

**Gonzalez v Starbucks Corp.**

2008 NY Slip Op 30834(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0106583/2005

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

OLGA GONZALEZ,  
  
Plaintiff,  
  
- v -  
  
STARBUCKS CORPORATION, and STARBUCKS COFFEE  
"73<sup>RD</sup> and COLUMBUS AVENUE",  
  
Defendants.

Index No.: 106583/05  
Motion Date: 10/30/07  
Motion Seq. No.: 04  
Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1 - 3	_____
4 - 6	_____
7 - 9	_____

**FILED**

MAR 25 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendant Starbucks moves for summary judgment dismissing this slip and fall action. Plaintiff opposes the motion. The court must GRANT defendant Starbucks' motion to dismiss the Verified Complaint.

At her deposition of July 13, 2006, as interpreted by an interpreter from English into Spanish and from Spanish into English, plaintiff testified in pertinent part:

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Q. And tell me what happened as you left the Starbucks store.

A. Well, I went down the step. I walked. And then that other step is where I fell.

Q. Can you point out to me the area where you fell?

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

A. Right here. (Witness indicating.)

Q. Ms. Gonzalez, I'm going to show you what's been marked as Plaintiff's Exhibit 1. I ask that you take a look at the lower picture and tell me whether you can see the area- or first tell me if you recognize the area depicted in the picture?

A. Yes.

Q. Okay. And does that picture show the area where you fell when you exited the Starbucks store?

A. Yes.

Q. Can you point that out to me, please?

A. Here. From here outside. (Witness indicating.)

Q. Okay. I believe you told us that you walked out of the Starbucks store, proceeded down the step, and as you were walking there was an area where you fell where there was another step; is that correct?

A. Correct.

Q. Okay. So on the right side of the picture near the shadow area would it be that step coming down from immediately outside of the door, correct?

(Mr. Tamasco indicating.)

Mr. Ochman: Just for the record, Counsel is pointing to the lower photograph on Plaintiff's Exhibit 1.

Mr. Taomasco: Correct.

Q. And then at approximately in the middle of that photo there was another change of elevation in the sidewalk which is approximately in the middle of the photo?

A. Uh-huh.

Q. In relation to these two points can you tell me exactly where you fell?

A. From here. (Witness indicating.)

Q. The area that you fell, were you walking on concrete at the time you fell or were you walking on tile?

A. No, concrete.

Q. So if you take a look at Plaintiff's Exhibit 2, and tell me whether you recognize what is depicted in the top picture, whether you recognize that as the entrance to the Starbucks where you exited.

A. Yeah.

Q. And if you take a look at the area immediately in front of the door you will see tile.

A. Yes.

Q. Do you recall seeing that tiled area on the day of the accident?

A. No. Imagine - I wasn't looking.

Q. Okay. And then there's an area below that first step which is concrete, correct?

A. Correct.

Q. And that area of concrete leads to another step down, correct?

A. What do you mean another step? No. From here I fell to here. I didn't fall here. It was from here to there.

(Witness indicating.)

Q. From here to there. You're indicating the area that- the tile area that steps down to the first concrete pad. And then past the shaded area, which is depicted in the lower third of the picture, there is another concrete pad, a change in elevation below that. Do you see that change in elevation?

A. Yes.

Q. Okay. Did your fall occur before or after the second change in elevation on the lower third of the picture?

A. No. Coming off the first step up here, when I stepped here, when I took a step here I fell. I slipped. (Witness indicating.)

Q. You slipped?

A. Yeah, from here. (Witness indicating.)

Q. Now, when you say when you slipped, do you recall which foot stepped down to the concrete first?

A. With the right one.

Q. Did you then take a step with your left foot before your fall?

A. Yes, when I put that foot down that's where I fell. I got hit here. (Witness indicating.)

Q. And which foot slipped out from underneath you; was it when you took the second step with your left foot?

A. When I stepped - when I walked and stepped down with the left.

Q. Okay. And explain to me how the fall occurred.

A. How it happened? It happened suddenly.

Q. Do you know what caused you to fall?

A. I don't know. I know that here I like tripped over something. My shoe hit something. (Witness indicating.)

Q. Did your shoe hit something in the concrete area depicted in Plaintiff's Exhibit 1?

A. No, not here. (Witness indicating.)

Q. Do you know what your foot struck causing you to fall?

A. No.

Q. Okay. After you stepped off the step with your right foot and then proceed to step down with your left foot, can you point to me exactly where your left foot landed in the upper picture of Plaintiff's 2?

A. When I came out?

Q. Yes. Can you show me where you stepped down with your right foot, right foot first?

A. Well, I came out of here. I took this first step. I took a step. And then when I took a step with the left one that's when I fell there. (Witness indicating.)

Q. Okay. Do you see anything in that picture - is there anything in that picture that you believe caused your left foot to slip?

A. No.

Q. You mentioned that your left foot struck an object?

A. Well, it hit me. I don't know what against, but when I was walking as I was coming out from - coming off the first step, the first step, I took one step, I started to walk and that's where I fell.

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Q. Did you see your foot, your left foot, as it hit the ground, the cement, before it slipped out from under you?

A. No, no.

Q. Okay. And after you stood back up after your fall did you look at the sidewalk to see what your foot hit?

A. No. What I did was pick up my things.

Q. And were you wearing your glasses at the time of the fall?

A. No, no, because I didn't see them. They were broken.

Q. No, before you fell, as you were walking out of the store?

A. Yes.

Q. Now, when your foot slipped out from under you, based on what you're telling me it appears that you fell forward as a result of the slip; is that correct?

A. Yes.

Q. And what was the condition of the cement on the day of the accident in the area where your foot slipped?

A. I don't know.

Q. Looking at the top picture in Plaintiff's Exhibit 2 can you tell me whether the cement where your foot slipped, if it looked any different than what is depicted on the picture on the day of the accident?

A. No.

Q. Now, directing your attention to the lower picture in Plaintiff's Exhibit 1, do you see the cement area where you slipped on that morning?

A. This area here, coming out from here. (Witness indicating.)

Q. And if you'll notice, will you agree with me that the cement, there's an area that is shaded a lighter color than the rest of the sidewalk? Do you see that area I'm referring to?

A. Yes.

Q. Now, which area did your foot slip on, the lighter area or the darker area of the sidewalk?

A. Here. Here. That's where it was. There. (Witness indicating.)

Q. So it would be on the lighter colored patch of cement, which would be the rectangular area in front of the door?

A. Yes.

Q. Now, do you recall whether that rectangular patch of lighter colored cement existed on the morning of your fall?

A. Oh, I don't know, my love. I don't know.

In her affidavit in opposition to the motion, sworn to on July 12, 2007, plaintiff states

More specifically, I tripped on the "lip" of the front step of STARBUCKS store's entrance, depicted on the photos taken shortly after the accident. Said "lip" is a metal and/or steel cover located at the corner end of the front step which is slightly elevated and caused my foot to get trapped resulting in my trip and fall.

During the Examination Before Trial, I was not sure of the correct terminology or phrase when referring to said "lip". However, throughout the deposition I pointed and even circled the area indicating the lip when asked to identify the cause and location of my fall. After the deposition, I was informed that it is referred to as a "lip".

Said "lip" on the front entrance step of the STARBUCKS store was the sole cause of my trip and fall.

Defendant Starbucks argues that plaintiff is unable to identify the defect in the premises that caused her to fall. The court finds that plaintiff's failure to ever describe the defect that caused her fall is fatal to her Complaint.

In Pippo v City of New York, 43 AD3d 303, 304 (1<sup>st</sup> Dept 2007), the appellate court recited its oft repeated holding that "'[a] party's affidavit that contradicts [his or her] prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment' (citations omitted)."

The court concurs with defendant that the close up photographs appended to plaintiff's opposition papers that show a metal strip bolted to the step must be disregarded because plaintiff's reference to such photographs were made for the first time in her affidavit in opposition to the motion for summary

judgment, and were never disclosed or marked at the deposition of plaintiff conducted more than a year before.

Lest the court's decision be considered overly harsh, plaintiff had every opportunity to identify the source of her fall as a piece of metal or a metal strip, but repeatedly testified that she did not know what her shoe hit that caused her to fall. At her examination before trial, she never testified that she did not know what it was called; nor did she ever attempt to describe the metal strip that her affidavit now calls a "lip". Plaintiff has attached no photographs that bear a circle made by plaintiff at her deposition identifying the defect that she asserts caused her fall. Finally, she testified at some point that she slipped on the "lighter colored patch of the cement", which is contrary to the statement in her opposing affidavit.

Given the plaintiff's repeated testimony "that she did not know what caused her to fall...a jury would be required to speculate as to the cause of her fall, [and] summary judgment is appropriate." Robinson v Lupo, 261 AD2d 525 (2d Dept 1999).

Therefore, it is

ORDERED and ADJUDGED that defendants STARBUCKS CORPORATION, and STARBUCKS COFFEE "73<sup>RD</sup>" and COLUMBUS AVENUE" motion for summary judgment is GRANTED, and the Verified Complaint is

