

**Glover v Jack in the Box, Inc.**

2010 NY Slip Op 32924(U)

October 13, 2010

Sup Ct, NY County

Docket Number: 110252/08

Judge: Louis B. York

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SCANNED ON 10/19/2010

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

PRESENT: LOUIS B. YORK

PART 2

Glover;

Jack in the Box, et al.

INDEX NO.

110252/2008  
~~100252/08~~

MOTION DATE

MOTION SEQ. NO.

001

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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/13/10

Lly

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: LAS PART 2

-----x  
SARAH GLOVER,

Plaintiff,

Index No. 110252/08

-against-

DECISION/ORDER

JACK IN THE BOX, INC., ZRC OPERATIONS  
COMPANY, INC. d/b/a QDOBA MEXICAN GRILL  
and QDOBA RESTAURANT CORPORATION,

Defendants.

**UNFILED JUDGMENT**

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Louis B. York, J.S.C.:

In this action, plaintiff seeks compensatory damages for injuries sustained, when a disposable aluminum tray collapsed, spilling hot water onto her thighs and legs. Plaintiff argues that the Defendant was negligent in supplying a defective tray. Defendant denies liability, asserting that no duty was owed to Plaintiff. Alternatively, Defendant states that even if a duty existed, Plaintiff assumed the risk of harm by picking up a noticeably hot tray, causing her own injury. Defendant also alleges that Plaintiff's destruction of the aluminum tray makes it impossible to determine if the tray was actually defective. Currently, Defendant moves for summary judgment. For the reasons stated below, the court grants Defendant's motion

Plaintiff is Sarah Glover, an office manager employed at Vibrant Media (Vibrant). Defendants are Jack In The Box, Inc., ZRC Operations Company, Inc. d/b/a Qdoba Mexican Grill and Qdoba Restaurant Corporation. Defendant operates a chain of restaurants serving Mexican-style food.

On April 9, 2008, Defendants delivered food and chafing equipment to the Vibrant's conference room. This was part of free luncheon given to Vibrant for winning a raffle held by Defendants. The chafing equipment consisted of 3 aluminum trays, 2 heating elements and a metal frame with handles on each side. Within the metal frame were the 2 heating elements. The heating elements light up a small flame when activated. The flames of the heating elements were 2 inches below a large aluminum tray that contained water. The large tray was about 4 inches deep. Above the large tray were 2 smaller trays containing food. Defendants set up the food and equipment, with little or no interaction with the Plaintiff. Defendants insist that the supplies provided to Vibrant Media were new and unused, prior to delivery.

Later in the day, after the small trays containing food appeared empty, Plaintiff attempted to dismantle the food setup. However, Plaintiff was never given any instruction how to do so, by either her employer nor by Defendants. Nonetheless, because of Plaintiff's role at Vibrant, she assumed that no one was going to take down the food setup. After discarding the empty food trays, Plaintiff sought to extinguish the flames of the heating elements that were still lit. Plaintiff believed that she needed to remove the large tray above the heating elements, in order to blowout the flames. Unbeknownst to Plaintiff, was the small self-extinguishing cap attached to each heating element.

Plaintiff felt the large tray and determined that it was still warm. After acknowledging that the water was hot, she gripped the shorter ends of the tray without securing the bottom and proceeded to lift up. A few seconds thereafter, the large tray

collapsed, spilling the water therein onto Plaintiff's thighs and legs. The injuries to Plaintiff are the basis for this action.

Plaintiff commenced this action on July 24, 2008, by filing a summons and verified complaint. Plaintiff alleges that Defendants were negligent in supplying aluminum trays, which they would have known was defective if they inspected it. Defendants' failure to do so, therefore, holds them responsible for the injuries that Plaintiff incurred. Defendants argue that no duty existed.

Annexed to Defendant's notice of motion is the affidavit of Art Sabeda, employed by Defendants for 5 years. Mr. Sabeda mentions that he never heard of any complaints regarding the disposable trays supplied by Defendants. Sabeda Aff., at ¶ 12. Sally Lee, a former-employee of Defendants, also states that she was "unaware of any complaints made regarding the trays...[nor, of] any one else ever getting burned." Lee Aff., at ¶ 12. Ms. Lee who actually delivered the trays involved in this suit, testifies that she "did not notice anything wrong with the trays when she was at Vibrant." Id., at ¶ 6. Plaintiff avers the same in her deposition, confirming that she noticed no problems with the tray prior to picking it up. She also reveals that she has a neurological disorder, multiple sclerosis, which can affect coordination.

When the facts appear clear and undisputed, summary judgment is utilized to eliminate civil cases from the trial court calendar that can be determined as a matter of law. Andre v. Pomeroy, 35 N.Y.2d 361 (1974). Based on the affidavits and positions presented, there were no noticeable defect in the trays. Defendants make a prima facie showing for summary judgment, because they cannot be held negligent, when they were never on notice of a possible defect in the trays they supplied to Media.

Plaintiff's injury was the first accident involving the disposable aluminum trays that Defendants are aware of. The circumstance of this case mirrors that of Flores v. Langsam Prop. Servs. Corp., 890 N.Y.S.2d 432 (2009). In Flores, the plaintiff was injured by scolding-hot water that sprayed out of her showerhead, after she turned off the water. Id. In upholding the First Department's ruling, the Court of Appeals writes that the plaintiff "failed to raise a triable issue of fact regarding defendants' actual or constructive notice of the particular dangerous condition that allegedly caused her injuries." Id. (citations omitted). In the present case, as in Flores, Defendants have no actual or constructive notice that the trays were defective.

Although Defendants incorrectly cites Restatement (Second) § 402 because it refers to sellers, the more appropriate section, § 388, extends liability to the suppliers of chattel that have actual or constructive knowledge that the chattel is "not reasonably safe for the use for which it is supplied." Restatement (Second) § 388. Assuming that the disposable tray was not defective, the papers do not support the suggestion that Defendants were on notice, that manner in which they were using the trays was unreasonably unsafe. Again, this is consistent case with law that extends liability only if the defendant was on actual or constructive notice "of the dangerous condition." Harris v. East Hills, 41 N.Y.2d 446, 450 (1977). Defendants sufficiently establish that they were not on notice.

When the moving party makes an appropriate showing for summary judgment, the burden shifts to the non-moving party to produce admissible proof that a material question of fact exists. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 327 (1986). Plaintiff fails to provide any proof, admissible in form, in its opposition papers. Defendants make

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a prima facie presentation for summary judgment dismissing the complaint, which the court grants, because Plaintiff does not raise a question of material fact. See Camera v. Long Island University, 272 A.D.2d 286, 707 N.Y.S.2d 356 (N.Y. App. Div. 2<sup>nd</sup> Dep't 2000). Plaintiff's opposition paper also fails to raise any factual issues or cite any cases contrary to the numerous cases that Defendants present in their motion.

Plaintiff's case rests on the unexpected folding of the tray that Defendants supplied. However, Plaintiff cannot provide ample proof of the tray's defective qualities because it was unknowingly discarded and destroyed by Vibrant. Defendants hint to Plaintiff's pre-existing neurological disorder, multiple sclerosis, as the possible cause of the injury, because the disorder can affect an individual's coordination and balance. However, Plaintiff misconstrues Defendant's theory of the accident as an attack on people suffering from multiple sclerosis, instead of presenting proof discordant to that theory. Additionally, Plaintiff's opposition presents no further proof that a question of material fact still exists. Although Plaintiff correctly highlights that the differing theories of the accident subsists, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson v. Lobby Liberty, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986).

Nonetheless, Plaintiff speculates that because she was injured, Defendants are responsible, merely for supplying the tray. However, liability "cannot be presumed from the mere existence of an injury." J.E. v. Beth Isr. Hosp., 295 A.D.2d 281, 284, 744 N.Y.S.2d 166, 170 (1st Dep't 2002) (citing Rella v State of New York, 117 AD2d 591, 592, 498 N.Y.S.2d 63, 64 [2<sup>nd</sup> Dep't 1986]). Plaintiff demonstrates no further proof of a possible defect in the tray. Furthermore, Plaintiff fails to show that the trays "did not

perform as intended.” Miniero v. City of New York, 65 A.D.3d 861, 863, 885 N.Y.S.2d 45, 47 (1st Dep’t 2009) (citing, Speller v Sears, Roebuck & Co., 100 NY2d 38, 42, [2003]). Plaintiff cannot defeat summary judgment purely on speculation. Bolde v Borgata Hotel Casino & Spa, 70 A.D.3d 617, 892 N.Y.S.2d 892, 1 (2d Dep’t 2010); see Lynn G. v. Hugo, 96 N.Y.2d 306, 310 (2001) (“speculations are, of course, insufficient to create a triable issue of fact”) (citations omitted). The nonmoving party will prevent summary judgment only if they show that the fact finder could decide the case “upon the logical inferences...drawn from the evidence.” Wurtzel v. Starbucks Coffee Co., 257 F.Supp.2d 520, 526 -527 (E.D.N.Y.,2003) (citing Schneider v. Kings Highway Hosp. Ctr., 67 N.Y.2d 743, 744). The court must grant summary judgment because Plaintiff presents inadequate proof to logically infer that Defendants were negligent.

Alternatively, Defendants’ seek summary judgment, arguing that Plaintiff assumed the risk of harm from the hot water in the tray. The doctrine of assumption of risk, generally a question for the jury, enables a court to render a judgment as a matter of law if no question of material fact remains. Maddox v. City of New York, 66 N.Y.2d 270 (1983). Assumption of risk applies when the plaintiff is aware of the risk, appreciates the risk and voluntarily assumes the risks. Morgan v. State, 90 N.Y.2d 471 (1997). This doctrine applies to this case.

In Plaintiff’s deposition, she acknowledges that the open flame from the heating elements made the water hot, along with the tray holding it. Plaintiff also states, she did not use any gloves, nor did she try removing any of the water, prior to lifting it. The possibility of being burned by the hot water was apparent. Yet plaintiff failed to utilize precautions or obtain assistance, in lifting a hot tray containing hot water.

Plaintiff cannot escape liability simply because she did not “[foresee] the exact manner in which [her] injury occurred.” McBride v. City of New York, 17 Misc. 3d 1119A, 851 N.Y.S.2d 64 (N.Y. Sup. Ct. 2007). It is immaterial if the tray folded in the middle, as Plaintiff alleges. Defendants made a prima facie showing that Plaintiff voluntarily lifted a hot tray, assuming the risk of danger attached to the hot water within the said tray. Summary judgment, therefore, is appropriate under the doctrine of assumption of risk.

Defendants also move for summary judgment through the doctrine of spoliation of evidence. This doctrine is not fitting to dismiss the complaint in this case. Although the destruction of the disposable aluminum tray is key to Plaintiff proving the existence of a defect, Defendants are not prejudiced in defending the negligence claim against them, as they have demonstrated with their arguments above. See Baldwin v. Gerard Ave., LLC, 58 A.D.3d 484, 871 N.Y.S.2d 121 (1st Dep't 2009) (dismissal is a proper sanction, if the moving party shows prejudice, resulting from the spoliation of evidence). Additionally, the courts “possess broad discretion [in providing] proportionate relief to the party deprived of the lost evidence”, including “adverse inverse instruction” to the jury. Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007) (citations omitted).

Finally, Defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(10), plaintiff's failure to name a necessary and indispensable party. However, the court need not address this issue, which is a procedural one, where, in other sections of this decision, the court grants summary judgment on the merits.

For the reasons given above, it is therefore

ORDERED and ADJUDGED that Defendants' motion is granted and this action is dismissed with costs and disbursements awarded to Defendants.

Dated: 10/13/10

ENTER:

*Luy*  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

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