

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - February 1, 2008

PETER B. SKELOS, J.P.
STEVEN W. FISHER
JOSEPH COVELLO
RANDALL T. ENG, JJ.

2007-04689

DECISION & ORDER

Shani Amit, plaintiff-respondent, v Hineni
Heritage Center, appellant, Shimon Avitan,
et al., defendants-respondents.

(Index No. 26443/03)

Steven G. Fauth, New York, N.Y. (James A. Aldag of counsel), for appellant.

Ofodile & Associates, P.C., Brooklyn, N.Y. (Anthony C. Ofodile of counsel), for
plaintiff-respondent.

In an action to recover damages for personal injuries, the defendant Hineni Heritage Center appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Kramer, J.), dated March 2, 2007, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it and for summary judgment on its cross claim for common-law indemnification against the defendants Darna Restaurant, Shimon Avitan, and Yehoud Avital, individually and d/b/a Mezonot Glatt Kosher.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff claims that she became ill after attending a Shabbat dinner at the premises of the defendant Hineni Heritage Center (hereinafter Hineni). The food had been prepared by the defendants Shimon Avitan and Yehoud Avital, d/b/a Mezonot Glatt Kosher, and delivered to Hineni's premises approximately seven hours before the dinner.

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Shortly after returning home from the dinner, the plaintiff became ill, and the undisputed evidence shows that, of the 70 to 80 dinner guests, at least a dozen other people became ill that night. The plaintiff was later diagnosed as suffering from “food poisoning” and “food-related gastroenteritis.”

Hineni failed to establish, prima facie, its entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it (*see Ayotte v Gervasio*, 81 NY2d 1062; *O’Leary v Bravo Hylan, LLC*, 8 AD3d 542; *Jaroslawicz v Prestige Caterers, Inc.*, 292 AD2d 232, 233). Although Hineni did not prepare the food, it was responsible for its proper storage and service. Yet Hineni failed to submit any evidence showing that the food was properly stored and served. Under these circumstances, Hineni was not entitled to summary judgment.

Moreover, because Hineni failed, prima facie, to establish its own lack of negligence, the Supreme Court properly denied that branch of its motion which was for summary judgment on its cross claim for common-law indemnification against the other defendants (*see Coque v Wildflower Estates Dev., Inc.*, 31 AD3d 484, 489-490; *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65).

In light of our determination, we need not reach the parties’ remaining contentions.

SKELOS, J.P., FISHER, COVELLO and ENG, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court