

**Baxter v Amber Asian Cuisine, Inc.**

2010 NY Slip Op 30676(U)

March 18, 2010

Supreme Court, New York County

Docket Number: 115233/07

Judge: Carol R. Edmead

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

PRESENT: Edmead  
Justice

PART 35

Baxter

INDEX NO. 115233/07

MOTION DATE 2/19/10

- v -

MOTION SEQ. NO. 002

Amber Asian

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

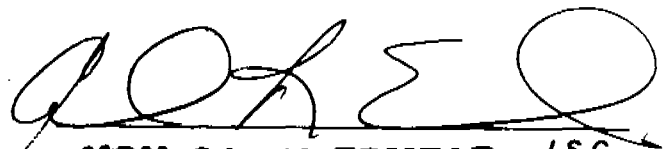
Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED  
**FILED**  
MAR 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision, it is hereby  
ORDERED that the motion of defendant Amber Asian Cuisine, Inc. doing business  
under the firm name and style of Amber Asian Cuisine I for an order, pursuant to CPLR  
§3212, for summary judgment against plaintiff Janice W. Baxter is denied; and it is further  
ORDERED that defendant serve a copy of this order with notice of entry upon all  
parties within 20 days of entry.  
This constitutes the decision and order of the Court.

Dated: 3/18/10

  
**HON. CAROL EDMEAD** 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 35

-----x  
JANICE W. BAXTER and MURRAY BAXTER,

Plaintiffs,

Index No. 115233/07

-against-

**DECISION/ORDER**

AMBER ASIAN CUISINE, INC.  
doing business under the firm name and  
style of AMBER ASIAN CUISINE I,

Defendant.

-----x  
HON. CAROL ROBINSON EDMOND, J.S.C.

**FILED**  
MAR 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**MEMORANDUM DECISION**

In this personal injury action by plaintiffs Janice W. Baxter (“plaintiff”) and Murray Baxter (collectively, “plaintiffs”),<sup>1</sup> defendant Amber Asian Cuisine, Inc. doing business under the firm name and style of Amber Asian Cuisine I (“defendant”) moves for summary judgment, pursuant to CPLR §3212.

*Background*

In her Complaint, plaintiff alleges that on October 8, 2007, she slipped and fell on the sidewalk in front of 1406 Third Avenue, New York, New York (the “premises”), resulting in serious injuries. Defendant owned a sushi restaurant at the premises, which includes a sidewalk café. Plaintiff alleges that defendant breached its duty to maintain the sidewalk in a reasonably safe condition when it negligently allowed the sidewalk to become slippery and unsafe.

In its motion, defendant argues that plaintiff has presented no evidence that defendant created the alleged defective condition or that a defect even existed. Citing plaintiff’s

\_\_\_\_\_  
<sup>1</sup>The Court notes that the action on behalf of Murray Baxter, plaintiff’s husband, has been discontinued.

examination before trial (“plaintiff’s EBT”), defendant contends that plaintiff walked past an area on East 80th Street where defendant was hosing down the sidewalk and proceeded to the corner of East 80th Street and Third Avenue. Defendant also argues that plaintiff’s Verified Bill of Particulars (“BOP”), wherein she alleges that defendant used unsafe cleaning materials on the sidewalk, is contradicted by plaintiff’s testimony that she did not see defendant’s employees use any soap or cleaning materials. Plaintiff further testified that there was no liquid or debris in the area she was standing just before she fell. Further, plaintiff testified that as she reached the corner, she did not experience any slippery sensation.

Defendant argues that plaintiff fell only after reaching the corner, waiting several seconds for the light to change, and beginning her attempt to cross Third Avenue. Plaintiff cannot cite the presence of water or some other substance as the cause of her slip and fall. As there is no evidence of any defect, there could be no evidence that defendant was on notice of any defect. Therefore, there is no evidence of negligence that would create a question of fact that should be presented to a jury.

Relying on her affidavit in opposition (“plaintiff’s affd.”), attorney’s affirmation (“opp.”) and memorandum of law (“MOL”), plaintiff argues that defendant failed to provide evidence in admissible form in support of its motion. Plaintiff contends that defendant relies on an affirmation by an attorney, who has no personal knowledge of the facts; the unsworn deposition transcript of Kevin Wang (“Mr. Wang”), the General Manager of defendant’s restaurant, who was not employed by the defendant on the date of plaintiff’s injury (*see* the “Wang EBT”); and the unsworn deposition transcripts of two of defendant’s employees, Taka Chen and Ai Yue Chen (*see* the “T. Chen EBT” and “A. Chen EBT”).

With respect to the EBTs of defendant's employees, all three original transcripts were mailed to defendant's former counsel, along with notices to execute and return the transcripts to the office of plaintiff's counsel, plaintiff argues (*see* the "Notices"). None of the transcripts was ever returned. Therefore, without having been signed and sworn to, the transcripts are not evidence in admissible form, plaintiff argues.

Even if the transcripts were to be considered, they contain either inadmissible hearsay or contradictory testimony concerning defendant's methods of maintaining the sidewalk that raises issues of fact requiring a trial, *i.e.*, whether a hose or soap was used to clean the sidewalk when the incident occurred. Accordingly, defendant's motion should be denied.

In reply, defendant argues that plaintiff's *affd.* is self-serving, and therefore, the Court should disregard it. Defendant contends that plaintiff's *affd.* was created without affording defendant any chance to question her as to the statements contained therein. Defendant further points out that plaintiff chose not to rely on any of her deposition testimony in opposition to defendant's motion, implying that plaintiff's deposition testimony did not create any material issues of fact regarding the alleged incident. Therefore, plaintiff's attempt to now rely on her affidavit should be rejected.

Defendant also argues that the transcripts on which defendant relies are in admissible form. Citing CPLR §3116(a), defendant argues that although the Wang, T. Chen and A. Chen transcripts were not signed and returned within sixty days, they can still be used as though fully signed.

Finally, defendant argues that plaintiff still has failed to present any evidence that defendant created the alleged defective condition, or that a defect even existed. Plaintiff's

attempt to rely on the testimony of Mr. Wang is unavailing, defendant argues. With respect to sidewalk cleaning procedures, Mr. Wang testified that the sidewalk was scrubbed with soap only on certain days when the sidewalk appears dirty. Mr. Wang never testified that soap or any other substance was specifically used on the date of loss just prior to plaintiff's incident. Additionally, defendant's deliveryman, Ai Yue Chen, testified that soap was not used on the date of plaintiff's incident. Furthermore, Taka Chen stated that the process of cleaning the sidewalk had not yet begun when plaintiff's accident occurred, and more importantly, that soap was not involved.

#### *Discussion*

#### *Summary Judgment*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1<sup>st</sup> Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the

burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition that caused the accident, or that the defendant had actual or constructive notice of the dangerous condition and failed to remedy it within a reasonable time (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Segretti v Shorestein Co. East, LP*, 256 AD2d 234 [1st Dept 1998]; *Weiss v Gerard Owners Corp.*, 22 AD3d 406 [1st Dept 2005]). “To constitute constructive notice of a dangerous condition, the defect or condition must be ‘visible and apparent, and . . . must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it’” (*Gibbs v Port Authority of New York*, 17 AD3d 252, 255 [1st Dept 2005], quoting *Gordon* at 837). Thus, a defendant, as the proponent of a summary judgment motion, must submit evidence in admissible form that shows it did not create or have actual or constructive notice of the dangerous condition (*Colt v Great Atlantic & Pacific Tea Company, Inc.*, 209 AD2d 294 [1st Dept 1994]; *see also Giuffrida v Metro North Commuter Railroad Co.*, 279 AD2d 403,

404 [1st Dept 2001] [“Where the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed”]).

At the outset, the Court notes that plaintiff’s argument challenging the admissibility of the Wang, T. Chen and A. Chen transcripts lacks merit. CPLR §3116(a), provides the following:

The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

Although CPLR §3116(a) “requires the deposed party’s signature on a deposition transcript *before it can be used as a deposition*,” a deposition transcript may be admitted as though it were signed where it has been certified as accurate by a court reporter ((*Morchik v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999] [emphasis added]; *Zabari v City of New York*, 242 AD2d 15, 17 [1st Dept 1998]). Further, unsigned but certified deposition transcripts can be used *by the opposing party as an admission* in support of a summary judgment motion (*Morchik* at 536; *Garris v City of New York*, 885 NYS2d 491, 492 [1st Dept 2009] [holding that the defendant properly submitted a certified yet unsigned transcript of plaintiff’s EBT as an admission that defendant neither caused nor created the defect involved in plaintiff’s accident]). Finally, the Courts have held that an argument contesting the admissibility of unsigned transcripts is unavailing if the plaintiff uses the “same unsigned transcripts in support of her opposition” to a summary judgment motion (*McGhee v HRH Const. LLC*, 2008 WL 1840186

[Sup Ct, New York County 2008], *citing Morchik* at 535).

Here, each of the disputed transcripts attached to defendant's motion has been certified. Further, plaintiff herself uses portions of the disputed Wang, T. Chen, and A. Chen transcripts in support of her opposition (*McGhee; Morchik* at 535). Therefore, plaintiff's argument regarding the admissibility of the Wang, T. Chen and A. Chen transcripts lacks merit.<sup>2</sup>

However, defendant's submissions fail to establish, as a matter of law, that it did not create the condition which allegedly caused plaintiff's accident. According to plaintiff's deposition, on which defendant relies, plaintiff was walking east on 80<sup>th</sup> Street toward Third Avenue. She further testified that she noticed that the sidewalk in front of the premises was wet, and that she saw two men hosing down the sidewalk in front of the premises (*id.* at 39). When the men saw plaintiff walking toward her, they "immediately stopped" spraying the sidewalk (*id.* at 40). Plaintiff testified that she could not see any detergents, chemicals or other liquids other than water being used on the sidewalk (*id.* at 41,44). However, she said: "As I was walking halfway [past the premises], I had the sensation of a little bit of slipperiness, but it was so minor . . . that I let it go and I kept walking. But I was aware that something was just that little tiny bit slippery" (*id.* at 36). Subsequently, plaintiff gave the following testimony:

Q. Tell me what you experience by the time you reached the corner?

A. By the time I reached the corner, I didn't experience anything. When the light changed *I started to step forward to cross the street and slid off the curb into the street falling forward.*

\*\*\*

Q. How many steps do you think you took or how many feet do you think you walked that was slippery and how many feet do you think . . . you took up to the corner where you stopped experiencing the slippery sensation?

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<sup>2</sup>The Court notes that plaintiff argues that it mailed the three disputed transcripts to "defendant's *then counsel*" (opp., ¶ 6) (emphasis added).

A. I felt the slippery sensation it stopped after a few [feet]. *It did not reoccur until I slipped into the street.*

\*\*\*

Q. So at this point when you are standing on the corner your back is to the area where they were spraying?

A. Correct.

Q. *During that five seconds that you were standing there, did you feel the slippery sensation before you fell?*

A. *It came as one motion. The light changed. I slipped over.*  
(*id.* at 45-47) (emphasis added)

Although plaintiff goes on to testify that there was no wetness where she was standing at the intersection waiting to cross, she stated that there was wetness in the street:

Q. During those five seconds that you were standing there, as far as you know, were you standing in any wetness?

A. No.

Q. *Was there any wetness in the street area?*

A. *Yes.*

(*id.* at 48-49).

Further, plaintiff testified that she did not look at the ground before she started moving (*id.* at 61). Therefore, it is not clear whether plaintiff actually noticed the area where she was standing.

Although plaintiff stated that she was not “standing” in any “wetness” (*id.* at 48), plaintiff’s testimony indicates that the “slipperiness” she experienced while walking past defendant’s premises, which was being cleaned by defendant’s employees, reoccurred when she “slid” off the curb and into the street. Further, plaintiff also stated, with respect to what she was standing on prior to her fall:

Q. In those five seconds in terms of what, if any, you experienced, *were you standing on top of anything*, whether it was a small item, large item, substance, or anything of that nature?

A. Could you quantify “substance”?

Q. Anything type of fluid, liquid, jelly.

A. *The street was wet.*

(*id.* at 35).

Therefore, defendant has failed to demonstrate a *prima facie* case entitling it to summary judgment.

The Court also notes that as plaintiff's EBT is ambiguous, it cannot be said that plaintiff's attestation that the "area of the sidewalk where I was standing waiting for the light to change was wet," contradicts her deposition testimony. Generally, a self-serving affidavit offered to contradict deposition testimony does not raise a *bona fide* question of fact and will be disregarded" (*Lupinsky v Windham Const. Corp.*, 293 AD2d 317, 318 [1st Dept 2002]); *see also Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002] ["A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]. Again, there is testimony indicating that the "slippery" condition reoccurred when she slid off the curb.

*Conclusion*

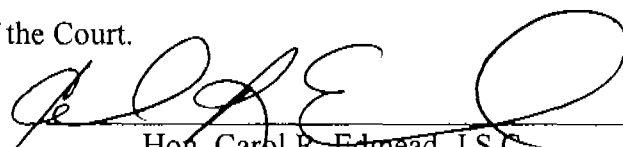
Based on the foregoing, it is hereby

ORDERED that the motion of defendant Amber Asian Cuisine, Inc. doing business under the firm name and style of Amber Asian Cuisine I for an order, pursuant to CPLR §3212, for summary judgment against plaintiff Janice W. Baxter is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 18, 2010



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**

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