

Kramer v SBR&C, LLC
2008 NY Slip Op 31426(U)
May 19, 2008
Supreme Court, Richmond County
Docket Number: 0102094/2006
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

PART DCM 3

**Index No.102094/2006
Motion No.:003**

**JEAN KRAMER, and
THEODORE KRAMER,**

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**SBR&C, LLC d/b/a THE VANDERBILT AT SOUTH BEACH,
and
THE VANDERBILT AT SOUTH BEACH, LLC,**

Defendants

The following items were considered in the review of this motion to vacate a prior order and for reargument.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants' motion for reargument is granted. Upon reargument defendants' motion for summary judgment is denied.

Facts

Defendants move this court seeking to vacate the prior February 11, 2008 Decision and Order of this court that was subsequently amended on March 12, 2008. In addition, defendants seek reargument of the motion *ab initio*.

This case arises out of Jean Kramer's claim that she sustained personal injuries allegedly after she slipped and fell on strawberries that fell on the dance floor at defendants' establishment. Pursuant to an amended March 12, 2008 decision and order, this court denied defendants' motion for summary judgment finding that "... it would be reasonable for a jury to infer that the

defendant created the dangerous condition that caused Mrs. Kramer to fall . . .” This amended decision replaced an antithetical decision issued by this court on February 11, 2008. Pursuant to the cover letter accompanying the amended decision, this court informed the parties that due to an administrative error the court signed a draft decision and distributed the same to the litigants.

Defendants now allege that the amended decision muddled the official docket and seeks to have both the February 11, 2008 decision and order and March 12, 2008 amended decision and order vacated. In addition, defendants argue that subsequent amended decision and order of the court misapprehended the Appellate Division, Second Department’s decision in *Brown v. Outback Steakhouse*.¹

The court does not agree.

Discussion

The court reserves its right to amend decisions when it becomes necessary to do so. In this case the court indicated to all parties that a draft decision was inadvertently signed and distributed to the litigants.

In defendants’ moving papers it is asserted that the court misapprehended the decision in *Brown v. Outback Steakhouse*.² In that case, the Appellate Division, Second Department reversed the holding of the trial court that granted defendants’ motion for summary judgment. The court held that in order for a plaintiff to prevail in a slip-and-fall case “ . . . a plaintiff must demonstrate that the defendant had actual or constructive notice of the allegedly defective condition that caused the fall, or created that condition. . .”³

¹ *Brown v. Outback Steakhouse*, 39 AD3d 450, [2d Dep’t 2007].

² *id.*

³ *id.* (Citations omitted)

In overturning the trial court the Appellate Division, Second Department focused on the following relevant facts:

. . . the deposition testimony of several of the plaintiff's coworkers who were with her at the time of her fall. On coworker testified to his observations, immediately after the plaintiff's fall, of a wet or greasy substance on the floor extending from a nearby kitchen door to an area right next to the location where the plaintiff fell. Another coworker testified that he had observed the defendants' employees periodically walking through that area carrying trays of food from the kitchen.⁴

In this case, plaintiff Mrs. Kramer testified that her host served strawberries to the guests.

Q. Were strawberries served to you at the retirement party for Frank?

A. They were on this little buffet table over here (indicating).

Ms. Panzella: Indicating the buffet table around number ten, but on the dance floor that client identified earlier.⁵

Q. This table that you just mentioned, this buffet table where the strawberries were located, as you said, describe the table for us; was it longer than the table we are sitting at today?

A. No, round table.

Q. Did you actually see strawberries located on this round table?

A. Yes, I did.⁶

Q. From the time that you first observed it up until the accident occurred, was this table always in the same location?

⁴ *id.*

⁵ Kramer, Jean Transcript at 45.

⁶ *id.* at 46.

A. Yes, it was.⁷

After Mrs. Kramer fell to the floor she was in a position to observe what caused her to slip on the dance floor.⁸ Mrs. Kramer testified that:

Q. During this three to four minutes you were on the ground, did you observe what that substance was that you felt was sticky earlier?

A. Yes, I did, it was strawberries.

Q. Was it more than one strawberry?

A. Yes.

Q. How many strawberries?

A. Like my hand, like spread out like that (indicating).

Q. Like three or four or more of the at least three or four?

Ms. Panzella: She was indicating an area about the size of her hands spread out.

A. With a few strawberries laying down.

Q. Were they fresh strawberries?

A. Fresh but squished.

Q. Was there any other substance other than strawberries in that immediate vicinity?

A. I didn't see anything else.⁹

Mrs. Kramer's testimony is substantiated by the testimony of her husband Theodore. Mr. Kramer observed the buffet table on the dance floor.

Q. At any time while you were at the party, did you make your way over to the vicinity of the dance floor?

A. Yes, because there was a table set up with cheese, crackers and fruit.

Q. Was that set up on the dance floor?

⁷ *id.*

⁸ *id.* at 37.

⁹ *id.* at 42.

A. On the dance floor.¹⁰

While Mr. Kramer did not observe any strawberries on the dance floor immediately following his wife's fall, he did testify as follows:

Q. So, at any time following your wife's fall, did you observe any food spilled on the dance floor?

A. No, but I saw that on her shoe.¹¹

In addition to the testimony of the plaintiffs, Joseph Tranchina submitted to a deposition concerning how defendants utilized the buffet table in the area where Mrs. Kramer fell.

Q. And at the end of this 45 minutes of passed hors d'oeuvres, would the classic station be moved?

A. Normally, yes.

Q. Normally how would it be moved, who would move it and where would it be moved to?

A. Wait staff would roll it out of the room.

Q. And what kind of table do you use for this classic station? By that I mean size and type of table.

A. It's a wood table. The size varies.

Q. And is it on wheels?

A. Yes.

Q. So it can be rolled in and out of the room?

A. Yes.¹²

Based on the sworn testimony of the plaintiffs and Mr. Tranchina a question of fact exists with respect to the creation of the dangerous condition that caused Mrs. Kramer's injuries. In deciding a motion for summary judgment competing contentions must be viewed in a light most

¹⁰ Kramer, Theodore, Transcript at 17.

¹¹ *id.* at 14.

¹² Tranchina, Transcript at 174.

favorable to the party opposing the motion.¹³

Here there is testimony that seems to indicate that defendants created a dangerous environment that caused Mrs. Kramer's injuries. In overturning the trial court's decision in *Brown v. Outback Steakhouse* the Appellate Division reasoned:

[s]ince the plaintiff is entitled, at this stage of the proceedings, to every reasonable inference that can be drawn from the testimony . . . and it is reasonably inferable from the testimony of the plaintiff's coworkers that the substance on which the plaintiff allegedly fell had been dropped from a tray carried by an employee of the defendants through the area, this testimony is sufficient to raise a triable issue of fact as to the defendants' creation of the allegedly dangerous condition. . .¹⁴

The undisputed facts indicate that defendants used a buffet table on the dance floor to serve strawberries. The testimony of plaintiffs indicates that a reasonable jury could infer that defendants did indeed create the allegedly dangerous condition that caused Mrs. Kramer's fall. As such, there is a triable issue of fact as to whether defendants created the alleged hazardous condition.¹⁵

Conclusion

Upon reargument defendants' motion for summary judgment is denied. Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.¹⁶ Here there is a question as to whether defendants

¹³ See, *Marine Midland Bank, N.A., v. Dino*, 168 AD2d 610 [2d Dep't 1990].

¹⁴ *Brown v. Outback Steakhouse*, 8 AD3d 315, [2d Dep't 2004].

¹⁵ See, *Hopkins v. Statewide Indus. Catering Group*, 272 AD2d 577, [2d Dep't 2000].

¹⁶ *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dep't 1994].

created the allegedly defective condition.

Accordingly, it is hereby:

ORDERED, that this court's Decision and Order dated February 11, 2008 is vacated; it is further

ORDERED, that upon reargument this court's Amended Decision and Order dated March 12, 2008 denying summary judgment in favor of the defendants is affirmed; and it is further

ORDERED, that parties shall return to **DCM Part 3 at 9:30 A.M. on June 9, 2008** for a pre-trial conference.

ENTER,

DATED: May 19, 2008

Joseph J. Maltese
Justice of the Supreme Court