

**Herbenson v Carrolls Corp.**

2010 NY Slip Op 33972(U)

September 30, 2010

Supreme Court, Schenectady County

Docket Number: 2010-76

Judge: Vincent J. Reilly

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF SCHENECTADY

PATRICIA HERBENSON,  
Plaintiff,

**DECISION/ORDER**

-against-

Index No. 2010-76  
RJI No. 46-1-10-0589  
Hon. Vincent J. Reilly Jr.

CARROLLS CORPORATION,  
Defendants.

APPEARANCES:

Rutberg & Associates PC  
For Plaintiff  
3344 Route 9 North  
Poughkeepsie, NY 12601

Smith, Sovik, Kendrick & Sugnet, PC  
For Defendant  
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Plaintiff commenced this action alleging that she purchased food at the drive-through of defendant's Burger King restaurant located in the City of Schenectady and allegedly sustained personal injuries when she consumed a mozzarella stick that was contaminated with degreasing fluid. Based upon the allegation that the mozzarella stick was unsafe and unfit for human consumption, the complaint sets forth three causes of action sounding in negligence, breach of implied warranty and strict products liability. In its answer, defendant asserted as affirmative defenses that plaintiff's alleged injuries were caused by her own culpable conduct, that her damages resulted from intervening or superseding factors outside of defendant's control, and that the mozzarella stick in question was materially altered. Plaintiff now moves for partial summary

judgment in her favor on the issue of liability. Defendant opposes the motion and cross-moves for an order compelling plaintiff to respond to its first set of interrogatories.

In order to demonstrate her entitlement to partial summary judgment on the issue of liability, plaintiff must offer sufficient competent proof to eliminate all triable issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557; Winegrad v New York Univ. Med. Ctr., 64 NY2d 85). If plaintiff demonstrates prima facie entitlement to judgment, the burden then shifts to the opponent to come forward with appropriate evidentiary material establishing that a triable issue of fact exists (see, Toomey v Adirondack Surgical Associates P.C., 280 AD2d 754). The existence of any material factual issues precludes summary judgment and requires denial of the motion.

First addressing plaintiff's implied warranty and strict products liability causes of action, where an item of food intended for human consumption is sold, there is an implied warranty that the item is fit for human consumption and free from any harmful substance when it leaves the manufacturer's control (see, UCC 2-314; Hohn v South Shore Services, Inc., 141 AD2d 504; see also, England v Sanford, 167 AD2d 147). As for plaintiff's negligence cause of action, a seller of products intended for human consumption is under a duty adequately to prepare, inspect and package its food product, and failure to do so may constitute negligence (see, Rudloff v Wendy's Restaurant of Rochester Inc., 12 Misc 3d 1081). Under any of these theories, in order to establish defendant's liability plaintiff is required to prove that the product was actually defective or unwholesome, and that the defect or unwholesome condition existed at the time the product left the possession or control of the defendant, and that such defect and that consumption of the product was a proximate cause of the injury for which recovery is sought, (see, id.; Ober v Associated Coca-Cola Bottling Co., Inc., 118 AD2d 1016; Pompilio v McGeory, 283 AD 826).

In support of the motion, plaintiff submitted her own affidavit in which she avers that on the date in question she ordered the mozzarella sticks from the drive-through window of defendant's restaurant and shortly after she bit into the food her mouth and tongue became numb. She further avers that she provided one of the mozzarella sticks to the Department of Health for investigation and testing. Plaintiff also provides copies of the complaint that she made to the Department of Health regarding the incident, along with the Department of Health's investigative report and test results which purportedly establish that a chemical found on the mozzarella stick provided by plaintiff matched a chemical found in a degreasing solution used in defendant's restaurant. However, the investigative report also sets forth that the degreasing solution was stored in a locked closet accessible only to management and that the degreasing solution had not been recently used to clean the equipment where the mozzarella was cooked. The report further states that defendant's management reported that plaintiff and her companions were belligerent and smelled of alcohol at the time of the alleged incident. Finally, in her reply papers, plaintiff submits the affidavit of an individual who was with plaintiff at the time of the alleged incident and allegedly observed her bite into the mozzarella stick and the ambulance and hospital records which purportedly establish that plaintiff sustained an irritation to her tongue as the result of the incident.

Even assuming that this evidence is sufficient to satisfy plaintiff's initial burden on the motion, defendant has submitted sufficient competent proof in opposition to the motion to raise a material issue of fact. Defendant's evidence includes an affidavit from defendant's restaurant manager who explains in detail how degreaser solution could not have come into contact with plaintiff's mozzarella stick in light of the manner in which the mozzarella sticks are stored, cooked and packaged and given the storage location and infrequent usage of the degreaser solution in the

restaurant. Defendant also submits the affidavit of the employee who took and bagged plaintiff's order on the date in question. The employee avers that plaintiff's box of mozzarella sticks looked clean and normal, that she did not observe a chemical smell or chemical stain when she bagged the box of mozzarella sticks, and that the box itself had no degreaser solution on it. Defendant also submits the affidavit of its restaurant accounting supervisor who furnishes information regarding hour-by-hour sales and an itemization of all products sold on the date of the incident, which defendant offers for the purpose of establishing that on the date in question the restaurant sold a high volume of food, including 14 orders of mozzarella sticks, without any complaints that the food was contaminated with degreasing solution. Finally, defendant offers evidence to suggest that the condition of plaintiff's tongue may be the result of a chronic condition rather than a chemical burn caused by contaminated food. Clearly, this evidence raises significant credibility issues which cannot be resolved in the context of a motion for summary judgment (see generally, Campbell v Campbell, 43 AD3d 1264; Goff v Clarke, 302 AD2d 725). The motion is therefore denied.

Accordingly, the Court must address defendant's cross motion to compel plaintiff to respond to its first set of interrogatories. In view of the Court's conclusion that plaintiff is not entitled to partial summary judgment on the issue of liability, and given the fact that plaintiff raises no substantive objection to the cross motion or to the interrogatories themselves, the cross motion is granted. Plaintiff shall have 30 days from the date of service of this order with notice of entry within which to respond to defendant's first set of interrogatories.

For the foregoing reasons, it is

ORDERED that the motion is denied, without costs, and it is further

ORDERED that the cross motion is granted, without costs, and plaintiff shall respond to

defendant's first set of interrogatories within 30 days from the date of service of this order with notice of entry.

**THIS DECISION SHALL CONSTITUTE THE ORDER OF THE COURT. THE ATTORNEY FOR DEFENDANT SHALL ENTER THIS ORIGINAL DECISION/ORDER WITHIN 20 DAYS OF ITS DATE AND PROVIDE A COPY WITH PROOF OF ITS ENTRY ON THE OPPOSING ATTORNEY(S) OR THE PRO SE LITIGANT(S), AS THE CASE MAY BE.**

Dated: 9/30/10



HON. VINCENT J. REILLY JR.  
Supreme Court Justice

**ENTERED**

Schenectady County Clerk's Office

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