

6 Misc.3d 399, 786 N.Y.S.2d 890, 2004 N.Y. Slip Op. 24478
(Cite as: 6 Misc.3d 399, 786 N.Y.S.2d 890)

FIND Request: 6 Misc. 3d 399

Supreme Court, New York County, New York.
Robin HAIRSTON, Plaintiff,

v.

METRO-NORTH COMMUTER RAILROAD, De-
fendant.

Dec. 2, 2004.

Background: Railroad employee brought action against railroad under Federal Employers Liability Act for injuries sustained when she slipped and fell while exiting car she had been assigned to clean. Railroad moved in limine to preclude employee from obtaining admission of surveillance tape that railroad itself had taken of employee after her accident, a copy of which employee had obtained during discovery.

Holdings: The Supreme Court, New York County, Richard F. Braun, J., held that:

(1) videotape did not constitute hearsay, and
(2) probative value was not outweighed by danger of unfair prejudice.

Motion denied.

West Headnotes

[1] Evidence 157 ↪380

157 Evidence

157X Documentary Evidence

157X(D) Production, Authentication, and Effect

157k369 Preliminary Evidence for Authentication

157k380 k. Photographs and Other Pictures; Sound Records and Pictures. Most Cited Cases

Surveillance videotape, which had been taken by railroad of injured railroad employee after her accident showing employee going through her life's activities outdoors using a walker, and which employee

sought to admit into evidence in her FELA action against railroad, was shown to be authentic without need for videographer to authenticate tape; employee testified that videotape was accurate, and railroad's attorney conceded that videotape was same one that he turned over to employee's counsel during discovery. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

[2] Evidence 157 ↪318(1)

157 Evidence

157IX Hearsay

157k315 Statements by Persons Other Than Parties or Witnesses

157k318 Writings

157k318(1) k. In General. Most Cited Cases

In action brought by injured railroad employee under FELA against railroad, surveillance videotape, which had been taken by railroad of employee after her accident showing employee going through her life's activities outdoors using walker, did not constitute hearsay; videotape had no sound other than static and employee did not commit any nonverbal acts that constituted hearsay. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

[3] Evidence 157 ↪359(6)

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k359 Photographs and Other Pictures; Sound Records and Pictures

157k359(6) k. Motion Pictures. Most Cited Cases

Surveillance videotape, which had been taken by railroad of injured railroad employee after her accident showing employee going through her life's activities outdoors using walker, and which employee sought to admit into evidence in her FELA action against railroad, was not unduly prejudicial to railroad, but, rather, was probative of employee's damages claims. Federal Employers' Liability Act, § 1 et seq.

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seq., 45 U.S.C.A. § 51 et seq.

[4] Trial 388 ↪56

388 Trial

388IV Reception of Evidence

388IV(A) Introduction, Offer, and Admission of Evidence in General

388k56 k. Cumulative Evidence in General.

Most Cited Cases

Surveillance videotape taken by railroad of injured railroad employee after her accident, which employee sought to introduce into evidence in her FELA action against railroad, was not cumulative; there was significant difference between hearing witnesses talk about employees's injuries and graphically seeing her in video using walker. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

****891 *399** Philip J. Dinhofer, LLC, by Philip J. Dinhofer, Esq., New York, attorney for plaintiff.

Richard K. Bernard, General Counsel, by José R. Rios, Esq., New York, attorney for defendant.

RICHARD F. BRAUN, J.

Plaintiff Robin Hairston was a coach cleaner for defendant Metro-North Commuter Railroad. After midnight on January 28, 1997, she was assigned to clean a railroad car at the North *400 White Plains station yard. After doing so, she exited the train car. While exiting the car, she slipped and fell to the ground, and injured her back. She sued defendant under the Federal Employers Liability Act.

Unbeknownst to plaintiff at the time, after her accident defendant had taken a surveillance videotape of her. Pursuant to CPLR 3101(d)(i), plaintiff obtained a copy thereof during discovery. Defendant did not offer the tape into evidence during the nine day trial before this court and a jury. Presumably, that was because the tape showed plaintiff going through her life's activities outdoors using a walker. However, plaintiff wanted to offer the videotape into evidence. Defendant moved in limine to preclude plaintiff from obtaining admission of the tape into evidence. Defendant objected to the admission of the videotape into evidence on five grounds. The first was that the videotape was not self-authenticating. Second, defen-

dant raised the objection that the videotape was hearsay, and not a business record because it was not taken in the regular course of business. Third, defendant objected that, just because defendant was not introducing the videotape into evidence, plaintiff cannot automatically get the tape into evidence. The fourth basis of defendant's motion was that the prejudice to defendant of the videotape evidence outweighs its probative value. Finally, defendant objected that the videotape was cumulative.

[1] This court held a hearing outside the presence of the jury to determine whether the videotape would be admitted into evidence upon plaintiff's offer. Plaintiff testified that the videotape was accurate. Defendant's attorney conceded that the videotape was the same one that he turned over to plaintiff's counsel. Thus, under the circumstances, plaintiff did not have to call the videographer to authenticate the tape (see Zegarelli v. Hughes, 3 N.Y.3d 64, 69, 781 N.Y.S.2d 488, 814 N.E.2d 795 [2004]). The tape was shown to be authentic.

[2] The videotape had no sound other than static. Plaintiff did not commit any nonverbal acts that constituted hearsay (see People v. Nieves, 67 N.Y.2d 125, 131 n. 1, 501 N.Y.S.2d 1, 492 N.E.2d 109 [1986]; Matter of Terrance W., 251 A.D.2d 1004, 674 N.Y.S.2d 529 [4th Dept. 1998]; People v. Esteves, 152 A.D.2d 406, 411, 549 N.Y.S.2d 30 [2nd Dept. 1989]). Thus, the hearsay objection was overruled (cf. Rivera v. Eastern Paramedics, 267 A.D.2d 1029, 1030-1031, 702 N.Y.S.2d 724 [4th Dept. 1999] [where it was held that the sound part of a videotape was not admissible**892 because the comments by nurses and description of care were hearsay]).

[3] Of course, defendant was correct that the videotape did not come into evidence automatically for the plaintiff where defendant*401 did not want to introduce the videotape. Plaintiff had to demonstrate the tape's admissibility upon defendant's objection. Plaintiff showed that the tape was authentic, and that it was relevant and material to the issue of damages in this action. Admitting the videotape into evidence may have been prejudicial to defendant. Admission of evidence favorable to one party and damaging to another naturally can cause prejudice to the latter. The standard, however, is not prejudice but undue prejudice (see People v. Buie, 86 N.Y.2d 501, 511, 634 N.Y.S.2d 415, 658 N.E.2d 192 [1995]; Matter of

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New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases], 191 A.D.2d 351, 595 N.Y.S.2d 756 [1st Dept. 1993]). Here, the videotape was not unduly prejudicial to defendant but rather was probative of plaintiff's damages claims (cf. DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184, 198, 590 N.Y.S.2d 1, 604 N.E.2d 63 [1992] [where it was highly prejudicial of plaintiff's counsel to comment in summation to the jury about defendant's having taken surveillance films, which were not introduced into evidence at the trial]).

[4] Finally, defendant asserted an objection that the videotape was cumulative. Plaintiff was in the middle of her direct testimony at the time of the hearing as to the videotape's admissibility. There is a significant difference between hearing witnesses talk about an injured party's injuries and graphically seeing her in a video using a walker. Thus, the videotape was not cumulative.

Therefore, the motion was denied (see Barnes v. New York State Thruway Authority, 176 Misc.2d 195, 200, 671 N.Y.S.2d 616 [Ct. Cl. 1998]; cf. Baird v. Campbell, 155 Misc.2d 857, 861, 590 N.Y.S.2d 399 [Sup. Ct., Queens County 1992] [where the trial court did not permit the plaintiff to introduce surveillance tapes at trial]). Defendant chose to take a surveillance video, and it was not to defendant's liking so defendant did not introduce the tape into evidence. Defendant was hoisted by its own petard in videotaping plaintiff. Plaintiff introduced the videotape which was admitted into evidence. The videotape was later shown to the jury while plaintiff's attorney was cross-examining the doctor employed by defendant, who evaluated plaintiff.

The verdict was for the plaintiff for \$242,000, with defendant and plaintiff each found to be 50% culpable. The motions to set aside the verdict were denied.

N.Y.Sup.,2004.

Hairston v. Metro-North Commuter R.R.

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