

**Amchin v Lone Star Steakhouse & Saloon of N.Y.,  
Inc.**

2011 NY Slip Op 30524(U)

February 22, 2011

Supreme Court, New York County

Docket Number: 101307/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Index Number : 101307/2009

AMCHIN, DUSHAN

INDEX NO. \_\_\_\_\_

vs

LONE STAR STEAKHOUSE

MOTION DATE \_\_\_\_\_

Sequence Number : 003

MOTION SEQ. NO. \_\_\_\_\_

STRIKE

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 ...

PAPERS NUMBERED

1

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

2

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

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 25 2011

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 2/22/11

HON. EILEEN A. RAKOWER

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: PART 15

-----X

DUSHAN AMCHIN,

Index No.  
101307/09

Plaintiffs,

**DECISION  
and ORDER**

- against -

LONE STAR STEAKHOUSE and SALOON of NEW  
YORK, INC., DEL FRISCO'S DOUBLE EAGLE STEAK  
HOUSE, and JOHN DOE,

Mot. Seq.  
002 & 003

**FILED**

Defendants.

**FEB 25 2011**

-----X

HON. EILEEN A. RAKOWER

NEW YORK  
COUNTY CLERK'S OFFICE

Dushan Amchin ("Plaintiff") brings this action to recover for personal injuries sustained when she slipped and fell inside Del Frisco's Double Eagle Steakhouse ("the restaurant") located at 1221 Avenue of the Americas in New York County on June 18, 2008.

There are two motions currently before the court. First, Plaintiff moves for an order awarding her summary judgment pursuant to CPLR §3212, and for sanctions against defense counsel for alleged improprieties during discovery. In addition, defendants move for an order striking Plaintiff's note of issue, and compelling the production of discovery which defendants contend remains outstanding.

With respect to Plaintiff's motion, Plaintiff submits her deposition transcript, wherein she testified to the following: When Plaintiff and her client entered the restaurant, a hostess led them to their table. The restaurant was crowded and they had to walk in between tables of patrons, which was a "narrow" space. Plaintiff testified that the floor was slippery, and that she fell when she turned her body in order to get out of the way of a waiter who was carrying dirty dishes and heading in the opposite direction. Plaintiff also submits the affidavit of Timothy Ryan, the client whom Plaintiff was with at the restaurant, which attests to similar facts. Plaintiff also annexes the affidavit of Maria Mendoza, an interior designer. Mendoza states that she inspected the accident site on August 26, 2010, and reviewed the floor plan provided

by the restaurant. Based upon her review, Mendoza opines that “the layout of that area of the restaurant where [Plaintiff] fell does not fulfill the code requirements based on the Life Safety Code, NFPA (National Fire Protection Association) 101-1985 ....”

As for the portion of the motion which seeks to have defense counsel sanctioned, Plaintiff alleges that on the agreed upon date to inspect the accident scene, Plaintiff’s counsel observed defense counsel “mov[ing] tables and chairs around in the restaurant in a vain attempt to alter the accident scene.” The Mendoza affidavit also attests to this.

In opposition, defendants argue that Plaintiff has failed to make a *prima facie* showing of entitlement to summary judgment. They argue that the Mendoza affidavit is of minimal probative value, and further argue that Mendoza’s inspection measurements and findings were based upon incorrect information. With respect to Plaintiff’s allegations against defense counsel, defendants vehemently deny any such claims, and state that defense counsel was merely restoring the tables and chairs to their normal positions after they had been moved by restaurant staff for cleaning in the normal course of business. This was attested to both by defense counsel in her affirmation, as well as by restaurant manager Brigid Anda.

In defendants’ motion, defendants state that Plaintiff’s note of issue must be stricken because discovery is not complete. Specifically, defendants state that Plaintiff failed to produce any of the photographs Plaintiff took during the site inspection on August 26, 2010. In addition, defendants state that Plaintiff improperly took photographs at the restaurant on a different date without the knowledge of the restaurant. Without waiving their right to object to the use of the photographs at trial, defendants demanded that Plaintiff provide the date and time the photographs were taken, as well as the identity of the person who took the photographs. Defendants also claim that several responses in Plaintiff’s supplemental bill of particulars are inadequate.

In opposition to defendants’ motion, Plaintiff states that all photographs taken of the scene have been produced, and discloses that Plaintiff’s counsel and Mendoza were the persons who took the photographs.

Turning first to Plaintiff’s motion, it is well settled that the proponent of a

motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009])

Here, the court finds that Plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law. While Plaintiff states that the floor was slippery due to polishing, Scott Gould, the general manager of the restaurant, testified that the floors were routinely polished by outside vendors at approximately 3:00 a.m. on Saturdays, in order to allow for the floors to dry. It is undisputed that Plaintiff’s accident occurred on a Wednesday around lunchtime. There remains an issue of fact as to whether defendants’ routine polishing of the floor caused the allegedly slippery condition. Similarly, the court cannot hold as a matter of law that the restaurant’s spacing of the tables was negligent. In addition, there are differing accounts as to the spacing of the tables which preclude summary judgment. Similarly, whether or not the waiter’s actions were negligent is an issue of fact for the jury.

With respect to defendants’ motion to strike the note of issue, the motion is denied in light of the fact that Plaintiff represents that she has produced all photographs taken of the accident scene. Defendant contends that Plaintiff’s bill of particulars fails to sufficiently alert defendants as to what actual notice is claimed. CPLR §3043(a)(5) provides that, where actual notice is claimed, plaintiff must provide “a statement of when and to whom it was given.” Plaintiff is bound by her pleadings.

Wherefore it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied.

ORDERED that defendants' motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February <sup>22</sup>15, 2011

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**

**FEB 25 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**