

Carrasco v Cheesecake Factory Inc.

2010 NY Slip Op 32762(U)

September 29, 2010

Sup Ct, Nassau County

Docket Number: 5275/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JOSEPH CARRASCO, an infant under the age of 14 years, by his mother and natural guardian, MELANIE CARRASCO and MELANIE CARRASCO, individually,

Plaintiffs,

- against -

THE CHEESECAKE FACTORY INCORPORATED, and SHAWMUT DESIGN AND CONSTRUCTION CORP., and EUROCRAFT ARCHITECTURAL METAL

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 5275/07

Motion Sequences No. 001, 002

The following papers having been read on this motion:

| | |
|--|-----------------------------|
| Notices of Motions, Affidavits, & Exhibits | <u>1, 2</u> |
| Answering Affidavits | <u>3, 4, 5, 6, 7</u> |
| Replying Affidavits | <u>8, 9, 10</u> |
| Briefs: Plaintiffs' / Petitioner's | <u>11</u> |
| Defendants' / Respondent's | <u> </u> |

The defendant The Cheesecake Factory Incorporated moves pursuant to CPLR 3212, supported by the April 26, 2010 affirmation by counsel for this defendant, the April 21, 2010 affidavit by Jennifer Mays, the April 22, 2010 affidavit by Josh Reinhard, the project executive for Shawmut Design and Construction Corp. and other supporting papers, including deposition testimony, for summary judgment dismissing the underlying action and all cross claims against it.

This defendant contends it cannot be found liable as a matter of law for any design defects in the subject table or products liability because it did not design, manufacture, distribute nor sell the subject table which purportedly caused injury to the infant plaintiff. The Cheesecake Factory Incorporated asserts it did not have any notice, either actual or constructive, that the table which allegedly caused injury to the infant plaintiff was in a dangerous condition, so this defendant cannot be held liable to the plaintiffs as a matter of law. The Cheesecake Factory Incorporated also avers it did not cause and create a dangerous condition since it did not design, install, manufacture, alter nor repair the subject table, so it cannot be held liable to the plaintiffs as a matter of law.

The attorney for Shawmut Design and Construction Corp. states, in a June 10, 2010 affirmation, Shawmut Design and Construction Corp. opposes the motion by The Cheesecake Factory Incorporated. The attorney for Shawmut Design and Construction Corp. points to the allegedly divergent deposition testimony of Teresa Kelly, the senior project manager of The Cheesecake Factory Incorporated, and David Sawez, vice president for the defendant Eurocraft Architectural Metal which provides a triable issue of fact. The attorney for Shawmut Design and Construction Corp. notes Kelly testified she came up with the design concept for the subject table, and drew the sketch which was approved by Rick McCormack, the vice president of design for The Cheesecake Factory Incorporated, and Kelly supervisor. The attorney for Shawmut Design and Construction Corp. also observes Kelly and Sawez had discussions about the design intentions for the table which made it portable for guests' comfort. The attorney for Shawmut Design and Construction Corp. asserts the testimony of Robert Deal, travel superintendent for Shawmut Design and Construction Corp., shows the addition of a fifth leg was not added on the watch by Shawmut Design and Construction Corp., rather Eurocraft Architectural Metal caused it to be delivered to Shawmut Design and Construction Corp. The attorney for Shawmut Design and Construction

Corp. contends that showing demonstrates The Cheesecake Factory Incorporated was aware of the post construction made to the subject table.

The attorney for Eurocraft Architectural Metal states, in a June 11, 2010 affirmation in opposition to the motion by The Cheesecake Factory Incorporated, there are numerous material issues of fact requiring jury determination. The attorney for Eurocraft Architectural Metal states, in detail, such issues include: the nature and involvement of The Cheesecake Factory Incorporated with respect to the subject table, and the accident at the premises owned, maintained, and managed by The Cheesecake Factory Incorporated. The attorney for Eurocraft Architectural Metal points to the June 3, 2010 affidavit by Sawez, who is not an engineer, which contradicts, in detail, the contentions by The Cheesecake Factory Incorporated, the June 4, 2009 deposition by John Kulacki, a general manager for The Cheesecake Factory Incorporated, and drawing of the subject table to support the opposition by Eurocraft Architectural Metal.

The attorney for The Cheesecake Factory Incorporated reiterates, in a June 15, 2010 reply affirmation to opposition by Shawmut Design and Construction Corp., there is no material issues of fact the responsibility of The Cheesecake Factory Incorporated for any defective design or manufacturing. The attorney for The Cheesecake Factory Incorporated adds the record is devoid of any evidence that The Cheesecake Factory Incorporated caused and created the dangerous condition.

The defendant Shawmut Design and Construction Corp. moves pursuant to CPLR 3212, supported by the April 21, 2010 affirmation by this defendant's counsel, and other supporting papers, including Kelly's July 15, 2008 deposition testimony, and an April 26, 2010 memorandum of law, (a) for summary judgment dismissing the plaintiffs' complaint, summary judgment against the defendant Eurocraft Architectural Metal on the cross claim by Shawmut Design and

Construction Corp. for breach of contract for failure to procure insurance, and all cross claims against Shawmut Design and Construction Corp. The defendant Shawmut Design and Construction Corp. also seeks to sever its cross claim for breach of contract against Eurocraft Architectural Metal, and direct a hearing after the trial or any settlement of the main action for an assessment of the amount of damages to which Shawmut Design and Construction Corp. is entitled.

The attorney for The Cheesecake Factory Incorporated states, in a May 20, 2010 affirmation together with other papers, The Cheesecake Factory Incorporated opposes the motion by Shawmut Design and Construction Corp. The attorney for The Cheesecake Factory Incorporated reiterates, in detail, the Court must dismiss the motion by Shawmut Design and Construction Corp. The attorney for The Cheesecake Factory Incorporated also contends Shawmut Design and Construction Corp. is required to indemnify, defend and hold The Cheesecake Factory Incorporated harmless for any negligence on behalf of Shawmut Design and Construction Corp. and Eurocraft Architectural Metal.

The attorney for Eurocraft Architectural Metal states, in a June 11, 2010 affirmation in opposition to the motion by Shawmut Design and Construction Corp. together with other supporting, there are numerous material issues of fact requiring jury determination. The attorney for Eurocraft Architectural Metal states, in detail, such issues include: the nature and involvement of Shawmut Design and Construction Corp. with respect to the subject table. The attorney for Eurocraft Architectural Metal points to a sworn statement, deposition testimony and other papers which contradict, the contentions by Shawmut Design and Construction Corp., and support the opposition by Eurocraft Architectural Metal.

The plaintiffs oppose both motions. The plaintiffs' attorney addresses, in a July 16, 2010 affirmation, both motions. The plaintiffs' attorney asserts, in detail, the defendants were jointly,

severally and collectively negligent in the design, fabrication, manufacture, placement, assembly, maintenance, modification, installation, use and misuse of the table. The plaintiffs' attorney points to the deposition testimony of the parties to support the plaintiffs' opposition to both motions.

Robert John Anders, the plaintiffs' industrial design expert, opines in a July 8, 2010-affidavit, the subject table was defectively designed and negligently fabricated, modified, placed, positioned and installed. Anders states he reviewed an April 16, 2006 DVD surveillance video involving the subject accident, visited the Grand Lux Café where he examined the subject table, reviewed drawings, plans, and details of that table, including transmittals and other documents concerning it, and the parties' testimony during examinations before trial.

The attorney for The Cheesecake Factory Incorporated states, in a July 28, 2010 reply affirmation to the opposition by Eurocraft Architectural Metal in a June 11, 2010 affirmation, and the plaintiffs' opposition in a July 16, 2010 affirmation, and in further support of the motion by The Cheesecake Factory Incorporated, its contention that there are no material issues of fact. The attorney for The Cheesecake Factory Incorporated details that response and support, and points to a subcontract by Shawmut Design and Construction Corp.

The attorney for Shawmut Design and Construction Corp. states, in a July 29, 2010 reply affirmation to all of the opposition to the motion by Shawmut Design and Construction Corp., the other parties fail to raise any triable issue of fact. The attorney for Shawmut Design and Construction Corp. reiterates the contentions of Shawmut Design and Construction Corp., and contends Shawmut Design and Construction Corp. owed no duty to the plaintiff

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to both motions. The plaintiffs seek damages for crush injuries on April 16, 2006, followed by amputation of three toes of the infant plaintiff. The plaintiffs allege the injuries were caused by a

marble/metal table tipping over in the Grand Lux Café, Garden City, New York.

Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; *see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

“Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination” (*Ugarriza v. Schmieder*, 46

N.Y.2d 471, 474). "It is equally well established that the evidence must be viewed in the light most favorable to the nonmoving party and that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see, Dolitsky v Bay Isle Oil Co., supra; see also, Ampolini v Long Is. Light. Co.*, 186 AD2d 772; *Quadrozzi v Norcem, Inc.*, 125 AD2d 559)" (*Jastrzebski v. North Shore School Dist.*, 223 A.D.2d 677, 678, 637 N.Y.S.2d 439 [2nd Dept 1996]). This Court is persuaded based upon all of the papers and proof submitted on both motions, the causes of action and defenses are not established sufficiently to warrant directing judgment in favor of any party as a matter of law. There are material issues of fact which require resolution by a trier of fact.

Accordingly, both motions are denied.

So ordered.

Dated: **September 29, 2010**

ENTER:

J. S.

ENTERED

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COUNTY CLERK'S OFFICE**

FINAL DISPOSITION NON FINAL DISPOSITION XXX