

**Chota v Central Plaza McDonald's Inc.**

2016 NY Slip Op 31988(U)

September 28, 2016

Supreme Court, Bronx County

Docket Number: 308782/09

Judge: Mary Ann Brigantti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

C

**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti  
-----X

MARIA CHOTA,

Plaintiff,

-against-

**DECISION / ORDER**

Index No. 308782/09

CENTRAL PLAZA MCDONALD'S INC. and  
MCDONALD'S CORPORATION,

Defendants

-----X

The following papers numbered 1 to 5 read on the below motion noticed on March 17, 2016 and duly submitted on the Part IA15 Motion calendar of **July 7, 2016**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def.'s Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Def.'s Reply Aff.	5

Upon the foregoing papers, defendant McDonald's Corporation ("McDonald's") moves for summary judgment, dismissing the plaintiff's complaint pursuant to CPLR 3212. Plaintiff Maria Chota ("Plaintiff") opposes the motion.

*Background*

Plaintiff alleges that on December 21, 2008, she fell from her chair at a McDonald's restaurant located at 2554 Central Park Avenue in Yonkers, New York. Plaintiff ordered her food and went to sit down in a plastic movable chair that she described as "wobbly." Plaintiff eventually leaned forward and the chair flew backwards, causing Plaintiff to fall to the ground.

McDonald's now moves for summary judgment on the basis that the subject restaurant business was owned and operated by a completely separate and independent corporation – co-defendant Central Plaza McDonald's Inc. ("Central Plaza"), pursuant to a franchise agreement Central Plaza had with non-party McDonald's USA, LLC. McDonald's argues that, as a matter of law, both itself (and McDonald's USA, LLC.) cannot be held liable for the alleged acts of the franchisee. McDonald's submits a copy of the franchise agreement between itself and franchisor

Robert D. Mitchell, as franchisee. McDonald's also submits a "Master Assignment and Assumption of Franchises" agreement indicating that it assigned its rights and status as franchisor to non-party McDonald's USA, LLC., before the subject incident.

McDonald's also provides the deposition testimony from Central Plaza employee Alba Ruiz who noted that he was employed by Bob Mitchell of Central Plaza, who owned this particular McDonald's franchise. The chairs at this location were all purchased and maintained by another employee of Central Plaza. There were no McDonad's corporation employees at this store on a daily or weekly basis. Alletha Skolowec, employed as Bob Mitchell's office manager at the location, also testified that McDonald's had no control over daily operations at the premises. McDonald's now seeks summary judgment, alleging that it cannot be held liable for the alleged acts of the franchisee under these circumstances.

In opposition to the motion, Plaintiff alleges that discovery is needed to investigate the relationship, roles, and intermingling of McDonald's Corporation and its purported assignee, McDonald's USA LLC, and how much involvement the movant had in directing the purchase, maintenance, retention and inspection on the chairs in question. Plaintiff asserts that this information is within the exclusive knowledge of the movants. Plaintiff concludes with a request that defendant be sanctioned for frivolous motion practice.

#### *Standard of Review*

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue

of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

#### *Applicable Law and Analysis*

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control, or a special use of the premises (*see Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292 [1<sup>st</sup> Dept. 1988], *lv. dism. in part, den. in part*, [1988]). In this matter, McDonald's Corporation established that it had no involvement with the subject premises at the time of Plaintiff's alleged 2008 accident. In 1997, McDonald's entered into a franchise agreement with Robert D. Mitchell as franchisee. In 2005, McDonald's assigned its rights as status as franchisor to non-party McDonald's USA, LLC.

Even assuming that the subject franchise agreement still applied to movant-McDonald's as franchisor, the movant nevertheless established entitlement to judgment as a matter of law. In determining whether a franchisor may be held vicariously liable for the acts of its franchisee, "the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee" (*see Kanimov v. McDonald's Corp.*, 121 A.D.3d 1050, 1051 [2<sup>nd</sup> Dept. 2014][internal citations omitted]; *Martinez v. Higher Powered Pizza, Inc.*, 43 A.D.3d 670 [1<sup>st</sup> Dept. 2007]). Here, the franchise agreement expressly provides that the franchisee shall remain an independent contractor responsible for all obligations and liabilities regarding the restaurant and its business, and responsible for all claims arising out of the operations of the restaurant, and the franchisee and franchisor agreed that McDonald's shall not be construed as jointly liable for any acts or omissions of the franchisee under any circumstances. McDonald's also provided testimony from two of Central Plaza's employees who stated that McDonald's had no control over the daily operations of the store. The office manager, Ms. Skolowec, testified that McDonald's did not have any control over what chairs were used in the restaurant and had

no mandate over what type of chairs were to be used, and McDonald's performed two prior inspections before 2008 that did not include inspection of tables or chairs. McDonald's also provided the invoices indicating that Central Plaza would independently order the chairs from an entity called "Falcon." The foregoing established, prima facie, that McDonald's retained no control over the daily operations of the subject premises and thus had no control over the alleged cause of Plaintiff's injuries (see *Khanimov v. McDonald's Corp.*, supra).

In opposition to the motion, Plaintiff failed to raise an issue of fact, and failed to establish that the motion is premature for lack of discovery. "To avail oneself of CPLR 3212(f) to defeat or delay summary judgment, a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party... that the claims in opposition are supported by something other than mere hope or conjecture ..., and that the party has at least made some attempt to discover facts at variance with the moving party's proof..." (*Volunto Ventures, LLC v. Jenkins & Gilchrist Parker Chapin LLP*, 44 A.D.3d 557 [1st Dept. 2007]). In this case, Plaintiff has not established that outstanding discovery would raise an issue of fact regarding McDonald's alleged degree of control over the daily operations of the subject premises or the chairs. Moreover, Plaintiff made no showing that she actively sought a deposition of the movant, or "at least made some attempt to discover facts at variance with [McDonald's] proof" (*id.*, see also *Hsing Hsing Chuang v. Whitehouse Condominium*, 68 A.D.3d 559 [1st Dept. 2009]).

*Conclusion*

Accordingly, it is hereby

ORDERED, that McDonald's Corporation's motion for summary judgment is granted, and it is further,

ORDERED, that Plaintiff's complaint and any cross-claims asserted against McDonald's Corporation are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 9/28, 2016

  
\_\_\_\_\_  
Hon. Mary Ann Brigantti, J.S.C.