[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden Justice PART 11

Index Number : 104081/2005
ROCHAS, MARISOL
VS
REPUBLIC RESTAURANT
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5-3-07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 9, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

----------X

MARISOL ROCHA,

Index No. 104081/05

Plaintiff,

-against-

REPUBLIC RESTAURANT CORP. and ME'KONG DELTA, INC. d/b/a REPUBLIC,

Defendants.

----------X

In this personal injury action, plaintiff, Marisol Rocha, moves for summary judgment as to liability on the complaint. Defendants Republic Restaurant Corp. and Me'Kong Delta, Inc. d/b/a Republic (together "Republic") oppose the motion, which is denied for the reasons below.

Background

Plaintiff alleges that she was injured on January 7, 2005, while a patron at Republic's restaurant located at 37 Union Square, New York, New York. Plaintiff testified that she sustained an injury to her left hand when a waitress caused glass to shatter on her table.

Plaintiff testified at her deposition that near the end of her meal, the waitress approached her table while holding a water glass in one hand and a hand-held, computerized ordering device in the other. Plaintiff further testified that as the waitress was attempting to give an adjacent table its receipt, the water glass slipped from the waitress's hand and fell onto plaintiff's table. According to plaintiff, the dropped water glass collided with the water glass that plaintiff was holding with her left hand, shattering both and causing injuries to her hand.

Defendant produced for deposition Cynthia Fuertes ("Fuertes"), a night manager who was on duty on the night of January 7, 2005. Fuertes identified the waitress involved in the incident as Kim Ogunstosin ("Ogunstosin"), who was known in the restaurant as Kemmy.[1] Fuertes testified that at the time of the incident she was at a centrally-located podium in the restaurant.

According to Fuertes both a waiter and Ogunstosin told her that prior to the incident, a battery fell out of Ogunstonsin's computerized device which was used by the staff to take orders. Fuertes described the battery as slightly larger than a business card and much thicker. Fuertes testified that the waiter who alerted her about the incident told her that "Kemmy, accidentally picked up the hand-held out of her pouch and the battery fell and some lady needs attention." (Fuentes dep. at 17). Fuertes testified that she then went to talk to Ogunstosin who told her that "the battery accidentally fell from [the] hand-held [device] and a lady got injured," and that when she " went to pick it up from the pouch, the battery fell off [and] fell on the table" but that "she wasn't sure how it happened." (Id at 22, 23). When asked whether Ogunstosin told her that the battery may have broken the glass on the table, Fuertes responded yes.

Fuertes also testified that Republic did not have any problems with the hand-held device prior to the incident, and that Ogunstosin did not complain about her device that evening.

Plaintiff moves for summary judgment on the grounds that there are no material issues of fact regarding Republic's negligence, since the only admissible evidence conclusively establishes that Ogunstosin's conduct was unreasonable in that she

[1] It appears that Ogunstosin's deposition was not taken as the parties were unable to locate her. (Fuertes dep. at 33,34).

attempted to handle too many tasks at once, and thus dropped the water glass and proximately caused plaintiff's injuries. Plaintiff also argues that Fuertes's deposition testimony is insufficient to raise a triable issue of fact as her statements that the battery pack fell causing plaintiff's injuries are based on hearsay.

In opposition, Republic argues that there are material issues of fact as to whether Ogunstosin dropped a water glass or whether the battery pack fell. In support of its opposition, Republic submits an affidavit from Fuertes, in which she further describes the events of January 7, 2005. In her affidavit, Fuertes states that she "was able to observe [plaintiff's] table and noticed that there was only one broken glass on the table." (Fuertes affidavit ¶8). She also states that "it is the restaurant's procedure that all water glasses are carried on trays with a full set of glasses. Therefore, "[Ogunstosin] would not have been carrying a single glass in her hand as alleged by [plaintiff]." (Fuertes affidavit ¶8). In addition, according to Fuertes, she observed Ogunstosin replacing the battery pack into the hand-held device subsequent to the incident.

In reply, plaintiff argues that Fuertes's affidavit should be disregarded as it conflicts with her deposition testimony.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, NY2d 851, 853 (1985). Upon making this showing, the burden shifts to the party opposing the summary judgment motion "to produce evidentiary proof in admissible

form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

For plaintiff in the present case to prevail on her motion, she must make a *prima facie* showing of entitlement to a judgment that defendant was negligent as a matter of law. It is well settled that negligence cases by their nature do not lend themselves to resolution on motions for summary judgment, since "even if the parties agree as to the underlying facts, the very question of negligence is itself a question for jury determination." Ugarriza v. Schmieder, 46 NY2d 471, 474 (1979). Negligence is usually a factual question as it requires a determination as to "'whether the plaintiff or defendant acted reasonably under the circumstances.'" Kearns v. City of New York, 263 AD2d 412, 413 (1st Dept 1999), quoting, Andre v. Pomeroy, 35 NY2d 361, 364 (1974).

In the present case, summary judgment is not warranted. Assuming that Ogunstosin dropped the glass as described by plaintiff, there remain factual questions as to whether under these circumstances her actions constituted negligence. See e.g. Hajder v. G. & G. Moderns, Inc., 13 AD2d 651 (1st Dept 1961)(summary judgment was not appropriately granted in plaintiff's favor against the defendant driver even though there was no dispute as to the speed or course of travel or physical surroundings of automobile at time of accident, since there were issues of fact as to whether the driver, under all of the circumstances, acted with reasonable care);compare Andre v. Pomeroy, 35 NY2d at 365 (granting summary judgment to plaintiff in case in which defendant admitted that while driving in heavy traffic she took her eyes off the road to look for something in her purse and drove into the car in front of her).

Furthermore, even assuming arguendo that plaintiff has made a prima facie showing entitling her to summary judgment, Republic has raised triable issues of fact based on the statements in Fuertes' affidavit[2] that there was single glass on the table, as to the restaurant's procedure for carrying glasses, and her observations regarding the replacement of a battery pack from the hand-held device.

Plaintiff's argument that Fuertes' affidavit should not be considered as it conflicts with Fuertes' deposition testimony is unavailing. Where "a reply affidavit can be reconciled with prior testimony, it 'cannot be regarded as merely a self-serving allegation calculated to contradict an admission made in the course of previous testimony.'" Kalt v. Ritman, 21 AD3d 321, 323 (1st Dept 2005) quoting Faulkner v. Allied Manor Road Co., 306 AD2d 224, 225 (1st Dept 2003). In this case, while Fuertes did not testify at her deposition that she personally saw one broken glass, or that she observed Ogunstosin replace her battery pack, her testimony did not directly address these topics. Likewise, nothing in Fuertes' deposition testimony foreclosed her statements regarding the restaurant's procedures for carrying water glasses.

Thus, as Fuertes' affidavit amplifies, rather than contradicts, her deposition testimony the court may consider it. See Bosshart v. Pryce, 276 AD2d 314 (1st Dept 2000) (denying summary judgment when allegations by plaintiff in opposition to the motion though more detailed did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601 (2d Dept 1995) (court did not err in considering affidavit

[2]While Fuertes' affidavit is sufficient to defeat defendant's motion for summary judgment, the court notes that although her deposition testimony contains hearsay, the court may consider it. Moreover, as noted in the body of the decision, the deposition testimony does not conflict with the statements in Fuertes' affidavit.

which did not contradict plaintiff's deposition testimony); compare Zylinski v. Garito Contracting, 268 AD2d 427 (2d Dept 2000).

Accordingly, plaintiff's motion for summary judgment must be denied.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference will be held on July 19, 2007, at noon, in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: June 21, 2007

J.S.C.