 16] which says that we intended to produce the video which was the subject of the Plaintiffs’ Motion to Compel [DE 11].¹⁸ We did exactly that; the Plaintiffs’ Motion to Compel sought to compel the “in-store surveillance” we listed on our 5/10/19 Privilege Log and we produced a complete and unedited copy of the in-store surveillance identified on our Privilege Log in June. This was the only video preserved from the day of the incident. There is nothing else to produce and there never was.

26. The Plaintiffs’ Motion for Sanctions claims “extreme irreversible prejudice” but the plaintiffs do not identify any prejudice, much less extreme irreversible prejudice.

27. The claim of “extreme irreversible prejudice” is baseless in any event because the “missing” exit door camera video footage would not have captured any meaningful information. If preserved, the exit door camera video footage would not have shown the accident, it would not have shown Mrs. Nguyen in the moments immediately before her accident, and it would not have shown Mrs. Nguyen in the 20 minutes after her accident. Although video from exit door camera would not have shown these things, the Membership Desk video did capture the moments

¹⁷ Plaintiffs’ Motion for Sanctions [DE 44] at paragraph 10.

¹⁸ There is no legitimate dispute about this: The Plaintiffs’ Reply [DE22] acknowledged that our undertaking was to provide the video requested in the Motion to Compel, which was the video listed on our Privilege Log, not “all” video. We produced all existing video.

immediately before Mrs. Nguyen's accident as well as 20 minutes of Mrs. Nguyen after the accident.

28. Rule 37(a) authorizes sanctions pertaining to motions for orders compelling discovery but there is no legitimate basis for sanctions in this regard because we produced the video sought by the plaintiffs' Motion to Compel (i.e., the in-store surveillance video listed on our Privilege Log), the plaintiffs conceded that their Motion to Compel was moot and the court determined the Plaintiffs' Motion to Compel to be moot [DE 23].

29. There is no basis for sanctions pursuant to Rule 37 (b) pertaining to failure to comply with a court order because no court order was violated.

WHEREFORE, this Defendant requests this Court to deny the Plaintiffs' Motion for Sanctions and requests the Court to consider issuing an Order to show cause pursuant to Rule 11(c)(3).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY the undersigned electronically filed on this 30th day of December, 2019, the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Tracy R. Sharpe, Esq., 707 N. Flagler Dr., West Palm Beach, FL 33401-7140 (tsharpe@sharpetriallaw.com; melissaw@sharpetriallaw.com).

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