

Peltz v Restaurant Assoc., Inc.

2008 NY Slip Op 33035(U)

November 6, 2008

Supreme Court, New York County

Docket Number: 109662/06

Judge: Shirley Werner Kornreich

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

PRESENT: Shirley Werner Kornreich
Justice

PART 54

Index Number : 109662/2006
PELTZ, RICHARD
VS.
RESTAURANT ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 109662/2006
MOTION DATE 8/14/08
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2, 3
4
5

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED

NOV 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/6/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
RICHARD PELTZ,

Plaintiff

INDEX NO. 109662/2006

- against -

RESTAURANT ASSOCIATES, INC.

DECISION AND ORDER

FILED
NOV 12 2008
COUNTY CLERK'S OFFICE
NEW YORK
Defendants

-----X
KORNREICH, SHIRLEY WERNER, J.:

Defendant in this action for negligence, Restaurant Associates, Inc. ("RA") moved for summary judgment. In support of its motion, RA has submitted the following documents: the pleadings, deposition excerpts, an affidavit of RA's director of operations at the time of the accident, and an affirmation of counsel. In opposition to the summary judgment motion plaintiff has submitted deposition excerpts and an affirmation of counsel. Both parties have also submitted legal argument in support of their positions.

I. *Summary of Undisputed Facts.*

On October 6, 2004, RA was operating a cafeteria at the Bear Stearns Metrotech Center in Brooklyn, New York. Bear Stearns employee Terry Orlando went to the cafeteria for lunch, where she ate almost every day; it was subsidized by Bear Stearns. On that day, Bear Stearns was running a book fair (between the entranceway and the wall), and the cafeteria was more crowded than usual. Orlando got some soup from the buffet in the middle of the cafeteria, to the side of the cashiers. While she was still near the buffet, someone bumped into her, and her soup spilled on the floor. During the next "[t]hree to five minutes on the low end," (Orlando EBT, p. 8:19-23,

[*3]
Motion Exc. C), Orlando tried to get the attention of cafeteria workers to clean up the spill by making eye contact with and waving to them. When this did not succeed, Orlando turned to go get help, but when she did, plaintiff slipped on the soup and fell, fracturing his shoulder and receiving other injuries.

On the day of the accident, approximately eight RA employees were working in the cafeteria: two at the deli/sandwich station, one at the grill, one at the chopped salad station, two cashiers stationed approximately ten to fifteen feet from the buffet/salad bar, and two runners responsible for restocking food. Each of these employees was trained and instructed to look out for spills. Byrne Affid., Motion Exh. F. There also was present an employee of Collins Building Services, Inc. ("CBS"), an outside cleaning company responsible for the cleaning and maintenance of the cafeteria during operating hours. It was the job of the CBS employee to find and eliminate spills and other dangerous conditions. Byrne Affid., Motion Exh. F. In the past, when Orlando had observed a spill, it was cleaned up right away by a cafeteria employee. In addition, she had seen warning signs placed near spills. Orlando EBT, pp. 12-13, Motion Exh. C.

II. *Legal Discussion and Rulings*

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. CPLR 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that there exists a triable issue of material fact. *Zuckerman*, 49 N.Y.2d at 560; see *GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on

[* 4]

summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

To make out a prima facie case of negligence, plaintiff must show that RA breached a duty of care owed to him and that RA either created the dangerous or defective condition, or had notice of the condition, actual or constructive, and failed to remedy it. *Morchik v. Trinity School*, 257 A.D.2d 534, 536 (1st Dept. 1999) (defendant granted summary judgment in slip and fall action when plaintiff failed to prove defendant breached duty of care, or created or had notice of condition causing plaintiff's injury). "Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Espinal v. New York City Hous. Auth.*, 215 A.D.2d 281, 282 (1st Dept. 1995); *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986); *Jackson v. Board of Ed. of the City of NY*, 30 A.D.3d 57 (1st Dept. 2006).

RA does not contest the issue of duty of care to plaintiff, and there is no evidence that RA in any way caused the soup to spill on the floor.¹ Although the cafeteria was crowded that day, apparently because of Bear Stearns' book fair, there is no inference from RA's evidence that the

¹The court observes that CBS was an independent entity responsible for cleaning and maintaining the cafeteria, and its employee was present on the day of the accident.

resulting crowd increase in any way caused the soup to spill. The evidence showed that the buffet was near the cashier and that the soup spill occurred during the lunch hour. There is no basis to draw an inference that the soup-bearer bumped into somebody because of some mismanagement of the cafeteria by RA. It was crowded, Bear Stearns was responsible for the book fair, the cashier was relatively near the buffet, and buffets are usually surrounded by people. RA has also presented more than sufficient evidence to establish lack of actual or constructive notice. Orlando did not succeed in getting the attention of a worker. RA presented evidence that plaintiff slipped approximately three to five minutes after the soup spilled, that its workers were stationed at various stations during the lunch hour, that it was the responsibility of the outside CBS employee to find and eliminate spills, but it was RA's standard practice to clean up spills quickly once its workers became aware of them.

The evidence RA produced, all admissible, establishes that they could not have reasonably been aware of the spill in such a short period of time. *See Gordon v. American Museum of Natural History, supra*, 67 N.Y.2d at 837 (plaintiff spotting papers on stairs 10 minutes before fall insufficient as matter of law to establish defendant had constructive notice of debris causing plaintiff's fall); *Winecki v. West Seneca Post 8113*, 227 A.D.2d 978, 979 (4th Dept. 1996) (summary judgment to defendant banquet owner proper in slip and fall case where no evidence how long liquid on floor, and there was evidence owner's workers checked floor for spills every fifteen to twenty minutes). Nor does evidence that the cashiers were stationed near where the spill occurred create an inference of constructive notice. *See Benware v. Big V Supermarkets, Inc.*, 177 A.D.2d 846, 847-848 (3d Dept. 1991).

Plaintiff has not produced any evidence to the contrary sufficient to raise a triable issue of

fact for the jury. Plaintiff did not produce any evidence that the spill had been visible or apparent prior to his fall, unlike the circumstances in *Anderson v. Central Tractor Farm & Family Ctr.*, 250 A.D.2d 1023, 1024 (3d Dept. 1998). In *Anderson*, the evidence showed that the spill was three feet long and there were twelve to fifteen sets of footprints tracking through it. *Id.* Here, plaintiff did not even notice the spill until after he had fallen. Accordingly, it is

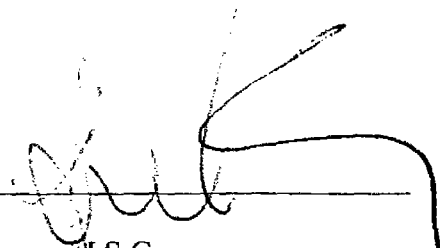
ORDERED that defendant Restaurant Associates, Inc's motion for summary judgment on plaintiff's claim for negligence is granted and plaintiff's complaint is dismissed.

The Clerk shall enter judgment forthwith.

ENTER:

Date: November 6, 2008

New York, N. Y.



J.S.C.

FILED
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NEW YORK